Independent International Fact-Finding Mission
on the Conflict in Georgia

Report

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Volume II

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Volume II

This volume contains a selection of contributions by experts in the military, legal, humanitarian, human rights, political and historical fields. They were critically reviewed by the Fact-Finding Mission and constitute the basis for this Report on the Conflict in Georgia.

The elaboration, findings and opinions expressed in these texts do not necessarily reflect the views of the Mission. In this regard, the views and findings as laid out in Volume I shall be considered as authoritative.

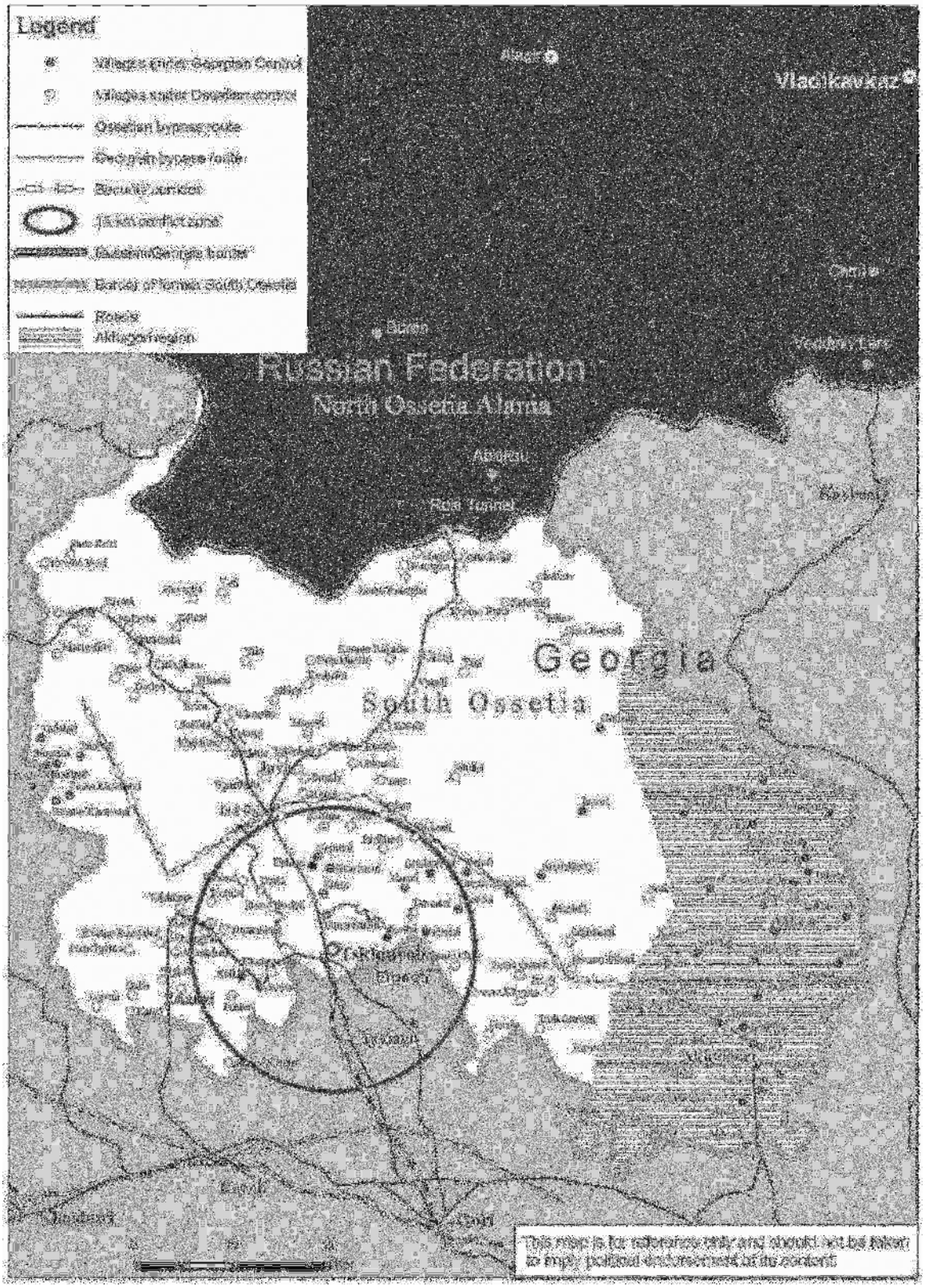
Acronyms

ASSR	Autonomous Soviet Socialist Republic (autonomous republic)
APC	Armoured Personnel Carrier
BMO	Border Monitoring Operation
BTC	Baku-Tbilisi-Ceyhan Pipeline
CERD	International Convention on the Elimination of All Forms of Racial Discrimination
CFE	Treaty on Conventional Armed Forces in Europe
CFSP	Common Foreign and Security Policy
CIS	Commonwealth of Independent States
CIS PKF	CIS Peacekeeping Force
CSCE	Conference on Security and Cooperation in Europe
CSTO	Collective Security Treaty Organisation
EAPC	Euro-Atlantic Partnership Council
EC	European Commission
ECHO	European Community Humanitarian Office
ECHR	European Court for Human Rights
EConvHR	European Convention for the Protection of Human Rights and Fundamental Freedoms
ECRML	European Charter of Regional Minority Languages
ENP	European Neighbourhood Policy
ESDP	European Security and Defence Policy
EUMM	European Union Monitoring Mission
EUSR	European Union Special Representative
GSSR	Georgian Soviet Socialist Republic
GTEP	Georgia Train and Equip Programme
GUAM	Organisation for Democracy and Economic Development, including Azerbaijan, Georgia, Moldova, Ukraine
HRAM	Human Rights Assessment Mission
HRL	Human Rights Law
HROAG	Human Rights Office in Abkhazia, Georgia
HRW	Human Rights Watch
ICC	International Criminal Court
ICCPR	International Covenant on Civil and Political Rights
ICG	International Crisis Group
ICJ	International Court of Justice
ICRC	International Committee of the Red Cross
ICTY	International Criminal Tribunal for the former Yugoslavia
IDP	Internally Displaced Person
IED	Improvised Explosive Device
IGO	International Governmental Organisation
IHL	International Humanitarian Law
IIFFMCG	Independent International Fact-Finding Mission on the Conflict in Georgia
ILC	International Law Commission
INGO	International Non-Governmental Organisation

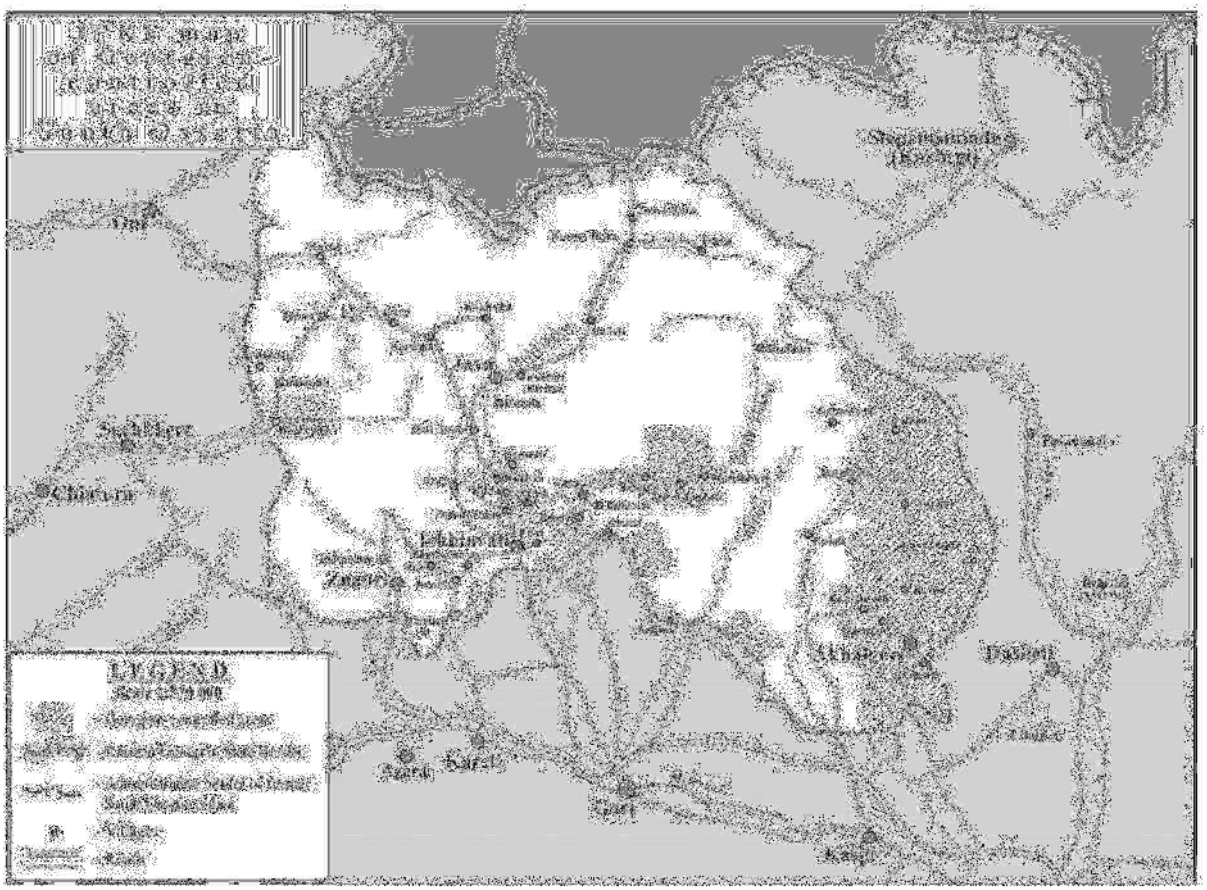
IPAP	Individual Partnership Action Plan
JCC	Joint Control Commission
JPKF	Joint Peacekeeping Forces
KFOR	Kosovo Force
MAP	Membership Action Plan
MRLS	Multiple Rocket Launching System
NAM	Needs Assessment Mission
NATO	North Atlantic Treaty Organisation
NGO	Non-Governmental Organisation
NRC	NATO-Russia Council
NSC	National Security Council (Georgia)
ODIHR	Office for Democratic Institutions and Human Rights
OHCHR	Office of the High Commissioner for Human Rights
OSCE	Organisation for Security and Cooperation in Europe
PACE	Parliamentary Assembly of the Council of Europe
PCA	Partnership and Cooperation Agreement
PfP	Partnership for Peace
POW	Prisoner of War
SAM	Security Assessment Mission
SCO	Shanghai Cooperation Organisation
SGBV	Sexual Gender-Based Violence
SIZO	Pre-Trial Detention Centre
SRSG	Special Representative of the Secretary-General
SSOP	Sustainment and Stability Operation Programme
SSR	Soviet Socialist Republic
TACIS	Technical Assistance for the CIS
TSFSR	Transcaucasian Soviet Federative Socialist Republic
UAV	Unmanned Aerial Vehicle
UNDHA	UN Department of Humanitarian Affairs
UNDP	UN Development Programme
UNHCR	UN High-Commissioner for Refugees
UNIFEM	UN Development Fund for Women
UNOMIG	UN Observer Mission in Georgia
UNOSAT	UN Institute for Training and Research (UNITAR) Operational Satellite Application Programme
UNSC	UN Security Council
UNSG	UN Secretary-General
USSR	Union of Soviet Socialist Republics
VCLT	Vienna Convention on the Law of Treaties
WTO	World Trade Organisation

Source: Fischer Weltalmanach, Fischer Taschenbuch Verlag, Frankfurt am Main, 2009

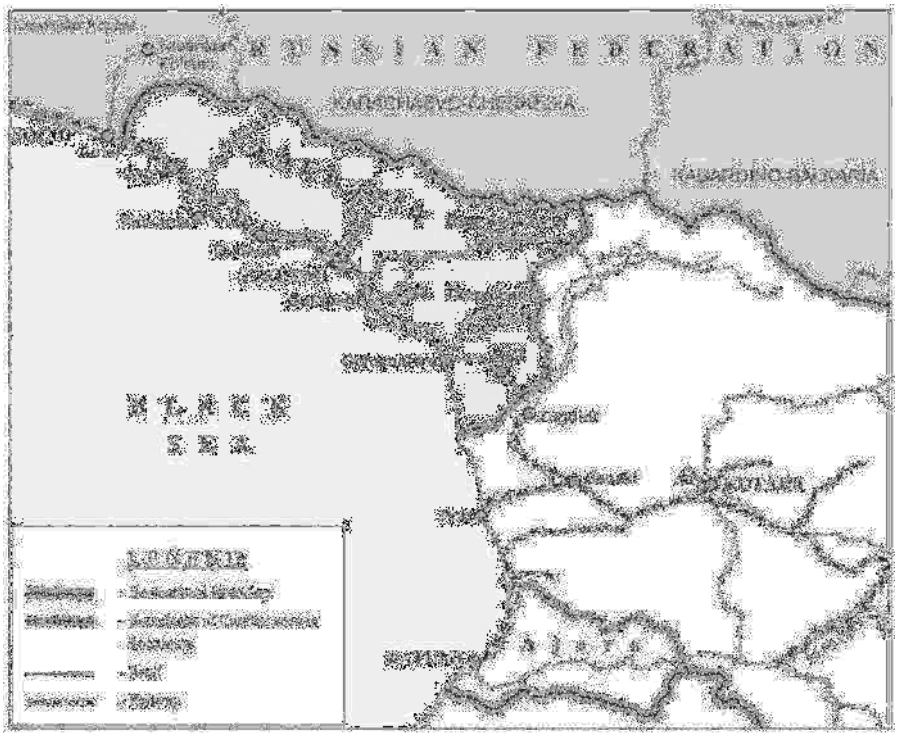
Source: Map No. 3780 Rev. 5, United Nations, Carthographic Section, August 2004



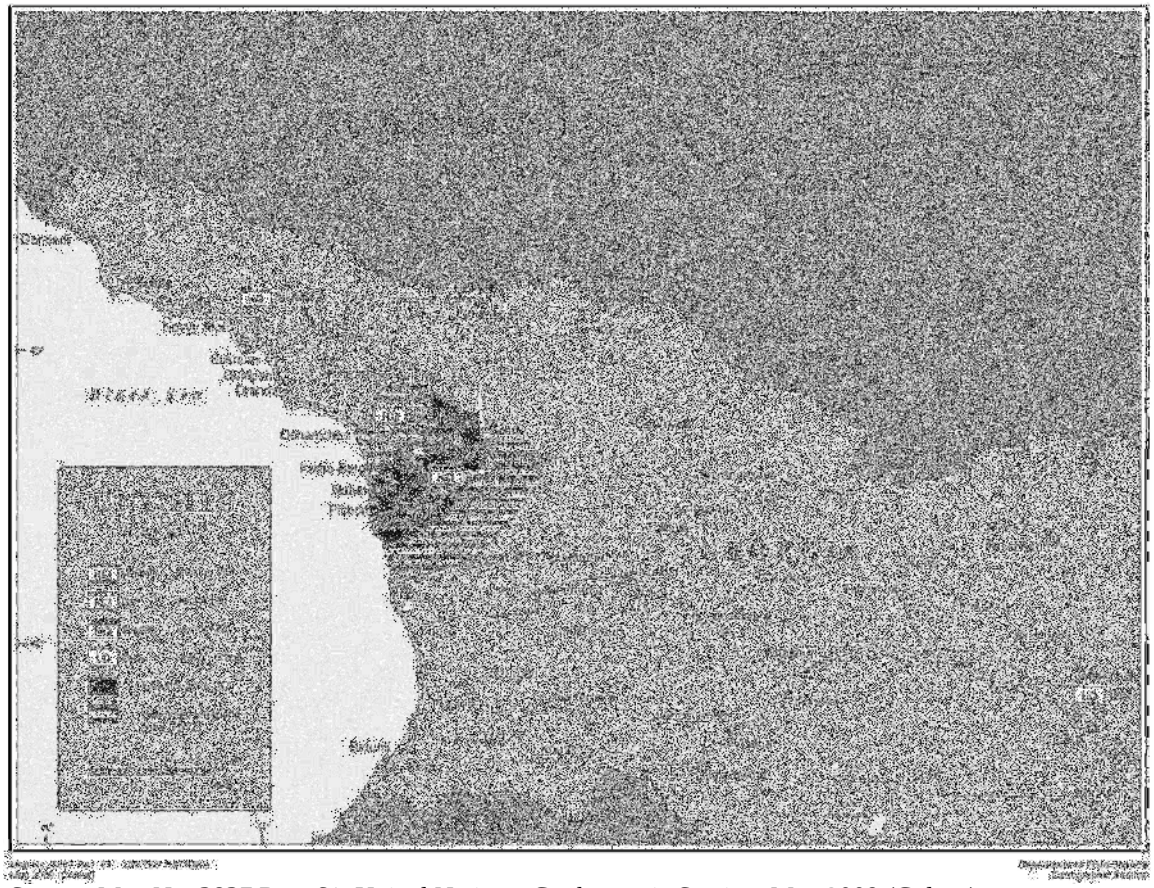
Source: Map of South Ossetia, International Crisis Group



Source: Joint Peacekeeping Force map, International Crisis Group



Source: Map of Western Georgia, International Crisis Group



Source: Map No. 3837 Rev. 61, United Nations, Carthograpic Section, May 2009 (Colour)

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1. Relations between Georgia and Russia

The historical and political preconditions of the armed conflict between Russia and Georgia in August 2008 reveal two sets of historically complex relations which overlap – bilateral relations between Georgia and Russia on the one hand, and internal conflictual relations between Georgia and the breakaway territories of South Ossetia and Abkhazia on the other. This context is furthermore entrenched in a broader geopolitical environment in which the Caucasus is presented as a theatre of competing influence between external powers.

History of an Ambivalent Relationship

Georgian national identity claims historical origins dating as far back as the establishment of an autocephalous Georgian church in the 4th century and the emergence of the Georgian language with its own alphabet in the 5th century. Nevertheless, for centuries Georgia was divided into diverse local sub-ethnic entities, each with its own characteristic traditions, manners, dialects and, in the case of the Mingrelians, Lazs and Svans, with separate languages similar to Georgian. The process of ethnic consolidation and nation-making had not been completed.[1] Earlier Georgian history culminated in the united Georgian Kingdom of the 11th to 13th centuries, when Georgia was a regional power in the Caucasus. In ensuing periods it split up into several political entities such as the kingdom of Kartli and Kakheti in the east and the kingdom of Imereti and principalities like Samegrelo and Svaneti in the west. Georgia weakened after repeated attacks by foreign powers like the Mongols and Timurides. From the 16th century onward, Ottoman Turkey and Safavid Iran began to subjugate western and eastern regions of Georgia respectively.

Seeking greater political influence in the Black Sea region, the Russian empire extended into the South Caucasus beginning in the second half of the 18th century. The situation in Georgia was dramatic at that time. Turkish and Persian armed invasions destroyed the country. King Erekle II, who had succeeded in unifying two Georgian kingdoms in the eastern part of the country, sollicited the Russian Empress Catherine II for protection. A treaty to this effect was signed in Georgievsk on 24 July 1783 and eastern Georgia (the kingdom of Kartli and Kakheti) became a Russian protectorate, notably against Persia. Yet Georgia fought alone against the next Persian invasion in 1795 and suffered the destruction of its capital. Erekle's son and successor, George XII, again asked Russia for protection while simultaneously trying

[1] A standard work on this process is: Ronald Grigor Suny, *The Making of the Georgian Nation*, Bloomington/Indianapolis, 1994.

to reach a separate bilateral agreement with Persia. In response, Russia proclaimed the annexation of his kingdom: on 8 January 1801 Tsar Paul I signed a decree incorporating Georgia into the Russian Empire.

Tsarist rule over Georgia can be divided into three periods[2]: 1) in 1801-1844 Georgia was under Russian military administration (Georgian Guberniya); 2) in 1844-81 it was known as the Viceroyalty of the Caucasus, and 3) in 1881-1917 it was fully integrated into the Russian Empire and experienced intensified russification. During the Viceroyalty period, Tbilisi became the informal capital of the Caucasus and Georgian nobility was raised to equal status with its Russian counterpart. A Georgian intelligentsia, which emerged as of the 1870s, gave rise to a national awakening.

Historically, how do Russia and Georgia view this annexation? Russia describes it in terms of a "humanitarian mission", helping an ancient Christian nation threatened by Islamic neighbours.[3] The Soviet and particularly the post-Soviet Russian view emphasise the unification of Georgian territories and stabilisation of the country under tsarist auspices. Georgian post-Soviet historiography partly underlines the negative consequences of the annexation, partly seeks a more balanced approach: the abolition of the autocephaly of the Georgian Church in 1811 and its subordination to the Russian Orthodox Church, denationalisation and russification were among the disadvantages. The advantages included Russian protection against external (Muslim) powers, the unification of all Georgian lands within one state organism and social progress such as the reform of the educational system. The advantages and disadvantages of the annexation were often interdependent: for instance, russification sparked a reactive Georgian national revival. To some extent, Georgians were a privileged nation within the Empire. Nevertheless, Russia is treated by the Georgian historical narrative mainly as a threat to the very existence of the Georgian nation.

Georgia's independence as the *Democratic Republic of Georgia* (1918 - 1921) was due more to the collapse of the Russian Empire than to its own efforts of national liberation. Georgia considers this "first independence" as its first important experience of modern democratic statehood. At the time, Georgian politicians were not determined to break ties with Russia. Noe Zhordania, leader of Georgian Mensheviks and later Prime Minister, declared in late

[2] For this periodisation see Andrzej Furier: *Droga Gruzji do niepodleg o!i* (*Georgian Way to Independence*), Pozna# 2000, pp. 36-39; Wojciech Materski, Gruzja (Georgia), Warszawa 2000, pp. 19-20.

[3] See the classical work of Vasily Klyuchevsky (Klju"evkij, V.O.: Russkaja istorija, Rostov-na-Donu 2000, kniga tret'ja, 437-440).

November 1917 that Georgia had made a historic choice to join the West, a path that led through Russia. However, Bolshevik ideology was not popular in Georgia at that time. In 1918 - 1920 Bolshevik groups organised uprisings in the province of Shida Kartli, inhabited mainly by the Ossetian minority. The uprisings were brutally suppressed in 1920 by the Georgian army. The Ossetians believe their nation was the target of Georgian repression but the Georgians claim they were struggling against the Bolsheviks, not the Ossetians.

The Bolsheviks established a Georgian Soviet Socialist Republic on 25 February 1921, which a year later became part of a Transcaucasian Soviet Federative Socialist Republic (TSFSR, also including the Soviet Republics of Armenia and Azerbaijan). When this Transcaucasian entity was dissolved in December 1936, all three Republics were incorporated into the USSR. Soviet Georgia had a complicated territorial structure: the Autonomous Republics of Abkhazia and Adjara and the Autonomous District (Oblast') of South Ossetia were included within its borders, covering about 22 percent of its territory. The Georgian elite was convinced that these entities had been created by the Soviet (Russian) central power to limit Georgian jurisdiction over its own territory.

Opposition and resistance to Bolshevik policy in Georgia led to a national uprising in August 1924 that was cruelly suppressed by the Soviet authorities, targeting mainly the Orthodox clergy and national intelligentsia.[4] This mass terror, a "decapitation of the Georgian nation", culminated in the 1930s. A Georgian national revival emerged in post-Stalinist decades. In April 1978, for example, thousands of people protested in Tbilisi against changes in the Georgian constitution which would give the Russian and Georgian languages equal status. Soviet authorities yielded to the demand to maintain the previous exclusive status of the Georgian language.

The Soviet period in Georgia ended tragically on 9 April 1989, the events of which became the "chosen trauma" of post-Soviet Georgian nationalism. Soviet troops broke up a peaceful demonstration in the centre of Tbilisi killing at least 19 people and wounding hundreds. The trauma resulted in a radicalisation of the Georgian national movement in the perestroika era, prompting even many Georgian communists to consider independence as the only viable perspective for the country.

Two years later, symbolically on 9 April 1991, the Georgian Parliament (Supreme Council) proclaimed independence. The most challenging heritage of the Soviet period – also in terms

[4] Valery Silogava and Kakha Shengelia, History of Georgia, Tbilisi, 2007, pp. 228-229.

of Georgian-Russian relations – remained the country's territorial structure with its three autonomous entities (Abkhazia, South Ossetia, Adjara). During the transition period to post-Soviet sovereignty under the leadership of Zviad Gamsakhurdia, the national movement did much to alienate these regions and national minorities from the Georgian independence project, branding ethnocentrist slogans such as "Georgia for Georgians".

Following the dissolution of the USSR, Russia declared former Soviet territory as its sphere of vital interest.[5] Expecting international recognition of its position as a guarantor of peace and stability in this area, Russia defined the post-Soviet newly independent states as its "near abroad", stressing their proximity and close ties with Russia. It was probably important for Russia to have influence in the South Caucasus to maintain control over a region neighbouring Iran and Turkey and its own North Caucasus, in which centrifugal tendencies were on the rise.

Relations between Moscow and Tbilisi were tense in 1990 - 1993, during the mandate of first Georgian President, Zviad Gamsakhurdia, and the initial period of Eduard Shevardnadze's rule. They then improved significantly until the late 1990s following Georgian accession to the CIS in 1993 but deteriorated once again in the early 2000s. Zviad Gamsakhurdia, soon criticised for his authoritarian rule, represented strong anti-Russian sentiments that were widely shared by the Georgian elite.

In October 1993, after Georgia's unsuccessful military engagement in South Ossetia and Abkhazia, Eduard Shevardnadze asked Moscow for assistance to suppress an insurrection instigated by supporters of Zviad Gamsakhurdia in the western province of Samegrelo. Russian troops provided this assistance but at the price of a re-orientation of Georgia's foreign policy. Eduard Shevardnadze signed the decree on Georgia's accession to the CIS in October 1993. In 1994 Georgia also joined the Russian-controlled Collective Security Treaty. Four Russian military bases, present since Soviet times, were to be maintained on Georgian territory, and Russian border troops deployed along the Georgian border with Turkey and at the sea border. The Russian military presence in Georgia also included the Russian-staffed peacekeeping forces in Abkhazia and South Ossetia.

With the location of foreign military bases on its territory, Georgia not only lost its territorial integrity *de facto*, but partially also its sovereignty. Georgian disenchantment with Russia

[5] Principles and Directions of the Foreign Policy of the Russian Federation, adopted at the beginning of 1993, and ensuing documents.

coincided with the West's growing interest in the South Caucasus since the mid 1990s and the rising significance of the Caucasian-Caspian region for the independent supply of oil and gas to the global market. Georgia supported important projects promoted by Washington as well as EU-fostered transport projects. Russia perceived such projects as an attempt to undermine its own geoeconomic position in the wider Caspian region. In the late 1990s, Georgia began to tighten its relations with the West. In 1999 it joined the Council of Europe, intensified its relations with NATO and left the Russian-dominated Collective Security Treaty. Relations between Moscow and Tbilisi continued to deteriorate, worsening with Russia's second war in Chechnya beginning in late 1999 and the Georgian refusal to allow Russian troops access along the Chechen segment of the Russian-Georgian border.

Since the late 1990s, the Georgian authorities had made new efforts to reduce the Russian military presence in the country. In 1993, Georgia and Russia signed an agreement on the withdrawal of Russian troops from Georgia until 1995, but the agreement did not come into force. In ensuing years, bilateral agreements on the deployment of Russian military bases were signed, the most important one on 15 September 1995. Under this agreement, four Russian bases were deployed in Georgia: in Batumi (Adjara), in Gudauta (Abkhazia), in Akhalkalaki (region of Samtskhe-Javakheti, inhabited by Armenians), and in Vaziani (near Tbilisi). An agreement on the withdrawal of Russian border troops was signed in November 1998 and all Russian border troops left Georgia in 1999. During the Istanbul OSCE Summit in 1999, Russia had committed to dismantling its military bases in Georgia. In 2001 the base in Vaziani was withdrawn and the infrastructure of the base in Gudauta was transferred to the CIS (in fact Russian) Peacekeeping Force in Abkhazia. The dismantling of the two other bases was the subject of difficult negotiations but was eventually implemented in 2007.

Russia, or at least certain forces proceeding from the territory of the Russian Federation (primarily the Confederation of Peoples of the Caucasus), had intervened in Georgia`s conflicts with Abkhazia and South Ossetia from the beginning of the 1990s. The military victory of pro-Abkhaz fighters in their armed conflict with Georgian troops would not have been possible without this interference. But in the early 1990s this Russian involvement had an inconsistent character. The political crisis in Russia itself influenced its policy in the region. Local Russian commanders stationed in Abkhazia actively supported the Abkhaz side. Divisions within the Russian Government may explain why both Georgia and the secessionist forces had been receiving Russian support intermittently.

The ensuing peace processes in Abkhazia and South Ossetia were largely in the hands of Russia. For around 15 years it was possible to preserve a minimum of stability in the region, i.e. to keep larger military operations suspended. The conflicts were in effect frozen.

At the turn of the millenium it became increasingly apparent that the resolution of the conflicts in Abkhazia and South Ossetia was not in the offing. Major geopolitical changes occurred in the first years of the new millennium in connection with the reorientation of America's foreign policy after 9/11 (2001) and EU enlargement, leading to a new policy towards its new neighbours. These changes further included NATO's eastward enlargement. Under the presidency of Vladimir Putin, Russia became wealthier, more stable and more assertive of its claims to influence in its "near abroad". Increasingly, Russia saw the West as a rival in the South Caucasus and elsewhere. This new international environment proved not to be favourable to the resolution of the conflicts in Abkhazia and South Ossetia. In the periods mentioned above, both Russia and Georgia developed an "enemy image" and negative stereotypes of each other.

Growing Confrontation 2004 – 2008

Under the leadership of Vladimir Putin and Mikheil Saakashvili, bilateral relations became the most precarious ever between the Russian Federation and a neighbouring state formerly belonging to the USSR. There were many irritants between Moscow and Tbilisi already in the period of President Shevardnadze. Problems poisoning the bilateral relations included: the Georgian demand for a Russian troop withdrawal and the dismantling of military bases on Georgian territory in accordance with commitments made by Russia at the Istanbul OSCE Summit in 1999; Georgian participation in the construction of the Baku-Tbilisi-Ceyhan oil pipeline (BTC); Russian demands for military access to Georgian territory to fight armed Chechen rebels in uncontrolled areas like the Pankisi Gorge; and increased US military support for the modernisation of a hitherto paltry Georgian army.

In January 2004, Andrei Kokoshin, Chairman of the Russian Duma Committee on CIS Affairs, referred to Georgia's "over-reliance on Western countries in the solution of these issues" as "the previous Georgian leadership's great mistake".[6] The main reason for the Russian frustration with Georgia was the "westernisation" of its foreign and security policies, which was to become even more pronounced under the new Georgian leadership of President Saakashvili. Russian diplomacy formally affirmed the sovereignty and territorial integrity of

[6] NTV television, 8 January, 2004.

Soviet successor states, yet still perceived these states as Russia's "near abroad", and in this perception, the sovereignty of the foreign and security policy of the newly independent states was limited. Russia's response to this "westernisation" was a coercive Georgia policy, a number of economic and diplomatic punitive measures.

In this context, Georgia's unresolved conflicts with Abkhazia and South Ossetia were a crucial matter. For the Georgians, the territorial integrity of their country and the reintegration of Abkhazia and South Ossetia were a matter of unquestionable national consensus. Even though Eduard Shevardnadze had tried to keep the profile of the unresolved secessionist conflicts low, he was not ready to give up Abkhazia or South Ossetia. And when his successor Mikheil Saakashvili was later criticised by various Georgian parties for his authoritarian tendency, there still remained a strong consensus among all these parties on Abkhazia and South Ossetia. "All of these parties completely supported the president's approach toward Abkhazia and South Ossetia."[7] On the Russian side, there was a similar consensus that the majority of non-Georgian residents of both territories - with their anti-Georgian and pro-Russian mood and with Russian passports distributed to them by the Kremlin on a massive scale - were to be protected as "Russian citizens" against possible "Georgian aggressions".

The Russian-Georgian breach in this regard was so deep that according to an assessment in 2007 by Sergei Markedonov, Head of the Department for Interethnic Studies at the Moscow Institute of Political and Military Analysis, any improvement in bilateral relations could only be expected in areas that were not directly related to the South Ossetia or Abkhazia issues.[8] However, such neutral areas were shrinking as President Saakashvili declared the restoration of Georgia's territorial integrity to be his political priority. He practised a policy of accelerated, enhanced reintegration whereas Russia increased its support to Abkhazia and South Ossetia. Russia was engaged in these conflicts as the main peacekeeper, as facilitator and as a member of the Group of Friends of the UN Secretary-General, but it was demonstrating a clear bias in favour of the "separatist" parties to the conflict. Its policy toward Georgia was perceived in Tbilisi as "not peacekeeping, but keeping in pieces".

Besides its main peacekeeping role in Georgia's unresolved conflicts, Russia had at its disposal strong economic resources permitting a coercive Georgia policy. Georgia had no

[7] Sergei Markedonov: *The Paradoxes of Russia's Georgia Policy*, in: Russia in Global Affairs, April-June 2007, p.6.

[8] *Ibid*.

equivalent means for an adequate response with the exception, perhaps, of its veto power on Russia's admission to the World Trade Organisation.

Shortly after the peaceful power change in Tbilisi, the then acting interim President Nino Burjanadze visited Moscow in December 2003, making it clear that the main purpose of her visit was to normalise Russian-Georgian relations. In the Russian point of view, the main pre-conditions for "normalization" of relations with Georgia were the following:[9]

- Renunciation of a unilateral orientation toward the US and NATO;
- Acknowledgement of Russia's special interest in Abkhazia and South Ossetia, home to tens of thousands of people who had recently obtained Russian passports;
- Permission for Russian security forces to fight Chechen rebels from Georgian territory, mainly in the Pankisi Gorge.

The main argument for persuading the new Georgian authorities to accept these conditions was economic. Georgia owed Russia more than USD 300 million, mainly for electricity.[10] Other forms of leverage at that time were the high number of Georgian migrant workers in Russia, and Georgia's dependency on Russia for trade and energy supply.

Hence, bilateral relations between Moscow and Tbilisi were already burdened when President Saakashvili came to power in January 2004. Except for a short "intermezzo", these relations further deteriorated in ensuing years.

A Short Period of Calm

A common presentation of bilateral relations between Georgia and Russia holds that they soured soon after President Mikheil Saakashvili came to power in the "Rose Revolution", with promises of even closer ties to the United States and the European Union, and an enhanced drive to join NATO. However, between the power change in Tbilisi in November 2003 and an escalation around South Ossetia in summer of 2004, an "intermezzo" seemed to signal a change for the better. One of the starting points for this improvement was the mediation role of Russian Foreign Minister Igor Ivanov in the Georgian political crisis of November 2003, which ended with the resignation of President Shevardnadze. During the period of presidential and parliamentary elections that followed in Georgia (in January and

[9] *Vladimir Putin sorts out Russian-Georgian relations*, Kommersant, December 26, 2003, p.9 (The Current Digest of the Post-Soviet Press, No.51, vol.55, January 21, 2004, p.20)

[10] *Ibid.*

March 2004 respectively), the new power elite around Mikheil Saakashvili gained the overwhelming consent of the population. This clear victory helped to pave the way for a strategy to overcome the weak state syndrome that had characterised the final years of the Shevardnadze era.

For Russia, it was a period of sizing up the new leadership in Tbilisi. One opportunity to do so was Mikheil Saakashvili's first visit to Moscow as the new Georgian President in February 2004. He announced Georgian willingness to take Russian interests into account and mentioned the improvement of their bilateral relations as one of his three main objectives – the other two being the fight against corruption and the reorganisation and strengthening of the Government.

Confronted with new President Saakashvili's authority at home the Kremlin adopted a more accommodating attitude towards Tbilisi.[11] A short thaw in bilateral relations included discussions on restructuring the Georgian energy debt owed to Russia, the unsettled conflict on Abkhazia with both sides wanting to go back to the "Sochi process",[12] agreements on media and information exchanges, the creation of a bilateral trade commission and closer cooperation in the energy sphere. A new bilateral agreement on 3 April 2004 provided for Georgian-Russian cooperation in the security sphere. The Georgian Defence Minister and his Russian counterpart announced bilateral solidarity efforts in combating international terrorism, drug trafficking, illegal migration and weapons smuggling.

Some Russian analysts considered the power change in Tbilisi as an occasion to re-think the Russian policy in the Caucasus. Sergei Karaganov, Chairman of the influential Council on Foreign and Defence Policy, suggested that Russia's confrontational stance toward Georgia only masked the absence of a well-considered approach.[13] Another commentator called into question Russia's policy of keeping regional conflicts in a status of "controllable instability" for the purposes of its own power projection in the South Caucasus. His argument: Russian power elites had no skill in controlling unstable systems.[14] Liberal-minded experts urged a Moscow policy shift toward Tbilisi, arguing that a continued hard-line approach would only

[11] Igor Tobarkov: Saakashvili's political punch prompts Kremlin to rethink policies, in: Eurasia Insight, April 7 2004.

[12] The "Sochi process" agreed to talks between Georgia, Russia, and Abkhazia on confidence-building measures, on the return of Georgian IDPs/refugees to Abkhazia, the reinstallation of war-destroyed infrastructure, and energy supplies to Abkhazia.

[13] Quoted by Igor Tobarkov, Russian Policy Makers Struggle to Respond to Political Changes in Georgia, Eurasia Insight, January 11, 2004.

[14] Vladislav Inozemcev in Nezavisimaja Gazeta, August 17, 2004.

drive Georgia deeper into the arms of its Western partners. Traditionalists in Russian policy-making and policy-analysing circles argued the opposite and were highly sceptical about the intentions of the ruling triumvirate in Georgia, the new power elite in Tbilisi represented by Mikheil Saakashvili, Nino Burdjanadze and Zurab Zhvania. Konstantin Zatulin, Director of the Institute for CIS Studies in Moscow, was convinced that the Georgian administration wanted "to finally take Georgia out of Russia's sphere of influence and turn it into a reliable US ally".[15] Dmitri Trenin from the Carnegie Moscow Centre referred to the bilateral relations at the end of 2003 as the "calm before the storm".[16]

Most analysts assessed the Russian economic influence in Georgia to be one stable factor in the relationship.[17] Another was the affinity for strong, centralised presidential power, proned by the leaders of both states. For a while, the rhetoric on both sides changed and a Russian-Georgian political dialogue gained fresh momentum. At the same time President Saakashvili presented Georgia as Washington's "main geopolitical partner" and pressed his western partners for help in restoring Georgia's territorial integrity. Although Russia allegedly had supported the peaceful outcome of the power change in Tbilisi, the Rose Revolution was perceived as a challenge to Russia's new assertiveness in CIS space. It was the first of subsequent "colour revolutions", which were described in Russian commentaries as a "geopolitical aggression" steered by Western powers against Russia's strategic position in the post-Soviet space. The supposed initial political affinity between Presidents Putin and Saakashvili changed into the most problem-ridden personal relationship between state leaders in the CIS.

The Adjara Crisis in Spring 2004

In this period, the disputed question of military bases merged with a political conflict around Adjara. The new Georgian leadership wanted to re-establish control over this territory. It counted on the support of the local population but was concerned about the risk of Russian intervention into this conflict. Russia's potential leverage into this crisis was amplified by the fact that "up to 70 percent of the residents of the 12th Russian military base in Batumi are

[15] Igor Tobarkov: Russian policy makers struggle to respond to political changes in Georgia, in: Eurasia Insight, January 11, 2004.

[16] Civil Georgia, December 22, 2003, Q&A with Dmitri Trenin of Carnegie Moscow Center, http://www.civil.ge/eng/article.php?id=5865&search=q&a%20with%20Dmitri%20Trenin

[17] Russia's First Deputy Minister for Foreign Affairs, Valery Loshchinin, stated in February 2005: "Our economic relations with Georgia have grown deeper with the advent of the new leadership. Russia's economic presence in Georgia is now weightier than ever before; our capital is entering all the major economic sectors." Interview in Rustavi-2 TV, February 10, 2005.

locals, but all of them have Russian citizenship".[18] Aslan Abashidze, the leader of Adjara, looked to Moscow for support in his political confrontation with the new power elite in Tbilisi. But in the confrontation between the new leadership in Tbilisi and the regime in Batumi, Moscow took a cautious stance between the Georgian Government and factions supporting Aslan Abashidze. At the height of the Adjara crisis in April and May 2004, when President Saakashvili gave Aslan Abashidze a 10-day ultimatum calling for his resignation and the disbanding of his militia forces, the Kremlin helped to resolve the conflict peacefully.

This crisis resulted in the reintegration of Adjara into the Georgian jurisdiction. The new Georgian Foreign Minister, Salome Zourabishvili, mentioned in talks with her Russian colleague that the resolution of the Adjara case was not transferable to Abkhazia. Other commentaries in Georgia, however, considered the outcome of this crisis as a precursor for a near-term reintegration of other breakaway territories.

The Adjara crisis had never been a secessionist or ethno-territorial conflict and was, indeed, incomparable to the Abkhazia or South Ossetia scenarios. The conflict between Tbilisi and Batumi lacked deeper historical and ethnic roots. There is no ethno-linguistic difference between Adjarians and Georgians. There is a religious difference with many Adjarians being Muslim, but this was never a factor in the conflict. There had never been an Adjarian declaration of secession from Georgia. And above all, Georgians and Adjarians had never known the wider armed clashes and the experience of mutual violence and brutality that constitute the crucial psychological element in Georgian-Abkhaz and Georgian-Ossetian relations, and the source of ever-recurring stories of hatred and fear. A few weeks after the peaceful end of the Adjara crisis, an escalated South Ossetia crisis would demonstrate how very different the Adjara crisis was compared to Georgia's secessionist conflicts. By then bilateral relations between Moscow and Tbilisi had become stormy.

The South Ossetia Crisis in Summer 2004

At the beginning of his presidency, Mikheil Saakashvili promised that he would restore Georgia's territorial integrity by the end of his tenure. Statements such as "South Ossetia will be reintegrated into Georgia within a year at the latest"[19] were alarming Moscow. Shortly after the reintegration of Adjara, the new government in Tbilisi began an anti-smuggling offensive in South Ossetia where a marketplace like Ergneti had indeed become a centre of

[18] ITAR-TASS, 5 May 2004, 12:24 GMT.

[19] Saakashvili at a news briefing in Tbilisi at July 10, 2004, quoted in: Eurasia Insight, July 12, 2004 "Saakashvili: Russia to blame for South Ossetia Crisis".

illegal trade in the Caucasus. Special forces from the Georgian Ministry of Internal Affairs were sent to some villages in South Ossetia, mainly under Georgian control.

In Russia, this security reinforcement was seen as an attempt to re-establish control over the whole of South Ossetia, and as the beginning of a new conflict between Moscow and Tbilisi. The Georgian Minister of Internal Affairs, Georgi Baramidze, reportedly announced that Tbilisi intended to resort to arms if Russian peacekeepers tried to shut down a police post that was blocking attempts to smuggle contraband from Russia to Georgia via South Ossetia.[20] The flow of contraband, indeed, decreased after police posts were opened in Georgian villages around Tskhinvali and not far from the Ergneti market. At the same time, Tbilisi offered South Ossetia a "carrot". For the first time, President Saakashvili proposed that South Ossetian autonomy would be re-established. He also promised to pay Georgian pensions to residents of South Ossetia even if they had already received pensions from Moscow as bearers of Russian passports. According to Georgia's Minister for Conflict Resolution, Georgi Khaindrava, Georgia was prepared to grant South Ossetia the same degree of autonomy that North Ossetia had as one of the republics within the Russian Federation.

A verbal skirmish between Moscow and Tbilisi ensued. Russian accusations of Georgian aggression were countered by Zurab Zhvania, Georgian Prime Minister: "On Georgian territory, no one can dictate to the Georgian authorities how they should restore order or put a stop to smuggling".[21] Georgian authorities intended to use a strategy similar to the one that was successful in the Adjara crisis. They tried to drive a wedge between the separatist authorities and the local population of South Ossetia. But the Georgian approach to regain control over the region and the Russian support for the challenged regime of *de facto* President Eduard Kokoity of South Ossetia led to a confrontation that escalated into armed clashes in the mosaic of Georgian and Ossetian villages surrounding Tskhinvali. On 10 July 2004 the Georgian President called on his military to be ready to mount "protracted, full-scale operations" to defend the country's territory. All available resources would be used for defence.[22] On the other side volunteers from the Russian North Caucasus and from the separatist Transnistria region in Moldova reportedly came to South Ossetia to help the Ossetians counter a "Georgian aggression".

[20] Quoted by Gennady Sysoyev and Vladimir Novikov in Kommersant, June 1, 2004, pp.1,9.

[21] Quoted by Gennady Sysoyev and Vladimir Novikov in Kommersant, June 3, 2004, p.9.

[22] Quoted by Svetlana Gamova in Novye Izvestija, July 12, 2004, p.4.

The conflict over South Ossetia became the central bone of contention between Russia and Georgia and took on international dimensions. Georgia pushed for internationalisation of the peacekeeping forces in South Ossetia and Abkhazia, seeking to end the Russian dominance of the existing format. In early August, President Saakashvili warned that vessels attempting to dock in Abkhazia without Georgian authorisation would be targeted, including tourist ships from Russia. The Georgian coast guard had already fired at a freighter reportedly registered in Turkey. Russian commentators linked the Georgian demands with US military support and Georgian NATO ambitions. But Washington and Brussels did not in any way condone the "reconquista-rhetoric" on the Georgian side.[23]

In August 2004 the crisis reached its high point with night-time shelling of Tskhinvali and nearby villages and escalating armed clashes. Georgia was on the verge of a large-scale armed conflict with its former autonomous region. Georgian Defence Minister Baramidze announced, "Georgia is prepared for war and does not advise anybody to start one".[24] But the new Georgian Government knew that an armed conflict would derail all of its plans to rebuild the Georgian state and economy, and most of President Saakashvili's main campaign promises. Russia was threatening to impose a total transportation blockade on Georgia. Abkhazia announced its withdrawal from all talks with Tbilisi as a result of the freighter incident.

In August 2004 an open war in South Ossetia involving Russian troops could be prevented. Georgian security forces stopped their offensive in the conflict zone. But the Georgian side now had a fundamental commitment problem when addressing new peace initiatives and autonomy offers to the South Ossetian and the Abkhaz conflict sides. The Georgian military initiative reactivated the memory of wars in South Ossetia and Abkhazia in 1991 - 1992 and 1992 - 1994 respectively, raising the already high psychological barrier to confidence-building even higher. Furthermore, the crisis marked an important step in the further deterioration of bilateral relations between Georgia and Russia.

In the years thereafter, the Georgian Government continued to focus on South Ossetia as its primary object for its declared policy of reintegration and restoration of territorial integrity. In

[23] The US coordinator of the Committee on Eastern Europe and Russia in NATO, Ira Straus, made rather critical comments stating that a peaceful reintegration of Abkhazia and South Ossetia is only possible with Moscow's help. "Saakashvili is driving his democratic revolution to the edge of an abyss, as he pushes toward military methods of bringing South Ossetia and Abkhazia back under Georgian control". Quoted by: The Current Digest of the Post-Soviet Press, No. 32, vol.56, September 8, 2004, p.4.

[24] Quoted by Vladimir Novikov and Oleg Zorin, Kommersant, August 2, 2004, p.9. (The Current Digest of the Post-Soviet Press, no.31, vol.56, September 1, 2004, p.6-7).

July 2005, President Saakashvili announced a new peace plan for South Ossetia that offered substantial autonomy and a three-stage settlement, consisting of demilitarization, economic rehabilitation, and a political settlement. South Ossetia's *de facto* President Kokoity rejected the plan, asserting in October 2005 "we are citizens of Russia".[25] In November 2006, a popular referendum was held in South Ossetia to reaffirm its "independence" from Georgia. Many South Ossetians voted in the 2007 Russian Duma election and the 2008 Russian presidential election.

For the purpose of reintegration, the Georgian strategy changed from using security forces in South Ossetia to building a political bridgehead in the breakaway region. "Presidential" elections in South Ossetia in November 2006 re-elected *de facto* President Kokoity. An alternative election held in parallel at the same time among the ethnic Georgian population (and those displaced from South Ossetia) elected Dimitri Sanakoyev, an Ossetian politician committed to political dialogue with Tbilisi and opposed to the power elite around Eduard Kokoity. In this population sector, a referendum was approved in support of Georgia's territorial integrity. In 2007 Tbilisi appointed Dimitri Sanakoyev head of a "provisional administration in South Ossetia" with official residence in the village of Kurta. A dual power structure had thus emerged in this tiny region with its 70,000 residents (of whom more than 20,000 ethnic Georgians). Tbilisi used the Sanakoyev administration in its plan to internationalise the negotiations on South Ossetia in a 2+2+2 format (Georgia, Russia, EU, OSCE, the Kokoity authorities, the Sanakoyev authorities) and was eager to present Dimitri Sanakoyev in international forums. At the same time Tbilisi launched a public campaign against Kokoity's separatist regime in Tskhinvali that was denounced as "criminal".

The Dispute over Russian Peacekeeping Role in Georgia's Conflict Zones

Russia's peacekeeping role in Abkhazia and South Ossetia was a fundamental bone of contention in Georgian-Russian bilateral relations, and a focus of Georgia's diplomatic efforts. Georgia increasingly demanded a revision of the existing negotiation formats and the internationalisation of peacekeeping forces in the conflict zones. The existing formats were based on ceasefire agreements ending the 1991 - 1994 armed conflicts between Georgia and both regions.[26]

[25] CEDR, October 7, 2005; Jim Nichol: Russia-Georgia Conflict in August 2008: Context and Implications for U.S. Interests, Congressional Research Service, March 3, 2009, p.3

[26] See Chapter 2 "Conflicts in South Ossetia and Abkhazia: Peace Efforts 1991 – 2008".

A paradox of the Russian peacekeeping role in Georgia was that Russia behaved with self-interest and ambitions of increased strategic influence in the South Caucasus, but at the local level, the Russian presence seemed to be indispensable and was presented as part of the former superpower's burden.[27] Prior to the growing confrontation between Moscow and Tbilisi and the new escalations in the conflict zones, Russian peacekeeping operations in South Ossetia were generally considered to be successful and effective in terms of stabilising the conflict and facilitating interactive negotiations between the Georgian and Ossetian sides.[28] Consequently, there was no substantial international pressure for a revision of these Russian-centred peacekeeping formats. Some Western commentaries acknowledged that the peacekeepers blocked the Georgian Government from initiating military actions for the reintegration of the breakaway territories.[29]

In the Georgian perception, however, the Russian peacekeepers had become border guards defending the administrative borders of Georgia's breakaway territories. In the 2004 South Ossetia crisis, the Georgian Parliament adopted a special statement. In the sternest accusation Tbilisi had made against Moscow since President Saakashvili took office, the parliamentarians declared: "The Russian Federation is not a peacekeeper or a mediator but one of the parties to the conflict".[30] In the framework of GUAM[31], Georgia's demand for an internationalisation and revision of the existing peacekeeping formats was supported by Ukraine. Together with Tbilisi, Kiev preferred to see other players such as the European Union and NATO as mediators and providers of peacekeeping troops in post-Soviet secessionist conflicts.

In October 2005 the Georgian Parliament adopted another "Resolution on the Peacekeeping Operations and the Situation in Georgia's Conflict Zones". It included a list of Russian citizens holding "high-level positions in the separatist power structures". The Parliament

[27] A typical Russian commentary on this aspect said in 2004, "Russia has no right to shirk its responsibilities as an intermediary and a peacekeeper. It must be made absolutely and unequivocally clear that Russia is resolved to prevent genocide in this region. This would seriously damage Moscow's prestige in the North Caucasus, in the region as a whole and in the CIS". See A. Chigorin: The Georgian Test, in: International Affairs No.5, 2004, pp.125-138; Countdown to War in Georgia, 2008, p. 497.

[28] John Mackinlay, Evgenii Sharov: Russian peacekeeping operations in Georgia, in: John Mackinlay, Peter Cross (Ed.): Regional Peacekeepers. The Paradox of Russian Peacekeeping, United Nations University Press Tokyo-New York-Paris 2003, pp. 64-111, p.72.

[29] Michael A. Weinstein: Deadlock in Georgia. An Incremental Gain for Russia, Eurasia Insight, August 17, 2004.

[30] Quoted by Vladimir Novikov and Gennady Sysoyev in Kommersant, August 14, 2004, p.1.

[31] In October 1997, Georgia together with Ukraine, Azerbaijan and Moldova established a consultative forum known as GUAM.

again adopted a resolution in July 2006 on the withdrawal of Russian peacekeepers and transformation of that operation. However, citing risks of destabilisation, Georgia's Western partners dissuaded Tbilisi from implementing that resolution. Speaking at the UN in September 2006 President Saakashvili accused Russia of the "annexation" and "bandit style occupation" of Abkhazia and South Ossetia. In this unprecedented harsh speech he demanded that Moscow pull the Russian peacekeepers out of both territories. For the Russian side it was highly symbolic that this speech at the 61st Session of the UN General Assembly in New York came one day after the NATO Council, also meeting in New York, had decided to commence an intensified dialogue with Georgia.[32]

Georgian criticism of Russian peacekeeping in Abkhazia's security zone flared up again in October 2007 when a Russian unit allegedly attempted to take control of a Georgian "patriotic youth camp", situated within Georgian-controlled territory near the Georgian-Abkhaz demarcation line in Ganmukhuri. In reponse to this incident, the Georgian National Security Council authorised the Ministry of Foreign Affairs to redouble efforts toward internationalising the peacekeeping operation.

Georgia expected greater involvement in conflict resolution by its partners like NATO and the EU, and by regional and international organisations. This connection between the Euro-Atlantic orientation of Georgian foreign and security policy and the expectations of Western support for reintegration of the "breakaway territories" was also made by the broader Georgian public.[33] According to a poll in February 2007, Georgian respondents gave the following answers to the question: "What do you expect from NATO membership?": security guarantees 57%, restoration of territorial integrity 42%, social welfare 22%, strengthening democracy 16%.

Georgia's demand to internationalise the peacekeeping formats in Abkhazia and South Ossetia met with restraint in the West. International organisations and Georgia's Western partners conceded the peacekeeping and mediator role to Russia reasoning that Russia recognised Georgian sovereignty at least formally. It was only since March 2008 with the escalation of Russian-Georgian relations over the unresolved conflicts that they began to perceive Russia's role as being much closer to that of a party to the conflict. It became more and more untenable to argue that Russia was an impartial arbiter. This understanding,

[32] The Current Digest of the Post-Soviet Press, No.39, vol.58, October 25, 2006, p.1-3.

[33] IRI (International Republic Institute), USAID etc.: Georgian National Voter Study. February 2007.

however, was not translated into actions capable of effectively transforming the peacekeeping and negotiating formats into genuinely international ones. The EU's Special Representative for the South Caucasus, Peter Semneby, very cautiously answered that the EU would look into the possibilities given that the existing peacekeeping force does not seem to enjoy the trust of all the parties and has become a source of disagreements.[34] But Brussels largely respected the strong Russian reservation about any change in the existing formats for peacekeeping and mediation in the "frozen conflicts". [35]

The European Union's engagement in unresolved conflicts in its common neighbourhood with Russia was characterised by the International Crisis Group as "working around the conflict", i.e. not "working on the conflict".[36] It was a soft policy confining itself to measures of conflict transformation by means of confidence-building between the parties to the conflict, the support of the mediation efforts made by other actors (OSCE in South Ossetia and UN in Abkhazia), economic rehabilitation of war damaged conflict zones and support for economic projects uniting the parties to the conflict, such as the power station at the Inguri river. The EU was not involved in "hard" security issues, as the Russian Federation was not supportive of its more active engagement such as providing peacekeeping troops. It was only after the armed conflict of August 2008 that the EU became more actively engaged in stabilising the post-war situation via its unarmed civil Monitoring Mission in Georgia (EUMM) within the framework of European Security and Defence Policy (ESDP).

"Creeping annexation"

Georgia's objection to the dominant Russian role in the peacekeeping operation in its conflict zones was motivated mainly by the perception that Russia's contribution to conflict management in the South Caucasus was not "peacekeeping, but keeping in pieces". Russia was seen as the protagonist responsible for keeping the conflicts in the region frozen, in order to maintain a "controllable instability" for the purposes of its own power projection in the South Caucasus. Moreover, Russia was promoting progressive annexation of Abkhazia and

[34] Interview with Peter Semneby in RFE/RL, May 3, 2008; Vladimir Socor: The West Can Respond More Effectively to Russia's Assault on Georgia, Part II, Eurasia Daily Monitor, vol.5, issue 88, May 8, 2008.

[35] Andrei Zagorski, leading researcher at the Moscow MGIMO-University, summarised this reservation in a paper on the Russian perception of the EU's 2008 Eastern Partnership initiative: "Any involvement of the European Union in conflict resolution in the common neighbourhood shall not challenge the Russia-led peacekeeping operations or Russia-brokered negotiating formats for conflict resolution in the Former Soviet Union. This demand does not exclude cooperation between Russia and the EU in the interest of conflict resolution or peacekeeping. However, the modalities of such cooperation were not supposed to challenge the key role of Russia".

[36] Conflict Resolution in the South Caucasus: The EU's Role, ICG Europe Report No.173, 20 March 2006.

South Ossetia by integrating these territories into its economic, legal and security space. The open annexation of these territories was blocked by several obstacles, ranging from Russia's military conflict in Chechnya to its interest in avoiding a massive confrontation with the West.

The clearest demonstration of this Russian policy of integrating separatist entities of neighbouring states into its own legal jurisdiction was "passportisation", the awarding of Russian passports and citizenship of the Russian Federation to residents of Abkhazia and South Ossetia.[37]

In this context, in 2007 Russia paid residents of Abkhazia a total of 590 million rubles in the form of pensions and allocated 100 million rubles to South Ossetia, where the overwhelming majority of the non-Georgian population were already holders of Russian passports.[38] According to commentaries by Russian political analysts, Moscow was using economic means "to try to caution Georgia against attempts to take back the unrecognised republics by force".[39]

Another aspect of "creeping annexation" was the fact that the separatist governments and security forces were manned by Russian officials. Russia appointed its former civilian and military leaders to serve in key posts in Abkhazia and especially in South Ossetia, including the *de facto* Defence Ministers of Abkhazia (Sultan Sosnaliev) and South Ossetia (Anatoly Barankevich) and the *de facto* Chief of the Abkhaz General Staff (LtGen Gennadi Zaytsev).[40] Russian journalist Julia Latynina once described the power elite in South Ossetia as a joint business venture between KGB generals and Ossetian entrepreneurs using money allocated by Moscow for the fight against Georgia.[41]

The Spy Scandal in Autumn 2006

Another incident provided a vivid example of the depth of the Russian-Georgian crisis and its emotional dimension. On 27 September 2006 Georgian authorities arrested four Russian military officers, accusing them of being members of an espionage network whose main goal

[37] For this legal problem see Chapter 3: "Related Legal Issues".

[38] Vedomosti, February 22, 2008 (The Current Digest of the Post-Soviet Press, no.7, vol.60, March 11, 2008, p.5).

[39] Quotation in Vedomosti, February 22, 2008.

[40] Stacy Closson, Georgia's Secessionist De Facto States: From Frozen to Boiling. In: Russian Analytical Digest, no.40, May 8, 2008, pp.2-5.

[41] Quoted in Die Zeit, Nr.35, August 21, 2008, p.1

was to prevent Georgia's integration into NATO. This marked a new low point in bilateral relations and triggered an exchange of mutual accusations. On the Russian side the incident strongly reinforced the already mature intention to punish Georgia. Moscow imposed heavy trade and financial sanctions against Georgia and recalled its diplomats from Tbilisi. The Georgian authorities handled the "spy affair" in a manner considered provocative not only in Russia. Georgia overplayed the incident: it did not expel the arrested officers discreetly – acceptable and standard *modus operandi* in such cases - but the men were released and transferred to OSCE officials in theatrical circumstances.

At a meeting with the Russian Security Council, President Putin complained that although Russia had consistently met its commitments to withdraw its military units from its former bases on Georgian territory "our servicemen were seized and thrown into jail". He labelled these actions as "state terrorism accompanied by hostage-taking" and alleged U.S. support for Georgian anti-Russian attacks, stating "these people think that, sheltered by their foreign sponsors, they can feel at ease and secure".[42]The Russian Defence Minister, Sergei Ivanov, made similar allusions at a NATO-Russia meeting in the Slovenian city of Portoroz at the end of September.[43] However, no Western country seemed to be prepared for a confrontation with Russia over Georgia. The EU, NATO, the UN, OSCE and other international institutions indicated deep concern over this outburst of verbal hostility in bilateral relations between Moscow and Tbilisi, calling upon both sides to mitigate their tone and to defuse tensions.

In his reaction to the Russian accusations President Saakashvili stressed Georgia's sovereignty, which included self-protection against Russian power projections.[44] On 28 September Russia asked the United Nations Security Council to condemn Georgia for taking "dangerous and unacceptable steps" that could destabilise the region. There was no such condemnation but members requested more information about the situation. The dispute intensified on 29 September 2006 with a statement from the Georgian Interior Ministry to the effect that Russian military "movements" had begun in territory bordering Georgia. He announced mobilisation of Russia's 58th Army, deployed in North Ossetia.

[42] Quoted by Vladimir Solovyov in Kommersant, October 2, 2006, p.1.

[43] Interpress News, ITAR-TASS news agency, September 29, 2006.

[44] "I have been openly stating for more than a year that our counter-intelligence is working, that we have information and that we are working for the protection of our democratic system…It is high time to understand that we do not speak just empty words". Civil Georgia, www.civil.ge, September 28, 2006.

Russia continued to seek support for punitive measures against Georgia. However, this provoked negative reactions from Armenia and Azerbaijan. In Armenia it was noted that Russia was defining its relations with Georgia without taking into account the interests of Georgia's neighbours. By imposing a blockade on Georgia, which serves as Armenia's main land route to Russia, the Kremlin strengthened the effects of the blockade imposed by Turkey and Azerbaijan on Armenia. Russia's blockade measures towards Georgia also adversely affected its own North Caucasian republics by closing the main border crossing between North Ossetia and Georgia. But above all, this crisis had an impact on Russian domestic affairs and affected the behaviour of Russian authorities toward the Georgian diaspora living in Russia in a way that damaged Russia's image in the world. "Until now, if government authorities contributed to public xenophobia it was through inaction, incompetence or irresponsibility. Now ethnic hostility is being incited by government figures – legislators and executive officials alike".[45] Some ethnic Georgians, including children, were loaded in cargo planes and expelled from Russia. Prominent Georgian intellectuals living in Russia were harassed by the tax police, Georgian businesses in Moscow were singled out by law enforcement authorities. Georgians were portrayed as the most criminal of all ethnic minorities in Russia. The campaign took an especially ugly turn when some Moscow schools were ordered to submit to the police lists of children with Georgian names.

When the EU ministers of foreign affairs expressed deep concern about the economic, political and humanitarian costs of the Russian measures against Georgia and Georgians, Konstantin Kosachev, Chairman of the State Duma Committee for International Affairs, conceded that criticism of several measures imposed by Russian executive organs on Georgians living in Russia was justified.[46] Reactions of protest emerged in Russia against the xenophobe reactions of their own authorities. Around a thousand demonstrators gathered in the centre of Moscow on 8 October 2006, many of them with emblems saying "I'm a Georgian".[47]

On 3 October 2006 in connection with the spy scandal, Russia cut air, land, sea, postal, and banking communications with Georgia. Earlier in 2006 it had slapped a ban on Georgian wine, fruit, vegetables, and mineral water, citing health concerns. Georgian officials downplayed the consequences of the sanctions. But the Georgian Ministry for Economic

[45] Masha Lipman, in: Washington Post, October 21, 2006.

[46] Frankfurter Allgemeine Zeitung, 19.10.2006.

[47] Interpress News, October 9, 2006.

Development released a report about the possible effects of suspending economic relations with Russia, noting that Russia was Georgia's main trade partner in 2006 despite restrictions on import of Georgian agricultural products. In the previous year, imports from Russia included 53% of the electric power and 95% of the natural gas consumed in Georgia. [48]

Russian Parliamentary Speaker Boris Gryzlov argued that the sanctions were directed against the Georgian Government, not against the Georgian people. But it was the ordinary Georgians who were suffering. The Georgian authorities were trying to cobble together an aid program for the Georgians deported from Russia in order to prevent anti-government protests, which the Russian sanctions supposedly aimed to trigger. But the crisis did not change the domestic political climate in Georgia against the ruling elite. Before the 5 October 2007 local elections, almost all political parties, including the opposition, stated that, despite internal divisions, they had no differences with the government on the policy toward Russia. But there were also some critical commentaries on the way the Georgian Government had handled the spy affair. Georgi Khaindrava, Georgia's former Minister for Conflict Resolution, told a Tbilisi newspaper that the authorities could have exposed the Russian spy network in a more professional manner, without undue clamour, particularly in order to avoid creating problems for the 800 000 Georgians who left their country because of economic hardship and were now working in Russia.[49]

As a result of Russia's economic sanctions Georgian exports to Russia in 2007 amounted only to USD 53 million, a 30 percent decline from the previous year. The sanctions spurred Georgia to restructure and reorient its export policies. Eventually, they did not lead to a dramatic decline of Georgian economic growth rates. They remained high, at reportedly 12 percent of GDP.

The "spy affair" ended with the return of the Russian Ambassador to Tbilisi in January 2007 and with a lifting of at least some of the Russian sanctions against Georgia. But it left the impression of irreversibly spoiled bilateral relations and revealed emotional and irrational scars in the mutual relationship. In Georgia allegations of Russia's spy activities and its "long arm" reaching into Georgian domestic affairs continued in subsequent years and played a prominent role in government attacks on opposition forces in the domestic political crisis.[50] This crisis grew violent on 7 November 2007 with Georgian riot police attacking

[48] Kavkaz Press, October 24, 2008.

[49] Quoted in Vremya novostei, October 3, 2006, pp.1-2.

[50] Quoted by Claire Bigg, Is Moscow behind Georgian unrest? RFE/RL November 15, 2007.

demonstrators. Georgia's Interior Ministry released footage of what it said were negotiations between several opposition leaders and Russian intelligence agents. According to Temur Yakobashvili, a Georgian political analyst and later Minister for Conflict Resolution, "Russian spies are trying to influence domestic developments… Russians are not even hiding that they are seeking a regime change in Georgia by manipulating domestic political developments and influencing various political movements and leaders."[51]

However, this accusation was called into question in Russia and beyond. "On the domestic political scene, there's no real basis to say that the Russians are strongly involved", said Thomas de Waal, a Caucasus expert at Britain's Institute for War and Peace Reporting. "If you look at the Georgian opposition, most of them are just as anti-Russian as the government…It's obviously convenient for President Saakashvili to blame Russia in a time of crisis. I think this is a card that can be overplayed, and I think many citizens are getting a bit fed up with that." [52]

The Georgian finger-pointing at Moscow was only part of a broader pattern in post-Soviet societies, as Sergei Markedonov put it. "Many Russian politicians are genuinely convinced that the West is to blame for everything: the West caused the Orange Revolution, the West caused the Rose Revolution, the West demolished the Soviet Union. Georgian authorities are using exactly the same method. Only here, evil Russia replaces the evil West. Georgia, Russia, and many post-Soviet countries share a like mentality. Only the enemy changes." [53]

In a review of Russia's foreign policy published in March 2007, Georgia was attributed the lowest score among all of Russia's international partners. At the time, Russia's Ambassador to Georgia, Vyacheslav Kovalenko, who had recently returned to Tbilisi, gave an interview on the current state of Russia-Georgia relations to the Russian newspaper Vremya Novostey. To the question "What must Georgia do to normalise relations?" he answered:" First and foremost, Tbilisi must give up the mindset that there is some threat to Georgia, which supposedly emanates from its northern neighbour, and must stop presenting the matter in such a way that it is specifically Russia that is hindering the restoration of Georgia's territorial integrity. Tbilisi must also understand that Russia has its own interests in the Caucasus in the sphere of security, and has its own notions about how this security may be ensured. After all,

[51] *Ibid.*

[52] *Ibid.*

[53] Sergei Markedonov, The Paradoxes of Russia's Georgia Policy, Russia in Global Affairs, April-June 2007, p.1.

the Southern Caucasus and our Northern Caucasus are in many ways a single organism. Finally, Georgia must understand that Russia is in no case hindering its course toward realisation of 'European identity', as is customary to say in Tbilisi".[54] But in ensuing months Russia continued its coercive Georgia policy and did nothing to dissolve the other side's "mindset that there is some threat to Georgia" and that someone is hindering the restoration of Georgia's territorial integrity.

Incidents of Violation of Georgian Airspace

In his annual report to Parliament, attempting to justify the Georgian adoption of NATO standards, President Saakashvili asked: "Do you remember how our territory was bombed during the Shevardnadze period?"[55] This was an allusion to incidents of violation of Georgian airspace by Russian airplanes in 2001 - 2002. There had been five major bombing incidents in Georgia since 2001 and Russia had denied them all. In October 2001, nine unidentified jets bombed areas of the Kodori Valley under Georgian control. In August 2002, Georgia accused Russia of bombing its northern Pankisi Gorge. In March 2007, Mi-24 helicopters bombed the Kodori and Chkhalta Valleys, and the Chuberi Pass. In August 2007 there was an air strike on the village of Tsitebulani near South Ossetia. And in April 2008, a MiG-29 fighter was videotaped downing an unarmed Georgian reconnaissance drone over the Gali region. Additionally Georgia claimed that Russia periodically moved military equipment into Abkhazia and South Ossetia in violation of the ceasefire agreements of 1994 and 1992 respectively. In reply to Georgian accusations of military violations by the Russian side the Russian Foreign Ministry reported that in 2007 alone peacekeepers in Abkhazia claimed 158 instances in which Georgian warplanes allegedly flew over the security zone.[56]

The first time that Russia acknowledged the violation of Georgian airspace was shortly before the armed conflict of August 2008. At the time, Russian routine references to Georgia's territorial integrity had already disappeared from official statements. On 10 July, Russia's Ministry of Foreign Affairs confirmed that Russian air force planes had flown a mission over South Ossetia the preceding day. The flight was allegedly meant to prevent a Georgian military attack in this conflict zone.

[54] Vremya Novostey, March 12, 2007.

[55] Quoted by Kommersant, February 16, 2006, p.1.

[56] Nezavisimaja Gazeta, June 5, 2008, p.1.

Countdown to the Armed Conflict: the Geopolitical Context

Developments in the context of Georgia's unresolved regional conflicts and the bilateral Russian-Georgian relationship were overshadowed by two supra-regional international issues in 2008. The first was Kosovo's declaration of independence and its official recognition by around fifty states. The second was the NATO procedure for a decision on a Membership Action Plan (MAP) for Georgia and Ukraine. Both issues may have challenged Russia's *Weltanschauung* of a post-bipolar world. For many years Russia had felt deeply irritated by NATO enlargement. In terms of emotional impact, the dispute on Kosovo's independence brought Russia back to the year 1999 when it perceived the NATO war in Yugoslavia as a fundamental challenge to its own position in the international arena.

Georgia's Aspiration to Join NATO

Among all external variables the greatest impact of the Russian-Georgian conflict has been on NATO enlargement policy, in particular with regard to the possible integration of Georgia and Ukraine. Moscow's coercive Georgia policy was initially meant to prevent NATO expansion into CIS space. This policy gained momentum with the discussion on the MAPs for Georgia and Ukraine. Russian moves against both countries were intended to show that Moscow could stop them from joining NATO.[57]

Admission to NATO had become a national project in Georgia. Orientation toward NATO was not only elite driven. Around 80 percent of the public supported NATO-membership - the highest popular vote among applicant countries in the past decades[58]. The Georgian Government repeatedly tried to set forthcoming dates for admission to full membership. Within NATO this drive was met partly with strong support, partly with scepticism. Strong support came from Washington. Within Europe it came from a nucleus of eight countries, supporting an active policy by NATO and the EU in Europe's East. Initiated in 2005 in Tbilisi by the three Baltic states, Poland, Ukraine, Romania and Bulgaria joined by Sweden and the Czech Republic, a Group of New Friends of Georgia supported Georgia's goal to advance to a MAP at NATO's summit in Bucharest in the spring of 2008.[59] On the other side, statements by some senior NATO representatives showed a more cautious approach towards a membership perspective for Georgia in the near future.

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[57] Stephen Blank, Russia and the Georgian Crisis: What Does Moscow Want? CACI Analyst, June 11, 2008.

[58] Compared to: Estonia 69%, Slovenia 66%, Latvia 60%, Lithuania 46%.

[59] Vladimir Socor, Friends of Georgia Hold Strategy Session in Lithuania, Jamestown Eurasia Daily Monitor, September 17, 2007, Vol.4, Issue 171.

Russia's Kosovo Precedent Formula

Kosovo's declaration of independence re-fuelled debates about the linkage between the fundamental international legal principles of self-determination, sovereignty and territorial integrity. Western governments and regional organisations that recognised Kosovo's declaration of independence argued a case of *sui generis*. However, even within the EU this argument was not accepted by all member states and there was no common position among them. Some of them feared the case of Kosovo would set a precedent for secessionist conflicts on their own territories.[60] Russia in particular rejected the *sui generis* argument and hinted at the Kosovo issue as a precedent for unresolved ("frozen") secessionist conflicts in the CIS space where Moldova, Georgia and Azerbaijan were involved in conflicts over breakaway regions such as Transnistria, Abkhazia, South Ossetia and Nagorno-Karabakh.

But Russia made use of this Kosovo precedent formula selectively, mainly as an instrument to pressure Georgia and less in the case of the Karabakh conflict between Azerbaijan and Armenia. Its involvement in this conflict differed from that in Georgia's conflicts with Abkhazia and South Ossetia and from its political position in Moldova's conflict with Transnistria. In the Karabakh conflict Russia was less directly involved and did not hold a dominant position as peacekeeper as it did in Abkhazia and South Ossetia (and Transnistria). Though Russia has a close security relationship to Armenia, in the Karabakh conflict it was less supportive of the Armenian-bound *de facto* state of Nagorno-Karabakh in comparison to its clear support for Abkhazia and South Ossetia.

In the Transnistrian conflict Russia also stood at the side of the separatist party to the conflict extending financial and political support to the Transnistrian authorities and keeping its 14th army (around 1'200 troops) stationed in the breakaway region. But with the Moldovan Government's commitment to neutrality, which marks a relevant difference to Georgian foreign and security policy, Russia supported a peaceful settlement of this conflict.

Thus the Kosovo precedent had its deepest impact on the unresolved secessionist conflicts of Georgia and on the bilateral relations between Georgia and Russia. Already in January 2006, President Vladimir Putin had called for universal principles to settle the "frozen conflicts" in the CIS. He insisted: "We need common principles to these problems for the benefit of all people living in conflict-stricken territories… If people believe that Kosovo can be granted

[60] Amanda Akcakoca, Thomas Vanhauwaert, Richard Whitman, Stefan Wolff: *After Georgia: conflict resolution in the EU's Eastern Neighbourhood*, European Policy Centre April 2009, p. 9.

full independence, why then should we deny it to Abkhazia and South Ossetia?"[61] This line of reasoning became official Russian policy. In June 2006 the Russian Foreign Ministry reacted to Montenegro's referendum on whether it should end its union with Serbia and to Kosovo's accelerated movement toward independence. "Moscow respects the principle of territorial integrity, but it points out that South Ossetia's right to self-determination is an equally respected principle in the world community".[62]

Moscow and its protégés in Sukhumi and Tskhinvali now had to find a way to apply the main arguments that the West was citing in favour of Kosovo's independence also to Abkhazia and South Ossetia. The first of these was that the claim to independence was supported by a majority of the local population living in those territories. The second argument was that alleged genocide had been committed there by forces of the metropolitan state. In support of the second argument, Parliaments in Russia and in North and South Ossetia hold Georgia responsible for "genocide" committed against Ossetians in 1920 and again in the conflict of 1989 - 1992. This position was strongly expressed in the first Russian statements on the August 2008 Georgian artillery offensive on Tskhinvali, which was described by the Russian and the South Ossetian sides as a Georgian "genocide" of Ossetians, having cost the life of 2'000 people. In the weeks that followed, the number of victims was revised significantly downward.

With Kosovo's unilateral declaration of independence in February 2008 and its subsequent official recognition by several states, the precedent formula had gained strength. Early in March, the *de facto* Parliaments of Abkhazia, South Ossetia and Transnistria addressed appeals to the Russian Parliament, the UN and other international organisations for recognition of their independence. On 6 March 2008, the Russian Foreign Ministry announced that it was lifting all restrictions against Abkhazia stipulated in a CIS agreement of 1996. On 16 April President Putin ordered the Russian Government to "work together with the *de facto* authorities of Abkhazia and South Ossetia to organise cooperation in the trade, economic, social, scientific-technical, informational, cultural and educational spheres, and also to enlist specific Russian regions in these efforts."[63] International commentaries deemed these measures to be Russian diplomacy's final departure from recognition of Georgia's territorial integrity. President Putin justified them as "exclusively socio-economic goals which

[61] Quoted by Akcakoca etc. p. 26.

[62] Nezavisimaja Gazeta, June 6, 2006.

[63] Vremja Novostej, April 17, 2006.

distinguishes them in principle from a number of countries' politicised and unlawful decisions to recognise the unilaterally proclaimed independence of Kosovo, decisions which, as has repeatedly been stressed, are precedent-setting in nature".[64] The *de facto* Presidents of Abkhazia and South Ossetia underpinned this formula with statements like "We have more political and legal grounds for recognition than Kosovo does".

Russia kept the promise it had made immediately after Kosovo declared independence to reassess its relations with the unrecognised entities. But it made use of this precedent formula selectively: it was used in the case of Georgia, constituted the key feature of Russia's coercive policy against Georgia and was closely connected to Georgia's NATO ambitions. But even with this enhanced use of Russia's Kosovo precedent formula Russian, Georgian and Western experts did not expect an imminent diplomatic recognition of Abkhazia and South Ossetia by the Kremlin. In one of his comments concerning Kosovo, President Putin announced that Russia would not repeat the mistake the West had made by formally legalising a case of secession. On the international stage and especially in Eurasian regional organisations like the Shanghai Cooperation Organisation (SCO), Russia strongly opposed separatism and assessed it (together with China) as one of the "evil forces" challenging global security. Russia had suppressed its own case of separatism in Chechnya with a maximum of military violence and had refused external criticism in regard to massive human rights violations during the Chechen wars as interference in its sovereignty. For over a decade Russia has ascribed to UN Security Council resolutions affirming the territorial integrity of Georgia. In this context official recognition of secessionist entities by the Kremlin would appear as a dramatic case of "double standard" – precisely the behaviour of which Russia accused the West.

This restraint finally disappeared with the armed conflict of August 2008. Already before its official recognition of Abkhazia's and South Ossetia's independence on 26 August 2008, Russia had significantly increased cooperation with the unrecognised entities. One day after President Putin's decree on 16 April 2008 on the close cooperation of Russian authorities with their counterparts in Sukhumi and Tskhinvali a Russian newspaper quoted Abkhaz *de facto* Foreign Minister Shamba with the following triumphant remarks: "We can see the ribbon at the finish line on the road to our recognition. And we'll cut that ribbon. We're not afraid of any backlash from Tbilisi. We're prepared for the fact that the situation in the conflict zone will heat up; Georgia may instigate that".[65] President Saakashvili did instigate that with the

[64] Vremja Novostej, April 22, 2006.

[65] Quoted by Mikhail Vignansky in Vremya novostei, April 17, 2008, p.1.

offensive against Tskhinvali and provided Russia with arguments to pursue its policy toward the Georgian secessionist conflicts.

The Escalation in 2008

The year 2008 began with Mikheil Saakashvili's re-election to his second presidential term with 53.4 % of the vote. As four years before, both Georgian and Russian officials expressed a desire to improve their bilateral relations. In his inaugural address on 20 January 2008, re-elected President Saakashvili offered to "extend the hand of partnership and cooperation to Russia." In his first news conference he invited President Putin to visit Georgia and added that "one of my main regrets is that during my first presidential term relations with Russia were spoiled". [66]

The Russian Government reacted by sending Foreign Minister Sergei Lavrov to President Saakashvili's inauguration, contrary to expectations that Moscow would boycott this ceremony in Tbilisi or send a low-level delegation. Foreign Minister Lavrov was the highest-ranking Russian Government official to visit Georgia since the spy scandal in 2006. On 21 February, Presidents Putin and Saakashvili met in the Russian presidential residence Novo-Ogaryovo. President Saakashvili expressed his interest in achieving at least a limited reconciliation. At the summit, the two sides agreed to re-establish direct civilian air links. Reportedly there were talks of a joint control of borders on the Psou river and at the Roki tunnel, which provoked protests from the leaders of Abkhazia and South Ossetia.

However, the fundamental variable affecting Russian-Georgian relations did not change with President Saakashvili's second term. The re-elected President strongly reaffirmed his intention to pursue Georgia's "Euro-Atlantic orientation" and to deepen its ties with NATO. During the election campaign all of his main opponents also professed to support this orientation in Georgian foreign and security policies, with only one fringe candidate dissenting.[67] In Russian commentaries Georgia's sovereignty was increasingly called into question. Konstantin Kosachev, Chairman of the State Duma International Affairs Committee, declared: "Georgia is a construction that emerged in the totalitarian Soviet Union, a construction whose authorship belongs to then-dictator Iosif Stalin".[68]

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[66] Quoted by Richard Weitz: Tbilisi and Moscow Ponder Next Steps after Saakashvili's Inauguration, in: CACI (Central Asia and Caucasus Institute) Analyst, February 6, 2008.

[67] Quoted by Richard Weitz, ibid.

[68] Ekho Moskvy, July 10; Vladimir Socor: De-Recognition of Georgia's Territorial Integrity Disqualifies Russia as "Peacekeeper", Eurasia Daily Monitor, vol.5, issue 132, July 11, 2008.

War rhetoric repeatedly flared up on all conflict sides since March-April 2008. This bellicose rhetoric around the unresolved regional conflicts in the South Caucasus was accompanied by a process of armament and a sharp rise in defence budgets in the region between 2004 and 2008. Growth in military spending in the three South Caucasian states in 2008 exceeded GDP growth dramatically. Georgia increased its military spending during this period from below 1 percent of its GDP to more than 8 percent. Likewise, the separatist entities became more militarised. Georgia made a standard accusation of Russia that it used the rotation of its peacekeeping contingents to deploy additional military forces into the conflict zones. In this context, statements that relations between Russia and Georgia were "strained to the limit of war" were repeatedly heard.

On 6 May 2008 Temur Yakobashvili, the Georgian Minister for Conflict Resolution (a post recently renamed to Minister for Reintegration), said at a news conference in Brussels that Georgia was very close to open hostilities: "We literally have to avert war". Such statements intensified to a degree that alarmed the international community. In the following days, the Georgian side welcomed the French Foreign Minister's attempt to prevent an armed conflict.[69] The European Union announced that a group of foreign ministers would head to Tbilisi to explore ways of halting the hostile actions and rhetoric that had marked Georgian-Russian relations in previous weeks. Though supportive of Tbilisi, the EU continued to aspire to a peacekeeping role, but was unwilling to commit to any actions that would set it in opposition to Moscow.[70]

After the July incident with a Russian airplane admittedly flying over South Ossetia, Georgia recalled its Ambassador to Russia. Gleb Pavlovsky, a political scientist with Kremlin connections, interpreted this as "a possible pre-war state of affairs in Russian-Georgian relations".[71]

At first global attention with regard to the escalation was focused on Abkhazia.[72] In May Russia moved to increase the troop levels of its peacekeeping force in Abkhazia to 2 500 and sent railway troops on a "humanitarian mission" into the region. The Abkhaz leadership claimed that territorial defence forces had shot down five Georgian reconnaissance drones in

[69] No War Thanks Kouchner – Georgian Minister Says, Civil Georgia, May 14, 2008.

[70] On May 9, the Slovenian Foreign Minister Dmitri Rupel emphasised that the EU did not have "any intention of supporting one side against the other now". See Nina Akhmeteli: US and EU Support for Tbilisi Grows amid Escalating Tension with Russia, Eurasia Insight, May 9, 2008.

[71] Interfax, July 11, 2008.

[72] Georgia and Russia: Clashing over Abkhazia, International Crisis Group Policy Report, June 5, 2008.

recent weeks.[73] NATO Secretary-General Jaap de Hoop Scheffer demanded that Moscow withdraw its railway troops and urged both sides to "engage quickly in a high-level and open dialogue to de-escalate tensions".[74] In July 2008 Germany initiated a three-stage plan for a settlement of the Georgian-Abkhaz conflict. The plan was developed within the framework of the Group of Friends of the UN Secretary-General. The first stage involved measures to rebuild trust between the conflict sides to lead to their signing of an agreement on the non-use of force, and the initiation of a process to bring Georgian IDPs/refugees back to Abkhazia. The second stage provided for reconstruction work financed by donor states. Not until the third stage was it planned to tackle Abkhazia's political status. Abkhaz *de facto* President Sergei Bagapsh turned down the plan and put forward his own conditions for beginning talks with the Georgian side. "We told the German Foreign Minister to add two points to the document. First, Georgia has to pull its troops out of the upper Kodori Valley in Abkhazia. Second, it must sign an agreement on not resuming military operations".[75]

Meanwhile the conflict escalation on the ground shifted from Abkhazia to South Ossetia. Both the Georgians and Ossetians launched artillery attacks on each other's villages and checkpoints. But even in July many experts did not expect that one of the parties to the conflict could be rationally intending to open hostilities. Only a few days before the armed conflict, a commentator from Novaya Gazeta predicted "There will be no war". No conflict side had an interest in starting a war, according to this commentary. "Not even someone with the wildest imagination could come up with any reasons why Tskhinvali might be interested in military operations against the Georgians". Nor could Tbilisi have any plans to wage war according to this commentary. First of all, the main condition for receiving a Membership Action Plan from NATO was stability, not open hostility. A "Blitzkrieg" seemed impossible, the Georgian economy would simply not withstand protracted military operations.[76] By waging war Georgia would risk losing support of the Western world that was already eroding due to the domestic political crisis and to disputes over the democratic results of the Rose Revolution. The danger of a full-scale armed conflict was rather seen in a scenario in which one of the many localised provocations in the conflict zones "could cut across the calculations

[73] Interfax, May 8, 2008.

[74] Quoted in Nezavisimaja Gazeta, June 5, 2008, p.1.

[75] Quoted in Kommersant, July 19, 2008, p.1.

[76] Yury Karlenovich Simonyan, in: Nezavisimaja Gazeta, July 28, 2008, p. 12.

of all sides".[77] Some other regional and military experts did predict a full-scale armed conflict. By that time it was already too late for any diplomatic action to be effective.

Conclusion

A prominent Russian expert on the Caucasus, Sergei Markedonov, characterised the Russian-Georgian relations as "rather paradoxical". On the one hand there are many traditional ties, primarily socio-cultural. For over 200 years Georgia had been part of the Russian and Soviet Empire. Its political class was incorporated into the Tsarist establishment. Georgia was Russia's bridgehead in its Caucasus wars of the 19th century, the imperial outpost for the establishment of Russian military and administrative power in the whole of the region. Later on, Georgia was a Soviet Republic with its very specific experience of Stalinist terror, but a comparatively high standard of cultural autonomy in the decades after Stalin's death. The Georgian historical narrative emphasises the two annexations by Russia in 1801 and 1921 as national traumas. A burden of mutual claims and contradictions was inherited from the Soviet and post-Soviet periods. The April 1989 events, when Soviet forces brutally broke up a demonstration in Tbilisi, marked a turning point in Georgia's tough independence course. In the period under Zviad Gamsakhurdia this course translated into a Georgian ethnocentric attitude with nationalistic slogans and enforced anti-Russian sentiments deterring non-Georgian minorities and autonomous regions from Georgia's independence projects. Georgia's drive for its emancipation from Russian power projection gained renewed strength after the peaceful power change from Shevardnadze to Saakashvili. The idea of "fleeing the Russian Empire" which made virtually no distinction between the contexts of pre-1917 Russia, the Soviet Empire and the post-Soviet Russian Federation had become the "keynote of its foreign policy".[78]

Thus the question of who was responsible for the 2008 August armed conflict cannot be focused solely on the night from 7 to 8 August and the Georgian offensive against Tskhinvali. It has to include a broader run-up to the conflict, a longer process comprising mutual accusations, military threats, violent incidents in conflict zones, acts of a great power's coercive policy toward an insubordinate neighbour, this neighbour's unrealistically accelerated policy of reintegration and presenting its Western-oriented foreign and security policies as "fleeing the Russian Empire".

[77] ICG Europe Report, Georgia and Russia: Clashing over Abkhazia, N°193, April 2008, S. 8.

[78] Sergei Markedonov: The Paradoxes of Russia's Georgia Policy, Russia in Global Affairs, April-June 2007.

In this growing confrontation, challenges and opportunities for security and economic cooperation between Russia and Georgia were ignored or missed.[79] Both sides should have realised that they had a shared interest in the stability of their common neighbourhood. As the Russian Ambassador to Georgia said upon his return to Tbilisi after the spy scandal, the South and the North Caucasus constitute a single organism. A region like Pankisi was a symbol for such mutual security challenges to both Georgia and Russia. The whole border between Georgia and Russia runs along critical zones of intersection between North and South Caucasian security challenges. Both sides shared economic interests. Russia remained Georgia's most important export market and the largest labour market for the Georgian diaspora. For Russia, Georgia was important to its political, military and economic actions in the whole of the South Caucasus. More than once, Russia's punitive acts against Georgia affected Armenia. With its policy of partitioning Georgia and recognising Abkhazia and South Ossetia as independent states after the 2008 August conflict, Russia did not gain any support even from its closest allies. On the other hand, Georgia had done much to alienate its breakaway regions and push them away from its own independence project. On all sides negative stereotypes and emotions prevailed over shared interests.

2. Relations between Georgia, the United States and NATO

Introduction

The second Bush administration defined three sets of US interests in the South Caucasus: first, its energy interests, regarded as strategic; second, the more traditional security interests, such as fighting terrorism, preventing military conflict and defending the territorial integrity of the three states in the region; and third, the democratic and economic reform of these states, to ensure their stability and legitimacy.[80]

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[79] Gulbaat Rzchiladse: Rußland und Georgien. Konfrontation statt Kooperation, in: Osteuropa, 7/2007, 71-80, the problem of missed cooperation, p. 78-79.

[80] See the interview with US Deputy Assistant Secretary of State for European and Eurasian Affairs Matthew Bryza in "Caucasus: U.S. Says Aliyev, Kocharian Must Show 'Political Will,'" Radio Free Europe/Radio Liberty, 23 June 2006, http://www.rferl.org/articleprintview/1069418.html (accessed on 27 July 2009). See also Jim Nichol, "Armenia, Azerbaijan and Georgia: Political Developments and Implications for U.S. Interests," CRS Report for Congress, Congressional Research Service, 13 August, 2008, pp. 2-5. On the history of US-Georgian relations see Svante E. Cornell, Small Nations and Great Powers. A Study of Ethnopolitical Conflict in the Caucasus, Curzon, Richmond, Surrey, 2001; Fiona Hill, "A Not-So-Grand Strategy: U.S. Policy in the Caucasus and Central Asia since 1991," an English translation of an article of Politique étrangère, on the website of the Brookings Institute http://www.brookings.edu/articles/2001/02foreignpolicy_hill.aspx?p=1 (accessed on 28 July 2009).

The history of US-Georgian relations since 1992 – the year the two countries established diplomatic relations – may be subdivided according to the efforts the United States made to implement these policy objectives in its relations with Georgia. There was no significant US involvement designed to achieve any of these three aims during the first period, which ranges from 1992 to 1995. The signing in 1993 - 1994 of a number of oil contracts between Western (including US) companies and the Kazakh and Azeri authorities raised the question of how this oil should be transported to world markets. This had security implications for American energy policies. Energy security was a key motive for stronger US involvement in Georgia in the second period, which can be situated between 1995 and 2001. US support for Georgia's security and defence policies was given partly with the help of NATO's cooperative framework, which will also be analysed below. Meanwhile, the US war against terror led to a redefinition of American security interests in Georgia. Washington's concern for Georgia's political stability led to increased American engagement in the field of military reform.

One word of caution: the fact that both US and NATO policies on Georgia are dealt with in this section on American-Georgian relations is not based on an assumption that their policies are to be regarded as identical. Georgia was not granted a Membership Action Plan (MAP) at the Bucharest meeting of April 2008 and this was a clear indication that, on the contrary, there are some basic political differences between NATO allies. NATO policies will be addressed in this section based on the observation that Georgia's integration into NATO was a dominant issue in American policies in the second and, in particular, the third period under consideration, ending with the armed conflict of August 2008.

1992 - 1995: No Crucial US Interests in Georgia

The dissolution of the Soviet Union in December 1991 left Georgia internationally isolated, as a result of internal turmoil. The establishment of diplomatic relations between the United States and Georgia was delayed until April 1992,[81] after the forcible removal of Georgia's first elected President, Zviad Gamsakhurdia, and the return to Tbilisi of Georgia's former leader, Eduard Shevardnadze. US attention at the time was focused on Russia, in a policy that became known as the "Russia First" approach. Questions such as the dismantling of the former Soviet nuclear arsenal in Belarus, Ukraine and Kazakhstan and the withdrawal of the former Soviet troops from the Baltic States were considered far more vital to US security interests than the internal turmoil in Georgia.

[81] See the website of the Georgian Ministry of Foreign Affairs http://www.mfa.gov.ge (accessed on 24 August 2009).

There was American support, however, for Eduard Shevardnadze and his efforts to stabilise a state torn apart by ethnic and civil conflicts. Secretary of State James Baker visited Tbilisi in May 1992.[82] The working guidelines that the United States developed at the time for dealing with the newly independent states included support for their independence, transition to a market economy and democracy, and regional cooperation.[83] After Georgia's unsuccessful military engagement in Abkhazia, President Clinton assured Mr Shevardnadze that the United States stood behind his leadership and would defend the principle of territorial integrity.

Where Abkhazia and South Ossetia was concerned, Russia was mandated with a dominant role in peacekeeping and a role of facilitator in mediation, despite its own interests as a neighbouring country.

The Sochi Agreement "on principles of settlement of the Georgian-Ossetian conflict," signed on 24 July 1992, led to the deployment in South Ossetia of peacekeeping forces consisting of Russian, Georgian and Ossetian troops. As the UN in the case of Abkhazia, the CSCE supported the territorial integrity of Georgia in its mediation efforts on this conflict, and its mission that was established in Tbilisi in December 1992 was consequently called "Mission to Georgia" (for more details see Chapter 2 "Conflicts in Abkhazia and South Ossetia. Peace Efforts 1991 – 2008"). In August 1993 the UN established an Observer Mission for Georgia (UNOMIG) to monitor the implementation of the ceasefire agreement that had been reached the previous month. The negotiations on a peaceful settlement of Abkhazia were entrusted to the UN, with Russia as facilitator. UN Security Council Resolution 896 of January 1994 prescribed clearly that the status of Abkhazia was to be defined by respecting "the sovereignty and the territorial integrity of the Republic of Georgia".

In the early 1990s the future status of Abkhazia and South Ossetia, the Russian Federation, the United States and the European governments had a common position in maintaining the principle of territorial integrity. They shared the view that this principle was needed to preserve the stability of the various republics that had emerged from the dissolution of the Soviet Union.[84] They rejected the idea that new international borders could result from the use of force. International borders could be changed only with the mutual consent of the governments or parties to a secessionist conflict – in line with the Helsinki Final Act. While

[82] Norman Kempster, "In a Show of Support, Baker Visits Shevardnadze," Los Angeles Times, 26 May1992.

[83] Elizabeth Sherwood-Rendall, "U.S. Policy and the Caucasus," in: Contemporary Caucasus Newsletter, Issue 5, Spring 1998, p.3.

[84] On the legal principles underpinning the international recognition policies, see Chapter 3 "Related Legal Issues".

the Western permanent members of the UN Security Council were seriously concerned about the situation in the Balkans, Russia was confronting instability within its own borders, including secessionist threats from Tatarstan and Chechnya of the Russian Federation. In its view, the North and South Caucasus constituted a single unit in security terms. Consequently, instability in the South would have a detrimental effect on the political situation in the North Caucasus.

The American Government – like other Western governments – did not oppose Russia's dominant peacekeeping role in South Ossetia or Abkhazia. The fact that the Georgian authorities had accepted such an arrangement, and the lack of vital geo-strategic interests to defend in the Caucasus region seem to have been the main reasons for this attitude. Washington did not share Moscow's view that the South Caucasus were part of Russia's "near abroad" in political terms, but it was convinced that they had a common interest in preserving stability, on the basis of the principle of territorial integrity. In the view of the American administration of the 1990s, Russia's involvement could increase the efficiency of the mediation efforts being made by the UN and the OSCE. Russia had unique knowledge of local political conditions, and had strong leverage over all the parties. Russia had stressed its readiness to cooperate with other countries. Moreover, it used the CIS label for its peacekeeping operation in Abkhazia, in order to stress the importance of regional organisations in solving such conflicts.

The division of labour between Russian peacekeepers and international and regional security organisations was regarded as a temporary arrangement that would pave the way for a comprehensive settlement along the lines agreed with the OSCE and the UN. The possibilities that these efforts might be frozen for about 15 years, that there might be an erosion of the common positions and, in particular, that Russia might shift its position on the question of territorial integrity, seemed not to have been duly taken into consideration.

The creation in December 1993 of the Group of Friends of Georgia to give support to the UN Secretary-General in the Georgian-Abkhaz peace process was an indication of some tension between the Western governments and Russia. The Western members of the group thought that they needed to counterbalance the support the Abkhaz authorities were receiving from Russia by firmly supporting the Georgian Government. But overall, the Clinton administration remained positive about Russia's security role at its own southern borders. In a

visit to Moscow in January 1994, President Clinton compared Russia's stabilising potential with American policies in Panama and Grenada.[85]

1995 - 2001: Energy Security and Military Cooperation

The signing of "the contract of the century" between Western oil companies and Azerbaijan in September 1994 led to a reorientation of American policies in the region. The Baku-Tbilisi-Ceyhan (BTC) project – a major pipeline that would transport oil from Azerbaijan to the Turkish harbour of Ceyhan – became the symbol of this energy strategy.

The American policy on energy security seemed indeed to be to the advantage of Georgia, and not only in economic terms. Tbilisi wanted to overcome the perceived indifference of Washington and other Western capitals to Georgia's domestic problems by increasing its geo-political significance. This could partly be achieved if Georgia became a bridgehead between Europe and Asia and a transit country for oil transport, in line with American energy security interests.

It soon became apparent to the United States that energy security had to be bolstered in the South Caucasus by strengthening political and economic reforms and managing the various ethnic conflicts that were dividing the region. This became of increasing concern during the second Clinton administration. In July 1997, Deputy Secretary of State Strobe Talbott declared, that conflict resolution in the South Caucasus "must be Job One for US policy in the region."[86]

American support of Georgia's state-building process was largely concentrated on military reforms. This support was not only bilateral but was also given within the larger military cooperation framework created by NATO's Partnership for Peace (PfP). Georgia had signed the PfP Framework Document in March 1994.[87] It also participated in the Euro-Atlantic Partnership Council (EAPC), created by NATO in May 1997 to enhance PfP cooperation.

[85] Carolyn McGiffert Ekedahl and Melvin A. Goodman, The Wars of Eduard Shevardnadze, London, Hurst & Company, 1997, p. 277.

[86] "A Farewell to Flashman: American Policy in the Caucasus and Central Asia,", an Address by Deputy Secretary of State Strobe Talbott at the Johns Hopkins School of Advanced International Studies, 21 July 1997.

[87] On Georgia's relationship with NATO see the paper on Georgia written by Marta Jaroszewicz in "NATO's New Role in the NIS Area, Interim Project Report: NATO and its Partners in Eastern Europe and the Southern Caucasus," Warsaw, Osrodek Studiow Wschodnich, Centre for Eastern Studies, December 2003, pp. 42-46.

This participation gave Georgia further opportunities to put the question of its unresolved secessionist conflicts and its problematic relations with Russia onto the Western security agenda. Georgia had to bear in mind that NATO's enlargement policies required a peaceful settlement of its internal conflicts, as stated in that organisation's 1995 Study on NATO Enlargement: "States which have ethnic disputes or external territorial disputes, including irredentist claims, or internal jurisdictional disputes must settle those disputes by peaceful means in accordance with OSCE principles. Resolution of such disputes would be a factor in determining whether to invite a state to join the Alliance."[88]

NATO was not involved – and did not plan to be involved – in the resolution of Georgia's internal conflicts. But it was confronted with the fact that the Georgian Government both wanted it to be involved and tried to establish a direct link between its participation in NATO activities and the resolution of the Georgian-Abkhaz conflict. Georgia supported NATO's military campaign in Bosnia in 1995, regarding it as a model to be applied in Abkhazia. President Shevardnadze drew a parallel between the campaigns of ethnic cleansing by the Bosnian Serbs and by the Abkhaz.[89] The Bosnia model of state unification by means of force had a particular attraction for the Georgian leadership. It was a model that enabled Eduard Shevardnadze to speak about his principled preference for a peaceful resolution of the conflict in Abkhazia, without excluding the option of use of force as a last resort. It should be stressed that this model referred not to a unilateral type of humanitarian intervention against the will of the central authorities but to a military operation that had received a clear mandate from the UN Security Council.

Eduard Shevardnadze also wanted to make it clear that any Western tolerance of ethnic cleansing or secession was unacceptable. His main concern was to put Georgian interests at the forefront of the West's – and in particular NATO's – security agenda. But he failed to persuade the international community to follow suit. The American administration openly denied that it was possible to apply a Bosnia-style peace enforcement operation to Abkhazia.[90] Tbilisi's appeal for a peace settlement to be enforced in Abkhazia had a negative impact on Georgian-Russian relations: the use of the Bosnia model created a direct link

[88] See point 6 in Chapter 1: "Purposes and Principles of Enlargement, Study on NATO Enlargement," September 1995, http://www.nato.int/docu/basictxt/enl-9502.htm (accessed on 28 August 2009).

[89] See Tim Potier, Conflict in Nagorno-Karabakh, Abkhazia and South Ossetia. A Legal Appraisal, Kluwer Law International, The Hague, 2001, pp. 114, 123.

[90] The US Special Envoy to the Newly Independent States, Stephen Sestanovich, said that he did not believe it was appropriate to resolve the Abkhaz conflict through a Bosnia-style operation. RadioFree Europe/RadioLiberty, Newsline, 4 June, 1998.

between Georgia's integration within NATO and conflict resolution in Abkhazia, which seemed to increase Russia's distrust of American-Georgian and NATO-Georgian relations.

In addition, President Shevardnadze gave political support to NATO's military intervention in Kosovo in April 1999. In both Kosovo and Abkhazia, ethnic cleansing constituted a just cause for the use of force, which Shevardnadze considered more crucial than the fact that NATO's military operation in Kosovo did not respect Serbia's territorial integrity.

The fact that the UN Security Council had not given its approval to NATO's military operation against Serbia, however, constituted a problem. Eduard Shevardnadze conceded that, in the particular case of Abkhazia, Russia as a veto power in the UN Security Council would have to support such an operation. Without Russian support, such intervention in Abkhazia would create a new international conflict, which NATO members would be unwilling to engage in. He therefore remained prudent, refuting the necessity of unilateral action.

By the end of the 1990s Moscow may have felt increasingly marginalised in the European security structure. This was perceived to be the result of NATO's gradual eastward expansion and its military cooperation with several CIS countries within the framework of Partnership for Peace. Some Russian officials even went so far as to express the suspicion that Western countries wanted to detach the North Caucasus from Russia.

The weakness of the security sector became manifest during the second armed conflict in Chechnya, which started in December 1999 and had serious spill-over effects on neighbouring Georgia. The Pankisi Valley on the Russian-Georgian border – a region largely populated by Kists, related to the Chechens – received increasing numbers of Chechen refugees (as many as 7 000 in the first few months), together with Chechen fighters.[91] The territory slipped from effective state control. The Georgian Government feared that any attempt to re-establish state control over this region would lead to direct involvement in the Chechen war, which it wanted to avoid. But this restraint led to Russian accusations that Tbilisi was willingly harbouring terrorists. The lack of Georgian state control over the Pankisi Gorge also fuelled the existing concerns in Western capitals.

[91] On the Pankisi crisis see Ghia Nodia, "Georgia: Dimensions of Insecurity," in Coppieters and Legvold (eds), Statehood and Security, op. cit, pp. 59-60 and Jaba Devdariani, "Georgia and Russia: The Troubled Road to Accommodation," in Ibid., pp. 178-187.

2001 - 2008: Strengthening Georgia's Statehood

The terrorist attacks on the United States on 11 September 2001 led to a radical reformulation of American foreign and security policies, which also affected the US relationship with Tbilisi. Georgia received increased attention from the US, partly owing to its geographical location as part of what some called the "Greater Middle East." It also became important as a transit country for US military aircraft supporting the war in Afghanistan. But far more relevant for the shift in American policies on Georgia seemed to have been the increasing concerns in Washington about the risk of political instability in Georgia. President Shevardnadze was not implementing the necessary political reforms, including in the fields of defence and border control. The Georgian Government's inability to handle the situation in the Pankisi Gorge led the US to launch the Georgia Train and Equip Program (GTEP) – a military programme designed to train Georgian troops – in March 2002. It became the key element in a policy that could be described as nation-building. One Georgian brigade was trained to deal with the Pankisi Gorge.

One of the aims of Georgia's participation in NATO was the reform of its security sector. It participated in numerous events and exercises as part of – or "in the spirit" of – PfP, and also took part in KFOR, the NATO-led peace support mission in Kosovo. Georgia officially applied for membership at the NATO summit in Prague in November 2002.[92] In 2003, the last year of Eduard Shevardnadze's presidency, Georgia's objectives with regard to its integration into NATO can be described as follows: first, to strengthen its statehood through the creation of efficient security forces. Second, to strengthen its international position, and third, to strengthen its position in the negotiations on Abkhazia and South Ossetia. The Georgian authorities hoped that positive developments in NATO-Russia relations would lead to more substantial involvement by Western countries in the negotiations on its secessionist conflicts, and to their participation in the peacekeeping forces.

NATO's involvement in the resolution of Georgia's secessionist conflicts was not part of NATO or American policy, however. The United States and the other NATO countries were far more interested in strengthening Georgia's statehood. The specific problems with its defence policies included : a lack of democratic control over the armed forces; one of the lowest defence budgets in the post-Soviet space; the absence of a security strategy, military

[92] See "NATO's New Role in the NIS Area," *op. cit.*, p. 43.

doctrine and planning; the inadequate use of external military assistance, and the insufficient oversight over various military institutions.[93]

In September 2003, when the Georgian authorities showed increasing resistance to the implementation of political and economic reforms, the United States showed its disenchantment by announcing a reduction of its aid to Georgia.[94] This criticism – which was also shared by other Western governments – strengthened the internal opposition to the Georgian Government.

Relations with the United States improved significantly with the Rose Revolution of November 2003. The new Government resolutely fought the Georgian irregulars infiltrating in the Gali district of Abkhazia from the Georgian side, whose activities could not be tolerated in the light of the global war against terror. Also the struggle against corruption, the new economic policies and military reform got full support from the US, prompted largely by the American apprehension of seeing Georgia turn into a failed state. Its support of the Saakashvili government seemed to have been inspired by additional motives of a primarily ideological nature. Georgia became a leading example of positive "regime change" in the region. On his state visit in Tbilisi on 10 May 2005 President Bush hailed Georgia as a "beacon of liberty". The American President stated that the Georgian message "echoes across the world – freedom will be the future of every nation and every people on earth."[95]

The United States gave political support to Georgia's proactive policies on South Ossetia and Abkhazia. In mid-2004 it called for an expansion of the mandate of the OSCE Mission to Georgia. The US Ambassador to Georgia declared in May 2005 that a peaceful resolution to both conflicts had to be found but that "the status quo should not remain."[96]

In 2005 the US launched the Sustainment and Stability Operation Program (SSOP), which followed on from the 2002 GTEP. This programme prepared the Georgian military for operations in Iraq. Light infantry equipment was delivered.[97] The SSOP was prolonged in July 2006 and July 2007.

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[93] *Ibid*., p. 44.

[94] See Dov Lynch, "Why Georgia Matters," Chaillot Paper No. 86, February 2006, p. 22.

[95] Lynch, op. cit., p. 51.

[96] Quoted in Dov Lynch, op. cit., p. 53.

[97] Lynch, pp. 52-53.

In late 2004 Georgia concluded an Individual Partnership Action Plan (IPAP) with NATO, which allowed the Alliance to provide more assistance in defence, institutional and political reforms. During President Saakashvili's visit to the United States on 5 July 2006, President Bush stated: "I believe that NATO would benefit with Georgia being a member of NATO, and I think Georgia would benefit."[98] He further spoke in favour of Georgia's receiving a Membership Action Plan (MAP). Although some Alliance members were more confident than others that Georgia had made adequate progress, in September 2006 the members came to a consensus on offering Georgia an "Intensified Dialogue" of stepped-up consultations to assist the country in continuing its reforms and furthering its aspiration to join the Alliance.

Those NATO members who were sceptical about offering Georgia a MAP may have considered that this might be perceived as a political commitment to admit Georgia and could negatively affect their relations with Russia.[99] Those NATO members – and particularly the United States – who favoured an acceleration of Georgia's joining NATO and an improvement of its membership prospects stressed the role of NATO's expansion and NATO partnerships in extending stability and security, through the democratisation of the defence policies of new members and partner countries and through the creation of cooperative security arrangements between democracies. They seemed convinced that the prospect of further integration, all the way to full membership, would curb any Georgian desire to use force to solve its internal conflicts, as that would be detrimental to its membership prospects.

One of the arguments put forward in the debate on NATO policy on Georgia was that, although Georgia's membership prospects were dependent on its efforts to achieve a peaceful resolution of its internal conflicts, this should not amount to making membership dependent on a final settlement. Such a direct link would make NATO-Georgia relations completely dependent on a settlement concerning Abkhazia and South Ossetia, and thus on Russia's policies in the region. And this, in turn, would amount to giving an external power – Russia – a veto over NATO's decision.

[98] The White House "President Bush Welcomes President Saakashvili of Georgia to the White House," http://georgewbush-whitehouse.archives.gov/news/releases/2006/07/20060705-4.html (accessed on 28 August 2009).

[99] On the debate on Georgia's integration into NATO see the various contributions and particularly the presentations of Jan Henrik Van Thiel and James Mackey in "Georgian NATO Accession and Potential Impacts on the Georgian-Abkhaz Peace Process," Istanbul, Turkey, 14-15 June 2007, 14th Conference in the Series Aspects of the Georgian-Abkhaz Conflict, Heinrich Böll Stiftung and University of California, Irvine, http://georgien.boell-net.de/downloads/Georgian_NATO_Accession_ENG.pdf (accessed on 28 August 2009).

The positive initiatives undertaken by NATO, acting as a transformative power with regard to Georgia's democratisation, were, however, counterbalanced by negative – and unintended – consequences for Georgia's internal conflicts, particularly at the level of security perceptions. NATO has extensive experience of military intervention in intra-state conflicts, which increased suspicion in Moscow, and fears in Sukhumi and Tskhinvali, of future NATO involvement in the breakaway entities. The American administration made strenuous diplomatic efforts to convince Russia that Georgia's integration into NATO would not go against its security interests. It also supported the idea of having delegations from Abkhazia and South Ossetia visit NATO headquarters in Brussels, where they would receive first-hand information about NATO policy.[100]

The Abkhaz leadership perceived Georgia's integration into NATO with a certain ambiguity. On the one hand, it would improve Georgia's military capacity and thus the potential for a forceful attempt to recover Abkhazia. It would create new hurdles for Abkhazia's international recognition. And it could lead to a marginalisation of Russia's role in the South Caucasus, and isolate Abkhazia militarily, politically and economically.[101] On the other hand, Georgia's integration into NATO would have direct repercussions on Russia's interests in the region. Russia's role in the Georgian-Abkhaz conflict had previously been perceived by Sukhumi as being driven by strategic interests that were not identical to the Abkhaz interests. It perceived Russia's support for their regime as resulting from tactical calculations, which could very well turn against Abkhazia's independence one day. But in the view of the Abkhaz leadership, Georgia's integration into NATO had gradually been turning this tactical alliance between Russia and Abkhazia into a strategic one, and had led to stronger Russian security guarantees for Abkhazia's *de facto* independence.[102]

Georgia's integration into the NATO framework was conditional on further progress in democratisation. The political crisis in Georgia – beginning in the autumn of 2007 with the confrontation between the Government and the opposition, brutal attacks by the riot police on demonstrators and the closure of opposition media – increased scepticism among some NATO members about whether it was advisable to invite Georgia to participate in a MAP at the upcoming NATO summit in Bucharest in April 2008. Other NATO members, however, acknowledged that Tbilisi had worked very hard to integrate into NATO, carrying out an

[100] *Ibid*., p. 31.

[101] See Viacheslav Chirikba, "Abkhazia, Georgia, Russia and NATO," in *Ibid.*, p. 34.

[102] Interviews in Sukhumi, July 2008.

ambitious IPAP. From the American perspective, Georgia – with its significant contribution of approximately 2 000 troops to the military efforts in Iraq – was even perceived as being in a process of transition from a "security consumer" to a "security provider." A further motivation for granting Georgia – and Ukraine – a MAP was that the US did not want to send a signal of weakness either to Russia or to NATO's Eastern European members and partners.[103]

The American administration was not insensitive to the criticism that Georgia's democratisation process showed serious shortcomings, but it drew different conclusions from some other NATO allies. It expressed strong concern about the Government's policies toward the opposition in the autumn of 2007, and called on the Georgian Government to reopen its private television stations.[104] But in Washington's view, the democratisation of Georgia would be best served by NATO integration.

By 2008 tensions between Georgia and Russia were running high. In January 2008 Ambassador Dmitry Rogozin, Russia's Envoy to the Russia-NATO Council, warned that Georgian membership of NATO would destabilise the Caucasus region.[105]. Other Russian officials expressed the opinion that a NATO invitation to Georgia to participate in a MAP would lead to Russia's recognition of Abkhazia and South Ossetia, in order to base Russian troops in these regions.[106]

On 14 February 2008, NATO Secretary-General Jaap de Hoop Scheffer received an official request from President Saakashvili to invite Georgia to participate in a MAP at the upcoming NATO summit in Bucharest on 3 April.[107] Some European Alliance members raised concerns about such an option. They pointed to the need for more substantial progress in democratisation. President Bush expressed support for a MAP invitation at a meeting with President Saakashvili in Washington on 19 March 2008.[108] It was not only in Washington that

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103 See Stefan Wagstyl, Stephen Fidler, and Chrystia Freeland, "Enlargement to the East Divides Nato Nations, *Financial Times*, 25 January, 2008

104 Ambassador Arthur Hartman, "Democratic Governance in Georgia: Lost Promises and Missed Opportunities", in Hug (ed.), *Spotlight on Georgia*, London, The Foreign Policy Centre, 2009, p. 88.

105 Jim Nichol, "Georgia (Republic) and NATO Enlargement. Issues and Implications", CRS Report for Congress, 7 March 2008, p. 4.

106 *Ibid*., p. 5.

107 *Ibid*., p. 2.

108 The White House. Transcripts: President Bush and President Saakashvili Meet in the White House, 19 March 2008, http://georgia.usembassy.gov/tr-03192008.html (accessed on 28 August 2009).

there was strong support for a MAP for Georgia but also from the new Group of Friends of Georgia[109]

During a NATO meeting of foreign affairs ministers on 6 March 2008 in Brussels, several European participants showed their inclination to postpone the decision on a MAP for Georgia and Ukraine. Georgia's application was even more controversial than Ukraine's. Objections on the part of Germany, France, Belgium and some other governments were largely based on their concern about relations with Russia. The French Minister for Foreign Affairs, Bernard Kouchner, urged the NATO Council to "take into account Russia's sensitivity and the important role it plays." In his view, relations with Russia were already sufficiently strained over Kosovo and a planned US missile shield in Central Europe. The French Government, and the EU as a whole, needed to cooperate with Russia. The German Minister for Foreign Affairs, Frank-Walter Steinmeier, expressed a similar view.[110] German Chancellor Angela Merkel stated on 10 March that countries involved in regional or internal conflicts should not become members of the Alliance.[111]

In the view of Tbilisi, Georgia might have a peripheral position in European security affairs, but the failure of the great powers to take the interests of small countries into consideration had also been detrimental to their own interests in the past. A comparison was made between the current policy of avoiding to take a firm, principled position vis-à-vis Russia and the policies of Western democracies before the Second World War. Appeals to Georgia for moderation were to be compared to the Western appeasement policies leading to the Munich Agreements of 1938 and the dismemberment of Czechoslovakia. These appeasement policies had led to a major victory by Nazism and the moral defeat of the West, and had moreover been incapable of halting the inevitable outbreak of the Second World War. President

[109] See Vladimir Socor, Friends of Georgia Hold Strategy Session in Lithuania, Jamestown Eurasia Daily Monitor, September 17, 2007, Vol.4, Issue 171, http://www.jamestown.org/single/?no_cache=1&tx_ttnews%5Btt_news%5D=33000 (accessed 28 August 2009).

[110] Vladimir Socor, Hard Debates at NATO on Georgian Membership Action Plan," Jamestown Foundation, Eurasia Daily Monitor, vol.5, issue 46, March 11, 2008, http://www.jamestown.org/single/?no_cache=1&tx_ttnews%5Btt_news%5D=33449 (accessed on 28 August 2009) ; Vladimir Socor, "Is NATO Facing a Russian Veto Through Franco-German Hands?", Jamestown Foundation, Eurasia Daily Monitor, Vol.5, Issue 53, 20 March, 2008, http://www.jamestown.org/single/?no_cache=1&tx_ttnews%5Btt_news%5D=33477 (accessed on 28 August 2009).

[111] Socor, Germany Torpedoes Ukrainian, Georgian Membership Action Plans Ahead of NATO Meeting, Jamestown Foundation, Eurasia Daily Monitor, Vol.5, Issue 48, 13 March 2008, http://www.jamestown.org/single/?no_cache=1&tx_ttnews%5Btt_news%5D=33458 (accessed on 28 August 2009).

Saakashvili made use of this historical comparison in an interview with the *Financial Times*, on 30 March 2008, a few days before the Bucharest meeting of 3 April.[112]

At the NATO summit, the Alliance members agreed that Georgia and Ukraine would one day join the Alliance, but, owing to the opposition of a number of European member states, it stopped short of offering Georgia a firm timetable for accession.

Russian military interference in Georgia intensified (see Chapter 5 "Military Events of 2008"). Violent clashes became frequent in South Ossetia. Starting in March, Georgian UAVs flying over Abkhaz territory were downed. Russia's relationship with the United States and the other NATO countries also deteriorated further. Georgia was only one of the issues on the diverging security agendas of Russia and the United States, which included the questions of the recognition of Kosovo and the installation of anti-missile defence systems in Central Europe. Moscow may have thought that Washington would not give up the goal of Georgia's further integration into NATO and, ultimately, its accession. Washington gave public assurances of US support for Georgia and cautioned President Saakashvili to refrain from military confrontation.

Abkhazia seemed at first to be the conflict region where risk of a violent escalation of the conflict was most likely, but tension then moved to South Ossetia. On 8 July 2008, four Russian military planes flew over South Ossetian airspace. The Russian Foreign Ministry claimed that the incursions had helped discourage Georgia from launching an imminent attack on South Ossetia. The Georgian Government denounced the incursion as violating its territorial integrity, and on 11 July recalled its Ambassador from Moscow for "consultations."

One day after the Russian air incursions, US Secretary of State Condoleeza Rice arrived in Georgia. In the face of the Russian jet manoeuvres over South Ossetia, she told reporters: "I'm going to visit a friend and I don't expect much comment about the United States going to visit a friend."[113] At a news conference in Georgia with President Saakashvili, Secretary of State Rice further stated: "We will defend our interests, defend our allies." [114] She also said: "we take very, very strongly our obligations to defend our allies and no one should be

[112] Interview Transcript: Mikheil Saakashvili, *Financial Times*, 30 March 2008.

[113] Helene Cooper and Thom Shanker, "After Mixed U.S. Messages, a War Erupted in Georgia," *New York Times*, 13 August , 2008.

[114] Michael Schwirtz and William J. Broad, "Rice Warns Iran That U.S. Will Defend Allies", *New York Times*, 11 July, 2008.

confused of that." [115] These remarks may have been addressed to the American allies in the Middle East that felt threatened by Iran's nuclear policies. But announced in Tbilisi, in the middle of the growing tension between Georgia and Russia, these statements could have been taken by the Georgian Government, and its President, as being addressed to Georgia, too.

According to the *New York Times*, in a private dinner the American Secretary of State warned President Mikheil Saakashvili not to get into a military conflict with Russia that his country could not win.[116] According to a senior American official "she told him, in no uncertain terms, that he had to put a non-use of force pledge on the table".[117]

Russia appeared at first to support a German peace plan intended to de-escalate tensions in Abkhazia, but during the visit to Moscow by German Minister for Foreign Affairs Steinmeier on 18 - 19 July, President Medvedev reportedly reiterated Russia's and Abkhazia's demands that Georgia sign an agreement with Abkhazia on the non-use of force as a precondition to further talks. President Medvedev also called for the retention of the existing negotiation formats and Russia's peacekeeping role. On 21 July, US Deputy Assistant Secretary Bryza stated that it was not acceptable to consider a non-use of force pledge as a precondition for the negotiations. This issue should be on the negotiating table along with other issues, and particularly the issue of the return of internally displaced Georgians to Abkhazia, in order to come to a bargain that would move the peace process forward: "It is impossible for any negotiating party to agree to the core elements of the bargain that needs to be struck as a precondition for launching the negotiation. That is not a good-faith set of preconditions."[118]

In the second half of July 2008 Russia conducted a military exercise near its border with Georgia, under the code name "Caucasus 2008." At the same time, a joint training exercise involving about 1 000 American and 600 Georgian troops, and small forces from Armenia, Azerbaijan and Ukraine, was held at the military base of Vaziani in Georgia, under the name "Immediate Response 2008." It was reportedly aimed among others at increasing troop

[115] *Ibid*.

[116] Cooper and Shanker, *op. cit.*

[117] Cooper and Shanker, *op. cit.*

[118] See the interview with U.S. Deputy Assistant Secretary of State for European and Eurasian Affairs Matthew Bryza by Brian Whitmore: "Bryza: Does Russia Wish to be a Facilitator, or A Party to Conflict?", RFE/RL, 21 July 2008, http://www.rferl.org/content/Abkhazia_Bryza_Nagorno_Karabakh_Turkey_Armenia/1185188.html (accessed on 28 August 2009).

interoperability for operations in Iraq. Most of the troops had left Georgia by the time of the outbreak of the conflict.[119]

The American administration reportedly did not consider that those manoeuvers went contrary to the Western diplomatic efforts to achieve a de-escalation of the military tensions between Georgia and Russia.[120] About this exercise, Matthew Bryza declared on 21 July 2008, that he "would hope it enhances security throughout the region by helping to increase the professionalisation and cooperation of all these military forces; professionalism is of course the key to military security."[121] According to American officials,[122] these manoeuvres had been preplanned a year and a half earlier. The Americans would not have had any knowledge about military preparations on the Georgian side, despite the excellent relations between the two Governments and the presence of US trainers in Georgia. The American administration would have been taken completely by surprise by the scale of the military escalation.

3. Relations between Georgia and the European Union

Introduction

After the disintegration of the Soviet Union, relations between the EU and Georgia concentrated on: the state-building process, including democratisation and the rule of law, market reforms and enhanced regional stability. This last objective includes support of the principle of territorial integrity in Georgia's secessionist conflicts, regional integration and support for Georgia's sovereignty.

The ways in which the EU has pursued these three objectives need to be considered for the whole period concerned, from the establishment of diplomatic relations between EU member

[119] Jim Nichol, "Russia-Georgia Conflict in South Ossetia: Context and Implications for U.S. Interests," CRS Report for Congress, 13 August, 2008, p. 3; Tea Kerdzevadze, "International Large-Scale Military Exercise 'Immediate Response 2008,'" 1 August 2008, http://georgiandaily.com/index.php?option=com_content&task=view&id=4981&Itemid=65 (accessed on 28 August 2009).

[120] See the interview with Matthew Bryza, *op. cit*.

[121] *Ibid*.

[122] Interviews with senior officials and former senior officials of the White House, the US Ministry of Defense and the State Department in Berlin and Washington on 11-12 January 2009, 29 April 2009 and 13-19 July 2009. On the presence of US military advisers in Georgia see John Vandiver, "U.S. Troops still in Georgia," *Stars and Stripes*, 12 August 2008, http://www.stripes.com/article.asp?section=104&article=56704 (accessed on 28 August 2009).

states and Georgia in 1992 up until the armed conflict of August 2008. The following is an analysis of the policies of the EU and its member states with respect to these three objectives in the periods 1992 - 1995, 1995 - 2003 and 2003 - 2008.

The first period was characterised by profound instability. Neither the EU nor its Member States had much leverage for achieving any of the objectives listed above. The second period to be considered ranges from the stabilisation of the political situation in Georgia in 1995, under the government of Eduard Shevardnadze, through to the exhaustion of his reform policies in 2003. During this time the EU created a legal framework for its bilateral relations with Georgia – the Partnership and Cooperation Agreements (PCA). The effectiveness of its aid, however, was severely hampered by the low absorption capacity of the Georgian state institutions. The third period started with a strategic reorientation by the EU toward the South Caucasus, with its new neighbourhood policies, a reorientation that preceded the Rose Revolution of 2003 and the election of Mikheil Saakashvili as Georgian President in 2004. This period ends with the armed hostilities of August 2008, which pushed the EU to take on a new responsibility in the conflict.

1992 - 1995: Overcoming Instability

As far as the first priority – state-building – is concerned, neither the EU nor its Member States were present in Georgia as long as Zviad Gamsakhurdia remained in power. His policies were considered as destabilising, particularly in relation to national minorities. After the forcible removal of President Gamsakhurdia in winter 1991/92, the European governments expressed strong support for former Soviet Minister for Foreign Affairs Eduard Shevardnadze when he returned from Moscow to take the leadership of his home country in spring 1992. As far as Europe was concerned, he could rely on support from the British, French and, in particular, German Governments. Berlin seemed to appreciate his contribution to the Soviet decision not to oppose the reunification of Germany. That same year Georgia became a member of the UN and CSCE.

But these European countries had no real impact on the political situation in Georgia. Russia took the leading role in establishing a ceasefire in South Ossetia (1992) and Abkhazia (1994), and – after the defeat of Georgian troops in Abkhazia in the autumn of 1993 – in disbanding the military forces that had remained loyal to former President Gamsakhurdia. The Georgian leadership faced difficulties in bringing paramilitary forces under its control. Under these conditions, there was little room for external aid to state-building. In the period 1992 - 1995,

President Shevardnadze's leadership was regarded as the main hope for stabilisation and future state reform.

As to economic reforms, it must be borne in mind that Georgia was not economically attractive – devastated as it was by the de-industrialisation that had resulted from the dissolution of its economic links with the former Soviet space, a civil war and two secessionist conflicts. No consistent economic or tax policy could be implemented in Georgia in the very first years after its independence. The European Commission addressed the consequences of economic hardship by implementing a large-scale food assistance programme.[123]

Thirdly, as far as stability and international security are concerned, one may mention the active support given by the UK, France, Germany and other European countries to the Georgian position on territorial integrity within the UN, the CSCE/OSCE and in other diplomatic fora. At the time, the EU and its Member States accorded a far higher priority to achieving Russia's integration into a multilateral cooperation framework than to the integration of any other former Soviet republic – with the exception of the Baltic states. This policy of the EU and its Member States was fully in line with the so-called "Russia First" policy of the US. This did not mean that they were ready to accept Georgia's belonging to a Russian sphere of influence, to the extent that this would go against European security interests.[124] But the European capitals did not translate such concerns into concrete policies.

1995 - 2003: Establishing Partnership and Cooperation

In 1995 substantial improvements were made to the domestic political situation in Georgia. The paramilitary organisations were marginalised and their members partly reincorporated into the Georgian armed forces. The Georgian Constitution of 1995 provided for federal options for the future settlement of the conflicts in Abkhazia and South Ossetia. When speaking about ethnic tolerance or political pluralism, leading politicians in Georgia were then using wording that would have been unheard of under President Gamsakhurdia. It

[123] Thirty-six million euro for 1993 and 1994. See Commission of the European Communities, "Commission Staff Working Paper, Annex to 'European Neighbourhood Policy' Country Report Georgia", Brussels, SEC(2005) 288/3, http://ec.europa.eu/world/enp/pdf/country/georgia_country_report_2005_en.pdf (accessed on 25 July 2009).

[124] For instance, there was some concern among NATO members about the implications of the military negotiations between Georgia and Russia for the implementation of the Treaty on Conventional Forces in Europe (CFE). See Bruno Coppieters, "Western Security Policies and the Georgian-Abkhazian Conflict", in Bruno Coppieters, David Darchiashvili and Natella Akaba (eds), *Federal Practice. Exploring Alternatives for Georgia and Abkhazia*, Brussels, VUB University Press, 2000, pp. 26-27.

demonstrated the capacity of significant currents within the political elite to create a discourse in line with the values promoted by European institutions. It created strong expectations that policies based on such values could also be implemented at the level of state institutions.

Political stabilisation favoured cooperation with the EU. A Partnership and Cooperation Agreement (PCA) between Georgia and the EU entered into force in July 1999. It is the legal basis for bilateral relations between the EU and Georgia, setting up a number of institutions to facilitate a regular political dialogue and enhancing cooperation in the various policy fields.

In this period, the Technical Assistance for the Commonwealth of Independent States (TACIS) programme of the European Commission (EC) provided help in such fields as market reforms and harmonisation of Georgian legislation with that of the EU.

The second half of the 1990s saw increased Western interest in the South Caucasus, particularly in the energy sphere. This mainly concerned Azerbaijan, but also had consequences for Georgia as a strategic corridor for oil transport. The European Commission Communication of 1995 entitled "Towards a European Union Strategy for Relations with the Transcaucasian Republics" stated that the EU would have "to ensure that it will play a key role in the negotiations of contracts for the exploitation of the remaining huge reserves; in determining the routing of pipelines".[125] But the EU did not conduct a co-ordinated, high-profile policy in the field of energy security.

In April 1999 Georgia became a full member of the Council of Europe. This opened a new opportunity for its participation in European integration, particularly as regards democratisation, the rule of law and minority rights.

The competitive relations between Russia and the United States – with the EU and the EU member states still as minor players – did not facilitate cooperation among external actors on security issues in the region. The Western countries did not consider that it would be possible to achieve a peaceful settlement in Abkhazia – which under President Shevardnadze was regarded as the main conflict resolution priority – without Russia's active support. There was also a general assumption that a settlement respectful of Georgia's territorial integrity would be in the Russian national interest, and that Russia had the leverage necessary to bring the Abkhaz to a compromise. Russia and the West had still sufficient common interests to defend – such as regional stability and the preservation of the principle of territorial integrity – to

[125] "Towards a European Union Strategy for Relations with the Transcaucasian Republics, Communication from the Commission", Com (95) 205 final, 31/5/95, http://aei.pitt.edu/4329/ (accessed on 24 August 2009).

allow them to coordinate their policies on Abkhazia and South Ossetia at a minimal level, but not to achieve any significant breakthrough in the peace negotiations.

The EU played an active part in confidence-building policies in South Ossetia, where the situation had been relatively quiet since the establishment of a ceasefire in 1992. Here Russia and the OSCE worked together within the multilateral framework of the Joint Control Commission (JCC). In 1997 the EC started with relatively modest projects in South Ossetia, with the agreement of Tbilisi,[126] and in April 2001 it became a participant and an observer at meetings of the JCC.[127]

The EC may have found it easier to implement such programmes in South Ossetia than in Abkhazia, owing to lesser tensions among the ethnic communities. South Ossetia was receiving far less international attention at the time than Abkhazia. France, Germany and the UK were focusing on the conflict in the latter region, and did not consider that the EC's activities in South Ossetia would diminish their own role in the region. Economic rehabilitation programmes had a reasonable chance of increasing confidence among the sides, even if this had to be seen as a slow, long-term process. It was not to be expected that it would lead quickly to productive status negotiations or even solve crucial issues linked to the status of the region, such as customs control on the border with Russia.

Two parallel events marked the end of this period in EU-Georgian relations. On the one hand, a fundamental shift took place in the policy of the European Union in 2003, in anticipation of its enlargement to Eastern Europe in 2004, which would necessitate new boundary policies. The EU's security strategy paper of December 2003 defined regional stability and democracy in its neighbourhood as being among its key interests.[128] This had far-reaching consequences for a neighbouring region such as the South Caucasus. Good governance had to be achieved

[126] Dennis Sammut, "Background to the Georgia-Ossetia Conflict and Future Prospects for Georgian-Russian Relations," Links Reports, 11 August 2008, p. 12, http://www.links-london.org/documents/ReportontheGeorgiaOssetiaConflictandfutureofGeorgianRussianRelations.pdf (accessed on 18 August 2009); On the EU's policies towards South Ossetia see also Damien Helly and Giorgi Gogia, "Georgian Security and the Role of the West," in Bruno Coppieters and Robert Legvold (eds), *Statehood and Security: Georgia After the Rose Revolution*, Cambridge/Mass., MIT Press, 2005, pp. 290-291.

[127] See Damien Helly, *L'Action extérieure de l'Union européenne dans le Caucase du Sud, 1992-2002. Modes d'action, influence et légitimité*, Institut d'Études politiques de Paris, thèse soutenue le 25 juin 2003, p. 367, on the Internet at http://ecoledoctorale.sciences-po.fr/theses/theses_en_ligne/helly_scpo_2003/helly_scpo_2003.pdf (accessed on 18 August 2009).

[128] "A Secure Europe in a Better World.", European Security Strategy, Brussels, 12 December 2003, http://www.consilium.europa.eu/uedocs/cmsUpload/78367.pdf (accessed on 24 August 2009); See also Nicu Popescu and Andrew Wilson, "The Limits of Enlargement-Lite: European and Russian Power in the Troubled Neighbourhood," Policy Report, European Council on Foreign Relations, June 2009, p. 13.

through the reform of the state institutions. On the other hand, President Shevardnadze's government did not implement the necessary reforms in the political, economical or security fields. The weakness of Georgian state institutions had a negative effect on relations with the EU, which was seeking stability in its broader neighbourhood.

In the period 1992 - 2004 the assistance given to Georgia by the EC had amounted to almost 420 million euros.[129] But the EU retrospectively characterised the situation before 2004 as one where Georgia's capacity to absorb such assistance had been hampered "by institutional and political instability, widespread corruption, severe budget constraints due to low tax collection and poor public finance management, and by a severe deterioration of governance."[130]

Georgian public opinion likewise demanded political and economic reforms. Mass mobilisations against flawed elections led to the resignation of President Shevardnadze in November 2003.

2003 - 2008: Towards Common European Policies

The Rose Revolution of November 2003 and the accession of Mikheil Saakashvili to the Georgian presidency in January 2004 raised great expectations in EU countries. The fact that for the second time in Georgia's short post-Soviet history the transition to power had failed to follow constitutional rules (the first being after the coup d'état against the previous President Zviad Gamsakhurdia, in winter 1991/92) was regarded as a minor point, when compared with the non-violent character of the revolutionary overthrow of the old regime and the overwhelming popular support for the new one.

In July 2003 the EU appointed a Special Representative (EUSR) for the South Caucasus with a mandate that encompassed assistance to the countries of the region with their reform policies.[131] The EUSR would also have the task of assisting with the resolution of conflicts. This would be done not through direct involvement in conflict resolution but through support for the existing mediation efforts of international organisations. The mandate of the EUSR was extended in 2006 "to assist creating the conditions for progress on settlement of conflicts." This extended mandate has permitted the new EUSR, Peter Semneby, to increase

[129] Commission of the European Communities, "Commission Staff Working Paper, Annex to 'European Neighbourhood Policy' Country Report Georgia", *op.cit.*

[130] European Commission, "European Neighbourhood and Partnership Instrument, Georgia, Country Strategy Paper 2007-2013", p.17, http://ec.europa.eu/world/enp/pdf/country/enpi_csp_georgia_en.pdf

[131] See Nicu Popescu, "Europe's Unrecognised Neighbours. The EU in Abkhazia and South Ossetia", CEPS Working document No 260, March 2007, pp.15-16, *shop.ceps.eu/downfree.php?item_id=1476* (accessed on 24 August 2009).

EU effectiveness by expressing common European positions in the region and by supporting the development of a more comprehensive policy within the EU institutions.

The appointment of a EUSR and the inclusion of the South Caucasus in the European Neighbourhood Policy (ENP) in June 2004 created a fundamentally new basis for EU-Georgia relations. The ENP offered sixteen neighbouring countries – including Georgia – perspectives for economic integration, financial assistance and political dialogue in order to stabilise them. This policy aims at bringing these countries close to the EU in legislative, economic and political terms, but without the EU offering them any prospect of membership.[132] The ENP also opened new regional perspectives by increasing cooperation in the Black Sea area – both Romania and Bulgaria became full members of the EU in 2007.[133]

The weakness of the judiciary in Georgia was one of the EU's main concerns. A rule of law mission was set up in July 2004 within the framework of the European Security and Defence Policy (EDSP). The objective of operation EUJUST Themis, which lasted for one year, was to support reforms in the criminal justice sector. Its efficiency has been questioned, but it had a high political value in the context of the EU's commitment to democratic reforms in the first years under President Saakashvili.[134]

The new Government was effective in reforming the civil service and fighting corruption, but the lack of an independent judiciary raised concerns in European capitals. There were also concerns with regard to the lack of media independence. In its Georgia Report of 2005 the European Commission mentioned that NGOs have reported significant numbers of instances of torture since the Rose Revolution.[135]

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[132] Wilson and Popescu, *op. cit.*, p. 13. See also Nicu Popescu, "The EU and South Caucasus: Learning Lessons from Moldova and Ukraine," in EuroJournal.org – *Journal of Foreign Policy of Moldova*, Issue 04/2006, http://eurojournal.org/more.php?id=212_0_1_0_M14 (accessed on 24 August 2009).
The lack of a prospect of full integration into the EU for Georgia and its breakaway territories weakened the EU's leverage for influencing the sides in these conflicts and contrasts with the EU's policies towards Bosnia, Kosovo and Macedonia. In the Balkans, such a membership prospect is an integral part of the EU's conflict resolution policies.

[133] Commission of the European Communities, Proposal for a Council Decision, Brussels, 24.10.2006, COM (2006) 623 final, p. 7.

[134] On EUJUST Themis see Damien Helly, "EUJUST Themis in Georgia: an Ambitious Bet on the Rule of Law": in Agnieszka Nowak (ed.), "Civilian Crisis Management: the EU Way," *Chaillot Paper* No 90, EU Institute for Security Studies, Paris, June 2006, pp. 87-102, http://www.iss.europa.eu/index.php?id=143 (accessed on 24 August 2009).

[135] See Commission of the European Communities, "Commission Staff Working Paper, Annex to 'European Neighbourhood Policy' Country Report Georgia", *op.cit.*

In the run-up to the presidential elections of January 2008 the EU established the so-called Michnik Group, led by the Polish intellectual and journalist Adam Michnik, to assess the media situation. It contributed to the public discussion on that issue.[136] The EU put further pressure on Georgia to sign and ratify the European Charter of Regional and Minority Languages (ECRML), which it had pledged to finalise within one year when acceding to the Council of Europe in 1999.[137]

In the economic field, in 2003 Georgia's real GDP was reportedly 50 per cent below its 1990 level.[138] But there were also positive signs. By 2003 there was already strong economic growth, induced by construction work on the BTC pipeline, and this growth continued in ensuing years. Significantly, the share of the shadow economy began to decline as early as 2004. In June 2004 the European Commission co-chaired a donors' conference with the World Bank, at which a total of 850 million euro was pledged for the period 2004 - 2006. To achieve this aim, the EC doubled its total assistance to Georgia compared with the previous period.[139] Georgia was also increasingly successful in attracting foreign investment, and in the first half of 2008 real GDP growth reached 9%.[140] The high levels of poverty and unemployment, however, remained a severe problem.

President Saakashvili's declared aim was to re-establish Georgian statehood not only by eradicating corruption, establishing the rule of law and modernising the economy but also by "gathering in the Georgian lands." Mikheil Saakashvili claimed that he would pursue a proactive policy, capable of achieving concrete results in the short term. In his view, President Shevardnadze had not only failed to reintegrate South Ossetia and Abkhazia, but had also failed to react to the fact that the Autonomous Republic of Adjara was behaving like an independent entity. In the Government's view, the survival of Georgia as a viable state would be in jeopardy unless full control over its territory and borders were not achieved soon.

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[136] Peter Semneby, "The EU's Democracy Agenda in Georgia," in Adam Hug (ed.), Spotlight on Georgia, London, The Foreign Policy Centre, 2009, p. 83.

[137] *Ibid.*, p. 85.

[138] On the following see Commission of the European Communities, "Commission Staff Working Paper, Annex to 'European Neighbourhood Policy' Country Report Georgia", *op.cit.*

[139] European Commission, European Neighbourhood and Partnership Instrument, Georgia, Country Strategy Paper 2007-2013, *op. cit.*, pp. 16-17.

[140] Commission Staff Working Document Accompanying the Communication from the Commission to the European Parliament and the Council, Implementation of the European Neighbourhood Policy in 2008, Brussels, 23/04/2009, SEC(2009) 513/2, p.8.

The EU and Georgia had different approaches to conflict resolution. The EU did not disagree with the idea of a proactive policy concerning conflict resolution, but it stressed the need to be cautious and to take a long-term perspective when designing conflict resolution policies. Georgia was primarily interested in turning the secessionist conflicts it was confronting into a priority on the European agenda, an objective that was not necessarily best served by a cautious, long-term approach.

This EU approach to the conflicts in Georgia was in line with the overall European approach to the conflicts in its neighbourhood. All so-called frozen conflicts at the boundaries of the EU – Transnistria, Abkhazia, South Ossetia, Nagorno-Karabakh – were to be handled with a long-term approach addressing the overall institutional and governance context and thus favouring stabilisation. The EU could make "an important contribution by working around the conflict issues, promoting similar reforms on both sides of the boundary lines to foster convergence between political, economic and legal systems enabling greater social inclusion and contributing to confidence-building."[141]

European governments welcomed the fact that the Georgian authorities presented a series of concrete proposals for federal relations with South Ossetia and Abkhazia, but there was also serious concern that the Government tried to force the breakaway regimes into negotiations and concessions by the threat of force.[142] Such attempts were seen as counter productive.

In addition, the EU had a strong interest in a de-escalation of the conflictual relations between Russia and Georgia. It was largely due to Western (including European) pressure that Saakashvili felt forced to back down in August 2004 in an escalating conflict in South Ossetia, and that it proved possible to reduce the risk of an open war involving Russian troops. In the EU's view, there was no realistic alternative to a progressive improvement of the relations between Russia and Georgia or to confidence-building between the sides in the conflicts on the breakaway territories. For the same reason the EU and EU member states

[141] Commission of the European Communities, Communication from the Commission, "A Strong European Neighbourhood Policy," Brussels 05/12/2007 COM(2007) 774 final.

[142] In May 2006, the then Defence Minister Okruashvili famously declared that he would resign from his position in the government if Georgia failed to reunite breakaway South Ossetia by the end of the year See "Okruashvili Reiterates S. Ossetia Reunification Deadline", *Civil Georgia*, 1 May 2006; "Okruashvili Quits Government" *Civil Georgia*, 17 November 2006. This statement was generally understood as being achievable only through the use of force.

voiced their concern about Russia's unilateral policies in the breakaway territories, such as Russian economic investments in Abkhazia in 2008.[143]

The EU and Georgia, moreover, had different views on the question of the extent to which conflict resolution should be regarded as a priority in the EU's involvement in Georgia. The ENP Action Plan endorsed by the EU-Georgia Cooperation Council in November 2006 aimed at contributing to economic integration and deepening political co-operation. These action plans are instruments designed to provide clarity on priorities, challenges and the next steps to be taken. They also provide benchmarks for further integration.[144] The question of the extent to which conflict resolution should be regarded as a priority was the one that raised most obstacles before an agreement on this plan could be reached. The EU was reluctant to take it up as a main priority, as requested by Tbilisi.[145] The 2006 ENP Action Plan eventually defined the promotion of the peaceful resolution of internal conflicts as "priority area 6" and included an extensive list of initiatives to be taken, ranging from support for "the active involvement of civil society in the conflict resolution efforts" to raising the issue of their settlement in EU-Russia political dialogue meetings.[146]

The strengthening of the Georgian armed forces raised some concerns in Brussels. Speaking at a conference in Slovenia on 28 August 2006, EC External Relations Commissioner, Benita Ferrero-Waldner, deplored the fact that defence expenditure in Azerbaijan and Georgia were "going through the roof" – and that this was unjustified, taking into account the enormous financial needs of education, health and small businesses.[147]

The need for a cautious, long-term approach was further raised when the changes in the negotiating format and the internationalisation of the peacekeeping forces in Abkhazia and South Ossetia – one of President Saakashvili's key priorities in conflict resolution – were being discussed. Since "Georgian territory's annexation is taking place behind these peacekeeping troops,"[148] it was about time to replace or at least weaken Russia's presence with an international force. But such a change in the peacekeeping framework was strongly

[143] Reuters, "EU Concerned at Russian Moves on Abkhazia", 10 March 2008, http://www.reuters.com/article/asiaCrisis/idUSL10832593 (accessed on 24 August 2009).

[144] Semneby, *op. cit*., pp. 80-81.

[145] See Popescu, "Europe's Unrecognised Neighbours", *op. cit*., pp. 8-9.

[146] EU/Georgia Action Plan, http://ec.europa.eu/world/enp/pdf/action_plans/georgia_enp_ap_final_en.pdf (accessed on 24 August 2009).

[147] "EU Warns Georgia over Increasing Defense Budget", *Civil Georgia*, 30 August 2006; Radio Free Europe/Radio Liberty, *Newsline*, 30 August 2006.

[148] "Saakashvili reiterates peaceful approach to conflicts", *Civil Georgia*, 11 July 2006.

opposed by the Abkhaz and Ossetian sides. They were convinced that Russia would be the only external actor to react in their favour if Georgia used force to regain Abkhazia or South Ossetia. The Russians, in turn, were opposed to losing a foothold in the region. The EU was in favour of an internationalisation of security provision in the disputed territories but, also in this case, defended the view that this required the consent of the sides, and had to be addressed cautiously, with a long-term vision.

EU enlargement led to the inclusion of a number of countries which favoured stronger EU engagement on behalf of Georgia. In February 2005, Estonia, Lithuania, Latvia, Poland, Romania and Bulgaria founded the new Group of Friends of Georgia with the aim of supporting Georgia's Euro-Atlantic orientation.[149] They acted as a group within the EU by pleading, for instance, at a EU Council of Ministers meeting in Portugal in September 2007, in favour of EU negotiations with Georgia on travel visas and trade, and calling for a more resolute position towards Russia concerning its intrusions into Georgia's air space.[150]

The EU policies were sometimes criticised as being in favour of appeasement with Russia. From the Georgian perspective, European governments had to be convinced that they had a duty to achieve substantial progress on conflict resolution in Georgia in a timely manner, and that this issue should become a firm priority in the EU's dialogue with Moscow.

The approach to Russia was the most crucial question in the debates within the EU on all questions related to its involvement in Georgia. Tbilisi invited the EU to take over the functions of the OSCE Border Monitoring Operation (BMO) in Georgia, after Russia's veto to the continuation of this operation by the OSCE Mission to Georgia at the end of 2004.[151] Not wishing to irritate Russia, the EU was reluctant to initiate such a large-scale operation, but it decided in 2005 to deploy a small Border Support Team, under the authority of the EUSR, initially with only three experts. The team was to improve Georgia's border management. This would help to prevent Russian accusations that Georgia was not controlling its borders and would thus contribute to de-escalate Georgian-Russian tensions. The number of experts was gradually increased.

[149] Vladimir Socor, "New Group of Georgia's Friends Founded" *Eurasia Daily Monitor*, 6 February 2005, Vol. 2, Issue 26.

[150] Vladimir Socor, "Friends of Georgia hold Strategy Session in Lithuania," *Eurasia Daily Monitor*, 17 September 2007, Vol. 4, Issue 171.

[151] On the following see Popescu, Europe's Unrecognized Neighbours, *op. cit.*, pp. 11-12.

This operation showed the intention of the EU to address the Georgian-Russian tensions at a relatively early stage of its escalation. The fact that the operation started with small steps, to be gradually strengthened over time, illustrates the cautious approach chosen by Brussels. This is also demonstrated by the fact that the operation was given low visibility – contrasting with other EU missions. Strengthening border management is, moreover, a long-term objective, which is also characteristic of the EU approach to conflict resolution in Georgia.

The EU's cautious, long-term approach proved not to be sufficient in dealing with the type of conflict in which Georgia and Russia were engaged. It needed to be combined with a resolute policy, once the low-intensity conflicts in the breakaway territories risked developing into large-scale hostilities. In June 2008, a few weeks before the outbreak of the armed conflict, the EU High Representative, Javier Solana, visited Tbilisi and Sukhumi, to advocate new peace talks. In July 2008 German Foreign Affairs Minister Steinmeier presented a peace plan to the authorities in Tbilisi and Sukhumi. With the outbreak of the armed hostilities in South Ossetia, President Sarkozy acted decisively to achieve a cease fire. At the beginning of October, the EU succeeded in deploying "more than 200 monitors from 22 Member States on the ground. This has been the fastest deployment of a mission the EU has ever done."[152]

[152] See EUMM – European Union Monitoring Mission in Georgia, What is EUMM?, http://www.eumm.eu/en/about_eumm (accessed on 24 August 2009).

Chapter 2

Conflicts in Abkhazia and South Ossetia: Peace Efforts in 1991 - 2008

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4. Observations **119**

1. Introduction

The present chapter analyses the conflicts in Georgia from a historical perspective, concentrating particularly on problems that began with the dissolution of the Soviet Union and the profound impact this dissolution had on the relations between the various nations and ethnic groups in Georgia.[1] The chapter stresses the role of perceptions – including historical narratives, threat perceptions and perceptions of national interests – and describes their transformation in the gradual deterioration of the relations between the conflicting actors.

Soviet Federalism

Soviet federal policies radically transformed the relations between nations. It formally recognised certain rights and granted administrative powers to national elites. This increased their self-awareness and political aspirations, particularly with regard to their political status. It also put the various nations in a hierarchical framework, which gave them unequal rights to administer themselves. Such policies thus increased the tensions between them, and the Soviet central leadership had to arbiter all the conflicts that resulted from these contradictory policies, preventing any of them from being expressed openly or – even worse – turning violent.

Soviet federalism was largely regarded as an attempt to accommodate the demands of the various nations that inhabited the Russian empire without abandoning the firm control of the communist leadership over every level of authority.[2] The major nations were recognised as the "titular nation" of a particular territory. Their communist elites were given the privilege of administering them. A multi-tiered form of government thus combined political centralisation with partial administrative decentralisation.

The right to national self-determination was acknowledged according to a hierarchical pattern that ranked the various nationalities according to a number of criteria, such as population size and the leverage of the national elites within the Communist Party. Of the various types of constituent entities within its framework, Soviet federalism granted the highest status to the union republics. Their sovereignty and right to secession were vested in the Soviet

[1] The present analysis does go into the distinctions made in Soviet scholarship and law between nations, nationalities and national communities, but uses these terms interchangeably.

[2] On Soviet federalism and its consequences for ethnic conflicts see Robert J. Kaiser, *The Geography of Nationalism in Russia and the USSR* (Princeton, Princeton University Press, 1994); Valery Tishkov, *Ethnicity, Nationalism and Conflict in and after the Soviet Union* (London, Sage, 1997). Edmund Herzig, *The New Caucasus: Armenia, Azerbaijan and Georgia (*London and New York, Pinter, 1999); Svante Cornell, *Small Nations and Great Powers: A Study of Ehtnopolitical Conflict in the Caucasus*, Richmond/Surrey, Curzon, 2001.

constitution, despite the fact that the one-party system excluded any form of power-sharing or the voicing of any national demands that went against Soviet rule. It gave the union republics substantial administrative powers, particularly in the fields of culture and education. The autonomous republics constituted the next level of administrative authority. They were all located within the union republics, to which they were subordinated. They had less power in the field of culture and education. The autonomous republics were formally not sovereign and thus could not secede. But they still had their own constitution and other attributes of partial statehood, such as an executive body led by a President and a Supreme Soviet (Council) with legislative powers. The autonomous regions were still lower in the federal hierarchy. They were likewise located on the territory of a union republic, but were not considered to have the characteristics of statehood.

In its own perspective, the Soviet Union achieved remarkable successes in ruling a huge empire that consisted of numerous nationalities and ethnic groups, and in keeping relative internal peace. However, it failed to change radically how the respective national elites and populations perceived their own national identities and interests. Moreover, the constitutional framework regulating their relations was not perceived as the result of a fair compromise, and not even as resulting from the objective of achieving a fair compromise. In other words, the Soviet Union failed to lay firm foundations for lasting peaceful coexistence among the numerous nationalities and ethnic groups that inhabited the empire. When the power of the centralised Communist party waned at the end of the 1980s under the double pressure of democratisation and nationalist mobilisation, there was no political framework that would have been strong enough to integrate the conflicting national demands.

It was in Georgia, where non-Georgian ethnic groups constituted about 30% of the population, that the Soviet authorities had the greatest difficulty in implementing these federal policies, especially when it came to relations between Georgians, Abkhaz and Ossetians. Moscow severely repressed expressions of nationalism. At the same time, it accommodated some of the demands of the local national elites with respect to status, culture, education and economic privileges. All of this was done in an arbitrary fashion. All three nations ended up being deeply dissatisfied with the arrangements made. Soviet power had been quite efficient in conflict prevention in the region – national conflicts never escalated to widespread violence – but not in conflict resolution.

Conflicts emerged on the different levels of the system of governance within Georgia. There was a conflict within Abkhazia and South Ossetia over the rights of the national communities

and over the question of whether and how sovereignty should be shared among them within these entities. There was a second conflict over the political status of the two territories. These two conflicts were closely interrelated, and involved both local communities and the central government.

The political disputes concerning the questions of self-government, political participation and territorial control were usually reinforced by historical arguments. This led to the construction of mutually exclusive histories of the Georgian, Abkhaz and Ossetian nations that were at the forefront of the nationalist mobilisations leading to armed conflicts in South Ossetia and Abkhazia in the 1990s.

First, there was the question of ancestral rights on the territories of Abkhazia and South Ossetia. Already in the wake of destalinisation in the 1950s, this was a major issue in the divergences between the national elites in Georgia. These positions – aiming at legitimising dominant or even exclusive authority over these territories – were instrumental in heightening national tensions, which escalated to open propaganda wars around 1990.

Second, the Georgian, Abkhaz and Ossetian national elites were all firmly convinced that the other communities had been instrumental in the oppression of their own national community, particularly in the period of Georgian independence and Soviet rule.

Tables below show the ethnic composition of Georgia as a whole as well as the ethnic compositions of Abkhazia and South Ossetia, according to the Soviet census conducted in 1989.

Ethnic composition of Georgia (the Georgian Soviet Socialist Republic) in 1989[3]

Georgians	3.787.393	70,13%
Armenians	437.211	8,10%
Russians	341.172	6,32%
Azerbaijanis	307.556	5,69%
Ossetians *	164.055	3,04%
Abkhaz **	95.853	1,77%

[3] The last Soviet census (1989).

Others	267.601	4,95%
TOTAL	**5.400.841**	**100%**

* 98.822 Ossetians (i.e. 60% of all Ossetians living in the Georgian SSR), lived outside of the South-Ossetian Autonomous Oblast'.
** Only 2.586 Abkhaz (i.e. 2,7% of all Abkhaz living in the Georgian SSR), lived outside of the Abkhaz ASSR.

Ethnic composition of Abkhazia (the Abkhaz Autonomous Soviet Socialist Republic) in 1989[4]

Georgians	239.872	45,68%
Abkhaz	93.267	17,76%
Armenians	76.541	14,58%
Russians	74.913	14,27%
Greeks	14.664	2,80%
Others	25.804	4,91%
TOTAL	**525.061**	**100%**

Ethnic composition of South Ossetia (the South Ossetian Autonomous District) in 1989[5]

Ossetians	65.233	66,21%
Georgians	28.544	28,97%
Russians	2.128	2,16%
Armenians	984	1,00%
Jews	396	0,40%
Others	1.242	1,26%
TOTAL	**98.527**	**100%**

[4] *Ibid*.

[5] *Ibid*.

Mutually Exclusive Histories: Georgians and Abkhaz

In the opinion of Abkhaz historians their people are one of the most ancient living in the Caucasus, and have lived on the present territory of Abkhazia since at least the fifth century BC.[6] The majority of its Georgian population, they say, migrated to this region relatively recently, as a consequence of a nationalistic policy of "georgianisation."

Georgian historians, on the contrary, have been asserting that from ancient times Abkhazia was a region where the Georgian language was spoken and the population living there was of Georgian (Kartvelian) extraction.[7] Some Georgian historians have defended the thesis that the original population was exclusively Georgian, while others were of the opinion that both Abkhaz and Georgians – or rather proto-Abkhaz and proto-Georgian tribes – inhabited this region since ancient times. There was thus no consensus among Georgian historians on the question of the indigenous character of the Abkhaz population, but a great convergence for the thesis that Georgians (or proto-Georgian tribes) had constituted the dominant cultural group in Abkhazia from time immemorial.

In 1810 Abkhazia was conquered by the Russian Empire. In 1864 the latter abolished local autonomies, and in 1883 Abkhazia was transformed into the Sukhumi district (*okrug*) ruled by the governor of Kutaisi. Revolts in the countryside were harshly repressed. After the Caucasian War, and in particular after the Russo-Turkish war of 1877-78 and the Abkhaz uprising, the czarist authorities forced more than half of the then Abkhaz population to flee to the Ottoman Empire. This emigration process is known as *Muhajirism* (from the Arabic word *Muhajir*, emigrant). They left behind a great deal of free land, which was – according to Abkhaz historians – occupied by settlers of various national origins, in particular Georgian (mainly Mingrelian), Armenian, Russian, and Greek.[8]

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[6] T.M. Shamba, A.Iu. Neproshin, "*Abkhazia. Pravovye osnovy gosudarstvennosti i suvereniteta*" [*Abkhazia. Legal foundations of statehood and sovereignty*], Moskva: In-Oktavo, 2004, pp. 14-24. See also O.Kh. Bgazhba, S.Z. Lakoba, "*Istoria Abkhazii s drevnejshikh vrem n do nashikh dnej*" [*The history of Abkhazia from ancient times to the present day*], Sukhum: Alashara, 2007, pp. 51-98; V. Chiribka, "*The origin of the Abkhazian people*" and G. Shamba, "*On the track of Abkhazia's antiquity*," in G. Hewitt (ed.), "The Abkhazians," Richmond, Surrey: Curzon, 1999, pp. 37-58.

[7] E.g., I. Javakhishvili, "*Kartveli eris istoria*" [*History of the Georgian People*], vol. I, Tbilisi: Stalinis sakhelobis Tbilisis sakhelmtsipo universitetis gamomcemloba, 1960[5], p. 427; N. Berdzenishvili, "*Mtsire shenishvna didi sakitkhis gamo*" [*A small note about a big question*], in Id., "Sakartvelos istoriis sakitkhebi" [Issues of the Georgian history], vol. 3, Tbilisi: Metsniereba, 1966, pp. 277-281 and "*Apkhazetis shesakheb*" [*About Abkhazia*], in *Ibid*., pp. 287-288; M. Lortkipanidze, "*Apkhazebi da Apkhazeti*" [*The Abkhazians and Abkhazia*], Tbilisi: Ganatleba, 1990, p. 22.

[8] *Istoriya bkhazii* (*The History of Abkhazia*). Lakoba S. Z. (ed.). Gudauda 1993, pp. 189, 205-217.

After the October revolution in Russia, the Bolshevik forces organised themselves in Abkhazia. They seized Sukhumi in April 1918 but managed to hold onto their power only for a few weeks before they were suppressed by Georgian Mensheviks. After the Soviet invasion of Georgia, Soviet rule was re-established in Abkhazia on 4 March 1921. On 28 March 1921 an enlarged meeting of the Caucasian bureau of the Communist Party decided to create the Abkhaz Soviet Socialist Republic as a Union Republic. Georgian historians see this decision as an unwarranted "gift" by the communists (Bolsheviks) to the Abkhaz for their pro-Bolshevik political sentiments and as a punishment for Georgia.

In terms of administrative structure, on 21 May 1918 the Revolutionary Committee of Georgia "recognised and welcomed the establishment of the Soviet Socialist Republic of Abkhazia."[9] But its independence from Georgia lasted only until December 1918, when a Union Treaty between Georgia and Abkhazia was ratified in Tbilisi. In compliance with the Union Treaty, the two governments decided to establish close military, political and financial-economic cooperation.[10] In December 1922 Georgia, Armenia and Azerbaijan formed the Transcaucasian Soviet Socialist Federal Republic. Abkhazia joined it not as a constitutionally independent entity, but through Georgia.[11] In 1931, Abkhazia was turned into an Autonomous Republic within the Georgian Republic.[12] Abkhaz historians see this gradual process of downgrading the status of their republic primarily as a Georgian rather than a Soviet policy. Some of them also see it as a "gift" by the Soviet leader Iosif Stalin to Georgia, his native country.

In the late 1930s Lavrenti Beria, the leader of the Georgian Communist party, promoted the partially forced settlement of tens of thousands of Georgians (in particular, Mingrelians) to Abkhazia.[13] According to Abkhaz historians, this was done not only for economic but also – or rather, mainly – for political reasons, as part of a policy of "georgianisation". They refer, moreover, to the repressive measures against Abkhaz culture in the 1930s, 1940s and 1950s, such as the fact that the entire educational process took place only in the Georgian language,

[9] "Declaration of the Revolutionary Committee of the Soviet Socialist Republic of Georgia – May 21st 1921," in Tamaz Diasamidze, *Regional Conflicts in Georgia* (The Autonomous Oblast' of South Ossetia, The Autonomous SSR of Abkhazia 1989-2008). Tbilisi 2008, p. 84.

[10] "Union Treaty between the Soviet Socialist Republic of Georgia and the Soviet Socialist Republic of Abkhazia – December 16th 1921," in: Tamaz Diasamidze… *op. cit*., p 89.

[11] "Constitution of the Soviet Socialist Republic of Abkhazia – April 1st 1925," in: Tamaz Diasamidze… *op. cit*., p. 110.

[12] S. Lakoba, "History: 1917-1989," in G. Hewitt… *op. cit.*, p. 94.

[13] T.M. Shamba, A.Iu. Neproshin, *op. cit.*, p. 73.

even at primary school level, and that any broadcasting in Abkhaz was prohibited. The Abkhaz also resented the fact that many local toponyms were replaced by Georgian names.

After the death of Stalin in 1953, many of these discriminatory measures were abolished and in a number of primary schools the Abkhaz language became the language of education. The Abkhaz State University was opened in Sukhumi in 1978 (with Georgian, Russian and Abkhaz sectors) to serve the needs of higher education in western Georgia, and an Abkhaz television programme was introduced. The Abkhaz were granted substantial overrepresentation in the government and in the administration of the autonomous republic.

Nevertheless, the subordination of autonomous republics to union republics within the hierarchical structure of the Soviet Union left the Abkhaz elites in an inferior position where access to political and economic decision-making at the all-Union level was concerned. The new policies, aiming at accommodating the demands of the Abkhaz minority (about 18% of the whole of Abkhazia's population), were insufficient to satisfy their aspirations. Since the 1970s there were several unsuccessful appeals to the Soviet central leadership to upgrade the legal status of the republic to that of a union republic, on par with Georgia. Eventually, the Abkhaz nationalists constructed a political and cultural history of Abkhazia that was either separate from or opposed to the Georgian versions.

The Georgians likewise perceived Soviet federal policies as profoundly unjust, and the overrepresentation of Abkhaz in the state institutions of the republic went against their perception of what majority rule should be like (Georgians constituted about 46% of the total population of the republic).[14] The Abkhaz refuted this demographic argument by stating that their minority position was due to repressive policies. The Abkhaz, who had constituted 55% of Abkhazia's population in 1897, believed that they had lost this majority position owing to forced emigration from the Russian empire and the resettlement of non-Abkhaz nationalities afterwards.[15]

[14] In fact, both the Abkhaz and the Georgians enjoyed better positions at the expense of all the other nationalities. In 1990, 67% of the ministers of Abkhazia and 71% of regional communist party department heads were Abkhaz. In Georgia, in 1989, 89.3% of the administrative-managerial personnel were Georgian whereas the Georgians formed approx. 70% of the population of Georgia. Miminoshvili R., Pandzhikidze G, *Pravda ob Abkhazii*, Tbilisi, 1990, p.6, quoted in Slider Darrell, "*Democratization in Georgia*," in Dawisha Karen, Parrott Bruce (eds.), *Conflict, Cleavage and Change in Central Asia and the Caucasus*, Cambridge, 1997, p.170; Mirsky Georgiy I., *On Ruins of Empire, Ethnicity and Nationalism in the Former Soviet Union*, Westport, Greenwood Press, 1997, p.6.

[15] For a graph of the demographic changes which occurred in Abkhazia since 1897, see http://www.c-r.org/our-work/accord/georgia-abkhazia/graph2.php.

Georgian dissident movements, which emerged in the second half of 1970s, strove for language and cultural policies that were in favour of the Georgian part of the population of Abkhazia and South Ossetia. They criticised the Soviet federal policies for having granted too many concessions to minorities. Such criticism was very much in line with the concerns of the Georgian public – which may help to explain the huge popularity of Georgian nationalist leaders, and first and foremost that of the former dissident and later President of Georgia, Zviad Gamsakhurdia.

Mutually Exclusive Histories: Georgians and Ossetians

The Ossetian view is that they have been living on both sides of the Caucasus mountain range as one of the most ancient nations of the region. The South Ossetians regard themselves as the southern branch of the Ossetian nation, a nation that is descended from ancient peoples, namely the Scythians, the Sarmathans and the Alans. South Ossetia, they claim, has been part of Ossetian territory from time immemorial, and the Ossetians joined Russia in the 18th century, earlier than Georgia and independently of it.[16]

Georgian historians do not deny Ossetian descent from the Alans, but claim that their homeland was north of the Caucasus Mountains and that the Ossetians only started to migrate south a few centuries ago.[17] They settled on the estates of Georgian feudal lords, including Duke Machabeli. Instead of calling this region "South Ossetia", Georgians would use the term *Samachablo* (estate of the Georgian Machabeli princes) or *Shida Kartli* (Inner Kartli). Even through the terminology used, the Georgians wanted to make the point that even though the Ossetians might constitute a majority on this territory, the region was Georgian in origin.

The positions of Georgian and Ossetian historians have also differed widely on other points, since the Soviet period. When Georgia declared its independence in 1918, the Ossetians refused to be divided by new international borders. They supported revolutionary Russia. In the view of Ossetian historians, this support was the only way for South Ossetians to unite

[16] The Republic of South Ossetia (Documents, Chronicles, Concise Historical Information), Tskhinval, Yuznaya Alania, 2007, pp.50-52.

[17] See Helen Krag and Lars Funk, *The North Caucasus, Minorities at a Crossroads*, Minority Rights Group International London, November 1994, pp. , http://www.minorityrights.org/4055/reports/the-north-caucasus-minorities-at-a-crossroads.html (accessed on 11 July 2009); Nikola Cvetkovski, *The Georgian – South Ossetian Conflict*. Dissertation under the supervision of Susanne Thorbek, Aalborg University, n.d., http://www.caucasus.dk/publication5.htm (accessed on 11 July 2009); Dennis Sammut and Nikola Cvetkovski, *The Georgia-South Ossetia Conflict*" VERTIC Confidence-Building Matters Papers No 6, Vertic London, March 1996; A. Totadze, "*The Ossets in Georgia: Myth and Reality*," Tbilisi: Universal, 2008, pp. 13-23.

with North Ossetia.[18] Clashes took place and the Georgians asserted their control over the territory using military force. Ossetian sources claim that five thousand Ossetians were killed in the fighting.[19] The Georgians describe these dramatic events as a first attempt to dismember their young state, and the Ossetians as the first act of "genocide" against their nation.

Georgian historians regard Ossetian support to the Bolsheviks as an act of treason, which opened the doors to the Soviet invasion of 1921. In the Georgian view, as a sign of gratitude, Moscow granted the South Ossetians the status of an autonomous region (oblast') in April 1922.

The South Ossetians complain about the repressive policies to which they were subjected by Georgia during Soviet times.[20] In their view, the creation of an autonomous entity was merely nominal. Ossetian toponyms were replaced by Georgian ones. In 1938, the latin-based alphabet that the Ossetians used was replaced by the Georgian alphabet (in 1954 the Georgian alphabet was replaced by the Russian cyrillic both in South Ossetia and Abkhazia) and Georgian was introduced as the language of instruction in schools.[21]

[18] I. Kochieva, A. Margiev, "*Gruziia. Etnicheskie chistki v otnoshenii osetin*" [*Georgia. Ethnic cleansing in relation to the Ossetians*], Moskva: Evropa, 2005, p. 8. The Ossetian argument was that when North Ossetia opted to join Soviet Russia, South Ossetia should have been included in that arrangement.

[19] See Boris Chochiev, *Chronicle of events of the Georgian Aggression 1988-1992*, Tskhinvali, 1996 p.126. This narrative was used later by the South Ossetians to justify their secession from Georgia. Speaking after the second conflict in 1989-92, the south Ossetian leader, Ludwig Chibirov, said "this is the second time in one generation that we have been the victims of genocide by the Georgians; in that way our demand for independence should not be seen as idealism but as pragmatism." From a conversation with Ludwig Chibirov, July 1995, quoted in Dennis Sammut "*Background to the Georgia-Ossetia conflict and future prospects for Georgian-Russian relations*," LINKS reports, 11 August 2008 (www.links-london.org).

[20] Barbara A Andersen and Brian D. Silver, *Equality, Efficiency and Politics in Soviet Bilingual Education Policy 1934-1980*, The American Political Science review, Vol 78, Issue 4, 1984 pp 1019-1039.

[21] The Republic of South Ossetia (Documents, Chronicles, Concise Historical Information), Tskhinval, Yuznaya Alania, 2007, p.54.

South Ossetia breaks away[22]

At the end of the 1980s, with the weakening of the Soviet Union, the question of unity with North Ossetia was posed once again, and in a more determined fashion, by South Ossetian leaders. In 1988 the Ossetian nationalist movement *Ademon Nykhas* (Popular Shrine) was founded (a similar movement was created in Abkhazia the same year). On 10 November 1989 the Regional Soviet (Council) of South Ossetia demanded that the Supreme Soviet of Georgia change the status of the Autonomous Region of South Ossetia to that of an Autonomous Republic within Georgia, which the Supreme Soviet of Georgia refused. On 23 November 1989, nationalist leader Zviad Gamsakhurdia organised a rally of about 20 000 – 30 000 Georgians in Tskhinvali in order "to protect the Georgian population"[23] in South Ossetia. The forces of the USSR Ministry of the Interior prevented the demonstrators from reaching the South Ossetian capital but there were violent skirmishes between the Georgian and Ossetian demonstrators.

Meanwhile, Georgia was preparing for its multiparty elections, and in August 1990 a law was approved by which only parties operating throughout the whole of Georgia were allowed to stand for election. South Ossetia's Regional Soviet, seeing in this bill a trap designed to exclude their movement *Ademon Nykhas* from the elections, responded, on 20 September 1990, by adopting a resolution declaring South Ossetia's sovereignty as a Soviet Democratic Republic within the USSR.

Gamsakhurdia's previous diatribes against the Ossetians for being "ungrateful guests" of Georgia was now turned into a constitutional policy. On 11 December 1990 the Georgian Parliament, under President Zviad Gamsakhurdia, whose coalition had won the elections on 28 October 1990, abolished the autonomy of South Ossetia. In the same month Georgia set up a blockade of the territory that would last until June 1992. By that time, the Georgian and Ossetian paramilitary forces had fought fiercely, committing violence and atrocities against the civilian population. In April 1991 Soviet units were sent into South Ossetia, but the fighting between Georgian and Ossetian militias continued. This was even the case after Zviad Gamsakhurdia was ousted from power in January 1992 by a *coup d'état*, and Eduard

[22] South Ossetian perspectives on their history and justification of their claim to independence are to be found on the official website of the Tskhinvali authorities http://cominf.org/english/ (accessed on 9 February 2009). There is also a special website accusing the Georgian authorities of a systematic policy of genocide of South Ossetia: http://osgenocide.ru/ (accessed on 9 February 2009).

[23] S. Serrano, "*Géorgie. Sortie d'empire,*" Paris: CNRS Editions, 2007, p. 10.

Shevardnadze returned from Moscow to Georgia in March 1992, at the invitation of the coup leaders.

In the USSR referendum of 17 March 1991, the South Ossetian population of the region (like the non-Georgian population in Abkhazia) reportedly voted in favour of the preservation of the Soviet Union,[24] while on 31 March 1991 Georgia held a separate referendum on its own independence. On 19 January 1992, immediately after the disintegration of the Soviet Union, the South Ossetians participated in another referendum where the vast majority of voters declared themselves in favour of independence from Georgia and unification with Russia.[25] The Georgian Government refused to recognise the referendum, viewing it as illegal. Following the result of the referendum of 19 January, the South Ossetian *de facto* Parliament "solemnly proclaimed the independence of South Ossetia"[26] from Georgia on 29 May 1992. The "Parliament of the South Ossetian Republic" appealed to Russia several times, demanding that it should recognise the independence of the country and/or accept it into the Russian Federation, but Russia refused to accede to this request.

On 24 June 1992, at a meeting between Presidents Boris Yeltsin and Eduard Shevardnadze and the representatives of North and South Ossetia, a ceasefire agreement was signed and a peacekeeping force, composed of Russian, Georgian and Ossetian units, was set up.[27]

[24] The exact results of the 1991 referendum in South Ossetia have never been published and the Soviet Central Commission for the Referendum did not include South Ossetia into its official Communiqué on the outcome of the referendum.

[25] A Political and Legal Assessment of the 1989-1992 Developments, Resolution of the Parliament of the Republic of South Ossetia, Tshhinval, 26 April 2006.

[26] "Declaration of Independence of the Republic of South Ossetia – May 29th 1992," in: Tamaz Diasamidze… *op. cit.*, p. 120.

[27] The 1992 Sochi Agreement "on principles of settlement of the Georgian-Ossetian conflict" between The Republic of Georgia and the Russian Federation signed by Edward Shevardnadze and Boris Yeltsin on 24 June 1992. Newspaper "Svobodnya Gruzia" issue 82, 27 June 1992; informal English translation available on www.rrc.ge

Abkhazia breaks away[28]

The Abkhaz national movement *Aidgylara* (Unity) was founded in 1988. On 18 March 1989, in a mass gathering at the village of Lykhny, more than 30'000 people demanded the restoration of the legal status that Abkhazia had had in 1921, as a Union Republic.

On 14 May 1989, the authorities in Tbilisi decided to turn the Georgian section of the Abkhaz State University into a branch of the State University of Tbilisi in Sukhumi. The creation of a separate branch of a Georgian university was perceived by the Abkhaz as an attempt to undermine their educational system and a way to replace "practical, reasonable and peaceful dialogue with wretched tricks."[29] This gave rise to Abkhaz protest demonstrations which in July 1989 led to violent clashes in Sukhumi and Ochamchira, in which several persons died and many were wounded.

On 25 August 1990 the Abkhaz Supreme Soviet adopted the "Declaration of the State Sovereignty of the Abkhaz Soviet Socialist Republic," in the absence of the Georgian deputies.[30] The purely declaratory nature of the document did not alter the political status of Abkhazia,[31] but it did demonstrate the Abkhaz aspiration for Abkhazia to be regarded as a sovereign republic, which could conclude a new agreement on state/legal relations with Georgia. The following day the Presidium of the Georgian Supreme Soviet declared that decision null and void. On 17 March 1991 a referendum on the preservation of the Soviet Union was boycotted by the Georgian population, including in Abkhazia. But a large majority

[28] Darrell Slider, 'Georgia', in Glenn Eldon Curtis (ed.), *Armenia, Azerbaijan and Georgia: Country Studies* (Washington, DC, Library of Congress,1995),149-230; Jürgen Gerber¸ *Georgien*: *Nationale Opposition und kommunistische Herrschaft seit 1956* (Baden-Baden, Nomos Verlag, I997); Naira Gelaschwili, *Georgien*: *Ein Paradies in Trümmern* (Berlin, Aufbau Taschenbuch Verlag, I993); Svetlana Chervonnaya, *Conflict in the Caucasus: Georgia, Abkhazia and the Rusian Shadow* (London, Gothic Image, 1994); Jonathan Cohen (ed), *A Question of Sovereignty: The Georgia-Abkhazia Peace Process*, Accord: An International Review of Peace Initiatives, 7 (1999); For an Abkhaz view of the history of Georgian–Abkhaz relations see Stanislav Lakoba, *Ocherki politicheskoi istorii Abkhazii* (Sukhum, Alashara, 1990), and *Abkhazia. Posle dvukh okkupatsii*, (Gagra, Assotsiatsiya 'Intelligentsia Abkhazii', 1994).

[29] "Decree issued by the Presidium of the Supreme Council of the Abkhaz ASSR on the substantive exacerbation of the inter ethnic relations in the Abkhaz ASSR because of the unlawful attempt to establish a Sukhumi branch of the Tbilisi State University – July 15th 1989," in: Tamaz Diasamidze… *op. cit*., p. 3.

[30] The Declaration was denounced the day after by the Georgian Supreme Soviet, and resulted in numerous protest rallies and the blockade of the railway in Sukhumi. A week later, the deputies who were absent during the vote of the declaration met and rescinded it. Chumalov, *op. cit*. pp. 218-19.

[31] Indeed, the Supreme Council of Abkhazia decreed that "before the resolution of this issue by the Supreme Council of the USSR and concluding the new union treaties, the current state-legal relations between Georgia and Abkhazia shall remain in force." "Decree issued by the Supreme Council of the Abkhaz SSR on Legal Guarantees of Protection of the Statehood of Abkhazia" in: Tamaz Diasamidze… *op. cit*., pp.29-31. Such declarations of sovereignty were far from extraordinary at that time: 28 other entities, including autonomous republics, autonomous oblasts, Transdniestria, Crimea and Gagauzia declared their sovereignty from December 1989 to September 1991. Walker Edward W., *Dissolution. Sovereignty and the Breakup of the Soviet Union*, Lanham, Rowman and Littlefield Publishers, 2003, p.96.

of Abkhazia's non-Georgian population (like in South Ossetia) participated in the referendum (52% of eligible voters), and 99% of them voted in favour.[32] This meant that the war of laws had escalated to the question of a separation of Abkhazia from Georgia.

2. Peace efforts in Abkhazia

Escalation of tension in 1991 - 1992. The electoral law and power-sharing agreement

Negotiations between Tbilisi and Sukhumi aimed at resolving the growing tension in Abkhazia, largely over its political status, started already in 1991, that is before the formal dissolution of the weakening Soviet Union. The idea was to discuss the redistribution of power there. The first proposal put forward in March 1991 by the Abkhaz national forum, *Aidgylara* (Unity), concerned the reorganisation of the local Supreme Council (Soviet). It provided for the creation of a two-chamber parliament in Abkhazia, consisting of a Republican Council, based on the principle of equality of citizens' rights and formed along territorial lines on the one hand, and a Nationality Council, based on the principle of equality of nations' rights and formed along nationality lines, on the other.[33] The proposal was turned down by Georgian President Zviad Gamsakhurdia, who seemed to fear that the Abkhaz would enjoy a right of veto in the Nationality Council and that this model could set a precedent for other nationalities in Georgia.[34]

Eventually, in July 1991, the two parties came back to a Soviet-type quota-based solution. For every district, the number of Abkhaz, Georgians and other national candidates to be elected had to be fixed by law. Twenty-eight seats were allocated to the Abkhaz, 26 to the Georgians and 11 to the remaining nationalities. Additional talks were held in the Georgian-Abkhaz Consent Commission (*soglasovatelnyi komitet*) to negotiate the parliament's procedure and the distribution of political mandates to the different nationalities. The Commission allocated the chairmanship of the Supreme Council to the Abkhaz and the vice-chairmanship to the Georgians, and vice-versa for the positions in the Council of Ministers.[35] If one takes into

[32] Information of the Central State [Election] Commission of the Abkhaz ASSR. In: Tamaz Diasamidze… *op. cit.*, p. 54.

[33] Hewitt George B., "Abkhazia: a problem of identity and ownership," *Central Asia Survey*, 12(3), 1993, p.321.

[34] Interviews in Sukhumi on 6/11/07 and 05/05/08.

[35] Similarly, the Ministers, Chairmen of State Committees and other agencies under the jurisdiction of the Council of Ministers were to be appointed by two thirds of the votes, meaning that the Georgians and the Abkhaz had to agree on every appointment. "Temporary Law of the Abkhaz ASSR on Rules of Election and Appointment of Officials by the Supreme Council of the Abkhaz ASSR," 27 August 1991, in: Tamaz Diasamidze… *op. cit.*, pp. 71-72.

account the fact that before this reform the chairmanship of the Supreme Council already used to fall to an Abkhaz, that the Abkhaz already had more seats than the Georgians in the Supreme Council and that the last head of the Council of Ministers was Georgian, the agreements did not fundamentally change the balance of power. But the reforms had two advantages: they protected the Abkhaz against a removal of the quotas, and the Georgians against undesired constitutional changes. Indeed, according to the new law on amendments to the constitution, a two-thirds majority was necessary both to put constitutional issues on the agenda, and then to pass laws.[36] If enforced, this law would ensure that no unilateral change could be made without approval of the other nationality, which would probably not have been the case if the older law were in force.

President Gamsakhurdia may have thought that by reaching a compromise solution, and satisfying some of the Abkhaz grievances, Tbilisi would relieve the existing political tension in Abkhazia and prevent another open conflict from breaking out in Georgia (in addition to the one in South Ossetia). The problem was, however, that this compromise did not fully satisfy the aspirations of either the Abkhaz or the Georgian community (who frequently described the agreement as an "apartheid law"). Additionally, after the elections held on 25 September 1991, the group of 11 deputies to the local legislature who represented other nationalities split. Seven of them joined the Abkhaz faction and four – the Georgian, thus constituting a 35-member pro-Abkhaz majority in the 65-seat Supreme Council. According to the Georgian side, on certain occasions this majority adopted constitutional laws in contravention of the requirement for a two-thirds majority, stipulated in the new law on changes to the Constitution.[37] This led to new controversies.

In May 1992 (i.e. after the *coup d'état* in Tbilisi, which saw President Gamsakhurdia ousted from power and the election of Eduard Shevardnadze as Chairman of Georgia's newly established State Council in March), the disgruntled Georgian representatives left the local Supreme Council and the Government to establish parallel power structures. Two months later, the pro-Abkhaz deputies replaced the 1978 Constitution with a 1925 draft Constitution

[36] "Law of the Abkhaz ASSR on changes to the law of the Abkhaz ASSR on Public Referendum in the Abkhaz ASSR," 27 August 1991, in: Tamaz Diasamidze… *op. cit.*, p.71.

[37] For example, on 23 July 1992, without the two-thirds majority required to make constitutional changes, the pro-Abkhaz deputies replaced the 1978 Constitution with a 1925 draft Constitution and proposed to work on a new Union treaty between Abkhazia and Georgia. They entrusted the Presidium to bring proposals to the session of the Supreme Council to "restore inter-state relations between Abkhazia and Georgia. [See: Tamaz Diasamidze… *op. cit.*, p.131].

and proposed that a new union treaty between Abkhazia and Georgia should be worked out.[38] The Georgian-Abkhaz talks on the status issue brought no tangible results. However, all these developments further contributed to the rise of tension in Abkhazia. The entry of Georgian troops into the territory of Abkhazia on 14 August 1992 disrupted political contacts between the two parties for quite some time.

The Outbreak of Armed Conflict and Peace Efforts up to 2008

The entry of the Georgian troops into Abkhazia on 14 August 1992, officially with the task of protecting the railway linking Russia with Armenia and Azerbaijan through Georgia's territory, resulted in armed hostilities. They lasted, with several short-lived armistices, until 14 May 1994. [39]

In August 1992 the Georgian forces managed to establish their control over the eastern and western parts of Abkhazia (with the exception of the town of Tkvarcheli in the east), while the pro-Abkhaz formations controlled the central part (between the Rivers Gumista and Bzib, and including the town of Gudauta).

A first serious international attempt to negotiate a peaceful settlement in Abkhazia was made by the then President of the Russian Federation, Boris Yeltsin. This effort resulted in the peace agreement of 3 September 1992.[40] In addition to the Georgian, Abkhaz and Russian leaders, the agreement was signed by leaders of the North Caucasus republics of the Russian Federation. It provided, *inter alia*, for a ceasefire, the withdrawal from Abkhazia of illegal armed groups, and the reduction of Georgian forces to "the level necessary to fulfil the tasks of the agreement" (the protection of the railway and other installations). More significantly, the agreement included the only explicit recognition the Abkhaz side has ever given of Georgia's territorial integrity, and it appealed to the United Nations and the OSCE to contribute to the peace efforts in the area. A first UN peace mission visited the region already in mid-September 1992.[41]

[38] Decree issued by the Supreme Council of Abkhazia on Decree issued by the State council of Georgia "on Regulation of Problems on Formation and Operation of the Border zone of the Republic of Georgia," 3 June 1992, in: Tamaz Diasamidze… *op. cit*., p.101.

[39] About the war see: Jurij Anchabadze, History: the modern period and Dodge Billingsley, Military aspects of the war: the turning point. In G. Hewitt… *op. cit.*, pp. 132-146 and 147-156.

[40] Final document of the Moscow Meeting, in: Tamaz Diasamidze… *op. cit.*, pp. 132-133.

[41] Report of a UNPO Mission to Abkhazia, Georgia and the Northern Caucasus. November 1992. http://www.unpo.org/downloads/AbkGeo1992Report.pdf; accessed on 24.08.2009.

The ceasefire called under the 3 September 1992 Agreement did not last long, however, and in early October the pro-Abkhaz forces – supported by volunteers from the North Caucasus and other parts of the Russian Federation – launched an offensive across the Bzib River and seized the whole of the western part of Abkhazia, including the town of Gagra, up to the Georgian-Russian border along the Psou River. Many analysts regard the Abkhaz military success in October 1992 as being of strategic importance, since it allowed the Abkhaz side to overcome its inconvenient "sandwiched" position, encircled by the Georgian-controlled areas, and to secure direct, unhindered land communication with the Russian Federation.

The United Nations reacted to the large-scale hostilities of October 1992 by dispatching another high-ranking mission to Georgia and by establishing a UN "initial presence" in the area. The UN role in peace efforts in the region was further upgraded in May 1993 when the UN Secretary-General appointed his Special Envoy to Georgia. His tasks were to reach an agreement on the implementation of a ceasefire, assist the parties in reviving negotiations, and enlist the support of third countries in achieving those objectives in coordination with the Chairman-in-Office of the CSCE.[42]

In the meantime, hostilities in Abkhazia continued, with particularly heavy fighting in and around Sukhumi, Tkvarcheli, Tamysh and along the Gumista River in March and July 1993. Only on 27 July 1993, the Russian mediation produced another ceasefire agreement (the so-called Sochi Agreement).[43] It also provided for the gradual demilitarisation of the conflict zone on both sides of the ceasefire line (basically following the course of the Gumista River); the return of refugees/IDPs; the establishment of monitoring groups and a joint commission for a peace settlement, composed of Georgian, Abkhaz and Russian and, if agreed upon, UN and OSCE representatives; the protection of the railway by special Georgian and Abkhaz forces; the deployment of international observers and a peacekeepers, and a Russian military contingent to maintain the ceasefire. It also provided for negotiations for the purpose of reaching an agreement on a comprehensive settlement of the conflict, under the aegis of the UN and with the assistance of the Russian Federation as facilitator.[44]

[42] Repertoire of the Practice of the Security Council 1993-95, Chapter 8: Situation in Georgia, available at: http://www.un.org/french/docs/cs/repertoire/93-95/93-95_chap08table.htm, accessed May 2009, p.4. Also: Hewitt George, Abkhazia: a problem… *op. cit.*

[43] Agreement on ceasefire and the mechanisms of its implementation in Abkhazia, in: Tamaz Diasamidze… *op. cit.*, p. 154.

[44] *Ibid.*

Following the Sochi Agreement the UN Security Council, in Resolution 858 of 24 August 1993, established a United Nations Observer Mission in Georgia (UNOMIG) comprising up to 88 military observers, with support staff, in order to verify compliance with the Agreement. The first small group of UN observers arrived in the conflict zone at the end of August 1993.[45]

After Georgian heavy weapons had been removed from the conflict zone in accordance with the Sochi Agreement, the pro-Abkhaz forces broke the ceasefire and on 16 September 1993 launched a massive attack on Sukhumi and a number of other locations on the Georgian side of the ceasefire line. Simultaneously, supporters of ousted President Zviad Gamsakhurdia renewed the insurrection in the province of Mingrelia (in the western part of Georgia, bordering on Abkhazia)[46], thus entrapping the government troops between two lines of fire. They were defeated within two weeks, and most of the territory of Abkhazia was seized by pro-Abkhaz forces. The only exception was the Kodori Valley, where fighting continued until spring 1994, when the next ceasefire was agreed upon in the Declaration on Measures for a Political Settlement of the Georgian-Abkhaz conflict of 4 April 1994 and, later formalised in the Agreement on a Ceasefire and Separation of Forces of 14 May 1994. Both documents were signed in Moscow under Russian and UN mediation.[47]

The Moscow Agreement provided, *inter alia*, for a ceasefire, and the deployment of international observers and a peacekeeping force of the Commonwealth of Independent States (CIS PKF). The separation of forces was reinforced by the establishment of Security Zones and Restricted Weapons Zones on both sides of the ceasefire line, which at that time basically went along the Inguri River, coinciding with the Georgian-Abkhaz administrative boundary.

Under the Moscow Agreement, the CIS PKF - in practice an entirely Russian force - was deployed in the conflict zone in June 1994. This deployment was *post factum* endorsed by the UN Security Council, while a few Member States raised doubts about the suitability of entrusting such a role to a neighbouring power with its own vital interests in the area.

[45] http://www.un.org/Depts/dpko/missions/unomig/background.html; accessed on 24.08.2009.

[46] George Khutsishvili, Intervention in Transcaucasus. "Perspective", vol. IV Nr 3 (February/March 1994), http://www.bu.edu/iscip/vol4/Khutsishvili.html; accessed on 24.08.2009.

[47] Quadripartite agreement on voluntary return of refugees and displaced persons, in Tamaz Diasamidze… *op. cit.*, pp. 172-174; Declaration on measures for a political settlement of the Georgian-Abkhaz conflict, in Tamaz Diasamidze… *op. cit.*, p. 175; Agreement on a ceasefire and separation of forces. in Tamaz Diasamidze… *op. cit.*, pp. 179-181.

The UN Security Council, in Resolution 937 of 21 July 1994, also extended UNOMIG's mandate and expanded it to 136 military observers with appropriate civilian support staff.[48] The above developments were followed by an agreement between the UN Secretary-General, Mr Boutros-Boutros Ghali, and the Chairman of the Council of Heads of State of the CIS, President Boris Yeltsin, on cooperation between UNOMIG and CIS PKF.[49]

The above arrangements reinforced the observation of the ceasefire and laid the foundations for a peace process. The 1992 - 1994 conflict in Abkhazia, however, with the involvement of North Caucasian and Russian volunteers, and the Georgian defeat, caused thousands of casualties on both sides and deepened the existing animosities. Some 300 000 people[50], including almost the entire Georgian population of about 250 000, had to flee from Abkhazia.[51] For the Georgians this was a time of national tragedy. The population displaced from Abkhazia took over hotels, schools and virtually all empty buildings in Tbilisi. Georgia, already reeling from the events of the previous five years, plunged further into chaos and frustration.

One of most controversial and diversely interpreted subjects concerning the 1992 - 1994 Georgian-Abkhaz armed conflict and its aftermath was Russia's role in the conflict and the responsibility for it. There is agreement among Georgian, Abkhaz and Russian scholars on the inconsistent nature of Russia's involvement. It is widely believed that the political crisis in Moscow – leading to the forcible dissolution of the Parliament by President Yeltsin in October 1993 – ruled out any well-designed, balanced intervention by Russia at its southern border.[52]

It seemed that significant elements of the Russian political establishment wanted to uphold the principle of territorial integrity of new post-Soviet states, including those in the Caucasus, but this was not a consensual view, and particularly not the main concern of the Russian military or the local commanders stationed in Abkhazia, who actively supported the Abkhaz

[48] http://daccessdds.un.org/doc/UNDOC/GEN/N94/298/25/PDF/N9429825.pdf?OpenElement; accessed on 24.08.2009.

[49] http://untreaty.un.org/unts/120001_144071/9/3/00006986.pdf; accessed on 24.08.2009.

[50] http://daccessdds.un.org/doc/UNDOC/GEN/N94/055/27/PDF/N9405527.pdf?OpenElement; accessed on 24.08.2009.

[51] "Resolution 896 (1994) adopted by the UN Security Council – January 31st 1994," in: Tamaz Diasamidze…*op. cit*., pp. 168-169.

[52] Bruno Coppieters, Locating Georgian Security. In Bruno Coppieteres, Robert Legvold (ed.), Statehood and Security, Georgia after the Rose Revolution. The MIT Press, Cambridge, London 2005, p. 373.

side.[53] Divisions between the various factions within the Russian Government further explain why at some points both sides, Georgians and Abkhaz, were receiving substantial Russian support.

Russia's precise role in the 1992 - 1994 armed conflict in Abkhazia is still not easy to judge, but Russian support for the Abkhaz side at some crucial moments undoubtedly created a major obstacle to the establishment of friendly relations between Moscow and Tbilisi. Georgian public opinion has even ascribed to Russia the main responsibility for the conflict in Abkhazia, and also for its own military defeat.

International efforts to mediate between the two parties to the conflict continued practically unabated, both during the above-mentioned period of armed confrontation in Abkhazia and afterwards. Many of these efforts were made under the aegis of the United Nations. The Group of Friends of Georgia, created in December 1993[54] and comprising France, Germany, the Russian Federation, United Kingdom and United States, supported the UN peace efforts. This was particularly the case after July 1997, when the group was formally included in the UN-sponsored Georgian-Abkhaz peace process and in this connection it was renamed as the Group of Friends of the UN Secretary-General.[55]

An important and in many respects crucial role was played by the Russian Federation, in its capacity as a facilitator of the UN-sponsored peace efforts, as a member of the Group of Friends, and independently (with varying degree of coordination or consultation with the UN).

Direct Georgian-Abkhaz contacts constituted a third channel for peace efforts. A positive role in this regard was played by the Bilateral Georgian-Abkhaz Coordination Commission for Practical Issues, set up in August 1997.[56]

These three channels of communication and discussion fora were generally complementary though there was a certain amount of competition between their respective activities.

[53] Alexei Zverev, Ethnic Conflicts in the Caucasus 1988-1994. Contested Borders in the Caucasus. VUBPRESS Brussels 1996, pp. 51 and next.

[54] http://www.state.gov/r/pa/ei/bgn/5253.htm; accessed on 25.09.2009.

[55] http://www.un.org/News/Press/docs/1997/19970731.SC6405.html; accessed on 25.08.2009. See also: Susan Stewart, The Role of the United Nations in the Georgian-Abkhazian Conflict. http://www.ecmi.de/jemie/download/Stewart_SC_final.pdf; accessed on 25.08.2009.

[56] *Ibid.* Also: Annex to the Program of Action on Confidence-building between the Georgian and Abkhaz Sides, http://www.rrc.ge/law/oqm_2001_03_15_e.htm?lawid=1455&lng_3=en; accessed on 25.08.2009.

Diplomatic initiatives by individual states further complemented the overall peace efforts in the region; first among these were Germany, France, Great Britain and the United States.

In addition to official channels, the following also took a meaningful, though only supportive role in the overall peace efforts in the context of the Georgian-Abkhaz conflict: international and local non-governmental organisations (NGOs), research centres, universities as well as specialised press and publications. This second-track diplomacy could be regarded as an important and even indispensable component, particularly in confidence-building and in articulating ideas from academic circles, but also in reflecting grass-roots sentiment, visions and aspirations. In this context, also to be mentioned were the contributions made by the so-called Schlaining process, launched by the British NGO Conciliation Resources[57] and the Berghof Center for Constructive Conflict Management[58], as well as by the Free University of Brussels[59] and the University of California, Irvine[60]. Many of these peace-oriented activities were materially supported by the Friedrich Ebert[61] and the Heinrich Böll[62] Foundations. The *Abkhaskiy Meridian*[63], an independent monthly published in Tbilisi but available also in Sukhumi, could be mentioned as one of the most important and brightest regular publications, generating interesting ideas and contributing to the peace efforts and Georgian-Abkhaz reconciliation. On the Abkhaz side, the *Nuzhnaya Gazeta*[64], *Ekho Abkazii*[65] and *Chegemskaya Pravda*[66] newspapers occasionally played similar roles.

These peace efforts were aimed not only at a cessation of hostilities, and later at the prevention of their resumption but, first and foremost, at reaching a comprehensive settlement of the conflict. Such a settlement should include agreements on the political status of Abkhazia, the return of refugees/IDPs, security issues and economic reconstruction. As far as international peace activities in the context of the conflict in Abkhazia are concerned, they

[57] http://www.c-r.org/our-work/caucasus/schlaining.php

[58] http://www.berghof-center.org/std_page.php?LANG=e&id=13

[59] http://poli.vub.ac.be/

[60] http://www.uci.edu/

[61] http://www.fes.de/

[62] http://www.boell.de/service/home.html

[63] Published with support of Friedrich Ebert Foundation and the Embassy of Switzerland in Tbilisi. At: http://www.fes.ge/index.php?option=com_content&view=category&layout=blog&id=35&Itemid=13; accessed on 25.08.2009.

[64] http://www.abkhazianews.narod.ru/news_Digest1_NG.htm; accessed on 25.08.2009.

[65] http://www.era-abkhazia.org/news/smi/eho.php

[66] http://era-abkhazia.org/news/smi/true.php

underwent a certain evolution and remained distinguishable for certain periods of time, at least in terms of negotiating strategies and tactics.

In general, it could be said that until mid-1997 peace efforts concentrated mainly on the political status of Abkhazia and the return of refugees/IDPs. The status question was always regarded as key to a future comprehensive peaceful settlement in Abkhazia, though it proved to be a very complex and challenging task. Nor was the return of refugees/IDPs a simple issue. In addition to its obvious humanitarian and economic dimensions, it had strong political and security aspects, since the return of Georgian refugees/IDPs *en masse* to Abkhazia would again seriously alter its ethnic composition and, eventually, its power structure, thus challenging the Abkhaz aspirations for a leading role in the territory. These two issues, however, were largely interconnected and therefore, during that period, they were frequently negotiated *de facto* in one package. It was no coincidence that important framework documents on these two matters were adopted together on 4 April 1994 in Moscow, namely, a Declaration on Measures for a Political Settlement of the Georgian-Abkhaz Conflict and a Quadripartite Agreement on the Voluntary Return of Refugees.

Regrettably, the strenuous efforts in this regard by both the United Nations and the Russian Federation failed to bring a breakthrough. Only a few more than 300 Georgian refugees/IDPs returned to Abkhazia in 1994 - 1995 in accordance with the Quadripartite Agreement.[67] Further orderly UNHCR-sponsored return of refugees/IDPs was largely hampered by the prevailing insecurity in the area, the undefined political status of Abkhazia and the unresolved Georgian-Abkhaz dispute over the pace of the return. At that time, the Abkhaz side was ready to consider the repatriation of up to 200 people a week (i.e. 800 a month)[68], while the Georgians regarded this figure as too modest[69], arguing that at such a pace the whole return process for some 250 000 Georgian refugees/IDPs, if continued, would take at least 25 years, a time span hardly acceptable to their public opinion or, in particular, to the destitute refugee/IDP community.

In the meantime, there was a gradual process of spontaneous return to the Gali district of Abkhazia (which before the 1992 - 1994 armed conflict had been predominantly a Georgian-

[67] http://daccessdds.un.org/doc/UNDOC/GEN/N95/003/95/IMG/N9500395.pdf?OpenElement; accessed on 25.08.2009.

[68] http://daccessdds.un.org/doc/UNDOC/GEN/N95/130/12/IMG/N9513012.pdf?OpenElement and http://daccessdds.un.org/doc/UNDOC/GEN/N95/231/93/IMG/N9523193.pdf?OpenElement; accessed on 25.08.2009.

[69] http://daccessdds.un.org/doc/UNDOC/GEN/N95/231/93/IMG/N9523193.pdf?OpenElement; accessed on 25.09.2009.

populated area) .[70] Spontaneous return later turned out to be the only kind possible and, therefore, could be regarded as more effective (in the year 2000, the returnee population in the Gali district was estimated at 40 000, i.e. about half of those who had lived there prior to the 1992 - 1994 conflict).[71] Nevertheless, it also suffered from serious problems, such as lawlessness and insecurity, lack of a clear legal status, difficulties with teaching children in their native Georgian language, etc., and other setbacks (as a result of the renewed hostilities in May 1998, and the destruction of houses, some 30'000 – 40'000 returnees left the Gali district for the Georgian side of the ceasefire line for a second time). (See Chapter 7 "International Humanitarian Law and Human Rights Law").

The issue of the status of Abkhazia proved to be even more difficult when it came to finding a mutually acceptable solution. In general, the Georgian side was ready to offer and discuss a great degree of autonomy for Abkhazia within the state of Georgia (a federal arrangement), while the Abkhaz insisted on a model of confederation, which would put both entities (Georgia and Abkhazia) on an equal footing in terms of international law, and give both of them a right to secession.[72] (See Chapter 3 "Related Legal Issues").

In the years 1993 - 1997, there were a number of initiatives, contributed largely by Russian diplomacy, aimed at reconciling these two different approaches. Draft concepts of a "union state," a "common state" and suchlike were put on the negotiating table. On two different occasions, in 1995[73] and 1997[74], the parties even accepted the respective draft agreements at a working level, but subsequently either one side or the other (in July 1995 the Abkhaz and in June-August 1997 the Georgians) changed its mind and withdrew its earlier consent. One of the most difficult issues for the parties proved to be not only the very concept of a future arrangement (federation or confederation) or its denomination, but also or mainly the right to secession. The Abkhaz insisted on such a right, arguing that it would constitute the most viable guarantee that their rights and positions within the agreed state arrangement would not be disregarded in the future. The Georgians, on the contrary, seemed to see serious potential

[70] *Ibid*.

[71] http://www.unhcr.org/3e2c05c37.html; accessed on 25.08.2009.

[72] Wojciech Górecki, Abchaskie elity wobec niepodleg'o$ci (The Abkhaz elites towards the independence), Studia i Materia'y nr 103, Polski Instytut Spraw Mi#dzynarodowych (The Polish Institute of International Affairs), Warszawa 1996.

[73] Protocol on Georgian-Abkhaz conflict settlement (draft), in Tamaz Diasamidze… *op. cit.*, p. 230-231.

[74] Georgian, Abkhaz Presidents Agree to Talks. Radio Free Europe / Radio Liberty (RFERL) Newsline 5.08.1997, http://www.rferl.org/content/article/1141465.html, accessed on 25.08.2009.

risks to themselves deriving from their acceptance of the right to secession.[75] They argued that such a provision in a future state arrangement might lead to one of the two following and unwanted scenarios: (a) the Abkhaz authorities might misuse such a right, even if unprovoked by the Georgian side, and already in the not-too-distant future might legally separate from Georgia; or (b) Abkhazia might formally remain within a common state structure for some time, but an Abkhaz "sword of Damocles" – separation – would hang over the Georgian "neck" any time Moscow was not fully satisfied with Tbilisi's foreign policy posture.

President Shevardnadze tried to address this dilemma in September 1995 by proposing an extension of the Russian military presence on Georgian territory for an additional 25 years, reportedly in exchange for Moscow's support of Tbilisi's policy of reintegration in the country.[76] Eventually, the level of Moscow's support most probably did not satisfy Tbilisi's expectations, as the Georgian Parliament did not ratify the September 1995 Agreement on the Russian military bases. Instead, Eduard Shevardnadze's government began to demand the withdrawal from Georgia of the four Russian military bases (one of these bases, Bombora, was located in Abkhazia, near the town of Gudauta) as well as Russian border guards. A formal agreement on the commencement of withdrawal of the Russian military bases from Georgia was reached at the OSCE Istanbul Summit in 1999, within the CFE framework.[77]

As for the UN-sponsored Georgian-Abkhaz peace process, in the first half of 1997 the UNSG Special Envoy for Georgia was replaced by the UNSG Special Representative (SRSG), and this change was accompanied by a change in the peace strategy.[78] Aware that the earlier attempts to resolve the status issue had been unsuccessful, the SRSG proposed instead that the parties involved in the peace process should concentrate their efforts on practical issues, namely on the return of refugees/IDPs, the improvement of security conditions along the ceasefire line and economic rehabilitation. The Russian Federation's experience with the negotiation and signing of the Khasavyurt Accord on Chechnya in August 1996, with a five-year postponement of a decision on political status, may also have had some influence on the SRSG's new approach to the Georgian-Abkhaz peace negotiations.

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[75] See e.g.: Ghia Nodia, Georgian perspectives, and Liana Kvarchelia, An Abkhaz perspective, in: A question of sovereignty. The Georgia-Abkhazia peace process. "Accord", September 1999, http://www.c-r.org/our-work/accord/georgia-abkhazia/contents.php; accessed on 25.08.2009.

[76] Agreement signed on 15.09.1995 by President Shevardnadze and Russian Prime Minister Chernomyrdin.

[77] Georgia, Russia Agree on Closure of Two Russian Bases. RFERL Newsline, 22.11.1999, http://www.rferl.org/content/article/1142039.html; accessed on 17.08.2009

[78] http://www.un.org/News/Press/docs/1997/Sc6366.doc.htm; accessed on 25.08.2009 and http://daccessdds.un.org/doc/UNDOC/GEN/N97/198/17/IMG/N9719817.pdf?OpenElement; accessed on 25.08.2009.

Eventually, the SRSG succeeded in reinvigorating the UN's role in the peace process and in establishing a well-developed negotiating mechanism which included high-level plenary meetings in Geneva, periodic sessions of the Coordinating Council alternating in Tbilisi and Sukhumi, and three almost permanently functioning Working Groups dealing with the return of refugees/IDPs, security issues and economic and social issues, respectively. The work of the above mechanism was supposed to be complemented and facilitated by broad-ranging activities aimed at mutual confidence-building, with the participation by grass-root representatives of Georgian and Abkhaz society. Three UN-organised conferences on confidence-building between the Georgian and Abkhaz sides were held – in October 1998 (Athens)[79], June 1999 (Istanbul)[80] and March 2001 (Yalta)[81] – which adopted special documents and programmes. This peace mechanism, later named the first Geneva Process, had added political weight since, from its very inception, the Group of Friends of the UN Secretary-General actively participated in its work (formally with observer status), in addition to the two parties to the conflict, the UN and the OSCE, with the Russian Federation as facilitator.

All the same, the impressive peace mechanism of the Geneva Process in reality produced quite modest results. Confidence-building was negatively affected by the continued anti-Abkhaz (and occasionally anti-Russian) partisan and terrorist activities along the ceasefire line, particularly in the Gali district, since there were strong suspicions that these activities were clandestinely sponsored by some official Georgian agencies.[82]

In January 1996 the CIS Council of Heads of State adopted a document introducing restrictions on contacts and cooperation between the CIS member states (including the Russian Federation) and Abkhazia.[83] These restrictions, though understandable in terms of international law, caused a further deterioration in the already very low living standards in Abkhazia, thus reinforcing the anti-Georgian sentiments still alive since the 1992 - 1994

[79] http://daccessdds.un.org/doc/UNDOC/GEN/N98/307/32/IMG/N9830732.pdf?OpenElement; accessed on 25.08.2009.

[80] http://daccessdds.un.org/doc/UNDOC/GEN/N99/212/47/IMG/N9921247.pdf?OpenElement; accessed on 25.08.2009.

[81] http://daccessdds.un.org/doc/UNDOC/GEN/N01/347/97/IMG/N0134797.pdf?OpenElement; accessed on 25.08.2009.

[82] Besik Kurtanidze, Guerrillas Keep on Fighting. Slavic and East European Collections at UC Berkeley. Army and Society in Georgia. June 1998. http://www.lib.berkeley.edu/doemoff/slavic/pdfs/army698.pdf; accessed on 25.08.2009.

[83] CIS Summit Tightens Screws on Abkhazia. RFERL Newsline 22.01.1996, http://www.rferl.org/content/article/1141092.html; accessed on 25.08.2009.

armed conflict, as it was widely believed that the restrictions were being imposed at Georgia's initiative.

Later, in May 1998, the eruption of active hostilities in the Gali region resulted not only in dozens of deaths but also in the widespread destruction of property (including hundreds of the UNHCR-renovated houses) and in an exodus (estimated at 30'000 – 40'000 people) from the Abkhaz-controlled territory of the majority of Georgians who had spontaneously returned to the other side of the ceasefire line. In certain important domains, therefore, the peace process practically reversed in late spring of 1998. A large proportion of the IDPs, who had fled after the events of May 1998, returned to the Gali region in 1999 with Abkhaz consent, but the overall situation there remained complex for a number of years.[84]

The economic rehabilitation envisaged for the conflict zone was regarded as a serious stimulus to the overall peace efforts and an important element of the Geneva Process. In this context, a UNDP-led Needs Assessment Mission (NAM) visited Abkhazia in February 1998[85] and issued a report with recommendations for an international assistance programme in various economic fields, amounting to almost USD 200 million.[86] The Georgian Government, however, which seemed to regard economic rehabilitation in the Abkhaz-controlled territories as its trump card in the peace negotiations, preferred to discuss such rehabilitation in a package with other issues (status and the return of refugees/IDPs). Under these circumstances – the absence of talks on the status issue and no clear prospects for an orderly return – the Georgian side was in no hurry to give its blessing to the implementation of the NAM's recommendations. The May 1998 events in Gali then had a serious negative, delaying effect on the entire peace process.[87]

One of main lessons drawn by the UN from the experience of 1998 seemed to be that it was very difficult to progress on the peace process and to solve particular problems without addressing the political status. A clear understanding emerged, therefore, that it was necessary to return to discussions on that matter. Bearing in mind, however, that numerous unsuccessful

[84] "The Blood-Dimmed Tide Is Loose ...". RFERL, "Caucasus Report" 13, 26.05.1998, http://www.rferl.org/content/article/1342037.html; accessed on 25.08.2009; http://daccessdds.un.org/doc/UNDOC/GEN/N98/164/04/PDF/N9816404.pdf?OpenElement; accessed on 25.08.2009; http://daccessdds.un.org/doc/UNDOC/GEN/N98/307/32/IMG/N9830732.pdf?OpenElement; accessed on 25.08.2009.

[85] http://daccessdds.un.org/doc/UNDOC/GEN/N98/122/08/IMG/N9812208.pdf?OpenElement; accessed on 25.08.2009.

[86] http://www.unpo.org/content/view/712/236/; accessed on 25.08.2005.

[87] S. Neil MacFarlane, The role of the UN, in: A question of sovereignty… *op. cit.*

attempts to bring the parties to a compromise on that issue had been undertaken in previous years, it was decided that a draft on the most contentious aspects of the status issue should be worked out and proposed to the parties by international actors. As a result, in Resolution 1255 of 30 July 1999 the UN Security Council supported "the intention of the Secretary-General and his Special Representative, in close cooperation with the Russian Federation, in its capacity as facilitator, the OSCE and the Group of Friends of the Secretary-General, to continue to submit proposals for the consideration of the parties on the distribution of constitutional competences between Tbilisi and Sukhumi as part of a comprehensive settlement." [88]

The work initiated by the above UNSC Resolution resulted at the end of 2001 in the adoption by the Group of Friends of the document entitled "Basic Principles for the Distribution of Competences between Tbilisi and Sukhumi," known as the Boden paper after the new SRSG, who took over this function in late 1999.[89] The Boden paper, supported by the UN Security Council[90], considered Abkhazia to be a sovereign entity within the State of Georgia. Consequently, it did not support Sukhumi's position that Abkhazia and Georgia were equal subjects under international law and, subsequently, its claims to the right to secession. It also ruled out the possibility of unilateral changes to a future federal agreement. The further parameters of the distribution of competences between Tbilisi and Sukhumi, within a federal agreement, were left for future negotiations between the two parties. Such an arrangement was supposed to be the subject of international guarantees, with the Russian Federation as one of guarantors.

In theory, if accepted by the parties, the Boden paper could have brought about a breakthrough in the negotiations on the status issue. But even at the time of its adoption, chances that it would play such a role were slim. Anticipating that the expected document would be based on the principles of the relevant UN Security Council resolutions, which clearly supported Georgia's territorial integrity, Sukhumi declared its independence in October 1999[91] and subsequently refused, repeatedly, to receive the Boden paper for

[88] http://daccessdds.un.org/doc/UNDOC/GEN/N99/223/74/PDF/N9922374.pdf?OpenElement; accessed on 25.08.2009.

[89] http://daccessdds.un.org/doc/UNDOC/GEN/N02/220/44/IMG/N0222044.pdf?OpenElement; accessed on 25.08.2009.

[90] http://daccessdds.un.org/doc/UNDOC/GEN/N02/238/65/PDF/N0223865.pdf?OpenElement; accessed on 25.08.2009.

[91] Act on the National Independence of the Republic of Abkhazia, in: Tamaz Diasamidze… *op. cit.*, pp. 351-352.

consideration.[92] In addition, from January 2001 the Abkhaz side virtually suspended its participation in the UN-sponsored Coordinating Council's mechanism, thus seriously weakening the whole peace process.[93] The impasse looming in the peace process contributed to the rising tension in the conflict zone, which culminated in hostilities in the Kodori Valley in October 2001.[94] The October fighting cost the lives of nine UNOMIG staff when the Mission's patrol helicopter was shot down by a ground-to-air missile.[95]

Despite all these odds, serious and largely successful efforts to stabilise the situation on the ground and to reinvigorate the Georgian-Abkhaz peace process were made in the period between mid-2002 and mid-2006 by a new SRSG, actively supported by the Group of Friends. A special pre-emptive security arrangement was put in place for the Kodori Valley (with a high-ranking international military team on stand-by), and the implementation of recommendations put forward in 2002 by the Security Assessment Mission for the Gali region (SAM)[96] gradually helped to improve the overall security situation in the conflict zone. These recommendations included, *inter alia*, the deployment of UN civilian police, international training of local police officers, and economic rehabilitation programmes, implemented mainly by UNOMIG and UNDP and funded largely by the European Commission as well as by other donor countries such as Switzerland, the Netherlands, Finland, Italy, Norway. Confidence-building measures included the UN-sponsored joint study visits by high-ranking representatives of the two sides to Bosnia-Herzegovina, Kosovo, Switzerland and Italy (South Tyrol) as well as the facilitation of the crossing of the ceasefire line by local people through the main Inguri Bridge (in a bus specially provided by UNOMIG).

The greatest achievement of that period, however, was probably the resumption of the official peace dialogue and cooperation between the two parties within the framework of the so-called second Geneva Process commenced in February 2003, with the full and active participation and guidance of the Group of Friends. In addition to regular plenary sessions with the participation of the UN, the Group of Friends and the two parties, this process also included

[92] In early 2006, also the Russian Federation started questioning the usefulness of the Boden paper for the Georgian-Abkhaz peace process, though not its principles, including Georgia's territorial integrity, which Moscow openly put in doubt only in August 2008.

[93] Georgian-Abkhaz Talks Resume under Auspices of UN. RFERL Newsline 16.05.2006, http://www.rferl.org/content/article/1143634.html; accessed on 25.08.2009.

[94] Situation in Abkhazia Remains Tense. RFERL Newsline 29.10.2001, http://www.rferl.org/content/article/1142514.html; accessed on 25.08.2009.

[95] http://daccessdds.un.org/doc/UNDOC/GEN/N01/600/84/PDF/N0160084.pdf?OpenElement; accessed on 25.08.2009.

[96] http://daccessdds.un.org/doc/UNDOC/GEN/N03/318/04/IMG/N0331804.pdf?OpenElement; accessed on 25.08.2009.

activities by three Task Forces dealing with the return of refugees/IDPs, economic rehabilitation and security and political issues.[97] The work of the third Task Force created a forum for the elaboration of concepts going far beyond local security problems, and touching upon issues to do with regional security and the international security guarantees for a future agreement on a comprehensive settlement. The meetings and deliberations on international security guarantees, in turn, created a promising platform for discussions at a later stage on political issues, including status. In 2005 a package of documents on the non-use of force and the return of refugees/IDPs was prepared for signing by the two parties at the highest level.[98] In May 2006 the UN-led Coordinating Council (established in November 1997, but dormant since January 2001) also resumed its work.[99]

The second Geneva Process was complemented by the so-called Sochi Process, agreed between President Eduard Shevardnadze and President Vladimir Putin at their meeting in Sochi in March 2003.[100] This mechanism dealt mainly with the rehabilitation of the railway (going from Sochi in the Russian Federation through Sukhumi and Zugdidi in Georgia to Erevan and Baku, in Armenia and Azerbaijan respectively), cooperation in the energy sector and the return of refugees/IDPs. UN representatives actively participated in most events of the Sochi Process, particularly those relating to the return of refugees/IDPs.[101] The return strategy, prepared jointly with the UNHCR, was aimed *inter alia* at improving legal, security and economic conditions for the returnees, particularly in the Gali district, and identifying and registering those IDPs on the Georgian side of the ceasefire line who were willing to return to their permanent home on the Abkhaz side.[102]

Regretfully, the positive momentum the peace process had gained in the period between mid-2002 and mid-2006 was not fully utilised and kept alive later on. In July 2006, pro-Georgian structures of the so-called Autonomous Republic of Abkhazia in exile moved their headquarters from Tbilisi to the Georgian-administered upper Kodori Valley, which

[97] *Ibid.*

[98] http://daccessdds.un.org/doc/UNDOC/GEN/N06/205/97/PDF/N0620597.pdf?OpenElement; accessed on 25.08.2009.

[99] Georgian-Abkhaz Talks Resume… *op. cit.*

[100] Concluding statement of the meeting between Vladimir Putin – President of the Russian Federation and Eduard Shevardnadze – President of Georgia. 6-7 March 2003, in: Tamaz Diasamidze… *op. cit.*, pp. 459-460.

[101] See e.g. http://daccessdds.un.org/doc/UNDOC/GEN/N04/444/70/PDF/N0444470.pdf?OpenElement; accessed on 25.08.2009.

[102] See e.g. http://daccessdds.un.org/doc/UNDOC/GEN/N05/557/24/PDF/N0555724.pdf?OpenElement; accessed on 25.08.2009.

constituted a part of the former Autonomous Republic of Abkhazia within Georgia. Sukhumi protested at the move and partly suspended its participation in the peace mechanisms.

The Georgian decision to install the alternative pro-Georgian authorities in the upper Kodori Valley was criticised by some analysts who believed that such a step could adversely affect the Georgian-Abkhaz peace process. Other analysts put Tbilisi's move in the context of the ongoing international controversies over the future recognition of Kosovo and Moscow's warnings of its possible recognition of Abkhazia and South Ossetia. In other words, they regarded the installation of the pro-Georgian administration in Kodori as a preventive move aimed at making Russia's recognition of Abkhazia more difficult, and therefore less feasible. Regardless of which of the above two assessments was more correct, it does not seem that the presence of the alternative administration and the Georgian security forces in the upper Kodori Valley really warranted the suspension by the Abkhaz side of its participation in most of the peace mechanisms. They seemed to serve more as a convenient excuse than a valid reason for Sukhumi's decision to considerably limit its participation in the peace process.

The virtual impasse in the peace process after mid-2006 coincided with Tbilisi's demands to alter the existing negotiating format and to replace the Russian-staffed CIS PKF with an international peacekeeping force with police functions.[103] However, after a period of relative calm, the overall situation in the conflict zone began to deteriorate speedily in spring 2008, in both the security and political spheres.[104]

The peace initiatives undertaken by President Mikheil Saakashvili in March[105] and May 2008[106], together with the high-level bilateral Georgian-Abkhaz talks in Sukhumi (May 2008)[107] and Stockholm (June 2008)[108], could be regarded as attempts to stop and reverse the

[103] It was stated by President Mikheil Saakashvili in his address at UN General Assembly on 22.09.2006. See: "Civil Georgia", 22.09.2006, http://www.civil.ge/eng/article.php?id=13622&search=international%20peacekeeping; accessed on 25.08.2009.

[104] Liz Fuller, Analysis: Bluster, Bathos Permeate Georgia's War Of Words Against Russia, Abkhazia. RFERL "Caucasus Report", 15.05.2008, http://www.rferl.org/content/article/1347801.html; accessed on 25.08.2009.

[105] The Georgian initiative of 28 March 2008 included proposals of unlimited autonomy of Abkhazia and wide federalism, supported by international guarantees; broad Abkhaz political representation in the official structures of Georgia, including a new post of Vice-President to be occupied by an Abkhaz; the Abkhaz right to veto legislation and decisions related to the constitutional status of Abkhazia, and to issues related to Abkhaz culture, language and ethnicity; the establishment of jointly controlled free economic zones in the Gali and Ochamchira districts; and the gradual merger of law enforcement and customs services. (UNSG report of 23 July 2008, S/2008/219, para18). The initiative was rejected by the Abkhaz side.

[106] Liz Fuller, Will Abkhazia, Georgia Resume Talks? RFERL "Caucasus Report", 23.05.2008, http://www.rferl.org/content/article/1347803.html; accessed on 25.08.2009.

[107] *Ibid*.

above-mentioned dangerous trend.[109] Visits and peace overtures by a number of Western diplomats to the region in the spring and summer of 2008 seemed to have similar objectives[110], including those of the High Representative for the Common Foreign and Security Policy of the EU, Javier Solana, the US Secretary of State, Condoleezza Rice and the Foreign Minister of Germany, Frank-Walter Steinmeier (July 2008), as did the meeting of the Group of Friends in Berlin (June 2008)[111].

On 23 June 2008, Georgian President Saakashvili sent a letter to Russian President Medvedev with peace proposals on Abkhazia. In the first phase, the Georgian peace initiative envisaged, *inter alia*, the following:

- establishment of a free economic zone in the Gali and Ochamchira districts of Abkhazia, a joint Georgian-Abkhaz administration and joint law enforcement agencies there as well as the return of refugees/IDPs to these two districts;
- withdrawal of the CIS Peacekeeping Force from its then locations and its redeployment along the Kodori River;
- re-opening of the Moscow-Tbilisi-Yerevan railway communications (through Abkhazia);
- re-opening of sea communications between Sukhumi (Abkhazia) and Trabzon (Turkey) and possibly other communication lines;
- a relevant agreement(s) could be the subject of international guarantees, with participation of the Russian Federation.
- An agreement on the non-use of force and the return of refugees/IDPs to other parts of Abkhazia could be concluded at a later stage, among other agreements.[112]

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[108] Secret Abkhaz-Georgian Talks in Sweden. "Civil Georgia", 20.06.2008, http://www.civilgeorgia.ge/eng/article.php?id=18588; accessed on 25.08.2009. Also: Senior MP on Meeting with Abkhaz Officials. "Civil Georgia", 27.06.2008, http://www.civil.ge/eng/article.php?id=18630&search=Stockholm; accessed on 25.08.2009.

[109] Liz Fuller, Analysis: Domestic Pressure On Abkhaz President Intensifies. RFERL "Caucasus Report", 6.06.2008, http://www.rferl.org/content/article/1347815.html; accessed on 25.08.2009.

[110] http://daccessdds.un.org/doc/UNDOC/GEN/N08/427/22/PDF/N0842722.pdf?OpenElement; accessed on 25.08.2009.

[111] Spiegel Reports on Three-Stage Abkhaz Plan. "Civil Georgia", http://www.civil.ge/eng/article.php?id=18708&search=Berlin Friend; accessed on 25.08.2009.

[112] Letter of President Mikheil Saakashvili to President Dmitry Medvedev of 23.06.2008, provided by courtesy of the Georgian authorities to the IIFFMCG.

In his response of 1 July 2008, President Medvedev did not support the Georgian peace initiative in general. Instead, he expressed the opinion that the Abkhaz side should be a main Georgian partner in peace discussions on Abkhazia and that primarily the release of tension and confidence-building between the two parties would lead to the resumption of the Georgian-Abkhaz peace process, disrupted in July 2006. In this context, the Russian President recommended that an agreement be signed between Tbilisi and Sukhumi "on the non-use of force and the withdrawal of Georgian armed forces from the upper Kodori Valley".[113]

In view of the dramatically deteriorating situation in the region and the protracted impasse in the UN-sponsored peace process, in summer 2008 the UN Secretary-General appointed a former high-ranking UN official, to undertake an assessment of the process and to explore the possibility of reviving it.[114] Although sorely needed, this initiative proved to be too late and was unable to prevent the forthcoming crisis.

3. Peace efforts in South Ossetia

General remarks

The Georgian and Ossetian sides have a different and even contradictory political and historical understanding of what constitutes the basis of the conflict between them.

The Georgian position was often articulated in two ways, namely that South Ossetia was a Russian-created problem aimed at dismembering Georgia and maintaining a Russian foothold in the country;[115] and later, especially after 2003, that South Ossetia was a criminal problem – a piece of land run by a criminal clan that was using it for smuggling and other illegal activities – and that South Ossetians would welcome the opportunity to be liberated from this situation.[116]

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[113] Letter of President Dmitry Medvedev to President Mikheil Saakashvili of 01.07.2008, provided by courtesy of the Georgian authorities to the IIFFMCG.

[114] http://www.un.org/apps/news/story.asp?NewsID=27259&Cr=Georgia&Cr1; accessed on 25.08.2009.

[115] In his annual Address to the Nation on 15 March 2007 President Saakashvili said that the terms Georgian-Ossetian and Georgian-Abkhaz conflicts had been "created by silly and unaware people." He went on to say that the Georgian-Ossetian conflict does not exist at all, and is one more fabrication of imperialist ideologists (Civil Georgia, 15 March 2007, Item 14796). Generally for the Georgian position see ! 2(3*. 2, *+ &01/2 (The Ossetian Question), "(' . $, 1$')(., #$3*4 &*-* . #%*-*2* 1994.

[116] The Georgian Parliament stated in its Resolution of 11 October 2005 that "clanish dictatorships have been established on the territories of Abkhazia and the former South Ossetian Autonomous Oblast' aimed at strengthening personal power and obtaining illicit income" (www.rrc.ge/law/dadg_2005_10_11_e.htm). Speaking at a GUAM summit in Baku on 19 June 2007 President Saakashvili said there was no problem in

Although the two views are somewhat contradictory they were occasionally presented to foreigners by Tbilisi as an explanation for the situation of South Ossetia. They also seemed to reflect the approach to the resolution of the conflict taken by the Georgian leadership, especially after November 2003.[117]

On the Ossetian side, the conflict was always presented as an ethnic one, with the Ossetian nation being the aggrieved party. Connecting the events of 1918 - 1921 with those of 1989 - 1992, Ludwig Chibirov, a leader of South Ossetia from 1993 to 2001, said "this is the second time in one generation that we have been the victims of genocide by the Georgians; in that way our demand for independence should not be seen as idealism but as pragmatism."[118] The South Ossetian *de facto* Parliament similarly adopted a resolution in November 2006 asking the international community to recognise the atrocities of 1920 and 1989-1992 as genocide against the Ossetian nation and to recognise Georgia as morally and legally responsible for crimes against humanity.[119]

Over the years the competing narratives had become more acute whenever trust between the sides hit a low point, but became less important when mutual trust improved.

Phase One: Re-establishing Trust (1992 - 1999)

The 24 June 1992 Sochi Agreement on Principles of a Settlement of the Georgian-Ossetian Conflict provided, *inter alia*, for an immediate ceasefire. It also provided for the withdrawal of armed formations from the conflict zone and the establishment of Joint Peacekeeping Forces (JPKF) under the supervision of a Joint Control Commission (JCC) consisting of representatives of the parties to the conflict, the Republic of North Ossetia and the Russian Federation. The Agreement envisaged further talks on the economic rehabilitation of the conflict zone and on the return of refugees/IDPs. It also provided for the freedom of

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relations between the Georgian and the Ossetian peoples, but problems persisted with the Tskhinvali-based authorities, who, as he put it, had a criminal past (Civil Georgia, 19 June 2007).

[117] Criticism of South Ossetia as a haven for criminal activity started emerging in the last years of the Shevardnadze administration. Speaking on Rustavi 2 TV on 2 December 2002, Georgian State Security Minister Valeri Khaburdzania said that Tskhinvali was the centre for the smuggling of stolen cars from Georgia into Russia and that his Ministry had information that the region was to become the new centre for extortion and kidnappings after Pankisi had been cleared. (See BBC Monitoring, 3 December 2002).

[118] From a conversation with Ludwig Chibirov, July 1995, quoted in "Background to the Georgia-Ossetia conflict and future prospects for Georgian-Russian relations," LINKS reports, 11 August 2008 (http://www.links-london.org/documents/ReportontheGeorgiaOssetiaConflictandfutureofGeorgianRussianRelations.pdf; accessed 13.08.2009). For the Ossetian point of view see e.g. #/ + ,) &$, ! ' -#" 0&1) " $ +. , ,) ( ) "3 / . 00) *0+. -%2( ) - 0+) 3 . 1- . 4 &)) (South Ossetia in the clashes of Russian-Georgian relations). oscow 2006.

[119] www.kavkaz-uzel.ru/articles/102862 (in Russian; accessed on 13.08.2009)

movement of the local population and goods.[120] The JPKF was formed a little later and consisted of a Georgian, Russian and Ossetian battalion. The JPKF *modus operandi* was described in another joint paper, adopted in June 1994, and gave a commanding role to the Russian military.[121]

The Sochi Agreement was regarded by many analysts as a success for Georgian leader Shevardnadze, not only because it halted the fighting and created a mechanism for resolving the conflict politically, but also because it meant that the Georgian central authorities could now focus on a larger and potentially more serious problem in Abkhazia, and on stabilising Georgia, still reeling from civil strife.

The Ossetians also clearly needed a breathing space. Problems in the Caucasus after the collapse of the USSR were not confined to the south of the mountain range. Clashes erupted in the Prigorodny region of North Ossetia in the Russian Federation which had a large Ingush population, [122] partly as a result of an Ossetian policy of relocating refugees/IDPs from South Ossetia and other parts of Georgia to that region.

Chechnya declared itself independent in November 1991, and in December 1994 Moscow undertook attempts to reassert their control over the territory by military means. This impacted directly on events in neighbouring North Ossetia.

The mechanisms envisaged by the Sochi Agreement – the JCC and the JPKF – stabilised the situation on the ground in South Ossetia from 1992 onwards, although initial efforts aimed primarily to stop the violence. By 1994 some steps had been taken to address and to solve other core problems of the conflict.

On 31 October 1994 the four-sided Joint Control Commission noted with satisfaction that the JCC had been successful in implementing a number of provisions of the Sochi Agreement. It also agreed that now the implementation of the Agreement "must be transformed into a permanent mechanism that will contribute in a planned and coordinated manner to the solution of different aspects of the settlement of the conflict: political, military

[120] ' . *- +$0' 1&)' (%&0, ') ! "# . 1992. (Diplomatic Herald MFA RF) 13-14. c.31.

[121] http://www.mid.ru/BRP_4.NSF/0/2bd92ad3afa09703c3256ea90022457f?OpenDocument(in Russian; accessed on 13.08.2009).

[122] The Ingush-Ossetian inter-ethnic conflict started in 1989 and developed into a brief ethnic war in autumn 1992 between local Ingush and Ossetian paramilitary units. According to Helsinki Human Rights Watch, a campaign of ethnic cleansing was orchestrated by Ossetian militants during the events of October and November 1992, resulting in the death of more than 600 Ingush civilians and the expulsion of approximately 60 000 Ingush inhabitants from the Prigorodny region.

(peacekeeping), economic, humanitarian and others."[123] One tangible way in which this was done was through a CSCE/OSCE-led effort to open discussions on a constitutional arrangement on the basis on the distribution of powers; however, the discussions on this moved very slowly and were eventually set aside.

Meeting again in Vladikavkaz a year later, on 30 October 1995, the four sides and the OSCE agreed to step up the negotiating process and appointed Experts' Groups in a number of areas, including on the status issue.[124]

On 16 May 1996, under the aegis of the OSCE, the sides agreed on what is perhaps the most optimistic document ever to come out of the conflict resolution process: the Memorandum on Measures of Providing Safety and Strengthening of Mutual Confidence Between the Sides in the Georgian-Ossetian Conflict. In this Memorandum the sides renounced the use force as a means of resolving the conflict, as well as political, economic or any other forms of pressure on one other; granted an amnesty to those who had participated in the 1989 - 1992 hostilities but committed no war crimes; agreed to an investigation of war crimes and envisaged punishment for those found guilty; agreed to the step-by-step removal of checkpoints and a reduction in the number of peacekeeping forces in the conflict zone, and agreed to support civil society initiatives. They also agreed to continue the negotiations aimed at a comprehensive political settlement of the conflict.[125]

This progress in the negotiations enabled three formal meetings to take place between President Eduard Shevardnadze and the South Ossetian leader Ludwig Chibirov between 1996 and 1998.

The statements issued after the meetings noted with satisfaction the emerging positive inroads toward a comprehensive settlement of the conflict (including joint economic projects).[126]

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[123] http://www.caucasica.org/docs/detail.php?ID=1330&PHPSESSID=85ce24d286e083a2941a5edb041f4078 (in Russian; accessed on 13.08.2009).

[124] http://sojcc.ru/soglashenia/165.html (in Russian; accessed on 13.08.2009).

[125] http://sojcc.ru/eng_news/271.html (accessed on 13.08.2009).

[126] http://sojcc.ru/soglashenia/95.html (in Russian; accessed on 13.08.2009). See also: "Statement on the results of the meeting between E. Shevardnadze and L. Chibirov," " #("($' !) *%& " (Svobodnaya Gruziya, Independent Georgia, Georgian newspaper), Issue 210, 15 November 1997 (translation from Russian) and also: "Meeting between E. Shevardnadze and L. Chibirov, " #("($' !) *%& ," Issue 158, 23 June 1998 (translation from Russian).

These three meetings, held over a period of less than two years, showed the progress that had been made not only in mitigating the conflict but in healing the wounds caused by the armed confrontation, but also in laying the foundations for a comprehensive settlement.

Building on the momentum of the three summit meetings, an "Experts' Group consisting of the plenipotentiary delegations of the sides, within the framework of the negotiating process on a comprehensive settlement of the Georgian-Ossetian conflict" met for the first time in Vladikavkaz on 16-17 February 1999.[127] This group was initially seen as being the forum where the principles for a final political solution could be worked out before being submitted for the final approval of the political leaderships of the two sides. Ten meetings of the group took place between 1999 and 2003. The first three were held in the region itself and the fourth meeting, held on 10-13 July 2000, took place in Baden in Austria on the initiative of the Austrian Chairman-in-Office of the OSCE.[128]

The negotiations that followed the 1996 Memorandum proceeded at a time when there was a new sense of optimism in Georgia. They also coincided with what can perhaps be described as Russia's time of greatest closeness to the West since the dissolution of the USSR. Georgian-Russian relations were also developing and personal relations between Presidents Yeltsin and Shevardnadze were good.

Many experts regard the period from 1996 to 1999 as having been particularly conducive to major progress in the peace process. An element of trust had by then been restored, after the 1989 - 1992 conflict; there were elements of a shared vision of how to take the process forward, and there was a good local and international political context in which to operate.

Perhaps the two sides failed to seize the moment, or at least to seize it firmly enough. In any case, the mood began to change significantly in 1999, as can be seen from a statement issued by the South Ossetian side on 24 September 1999. The South Ossetian *de facto* authorities stated that "the settlement of the conflict can never be the internal affair of Georgia, and any declaration to the contrary is likely to disrupt the negotiation process." The statement continued: "… despite the official opinion by Tbilisi about an imminent settlement, the facts point towards a change of attitude by the Georgian party to the problem." The South Ossetian side further stated that Georgia was "economically oppressing South Ossetia" by blocking the

[127] OSCE Newsletter, Vol. 6, No 2/3 (http://www.osce.org/publications/sg/1999/02/14247_314_en.pdf; accessed on 13.08.2009).

[128] Annual Report 2000 on OSCE Activities (http://www.osce.org/publications/sg/2005/05/14111_280_en.pdf; accessed on 13.08.2009).

transit of goods intended for the economic rehabilitation of the territory. The statement complained that the schedule for electricity supply had been breached in terms of both volume and timing. The statement further added that the South Ossetian authorities considered that the agreements on economic rehabilitation adopted in January and June 1999 had not been implemented successfully. [129]

This criticism from South Ossetia coincided with the increasing internal unpopularity of Ludwig Chibirov, its leader since 1993. There was no evidence to suggest that Chibirov's unpopularity was directly connected to his constructive stance in the negotiations with the Georgian side. But his weakening political position, probably due to the continued social and economic hardships, and his eventual defeat in the *de facto* presidential elections in South Ossetia in December 2001, seemed to have a markedly negative effect on the Georgian-Ossetian peace process.

Economic Issues Emerge as Crucial Elements in the Conflict Resolution Process

Once the fighting had stopped after the Sochi Agreement in June 1992, economic issues merged as quite central to the conflict resolution process. They can be summarised in three categories: demands by the South Ossetian side for compensation for the material damage done during the 1989 - 1992 crisis and for the economic rehabilitation of the conflict zone; economic development, including infrastructural development; and issues relating to the transit of goods from the Russian Federation through South Ossetian territory to Georgia, and vice versa. [130]

The Ossetian side regularly raised the issue of compensation for the damage they claimed they had suffered as a result of the 1989-1992 crisis, amounting to billions of roubles.[131]

[129] South Ossetia Accuses Georgian Leadership of Sabotaging Talks. RFERL Newsline 27.09.1999. http://www.rferl.org/content/article/1142000.html

[130] Sochi Agreement. See &+), *#/ &0%(& $%/+&(!" . 1992… *op. cit.* English translation: Tamaz Diasamidze, *Regional Conflicts in Georgia (The Autonomous Oblast of South Ossetia, The Autonomous SSR of Abkhazia 1989-2008).* Tbilisi 2008. pp. 110-111. Article of the June 1992 Sochi Agreement stated that: "the parties shall immediately start negotiations on the economic restoration of the regions located in the conflict zone and the creation of proper conditions for the return of refugees; the parties deem it inadmissible to apply economic sanctions or blockades or any other impediments to the free movement of commodities, services or people, and commit themselves to providing humanitarian assistance to the affected population."

[131] On March 2006 the Ossetian side estimated the total damages (and its subsequent claim on Georgia) at 56.1 billion rubles (i.e. over USD 118 billion). http://www.kavkaz-uzel.ru/articles/92083 (in Russian, accessed on 13.08.2009).

Ossetian politicians frequently chastised Russia and particularly Georgia for not providing the financial assistance they had promised for the economic rehabilitation of the conflict zone.[132]

Given the state of the Georgian economy in this period there was little hope that Georgia could provide either compensation or the substantial post-conflict reconstruction assistance the Ossetians were expecting. The Georgian side, however, was in discussion with foreign governments and international organisations in an effort to secure funding for post-conflict reconstruction, on the understanding that this assistance would be channelled through the Georgian Government.

The Ossetians also argued that because their economy had been destroyed by the conflict they could not pay for the electricity they received from Tbilisi. There were also other issues connected with the electricity supply. For example, Tskhinvali was receiving only about one hour's electricity supply from Georgia every day. Some remote parts of Georgia were in a similar situation, and even in Tbilisi the electricity supply was irregular, with power cuts a daily occurrence. Like other parts of the former Soviet Union, South Ossetia was suffering the consequences of the collapse of the command economy, and with little or no new investment there except in agriculture.

The other area of contention between the Georgians and Ossetians in the economic sphere was connected with the flow of goods between Russia and Georgia through the Roki tunnel and South Ossetian-controlled territory, over which the Georgian authorities had no control.

Up until 1995-1996, the peacekeeping forces' checkpoints kept the sides separated and there was very little trade, although some smuggling into Georgia was already going on. After 1996 this situation changed quite radically and trade between the two sides began to flourish.

The OSCE and the Georgian-Ossetian Conflict Resolution Process

By the end of 1992 the CSCE had embarked on some ambitious tasks by launching "Missions of Long Duration," including what later came to be known as the OSCE Mission to Georgia. A CSCE Rapporteur Mission was sent to Georgia on 17 - 22 May 1992, shortly after the country joined the organisation. By the end of 1992 the CSCE had embarked on some

[132] Under the Georgian-Russian Intergovernmental Agreement on the economic rehabilitation of the zone of the Georgian-Ossetian Conflict of 14 September 1993, the Georgian side was to cover 2/3 and the Russian side 1/3 of the costs. See ' . *-+$0' 1&)' (%&0,') ! "# . 1993. (Diplomatic Herald MFA RF) 23-24. c. 44. English translation: Tamaz Diasamidze… *op. cit.*, p. 158. In 2002 Georgia and Russia concluded another agreement in which the sides agreed better coordination was needed, including an intergovernmental body on implementation (Annex 2 to JCC Protocol 2, 3 July 2001).

ambitious tasks by launching Missions of Long Duration, including what later came to be known as the OSCE Mission to Georgia. The decision to establish the Mission was taken at the 17th CSCE Council of Senior Officials meeting in November 1992.[133] The Mission's mandate was agreed a month later,[134] when it was decided that the objective of the Mission would be "to promote negotiations between the conflicting parties in Georgia (…) aimed at reaching a political settlement."[135]

The Mission[136] began its work in December 1992 and, significantly, within a short time secured the support of both sides in the Georgian-Ossetian conflict, a Memorandum of Understanding having been signed with the Georgian Government in January 1993, while a Memorandum of Understanding with the South Ossetian leadership was agreed by an exchange of letters in March 1993.

From the beginning the OSCE Mission to Georgia had to cope with two factors that affected its work. The first was that from 1992 onwards, the CSCE/OSCE had consistently supported the territorial integrity of Georgia in all its official documents. The Mission was called Mission to Georgia and was established in Tbilisi. This did not endear it to the South Ossetian side, which often seemed to suspect that the Mission was biased. Despite this, however, over the years the CSCE/OSCE managed to gain a measure of trust from the Ossetian side as well. The second factor was that the CSCE/OSCE came to the process after the Sochi Agreement had been signed. Although the Sochi Agreement does not state this clearly, it was understood – and subsequently incorporated into documents agreed by the sides – that the Russian Federation was the main facilitator of the peace process. The JCC mechanism provided for a four-sided arrangement in which the Russian Federation was the main facilitator. However, the CSCE/OSCE was welcomed to the process, and by 1994 its position had also been formalised within the framework of the JCC.

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[133] OSCE CSO Meeting journal 2, Annex 2, 6 November 1992.

[134] With regard to the Georgian-Ossetian conflict the mandate given by the CSCE Council required the mission "to facilitate the creation of a broader political framework, in which a political settlement can be achieved on the basis of CSCE principles and commitments; intensify discussions with all parties to the conflict, including through the organisation of round tables, in order to identify and seek to eliminate sources of tension; in pursuit of the monitoring role concerning the Joint Peacekeeping Forces, establish appropriate forms of contact with the military commanders of the forces, gather information on the military situation, investigate violations of the existing ceasefire and call the local commander's attention to possible political implications of specific military actions; be actively involved in the reconvened Joint Control Commission." CSCE CSO Meeting journal 3, Annex 1, 13 December 1992.

[135] *Ibidem*.

[136] http://www.osce.org/georgia.

The Mission made a substantial contribution to improving the dialogue between the sides, building trust, narrowing differences and, in fact, bringing the sides close to an agreement. Its presence was a sign that the international community was interested in the establishment of peace in the area. The Mission complemented and in some ways balanced the Russian role in the Georgian-Ossetian peace process.

The European Union and the Georgian-Ossetian Conflict Resolution Process

The EU began to engage with Georgia soon after 1992. A delegation of the European Commission opened in Tbilisi in 1995, long before such missions were established in either Armenia or Azerbaijan. At that time the EU's main work was humanitarian, providing much-needed assistance to Georgia at this very difficult stage in its modern history. The EC also sought to provide low-key political support and encouragement to Georgia's fledgling democracy.[137] Up to 1997, however, the EU's involvement in the Georgian-Ossetian conflict was mainly through its support for NGO confidence-building programmes.

As progress was registered in the negotiations between the Georgian and the South Ossetian sides after 1995, the European Union sought to support this process by offering assistance for post-conflict economic rehabilitation. A delegation of the European Commission visited Tskhinvali in the spring of 1997 for a meeting with South Ossetian leader Ludwig Chibirov. In July 1997 the EC commissioned a small fact-finding project to identify possible areas of assistance. The South Ossetian side engaged positively in the process. One consideration that was always an issue was that EU projects in South Ossetia had to be part of a package of support for Georgia, which meant: *first*, that the Georgians had to agree that part of the money would be spent in South Ossetia; and *secondly*, that the Ossetians had to agree that monies spent on the territory they controlled would come from budget lines intended for Georgia. It can fairly be said that despite considerable posturing on all sides, pragmatism generally prevailed right up to the August 2008 crisis, and language acceptable to both sides was eventually agreed, based on an understanding that money was to be allocated to both sides of the conflict divide.[138]

[137] http://www.delgeo.ec.europa.eu/en/about_us/about_us.html#therole%20of%20the%20Delegation (accessed on 13.08.2009).

[138] Georgia: Avoiding war in South Ossetia. International Crisis Group, Europe Report Nr 159. Tbilisi/Brussels 26 November 2004, p. 19-20.

Initially, the European Union was perceived largely as an important source of financial support by both sides in the conflict. As its involvement increased, however, the EU was requested to become more directly and broadly involved in the conflict resolution process.

In July 1999 the JCC agreed that the European Commission could attend JCC meetings as an observer during discussions on economic issues.[139] This in fact gave the EC a seat around the negotiating table, and while formally not changing the format of the negotiations, it certainly influenced their dynamics. Eventually a Steering Committee was also established to oversee the economic rehabilitation programme. The EC was a full member of the Steering Committee,[140] and later used its presence to leverage the inclusion of other, mainly Western, donor countries in the Committee, a move that was warmly welcomed by the Georgian side and acquiesced to by both the Russians and the Ossetians. The EC tried to use its presence in the JCC to engage in some of the more problematic issues. In 2002, a joint EC-OSCE proposal suggested the setting up of a joint Georgian-Ossetian Trade Control Centre at Didi Gupta. This proposal remained on the table for some time and re-emerged in different guises but was never actually implemented.[141]

Second-track Initiatives

The work of the OSCE and EU throughout this period was complemented by a number of innovative engagements by international NGOs. In the period 1994 - 2000, important, ground-breaking work was done by the British organisations VERTIC and LINKS. A number of high-profile meetings were held at which politicians from the two sides met, often for the first time, outside the framework of the JCC. [142]

In January 1997 the process facilitated the visit of the Speaker of the South Ossetian *de facto* Parliament, Kosta Dzugaev, to Tbilisi, where he met with President Shevardnadze and Speaker of Parliament Zurab Zhvania, and had separate meetings with all the political factions in the Georgian Parliament. This remained the highest level visit by a South Ossetian leader

[139] Annex 4 to protocol 10 of the JCC session of 23 July 1999;www.rrc.ge/law/Skkprot10dan4_1999_07_23_e.htm; accessed on 13.08.2009.

[140] See e.g. http://www.civil.ge/eng/article.php?id=14668 and http://www.undp.org.ge/Projects/Osetibrief.pdf; both accessed on 14.08.2009.

[141] Generally on European Commission assistance in Abkhazia and South Ossetia see: http://www.delgeo.ec.europa.eu/en/programmes/rehabilitation.html; accessed on 14.08.2009. See also UN OCHA Georgia, "South Ossetia Briefing Note," January 2004.

[142] http://www.links-london.org/.

to Tbilisi since the 1991 - 1992 hostilities.[143] During this period, the South Ossetian side also engaged positively with other initiatives spearheaded by the Norwegian Refugee Council[144] and the Mercy Corps Conflict Management Group (which has close ties to Harvard University).[145]

Apart from their merit in building trust between the sides, these initiatives helped to increase the capacity of the South Ossetian side in managing their negotiations with the Georgian side and to improve their understanding of the international experience of conflict resolution. South Ossetian officials were hosted in Boston and London and were introduced to conflict resolution processes under way in Northern Ireland, and constitutional processes and devolution of power in Scotland.

After 1999, second-track initiatives ran into difficulties, since on the one hand the Georgian side seemed to be seeking to centralise all peace initiatives concerning South Ossetia, and on the other there seemed to be a growing belief on the Ossetian side that all communications with Tbilisi could be channelled through Moscow.

Phase Two: the Process "Put to Sleep" (2000 - 2003)

The popularity of South Ossetian leader Ludwig Chibirov plummeted in 1999. In November 1999 South Ossetia saw the first anti-government demonstrations calling for his resignation, citing the catastrophic economic situation, and in particular the absence of energy supplies. In the *de facto* presidential elections held in South Ossetia in December 2001 Chibirov came third in the first round and was eventually replaced by Eduard Kokoity, an Ossetian businessman based in Moscow.[146]

The conflict resolution process began to deteriorate after 1999. Not only there were no further meetings between the leaders of the two sides, but the level of the delegations was also

[143] South Ossetian Leader in Tbilisi. RFERL Newsline 16.01.1997 (http://www.rferl.org/content/article/1141329.html; accessed on 14.08.2009). See also: Georgian Parliament Speaker in South Ossetia. RFERL Newsline 21.01.1997. (http://www.rferl.org/content/article/1141332.html).

[144] http://www.nrc.no.

[145] http://www.mercycorps.org/countries/unitedstates/10703.

[146] In the second round of the *de facto* presidential elections 22 109 voters, or 63% of the registered electorate participated in the poll. Eduard Kokoity got the support of 12 171 voters, or 55%; his rival in the second round, Parliamentary Chairman Stanislav Kochiev got 9 009 votes or 40,7%. The Georgian population of South Ossetia boycotted the election. (See report of Black Sea Press, 7 December 2001). Eduard Kokoity was little known in Georgia, let alone in the rest of the world. When he was elected he was 38 years old. During Soviet times he was Secretary of the Tskhinvali branch of Komsomol and champion of Georgia for wrestling. He claimed to have fought during the 1991 - 1992 hostilities (Black Sea Press, 7 December 2001).

gradually downgraded. Meetings of the JCC, meanwhile, focused primarily on economic issues.

Superficially, the conflict resolution process appeared to continue. The Experts' Groups held at least ten meetings between 1999 and 2003. In the first four there were attempts to push forward some principles on which a future political agreement could be based, but a final text was never agreed although some drafts did emerge with some parts of their texts agreed and some not.[147] Even these efforts were later abandoned. From a certain point on, the Georgian-Ossetian peace process became strictly a conflict management process, with a political solution postponed indefinitely. According to some analysts, the sides put the conflict resolution process "to sleep."

Ergneti Market – Smuggling as a "Confidence-Building Measure"

By 1996 - 1998 the security situation in the South Ossetia conflict zone had gradually stabilised, and most of the checkpoints separating the two sides were dismantled. The Georgian markets were suddenly flooded with Russian goods brought in through South Ossetia, on which no customs duties had been paid - depriving the beleaguered Georgian economy of an important source of income. Meanwhile, the Ossetians began making money by charging a transit tax at their side of the Roki tunnel. Most of this illegal trading centred around the Ergneti market, an area on the administrative border between South Ossetia and the rest of Georgia that had developed spontaneously into a trading place between the Georgians and the Ossetians. In its heyday, around 3 000 people would gather there daily to conduct business.

In effect, Georgia's grey economy became even greyer, and various people with connections to the local authorities, and some possibly also to the peace process, became embroiled in these lucrative smuggling operations.[148] Any attempt by the Georgian Government to control the smuggling was usually condemned by the Ossetian side as being part of a policy to strangle their economy, and a contravention of the Sochi Agreement.[149]

In practical terms, the Ergneti market blossomed into a spontaneous quasi-free economic zone, where the Ossetians sold smuggled goods to Georgians who could buy them without

[147] See Agreement (Declaration) on basic principles of political and legal relations between the sides in Georgian-Ossetian conflict. Draft. Status as of 12.07. 2000. In: Tamaz Diasamidze… *op. cit*., pp. 364-365.

[148] For a discussion of the officials on both the Georgian and Ossetian sides implicated in the illegal operation of the Ergneti market see *Georgia: Avoiding war… op. cit*., pp. 10-11.

[149] *Ibidem*, p. 11.

paying customs duty. Smuggling was reportedly also going on in the opposite direction, from Georgia to Russia, but its impact on the much larger Russian economy was insignificant by comparison. The question remains whether the Georgian leadership, being sensitive to Ossetian hardship, accepted the Ergneti market as part of the peace process, or whether it tolerated it for other reasons. At any rate, for a number of years the Georgian authorities remained largely passive in response towards the problem.[150]

The fact that the two communities were no longer separated and could now resume contacts with each other, including trading, was undoubtedly a positive phenomenon and was frequently hailed as a sign of the success of the peace process. All the same, the Ergneti market may also have had negative consequences for the conflict resolution process:

- Some local officials may have developed an interest in the Egneti smuggling operation, giving them a vested interest in maintaining the political and legal status quo. Safeguarding Ergneti as "a symbol of Georgian-Ossetian friendship," but also as a source of illegal income, could have become their top priority;

- It allowed the political opposition to President Shevardnadze to articulate the view that the Georgian-Ossetian peace process was not a process at all but a smuggling operation that needed to be dealt with by the police. This seemed to reflect the approach of at least part of the Saakashvili government after it came to power in 2004;

- It seemed to disappoint at least some of the international community, and to weaken considerably its enthusiasm for supporting a conflict resolution process.[151]

Ergneti eventually became a self-inflicted problem. Many Ossetians who had no other means of income became dependent on the smuggling operation for their livelihood. When the Georgians eventually closed down Ergneti market in June 2004 this was not perceived by the Ossetian leadership as either a police or an anti-smuggling operation, nor was it widely welcomed by the Ossetian population, as the new Georgian leadership might have expected.

[150] Alexandre Kukhianidze, Aleko Kupatadze, Roman Gorsiridze, *Smuggling through Abkhazia and the Tskhinvali Region of Georgia*. Tbilisi 2004. Research report for the American University`s Transnational Crime and Corruption Centre. http://www.conflicts.rem33.com/images/Georgia/crim_geor_kukhian_kupatad.pdf; accessed on 14.08.2009.

[151] *Georgia: Avoiding war… op. cit.*, p. 11.

Instead, it was perceived as yet another unfriendly act by a belligerent Georgian Government harming the South Ossetian people.[152]

In its report in November 2004 the International Crisis Group, while agreeing that "the Ergneti market generally had a negative effect on Georgia's legal, political and economic environment," argued that "it provided at least three benefits. Although much of the proceeds apparently went to elites among the local authorities, law enforcement and 'business community,' average citizens also gained livelihoods from the trade in a context of overall high South Ossetian unemployment and poor economic development. Prices on basic goods such as bread were artificially low, because there was no tax. Most importantly, perhaps, the market was a means for average Georgians and Ossetians to meet, build contacts and identify common interests after the war years."[153] The report mentioned that similarly, in northern Bosnia-Herzegovina, along a main road linking Croat, Bosnian and Serb settlements, the "Arizona market" had since 1996 been a unique meeting place facilitating reconciliation – and that even here there was no tax system to regulate trading until 2000.[154]

However, notwithstanding the general improvement in the security situation in the conflict zone and by June 2004 the flourishing trade, the continuing ambiguity surrounding the political status of South Ossetia meant that the Georgian-Ossetian conflict was still far from resolved.

Phase Three: Mistakes and Misperceptions (2004 - 2008)

After the Rose Revolution of November 2003, Georgian-Ossetian relations experienced a radical shake-up. Initially, the new Prime Minister, Zurab Zhvania, took the overall lead in the negotiations with Tskhinvali. In 2004 - 2005 the Georgian leadership intimated a desire to move to resolve the conflict with South Ossetia and indicated that it expected both the Ossetians and the Russian facilitators to contribute to these efforts as well. Georgia's negotiating position was that, provided Georgia's territorial integrity was respected (i.e. as long as South Ossetia accepted that it was part of Georgia), everything else was negotiable.[155]

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[152] Georgia Maintains Pressure on South Ossetian Leadership. RFERL Caucasus Report, vol. 7, nr 25, 25.06.2004.

[153] *Georgia: Avoiding war… op. cit.*, p. 10-11.

[154] *Ibidem*, p. 11.

[155] Gela Bezhuashvili, the Head of the Georgian Security Council, said prior to a meeting of the JCC in Moscow on 13 July 2004, "the end result of the settlement of this conflict will be restoration of Georgia's territorial integrity" (See BBC monitoring, 13 July 2004 – Interview of Bezhuashvili on Imedi TV on the same day, ref BBCMNF00200040713e07d001md); on the other hand, speaking on the same day, another Georgian official, State Minister Giorgi Khaindrava stated that "we are ready to give South Ossetia as much sovereignty as

From 2004 right up to the August 2008 armed confrontation, however, Georgian policy did not seem to be very consistent. On the one hand the Georgian leaders proposed several peace plans, seeking international endorsement and support for their acceptance and eventual implementation; they promised to resolve the conflict by peaceful means only, and offered generous assistance to the Ossetian population in an effort to win hearts and minds.[156] At the same time, they also appeared to be trying to apply a certain amount of psychological and even military pressure (like in August 2004) on the South Ossetians. These developments were often seen as spurring the anti-Georgian resolve of the Ossetian side.

For the first six months of 2004 the Georgian leadership was focused on events in Adjara, an autonomous entity which, while never claiming independence like Abkhazia and South Ossetia, and being much more closely integrated into the Georgian state, was still *de facto* out of Tbilisi's control during most of the period of Eduard Shevardnadze's presidency. On 6 May 2004, the Adjaran leader Aslan Abashidze fled to Moscow after a stand-off of several months with the central Government in Tbilisi. The Georgian Government, and indeed most Georgians, perceived the changes in Adjara as the start of the process of restoring Georgia's territorial integrity. These events may also have had an impact on Ossetian perceptions of Georgia's new strategy: on numerous occasions the Ossetian leaders accused Tbilisi of trying to repeat "the Adjara scenario" in South Ossetia.[157]

A "Carrot and Stick" Approach

Things began to heat up towards the middle of 2004 when, on 31 May, Georgian Interior Ministry troops set up road blocks around Tskhinvali, ostensibly to prevent smuggling, and the Ergneti market – once seen as the ultimate confidence-building measure– disappeared overnight.[158]

North Ossetia has in Russia. South Ossetia was a district once. We are ready to go further, to let it be an autonomous republic, with all the rights that that entails." (See BBC Monitoring on 13 July 2004, Interview of Khaindrava with Ekho Moskvy Radio, reference BBCSUP0020040713e07d003ux).

[156] Offers were also made to the South Ossetian leader. In an interview with the Russian station NTV Mir on 3 June 2004 President Saakashvili not only offered Eduard Kokoity immunity but said "I think he could become one of the most important leaders of Georgia, and not just stay a kind of besieged field commander in a little enclave" (See BBC Monitoring, 3 June 2004, reference BBCMNF00240603e063004ed).

[157] In May 2004, the Georgian youth movement "Kmara" that had acted as the shock troops of the Rose Revolution in the run up to the resignation of President Shevardnadze. It was also very active in Adjara prior to the ousting of Aslan Abashidze, and announced its intentions to focus its attention on South Ossetia, provoking a sharp rebuke from Eduard Kokoity. (See Prime News, 24 May 2004 [ref: primene0020040524e05o00006].

[158] 14() ! 01/ $/ %)3 0/ ,) 3) +4 7+/ . / -) 5&2+/ * #, / +"%6 ' . / * 2&3)) (Georgia Conducts Policy of Economic Blockade against South Ossetia) http://www.kavkaz-uzel.ru/articles/56279 (in Russian; accessed on 14.08.2009).

This show of force triggered protests by both Moscow and Tskhinvali, and prompted a demand by the Commander of the JPKF for the removal of the new road blocks. On 1 June 2004 the Russian Foreign Ministry issued a strongly-worded statement warning that Tbilisi's "provocative steps" might lead to "extremely negative consequences." The Russian Foreign Ministry said that Georgia's central Government would be held responsible in the event of any further deterioration of the situation or "bloodshed" in the region.[159] The negative Ossetian reaction to the Georgian show of force was dismissed by Tbilisi as a reaction to the Georgian attempt to eradicate smuggling.[160]

In a pattern that was to be seen throughout 2004 - 2008, Georgia's tightening of the noose around Tskhinvali was accompanied by a parallel process aimed at win over the Ossetians. On the same day as the stand-off with the Ossetian leadership and the JPKF, President Saakashvili proposed a package which included the payment of pensions to South Ossetia's residents out of Georgia's state budget, a free emergency ambulance service, and free agricultural fertilisers for Ossetian farmers. Georgia also began radio broadcasts in Ossetian for two hours a day.[161]

Small incidents continued throughout June, and on 7 July 2004 the Georgian peacekeeping contingent seized nine trucks belonging to Russian peacekeepers, loaded with arms and munitions. The Georgians alleged that the Russians were arming the Ossetian secessionists, while the peacekeepers insisted that the supplies were for their own use. The following day Ossetian militias ambushed fifty Georgian members of the peacekeeping battalion. Russian TV channels showed the Georgian soldiers kneeling in the Ossetian capital, Tskhinvali. They were released a day later.

On 10 July President Saakashvili, speaking at a parade for new officers at the Military Academy in Tbilisi, said Georgia "will regain control over Tskhinvali very soon (…) nothing

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[159] . . #6 ' -) ' &! / ' 5"2) . 1) 23"4)) $. +03% (- . * 1' 2)) (Press Release on the Situation around South Ossetia) Ref. nr. 1236-01-06-2004, 1.06.2004. (http://www.mid.ru/brp_4.nsf/0/E389EB4B3E33A4EFC3256EA6005C1C61; in Russian; accessed on 14.08.2009).

[160] Tbilisi Reinforces Checkpoints at Ossetian Conflict Zone. Civil Georgia, 31 May 2004, http://www.civil.ge/eng/article.php?id=7033&search=; accessed on 26.08.2009.

[161] On 30 June 2004 Georgia's influential Minister of Security (later Interior Minister), Vano Merabishvili, called for a change of government strategy towards South Ossetia. He said that Georgia must show the international community that it supports peace policy in South Ossetia, whilst making it clear that it would not tolerate the actions of Ossetian leader, Eduard Kokoity (see report on Prime News, 30 June 2004, reference primene0020040630e06u0002).

can obstruct this process." "However," he added, "we should be ready for everything."[162] Meanwhile, there were shoot-outs practically every night, involving Georgian, Ossetian and Russian peacekeepers. Both sides interfered with traffic along the road from the Roki tunnel to Tskhinvali.

Urgent meetings of the JCC were held on 14 July 2004[163] and again on 30 July[164] in an effort to defuse the crisis, but without much success, and incidents became more serious in August when the sides started using mortars and light artillery.

A ceasefire was agreed at an extraordinary meeting of the JCC on 13 August 2004 and the corresponding agreement was countersigned by Georgian Prime Minister Zurab Zhvania and *de facto* South Ossetian leader Eduard Kokoity.[165] Although skirmishes continued throughout August, this was an example of how the JCC, despite its limitations, still had the potential to be a practical, if not necessarily efficient, conflict-management mechanism. The events of the summer of 2004, however, poisoned the atmosphere between the Georgian and Ossetian sides and destroyed much of the confidence-building work that had been done with great effort and patience in the previous decade.[166] Altogether, several dozen Georgian and Ossetian soldiers, policemen and civilians died in the clashes, as well as several Russian peacekeepers.

The events of summer 2004 were the first example of the Georgian "carrot and stick" strategy: on the one hand trying to win the sympathy of the Ossetians, while pressuring Eduard Kokoity's leadership. The Ossetians claimed that Eduard Kokoity was open to meeting "with the young President Saakashvili" after his election in 2004, but these

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[162] *Saakashvili Vows to Gain Control over South Ossetia "Soon"*. Civil Georgia, 10 July 2004 , http://www.civil.ge/eng/article.php?id=7377&search=; accessed on 26.08.2009.

[163] Protocol nr 33 of the Special Meeting of the Joint Control Commission (JCC) on Georgian-Ossetian Conflict Resolution. Tamaz Diasamidze… *op. cit.*, pp. 499-500.

[164] Several Wounded in Clash between Georgian and Ossetian Forces... but Negotiations Continue Unimpeded. RFERL Newsline 2.08.2004 (http://www.rferl.org/content/article/1143212.html; accessed on 14.08.2009). See also Protocol nr 35 of the co-chairmen meeting of the Joint Control Commission (JCC) on Georgian-Ossetian Conflict Resolution. Tamaz Diasamidze… *op. cit.*, pp. 502.

[165] Protocol nr 36 of extraordinary meeting of the Joint Control Commission (JCC) on Georgian-Ossetian Conflict Resolution. Tamaz Diasamidze… *op. cit.*, pp. 505.

[166] In an article published on 17 February 2007, the Georgian newspaper 24 Saati referred to the events in August 2004 and admitted that "these events seriously shook the trust of the pro Georgian part of the Ossetian public in the Georgian state, made the anti Georgian part more radical and strengthened Eduard Kokoity's government" (See BBC Monitoring on 19 February 2007 (reference BBCSUP00200070219e32j00xe).

approaches were snubbed.[167] Eduard Kokoity and Mikheil Saakashvili never met, although there were three meetings in 2004 - 2005 between the former and Zurab Zhvania.

Addressing the UN General Assembly session in New York on 21 September 2004, Ossetian President Saakashvili proposed a new "stage by stage settlement plan" for the South Ossetian and Abkhaz conflicts. He outlined three steps which he said were "designed to speed resolutions" of these conflicts: confidence-building and the return of refugees/IDPs; demilitarisation of the conflict areas; and offering the breakaway regions the "broadest form of autonomy" with international guarantees. [168]

However, President Saakashvili also said that the breakaway regions in Georgia were "black holes that breed crime, drug trafficking, arms trading and, most notably, terrorism." "These lawless zones have the potential to affect European security as long as they remain unresolved (…). [The international community] can no longer afford to ignore the security risks that emanate from these black holes and smugglers' safe havens," he added.[169]

On 5 November 2004 Zurab Zhvania and Eduard Kokoity held talks in Sochi, first in the presence of representatives of Russia, North Ossetia and the OSCE, and later in a tête-à-tête. The result was a common understanding that promised to give a new beginning to the peace process.[170]

At the beginning of 2005 the Georgian President launched another peace initiative, which could be regarded as a more developed, refined version of his September 2004 "settlement plan." It was widely perceived as the most detailed and comprehensive proposal yet for resolving the conflict in South Ossetia. It was first presented by President Saakashvili in his address to the Parliamentary Assembly of the Council of Europe in Strasbourg on 26 January 2005. The proposal provided, *inter alia*, for a broad autonomy for South Ossetia – "even broader, in fact, than that accorded to the Republic of North Ossetia" by the Russian Federation – as well as a role in Georgia's central parliamentary, judicial and government structures.[171] It envisaged talks on the establishment of free economic zones as well as special rights in the spheres of education and culture. Addressing the "wrongs of the past," it

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[167] %) ! -$. & #*. *"! ' +$, $#*"*, !((South Ossetia Ready for Negotiations), http://www.kavkaz-uzel.ru/articles/47933 (in Russian; accessed on 14.08.2009).

[168] http://www.un.org/webcast/ga/59/statements/geoeng040921.pdf (accessed on 14.08.2009).

[169] *Ibidem*.

[170] Georgia Pledges again to Withdraw Excess Troops from South Ossetia... but Fails to Resolve Status Issue. RFERL Newsline 8.11.2004. http://www.rferl.org/content/article/1143278.html; accessed on 14.08.2009.

[171] http://www.coe.int/T/E/Com/Files/PA-Sessions/janv-2005/saakashvili.pdf; accessed on 14.08.2009.

proposed a special law on property restitution for victims of the 1990 - 1992 conflict, one special commission to deal with unresolved property disputes and another to deal with allegations of crimes against the population. The proposal was to be implemented within a transitional 3-year conflict-resolution period with international assistance and guarantees.[172]

On 10 July 2005 the Georgian Government hosted a large international conference on the South Ossetia issue in Batumi. In his opening address to the conference, President Saakashvili described the above proposal for South Ossetia as a "dream list," which gave Tskhinvali everything it desired except independence. The South Ossetians rejected the peace proposal and refused to attend the Batumi meeting, their main reason being the fact that neither the North Ossetians nor the Russians had been invited. There followed another hot summer of skirmishes, kidnappings and killings, with each side blaming the other for starting.[173]

On 11 October the Georgian Parliament issued a resolution instructing the Georgian Government to take measures to prepare for the withdrawal of Russian peace-keepers from the conflict zones in South Ossetia, "if the performance of the peacekeeping forces did not improve before February 2006."[174]

On 27 October 2005, at a Special Meeting of the OSCE Permanent Council in Vienna, new Prime Minister Zurab Nogaideli presented an Action Plan outlining the objectives of the Georgian authorities for the coming fifteen months and the steps to arrive at a comprehensive solution to the conflict. The United States and the EU welcomed this Action Plan, which envisaged radical changes to the conflict-resolution and conflict-management mechanism, including the JCC format. It proposed, *inter alia,* a new framework for the conflict settlement process with the participation of the OSCE, EU, US and Russian Federation.[175] This Georgian proposal was immediately dismissed by both the Russian and the Ossetian sides, which

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[172] *Ibidem.*

[173] Georgia Again Offers South Ossetia "Broad Autonomy." in: Absence of South Ossetian Leaders. RFERL Newsline 11.07.2005. http://www.rferl.org/content/article/1143435.html; accessed on 14.08.2009. See also: +!"! 03'((#.2." *.-12(234(.--. /0%$.12!"(25 &-.) 1%2((/.+-36 !"2.-.,(6 (The Georgian Leader is Ready to Grant South Ossetia Full-scale Autonomy). http://www.kavkaz-uzel.ru/articles/78481 (in Russian; accessed on 14.08.2009).

[174] Georgian Parliament Issues Ultimatum to Russian Peacekeepers... which Russian Ministers Condemn as Counterproductive. RFERL Newsline 12.10.2005. http://www.rferl.org/content/article/1143498.html; accessed on 14.08.2009.

[175] http://www.osce.org/documents/pc/2005/10/16791_en.pdf; accessed on 14.08.2009.

insisted that the JCC mechanism was the only one that would be effective in resolving the conflict.[176]

While Tbilisi was busy advocating its new peace plans, the Ossetians retained the earlier proposals (the so-called three-stage peace plan: confidence-building, demilitarisation of the conflict zone and discussions on the political status of South Ossetia) presented by President Saakashvili at the UN in September 2004 and again at the Parliamentary Assembly of the Council of Europe (PACE) in January 2005.[177] At the JCC meeting in Moscow on 24-25 October, both the Russian and South Ossetian sides expressed their support for this conflict resolution plan.[178] Commenting on that meeting of the JCC, Russian Special Envoy Valery Kenyakin said on 26 October that, despite heated debates, there seems to be "an agreement" on a "three-stage scheme." Kenyakin's description matches, but does not directly refer to the peace plan proposed by President Saakashvili at the PACE, which South Ossetia had rejected at the time and the Russian Federation had refrained from supporting.[179]

Referring to these peace talks, including the last JCC session, the Georgian Minister for Conflict Resolution, Giorgi Khaindrava, said on 28 October 2005 that they were marked by "a breakthrough, at least on paper."[180] Khaindrava's optimism was short-lived. At the next JCC meeting held in Ljubljana on 16 November, the Russians, clearly concerned by the Georgian attempt to change the JCC format, announced without warning that they were proposing another meeting of the JCC with the participation of the Presidents of Russia, Georgia and North and South Ossetia.[181] Ambassador Valery Kenyakin said that such a meeting "would give a new impetus to the negotiating process." The Georgian side rejected the proposal and, reportedly, also the idea of a direct meeting between President Saakashvili

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176 Russia, South Ossetia Dismissive of New Georgian Peace Initiative. RFERL Newsline 1.11.2005. http://www.rferl.org/content/article/1143511.html; accessed on 14.08.2009.

177 *Ibidem*.

178 Protocol nr 45 of the Meeting of the Joint Control Commission (JCC) on Georgian-Ossetian Conflict Resolution. Tamaz Diasamidze… *op. cit.*, pp. 534-535.

179 *--& !&#&. , &1. + / , $"/ (&; *!) & ", / %&) *-*-$. &) -' *"* ' *) 0 (&! . (Russia Envisages Three-stage Scheme of the Settlement of Georgian-Ossetian Conflict). http://www.regnum.ru/news/534206.html (in Russian; accessed on 14.08.2009).

180 http://www.civil.ge/eng/article.php?id=11069; accessed on 14.08.2009.

181 South Ossetia Talks Inconclusive; South Ossetian Leader Rejects Georgian Demands, Peace Proposal. RFERL Newsline 18.11.2005. http://www.rferl.org/content/article/1143522.html; accessed on 14.08.2009.

and Eduard Kokoity. Instead, the Georgians offered the latter a meeting with Zurab Nogaideli, which Eduard Kokoity rejected.[182]

After 2004 the Georgians preferred to see NGOs as being helpful in articulating their political and constitutional package on South Ossetia rather than as channels for alternative lines of communication with the Ossetian side. The Ossetians, on the other hand – especially in the aftermath of the "colour revolutions" – were rather suspicious of NGOs, and were at all events opposed to any activities that they perceived as being in competition with the JCC format.

In December 2005 Georgia and South Ossetia each pushed ahead with their own different visions of conflict settlement, the Georgian side presenting its views at the OSCE Ministerial Council in Ljubljana.[183]

The South Ossetian side articulated its position in a new proposal entitled "The initiative of the President of South Ossetia on the peaceful resolution of the Georgian-Ossetian conflict," set out in a letter to the Heads of State of the OSCE on 12 December. The proposal had many similarities with the Georgian proposal presented previously, and entailed a three-stage plan: (a) demilitarisation, confidence-building and security guarantees; (b) social and economic rehabilitation and (c) political settlement. The devil was in the detail, however, not least because the Ossetians saw the plan as spanning a long time, possibly even decades, where the third stage was concerned. The Georgians had a much shorter time frame, spanning months rather than years.[184]

In 2006 Georgia took steps on another issue connected with the conflict: the return of all IDPs/refugees. Georgia committed itself to passing a law on property restitution in 1999 while joining the Council of Europe. In May 2006 a draft law was presented to Parliament on "compensation, restitution and the restoration of rights for the victims of the Georgian-

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[182] Protocol nr 46 of the Meeting of the Joint Control Commission (JCC) on Georgian-Ossetian Conflict Resolution. Tamaz Diasamidze… *op. cit.*, pp. 540-541. See also: :;9.@) 89.01-.6;)' /672$:.;11 1 89.5B.9-5161:;9) 9<011 6. :7:;71;:((There will be no Meeting of the President of South Ossetia and the Prime Minister of Georgia). http://www.kavkaz-uzel.ru/articles/85146 (in Russian, accessed on 17.08.2009).

[183] 4)+) # ! 9<011:@1;).;,@7=795); 5197;+79@:31>:14 6</ -).;:(+:.9B.0672;9)6:=795)?11 (According to head of Georgian MFA, format of peacekeeping forces should be radically transformed). http://www.kavkaz-uzel.ru/articles/85098 (in Russian, accessed on 17.08.2009).

[184] %9.-47/ .61(" 7372;A87<9.,<4197+)61C376=413;)+' /672$:.;11:7+8)-)C;:84)675 &*141:1, <+.9.6 89.5B.9 9<011 (Georgian Prime Minister believes Eduard Kokoity`s proposals on resolution of the conflict in South Ossetia coincide with Tbilisi`s plan. http://www.kavkaz-uzel.ru/articles/86519 (in Russian, accessed on 17.08.2009).

Ossetian conflict". It recognised the right of all IDPs/refugees to return to their houses if they wished and could prove their ownership of the property.[185]

Official Georgian sources claim that about 60 000 ethnic Ossetians were forced to leave South Ossetia and other parts of Georgia as a result of the 1989 - 1992 conflict – most of them taking refuge in North Ossetia. Some 10 000 ethnic Georgians left South Ossetia. The proposed law envisaged the creation of an 18-member tripartite commission to hear the appeals submitted by victims of the conflict. Six seats on the commission, to be based in Tbilisi, were to be occupied by representatives of international organisations. These members of the commission were then to select six members from each side (Georgian and South Ossetian) on the basis of an open competition.[186] The South Ossetian side described the document as "one more PR campaign" by the Georgian authorities, which would fail to bring relief to the refugees/IDPs.[187] The law was adopted by the Georgian Parliament on 30 December 2006, but the South Ossetian side never really engaged with it, and it remained largely a symbolic Georgian gesture.[188]

Both sides continued to up the stakes in 2006. The Georgian Parliament adopted a resolution on 15 February instructing the government to replace the Russian peacekeepers in South Ossetia with "an effective international peacekeeping operation"[189] – this despite a warning on 9 February by the US Ambassador to the OSCE that the withdrawal of the Joint Peacekeeping Forces in South Ossetia "may be destabilizing."[190]

A sense that a line was being drawn was also felt in South Ossetia.

On 26 April 2006 the *de facto* "Parliament of the Republic of South Ossetia" adopted two resolutions: the "Declaration on the genocide of the South Ossetians in 1989 - 1992" and the Resolution "on the political and legal assessment of the 1989 - 1992 developments." The two

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[185] Georgia Proposes Draft Law on S. Ossetia Restitution. http://www.civil.ge/eng/article.php?id=12596; accessed on 17.08.2009.

[186] *Ibidem.*

[187] S.Ossetia Rejects Tbilisi's Draft Law on Restitution. http://www.civil.ge/eng/article.php?id=12387; accessed on 17.08.2009.

[188]) , #$$ ( ) $& + #! % &') "*+$+, - $$ (Law on Restitution adopted in Georgia). http://www.kavkaz-uzel.ru/articles/106239 (in Russian, accessed on 17.08.2009).

[189] On 11 October 2005 the Georgian Parliament also adopted another resolution "Regarding the current situation in the conflict regions on the territory of Georgia" which assessed negatively the role of Russian peacekeepers in Abkhazia and South Ossetia, warning that unless the situation improved by February 2006 it will ask for an end to these operations.

[190] As Deadline Looms, Georgia Changes Tone on South Ossetian Peacekeepers. http://www.eurasianet.org/departments/insight/articles/eav021006a.shtml; accessed on 17.08.2009.

resolutions were meant to serve as a reminder of the events in 1989 - 1992, and in so doing to justify South Ossetian intransigence. The first resolution requested the international community to recognise the atrocities of 1989 - 1992 as genocide against the Ossetian nation and to recognise Georgia as "morally, legally and financially responsible for crimes against humanity." It requested Georgia "to take the necessary measures to create proper conditions for the refugees' rights and property restitution with full compensation for the moral and material damage." The second resolution called for the recognition of the "international legal personality of the Republic of South Ossetia" and the application of "all lawful measures to prevent provocation on the part of Georgia aimed at destabilising the situation in South Ossetia and at raising the incessant blockade."[191]

In the summer of 2006 events took a turn for the worst. On 9 July the " Secretary of the National Security Council of South Ossetia" was killed when a bomb went off as he was opening his garage door.[192] A few days later two teenagers died and four other civilians were injured in a bomb explosion in Tskhinvali.[193] On 18 July the Georgian Parliament passed a resolution calling on the Government to launch procedures to suspend Russian peacekeeping operations in Abkhazia and South Ossetia immediately.[194] In September, clashes took place in the South Ossetian conflict zone, resulting in deaths on both sides.[195]

The North Ossetian Connection

Some international experts believe that much of the Georgian analysis of the conflict in South Ossetia, in particular since 2006, has underestimated the extent, role and complexity of the engagement of the political leadership and the people of North Ossetia in the Georgian-Ossetian conflict.

Whatever the role of the North Ossetians during the conflict in 1989 - 1992, there is no doubt that it was one of active support for the South Ossetians. However, after the signing of the 1992 Sochi Agreement, North Ossetia sought, in most instances, to play a constructive role in

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191 ' +"! /80) ! - . , /) 0 - .) (#"03 * , 0#80/ 0#&++, / 0) . 1() 4 (" $&+, 2) %(South Ossetia requests Georgia be held responsible for genocide). http://www.kavkaz-uzel.ru/articles/95997; accessed on 17.08.2009.

192 South Ossetian Official Killed by Bomb. http://www.rferl.org/content/article/1143669.html; accessed on 17.08.2009.

193 Two Killed by Blast in South Ossetia. http://www.rferl.org/content/article/1143673.html; accessed on 17.08.2009.

194 Georgian Parliament Calls for Expulsion of Russian Peacekeepers. http://www.rferl.org/content/article/1143676.html; accessed on 17.08.2009.

195 One Georgian Serviceman Killed, Two Wounded in South Ossetia. http://www.rferl.org/content/article/1143712.html; accessed on 17.08.2009.

both managing and resolving the conflict.[196] It acted more as a restraining hand than an instigator vis-à-vis the successive South Ossetian leaderships. In recent years, however, the Georgian narrative of the conflict has given little space to North Ossetia. But systematic attempts to erode the role of Vladikavkaz in the conflict resolution process may have proved a short-sighted approach for in effect, Tbilisi thereby strengthened the maximalist positions of the South Ossetian leadership.

Establishment of an Alternative Administration in South Ossetia

On 24 October 2006 the "Salvation Union of Ossetians," a newly established organisation which clearly had the backing of Tbilisi, announced that it would hold alternative presidential elections and a referendum in South Ossetia in November, parallel to those organised by the Tskhinvali authorities. The new initiative was spearheaded by Dmitry Sanakoyev, an Ossetian who had served as "Defence Minister", "Deputy Prime Minister" and, for a short time, "Prime Minister of South Ossetia" under "President" Chibirov between 1996 and 2001.[197]

On 12 November 2006 competing elections were held in both the Tskhinvali-controlled areas of South Ossetia and the Georgian-controlled areas. As expected, Eduard Kokoity emerged as the winner in the Tskhinvali-controlled areas, with 98.1% of the votes, while Dmitry Sanakoyev was victorious in the Georgian-controlled areas, with 94% of the votes.[198]

In order to give credibility and legitimacy to Dmitry Sanakoyev, the Georgian Government moved to create a temporary unit to which it assigned the administration of all the territory that had been part of the former South Ossetian Autonomous Oblast' under Tbilisi's control,[199] subsequently making him head of this administration.

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[196] In April 2002 both Georgia and South Ossetia welcomed the offer of North Ossetian President Alexander Dzasokhov to mediate actively in the conflict resolution process (see Prime News, 14 April 2002). One of South Ossetia's most prominent nationalist exponents, Alan Chochiev, was arrested in Vladikavkaz on 14 October 2003 after sharply criticising Dzasokhov for taking a pro Tbilisi stand in the negotiations on South Ossetia (see Prime News 24 October 2003).

[197] Group Announces 'Alternative Polls' in S. Ossetia. http://www.civil.ge/eng/article.php?id=13936&search=Salvation%20Union%20of%20South%20Ossetia; accessed on 17.08.2009.

[198] South Ossetia Leader Reflected to Second Term. http://www.rferl.org/content/article/1143755.html; accessed on 17.08.2009.

[199] Throughout 1992-2008 parts of the territory of the former South Ossetian Autonomous Oblast' remained under Georgian administration, including the Georgian enclaves of Artsevi and Eredvi to the east of Tskhinvali, Tamarasheni/Kurta on the outskirts of Tskhinvali and Avnevi and Avalasheni/Nedleti in the Znauri district to the west. Also under Georgian administration was a large part of the district of Akhalgori (Leningori).

The Georgian Parliament passed a resolution on 8 May 2007 setting up the Temporary Administrative Unit,[200] and Dimitry Sanakoyev, as its head. He addressed the Georgian Parliament on 11 May, saying that the Ossetian people's future "was only in a democratic and stable Georgia."[201]

The reaction of the Kokoity administration to the new "claimant" to the Ossetian voice was, as expected, critical and hostile. Apart from posing a direct threat to its legitimacy, the emergence of the Sanakoyev administration raised the spectre of an Ossetian "civil war" and, according to at least one source, aroused fears that this would be used as an excuse for external intervention to help impose Tbilisi's rule over the region.[202]

Eduard Kokoity, speaking on Ossetian TV the following day, said that measures were needed to remove Dmitry Sanakoyev from the territory of the Republic of South Ossetia and warned that he would not resume talks with the Georgian Government until Tbilisi renounced further contact with the latter.[203] In response Tbilisi threatened that it might be forced to "neutralise" separatist forces in the region.[204]

Deteriorating Situation in 2007 - 2008

From the summer of 2007, the situation in South Ossetia grew increasingly tense. The conflict resolution process was at a standstill; the conflict management process barely operational, and trust between the sides was at its lowest ever, without dialogue between the sides or any second-track lines of communication.

In its June 2007 report, "*Georgia's South Ossetia Conflict: make haste slowly*," the International Crisis Group stated that:

> *"The confidence which existed at the community level in the zone of conflict before 2004 has been destroyed. There were some positive trends in the aftermath of that year's crisis but the security situation remains volatile. Repeated small*

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200 South Ossetian Leader Suspends Contacts with Tbilisi. http://www.rferl.org/content/article/1143867.html; accessed on 17.08.2009. See also: Georgian President Appoints Head of South Ossetian Provisional Administration. http://www.rferl.org/content/article/1143869.html; accessed on 17.08.2009.

201 ". "+/ &# #6 2340) , # 0"1, "- & 3& 14()) +"+ $, "#" #1& & . / * "%) .) 231"5)) ! ' . / * 283)) (Sanakoyev addressed the Georgian Parliament as Head of the South Ossetian Provisional Administration. http://www.kavkaz-uzel.ru/articles/114017; accessed on 17.08.2009.

202 Georgia`s South Ossetia Conflict: Make Haste Slowly, Europe Report Nr 183. Tbilisi/Brussels 7 June 2007, p. 6.

203 *Ibidem*, p. 8.

204 *Ibidem*.

incidents could easily trigger a larger confrontation. Crimes, detentions, shootings and exchanges of fire have become routine. Killings, kidnappings, shelling, mine explosions and other ceasefire violations also occur, as do direct confrontations between armed personnel, especially in the warmer months. With the rise in tension after Sanakoyev's appointment, there is a risk of a new escalation this summer."[205]

In April 2008 the Russian President upped the ante by tasking the Russian Government with establishing formal contacts with institutions in Abkhazia and South Ossetia, one of a series of measures aimed at boosting relations with the two entities. The move stopped short of international recognition, but it nonetheless sparked widespread condemnation in the West.[206]

As summer approached, the tension in South Ossetia increased dramatically. On 3 July a convoy with Dimitry Sanakoyev on board was attacked. He was unhurt but three Georgian policemen were killed.[207] In July 2008, Georgian forces occupied the Sarabuki Heights, which overlooked the Georgian and Ossetian by-pass roads and thus in effect controlled access to and from Tskhinvali. The Ossetians made several attempts to dislodge the Georgians from the heights, but failed. Georgian snipers reportedly shot and killed several Ossetian fighters,[208] and incidents of shelling from both sides further intensified in early August 2008.

Peace Efforts by the OSCE and the European Union

Right up until it was shut down in June 2009, the OSCE Mission to Georgia was engaged in what was described as a "multi-dimensional approach to helping create a more favourable context for peaceful resolution" of the Georgian-Ossetian conflict. Apart from the political process, this included an economic rehabilitation programme which the OSCE described as "a unique initiative helping pave the way for peaceful resolution."[209] In November 2005 the Mission had launched a needs-assessment study – this was followed by a specially convened

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[205] *Ibid*., p. 14.

[206] Putin Tasks Government with Providing Further Assistance to Abkhazia, South Ossetia. http://www.rferl.org/content/article/1144094.html; accessed on 17.08.2009.

[207] !) / 0+ 2(3** 0$231(-"/ , 013() &#%5 %1(. (/ / 0+ #' . */ *231#4** #/ #, 0(%# (In South Ossetia Target Fire Hits Convoy of Provisional Administration Head Sanakoyev). http://www.kavkaz-uzel.ru/articles/138688 (in Russian, accessed on 17.08.2009).

[208] 0230"/ *(1#/ (/ 08 %!) / 0+ 2(3** 23#$*-6/ 0((Wounded casualty in South Ossetia in stable condition). http://www.kavkaz-uzel.ru/articles/139786 (in Russian, accessed on 17.08.2009).

[209] The OSCE Mission to Georgia brochure, OSCE Vienna, 25 February 2008, www.osce.org/item/29837.html.

donors‘ conference in Brussels in June 2006 where some eight million euros were pledged for the implementation of projects agreed upon by the sides.[210]

The biggest contributor to the package was the European Union, through the European Commission and individual contributions from its member states. In addition to the economic rehabilitation programmes in Abkhazia and South Ossetia, the EC’s activities included humanitarian assistance, confidence-building, democratisation and human rights projects.[211]

Most of the funding was for the economic rehabilitation programme. Between 1998 and 2007 the EC spent 7.7 million euros on projects such as the rehabilitation of the drinking water supply network, the rehabilitation of schools and the establishment of three agricultural co-operatives (1998 - 2001); the rehabilitation of the Gori-Tskhinvali rail link, the Tskhinvali gas and electricity network (2001 - 2002), and other water and gas projects in Tskhinvali and other parts of the territory (2003 - 2007).[212]

The EC also funded a number of smaller projects and, more significantly, also contributed 140 000 euros to the work of the Joint Control Commission.[213]

From the time the EC joined the JCC process (1999) the European Union became far more involved in the Georgian-Ossetian conflict resolution process. In 2003 the European Union appointed its first Special Representative to the South Caucasus. His mandate referred in general terms to “preventing and assisting in the resolution of conflicts, promoting the return of refugees and internally displaced persons”[214]. After the appointment in February 2006 of Peter Semneby as EU Special Representative to the South Caucasus this was further reinforced with a mandate to “contribute to the settlement of the conflicts and to facilitate the implementation of such settlement in close co-ordination with (…) the conflict resolution mechanism for South Ossetia”[215].

The European Union’s involvement in the conflict settlement process now became two-pronged: the European Commission continued with its role as a provider of economic

[210] EU Statement on Donors Conference on South Ossetia, Georgia. http://www.osce.org/documents/pc/2006/06/19557_en.pdf; accessed on 17.08.2009.

[211] From the website of the EC Delegation to Georgia www.delgeo.ec.europa.eu/en/programmes/rehabilitation.html.

[212] *Ibidem*.

[213] *Ibidem*.

[214] Council of the European Union, Joint Action 2003/496/CFSP (OJ L 169, 8 July 2003) as last amended by Joint Action 2005/100/CFSP (OJ L31, 4 February 2005).

[215] Council of the European Union, Joint Action 2006/121/CFSP (OJ L49/14, 21 February 2006).

rehabilitation assistance, while the EUSR began to engage more widely in the conflict resolution issues, including by exploring new formats for dialogue between the sides.

This needed to be, and largely was, a finely-balanced operation. Broadly speaking, the European Commission was committed to the JCC format, which it was partly funding. The EUSR, having tried and failed to be allowed to share the EC seat on the JCC, sought to create other spaces for Georgian-Ossetian engagement.

In response to his expanded mandate the EUSR organised a fact-finding mission to Abkhazia and South Ossetia in January 2007. This set in motion a number of initiatives, including the expansion of the role of the EU Border Monitoring Mission which was also to play a liaison role with the authorities of Abkhazia and South Ossetia.[216]

Much of the EU's effort after 2004 was targeted at reducing tension, trying to prevent the escalation of violence, and confidence-building. The European Union's activities were welcomed by all the sides involved in peace efforts in the Georgian-Ossetian zone of conflict, but its engagement would have been far more meaningful and effective if it had operated within the proper framework of a peace process. No such framework existed, however, especially after 1999.

4. Observations

1/ According to the international and regional organisations and external actors involved in the mediation of the Georgian-Abkhaz and the Georgian-Ossetian conflicts, the right of internal self-determination of the various peoples in Georgia would have to be achieved through constitutional reform. The self-governance of Abkhazia and South Ossetia within a federal Georgia was the key objective to be achieved. In the negotiations on the political status of these two entities, the parties had a wide choice of variants of federalism.[217]

The Georgian Government has spoken in favour of a so-called asymmetrical federalism, in which some constituent states would enjoy more powers than others. Under this model,

[216] http://register.consilium.europa.eu/pdf/en/08/st10/st10601.en08.pdf; accessed on 17.08.2009.

[217] Externally, a federation is an indivisible sovereign state, in line with the principle of territorial integrity, and internally, sovereignty is shared between the federal government and the constituent entities, in line with the principle of self-determination. Each level of government has its specific competencies in law-making and executive power. The constituent entities are not subordinated to the federal level of governance, as both derive their power directly from the constitution. Constitutional reforms require the involvement of both levels.

Abkhazia would have received a higher level of self-government than South Ossetia. This approach has been justified by Tbilisi on the grounds of differences in the ancestral rights of these two titular nations and the fact that the Ossetians have a homeland outside Georgia – the North Ossetian Republic in the Russian Federation.

The model of federation, however, raised serious concerns among the Abkhaz and the Ossetians. A federation is expressly designed to protect minorities through their over-representation in state structures and by giving them veto powers at the different levels of governance. But such guarantees do not suspend the application of majority rule. If integrated into the functioning of a federation, the authorities of Abkhazia and South Ossetia would frequently be in danger of being outvoted on a number of important issues to which their power of veto did not apply. Moreover, the existing models of a federation did not adequately meet their security concerns. In principle, constituent states are not allowed to have autonomous security policies. They cannot have a defence system capable of protecting them from the central government in the event of a violent conflict. Nor can they be integrated into the functioning of international security organisations, which as a rule require full sovereignty as a basis for participation. They may receive guarantees from external actors or international security organisations, but there has been little experience of the practical implementation of such security mechanisms in federations.

For this reason, in Abkhazia and South Ossetia there was a strong preference – if independence should prove impossible to achieve – for a confederation.[218] The confederative model is based on a treaty between sovereign states, and their union does not deprive them of their sovereignty. The government of a "union of states" has minimal powers, while the constituent states have a veto on all fundamental policy issues. Their sovereignty is recognised internationally, which in principle gives them the right to secede. This combination of a weak federal government and sovereign powers for the member states made this model unappealing to the Georgian authorities and attractive to the Abkhaz leadership – up until 1999, when Abkhazia declared its independence. The fact that there is no functioning

[218] The concept of confederation has a more important place in political science literature than in contemporary reality. In the history of confederations it is conspicuous that the most eminent examples are all cases in which confederative episodes ultimately gave way to more integrated federations or unitary states. The four classic cases were the Swiss Confederation, from late medieval times until 1798 and again from 1815 to 1848, the United Provinces of the Netherlands from 1579 to 1795, the German Bund from 1815 to 1866 and the United States Confederation from 1781 to 1789. Thus none of these confederations survived the third quarter of the nineteenth century, an international context where centralised statehood became a question of survival. See Xiaokun Song, "Confederalism – A Review of Recent Literature," in B. Coppieters, D. Darchiashvili and N. Akaba (eds), *Federal Practice – Exploring Alternatives for Georgia and Abkhazia* (Brussels: VUB Press, 2000), pp. 181-193, http://poli.vub.ac.be.

confederative union of states in the contemporary world added to Georgian scepticism. In their view, such a model would not halt unilateral steps towards Abkhaz and South Ossetian independence but would only serve the purpose of legitimising such a move. They were also afraid that, even if secession did not materialise immediately, the constituent states could be used as convenient leverage by an outside power for intervening in Georgia's internal affairs.

2/ For a number of years, the Ossetian conflict seemed to be perceived by Tbilisi and the international community as less urgent and less important than that in Abkhazia. On several occasions the windows of opportunity in the Georgian-Ossetian peace process seemed to open and close without being fully exploited. On the Georgian side, both during the Shevardnadze administration and, even more so, under that of Mikheil Saakashvili, there had also been a general feeling that the conflict in South Ossetia was easier to solve than that in Abkhazia. This may have been one of reasons why Tbilisi's diplomatic efforts in the field of conflict resolution in 2004 - 2007, in contrast to the previous period, concentrated predominantly on South Ossetia.

3/ The conflicts in Abkhazia and in South Ossetia, though confined to relatively small territories, have proved to be complex with both internal and external aspects. The internal aspects of the two conflicts seem to have, *inter alia,* historical, political, demographic and economic roots. The external aspects are connected with developments outside the Georgian-Abkhaz and Georgian-Ossetian conflict zones and with interests of great and neighbouring powers, in particular those of the Russian Federation. Russia, having traditionally strong links with the region and vast political, economic and security interests there, was given the role of facilitator in the Georgian-Abkhaz and the Georgian-Ossetian negotiation processes, and that of a provider of peacekeeping forces. This formula, while fully understandable in terms of "real politics," seriously affected the existing political equilibrium in the region, as it meant in practice that these two conflicts could be settled not only when the interests of the Georgian, the Abkhaz and the Ossetians were duly reconciled, but also those of Moscow. In a situation of worsening Russian-Georgian relations, it became more and more difficult to find an acceptable compromise within the above "triangles."

4/ In the view of many Georgians, the Russian policy, especially since 2004 onwards might lend credence to the Georgian Government's claim that Russia was not an honest broker. Its policy included the legalisation of links with the breakaway territories, the granting of Russian passports to their populations, and declarations about using the Kosovo precedent as a basis for the recognition of South Ossetia and Abkhazia. The Russian peacekeepers were

also regarded as being largely a protective ring behind which secessionist entities were developing their institutions. At times of tension in the area Moscow has made it clear, particularly since 2006, that it would not stand idly by in the event of Georgian military action in the breakaway entities.[219] The above may help to explain why many of the Georgian efforts in 2004 - 2008 were directed at changing the format of both the negotiation and the peacekeeping arrangements.

5/ Notwithstanding the real or perceived interests of the third parties, one of the weaknesses of the peace processes in 1992 - 2006 seemed to be the fact that the Georgian, Abkhaz and South Ossetian sides concentrated heavily on the external aspects and players without paying sufficient attention to building mutual trust and promoting reconciliation, and without putting enough effort into these important processes. In 2006 - 2008 the Georgians did put stronger emphasis on bilateral cooperation and talks with Tskhinvali and Sukhumi, but the way in which they chose to do this – by decreasing Moscow's political role in the peace negotiations and that of the Russian peacekeepers on the ground – was not appealing to the Abkhaz and Ossetian sides, who regarded the Russian Federation as their main security guarantor. On the other side, the Abkhaz and Ossetian demands in this period for Georgian guarantees of the non-use of force and other unilateral concessions (the withdrawal of the Georgian security forces from the upper Kodori Valley, etc.), as preconditions for any resumption of the peace process, could hardly be regarded as constructive either, especially in the context of public calls by some Abkhaz leaders for the forcible seizure ("liberation") of the Georgian-administered upper Kodori Valley. As far as the Georgian-Abkhaz peace talks were concerned, in previous years (up to mid-July 2006), security and the non-use of force had always been discussed as part of a larger package, and were usually linked with Abkhaz consent for, and cooperation on, the return of the refugees/IDPs.

6/ Opportunities for a peace settlement in Abkhazia and South Ossetia seemed better before 1999 than after. The clear hardening of the Abkhaz and South Ossetian positions in the respective peace negotiations, noticeable since 2000, combined with the worsening of Georgian-Russian relations after 1999 and weakened Western persuasive power vis-à-vis Moscow, gradually narrowed the space for a political compromise. Where the conflict in Abkhazia was concerned, a new opportunity may have appeared in 2005, when new leaderships, not responsible for the 1992 - 1994 armed confrontation, came to power in both Sukhumi (in January 2005 Sergei Bagapsh replaced Vladislav Ardzinba as *de facto* President)

[219] See statement of Russian Defence Minister Sergei Ivanov (Civil Georgia, 8 October 2006, item 13822).

and in Tbilisi (in early 2004, Eduard Shevardnadze was replaced by Mikheil Saakashvili). Unfortunately, the new Georgian leadership did not seem to have either the determination or skill necessary to exploit that opportunity and reverse the process of Abkhazia's drifting away.

7/ For a number of years the peace efforts, including those undertaken by the three parties and the international community, had a positive effect on regional peace and stability. There were also periods of Georgian-Abkhaz and Georgian-Ossetian *rapprochement* and the building of trust and mutual ties. Simultaneously with the process of Georgian-Abkhaz and Georgian-Ossetian détente and normalisation, another process was also going on: that of the gradual tightening of links between these two territories and the Russian Federation. This second process, more visible after 1999 and accelerated in spring 2008, generally appeared stronger than the first. Described by the Georgians on a number of occasions as the "creeping Russian annexation of Abkhazia and South Ossetia," this tightening of links may have increased Georgian frustration at the stalled peace processes and protracted failure to arrive at a comprehensive settlement.

8/ The establishment of alternative South Ossetian and Abkhaz administrations in the breakaway regions in 2006 was regarded by many as the most controversial Georgian move in the conflict resolution process. It was probably motivated by a few considerations. The strongest may have been related to the ongoing controversies over Kosovo, and Moscow's warnings that it would recognise Abkhazia and South Ossetia if Kosovo's independence was recognised by the Western powers. For considerable parts of the territories of South Ossetia and Abkhazia to be under the formal control of pro-Georgian administrations may, therefore, have been regarded by the Georgian leadership as a preventive measure, aimed at making Russian recognition of the two separatist provinces more difficult, and therefore less feasible.

9/ Decisions on Kosovo's independence and its international recognition, together with the Bucharest NATO summit of 2-3 April 2008, with its promise of Georgia's future NATO membership, complicated the international context in which events were unfolding. The decision by the Russian Federation to withdraw the 1996 CIS restrictions on Abkhazia (March 2008) and to authorise direct relations with the Abkhaz and South Ossetian sides, in a number of fields (April 2008), added another dimension to an already complex situation in the area

10/ The virtually passive and non-innovative approach to the peace processes adopted by the international community present in the area, in particular the UN (since mid-July 2006), was not enough to prevent the forthcoming crisis. Thus a series of mistakes, misperceptions and missed opportunities on all sides accumulated to a point where the danger of an explosion of violence became real. Unlike in the early 1990s, what was about to happen in August 2008 was no longer a localised conflict in a remote part of the world but a short, bitter armed confrontation between two states, fought in the battlefield but also on live television, and carrying major international implications.

Chapter 3

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3.1. The Legal Status of South Ossetia and Abkhazia

The status of Abkhazia and South Ossetia under international law is decisive for determining the international rights and obligations of those regions. This question is analysed here for the period from the end of the armed conflicts in South Ossetia (1992) and Abkhazia (1994) up to the outbreak of the armed conflict of August 2008.

I. Determination of Statehood on the Basis of International Law

The question of whether a certain territorial entity is a "state" can be approached in two different ways. First, it is possible to argue that statehood can be determined on the basis of certain objective criteria. In this case, the recognition by other states would be of only declaratory value (declaratory theory of recognition). Second, the reaction of the other international legal subjects can be seen as decisive. What counts then, is the recognition of a territorial entity as "state" by other states (constitutive theory of recognition).[1] State practice[2] and international legal scholarship[3] espouse predominantly the first approach, assuming that recognition is *not* constitutive of a state.[4]

Therefore, the international legal status of a territorial entity has to be assessed with a view to the presence or absence of certain factual elements. There is no authoritative definition of the relevant criteria. Yet there is a basic consensus that minimal preconditions for statehood are (1) a defined territory, (2) a permanent population, and (3) an effective government.[5]

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[1] See the historical debate by James Crawford, *The Creation of States in International Law* (2nd ed. Oxford: Clarendon Oxford UP 2006), at 19 *et seq*.

[2] See e.g. *The Charter of the Organisation of American States* of 30 April 1948, which came into effect on 13 December 1951 (Art. 13): "The political existence of a State is independent of recognition by other States. Even before being recognised, the State has the right to defend its integrity and independence …". For an overview of state practice see Ian Brownlie, *Principles of International Law* (7th ed. Oxford OUP 2008), at 95 *et seq.*

[3] See only, among many others, Georg Dahm/Jost Delbrück/Rüdiger Wolfrum, *Völkerrecht*, vol. I/1 (Berlin: De Gruyter 1988), at 188-191; Antonio Cassese, *Public International Law* (2nd ed. Oxford OUP 2001), at 48-49; Patrick Daillier/Allain Pellet, *Droit international public* (7th ed. Paris: LGDJ 2002), at 557-58.

[4] The reason is that there is no central recognition authority, and that recognition is accorded in a decentralised fashion by the other states on the basis of their own assessment as to whether the criteria for statehood are present. If these acts of recognition were constitutive of statehood and would "create" states, the result would be that an entity could be a "relative" state: A state *vis-à-vis* one state, but not a state *vis-à-vis* another. This relativity would cause legal confusion and would be impracticable. Moreover and most importantly, if statehood depended on recognition, an unrecognised political entity, although it possesses all features of a state (defined territory, permanent population, effective government, and independence) would not be protected by international law and would itself not be bound by international law. It would exist in an international legal vacuum. Such a state of affairs would in policy terms be undesirable.

[5] Karl Doehring, "State" in Rudolf Bernhard (ed), *Enyclopedia of Public International Law*, vol. 4 (North-Holland: Elsevier 2000) 600-604, at 601; Dahm/Delbrück/Wolfrum 1988 (above note 3), at 131; Brownlie (above note 2, at 71-72; Cassese, *Public International Law* (above note 3), at 48. Cf. also Opinion No. 1 of the European Conference on Yugoslavia : "the state is commonly defined as a community which consists of a

These objective criteria for determining statehood are very general and flexible, and their application to concrete cases always remains a question of appreciation. Especially the "effectiveness" of government is a question of degree. The emergence of a new state, especially as a result of secession from an existing state, is usually a process extended through time. Throughout this process, independence can decrease or increase, depending on a number of factors.

In current international law, the observation of legal principles which are themselves enshrined in international law (notably the principles of self-determination and the prohibition of the use of force), are accepted as an additional standard for the qualification of an entity as a state.[6] The "guidelines" elaborated by the EU foreign ministers for the recognition of new states in Eastern Europe and in the Soviet Union have taken into account the respect for basic international obligations, especially in the field of human and minority rights.[7] It is however not clear whether these criteria of legitimacy were applied as legal conditions or as a matter of political discretion. In either case, these normative considerations can work in the same direction as the principle of effectiveness and underscore an entity's claim to statehood.

Crucially, assessment of statehood in international law and in international politics overlaps, but differs. The political practice of recognition of states, as a rule, starts out from the objective criteria identified in international law, but may be guided by additional considerations. It is very possible that an entity short of statehood is recognised as a state by another state or states for particular political motives.

That means that territorial entities can fall into three different categories: (1) (full) states fulfilling the relevant criteria for statehood and universally recognised; (2) state-like entities fulfilling the relevant criteria, but which are not, or not universally, recognised;[8] and entities

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territory and a population subject to an organized political authority" (repr. in ILM 31(1992), at 1494-1497; EJIL 3 (1992), at 182), para. 1 b).

[6] Crawford (above note 1) at 128-131; Malcolm N. Shaw, *International Law* (6th ed. Cambridge University Press 2008), at 206.

[7] Guidelines repr. in Europa-Archiv 47 (1992), D 120; ILM 31 (1992), at 1486-87.

[8] A term used in this context is the term "*de facto* regime". That term was coined in scholarship to describe "entities … claiming to be states …, which controlled more or less clearly defined territories without being recognized – at least by many states". Jochen A. Frowein, "*De facto* regime" in Rudolf Bernhardt (ed), *Encyclopedia of International Law*, vol. 1 (Amsterdam: Elsevier 1992) 966-968; at 966. Jochen A. Frowein, *Das de facto-Regime im Völkerrecht* (Köln: Carl Heymanns 1968). In that terminology, entities such as the German Democratic Republic before its broad recognition in 1972 or North Vietnam before the unification of Vietnam were *de facto* regimes. However, the term *de facto* regime is probably even more ambiguous than the others. If we follow the prevailing scholarly line that international recognition has only a declaratory effect and is not constitutive of statehood, such entities need not be called *de facto* regimes, but simply state-like entities. "*De facto* regime" is also a term of international humanitarian law, where it denotes a prolongation and

short of statehood (not fulfilling the relevant criteria, or only some of them, or only in a weak form, but eventually recognised by one or more states).

Even if recognition has only a declaratory value, the recognition of an entity as a state by other states can give a certain evidence of its legal status as a state, although this presumption can be refuted on the basis of facts.

Such a type of *prima facie* evidence did not exist for South Ossetia before August 2008. No state had recognised it before the outbreak of the war, not even for opportunistic reasons.[9] Moreover, South Ossetia itself had not unambiguously and consistently claimed to be a state: on the one hand the South Ossetian authorities have sought to be recognised as a sovereign and independent state, but on the other hand they have also advocated unification with North Ossetia through integration into Russia.[10] Integration into the Russian Federation would go against the attainment of independent statehood.

Nevertheless, despite these uncertainties and lack of recognition, South Ossetia could have been a "state", if it had fulfilled the relevant criteria mentioned above.

With regard to the territorial status under international law, Abkhazia was similar, but not identical to that of South Ossetia before the outbreak of violence. Abkhazia was not recognised by any state before August 2008. But integration within Russia has been far less appealing to Abkhazia than to South Ossetia. Abkhazia always stressed the fact of being a sovereign state.[11]

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stabilization of insurgency. In that IHL-tradition, it was assumed that an entity must be recognized as a *de facto* regime and only through recognition acquires limited legal personality. The difference from the recognition of a state is that the recognition of a *de facto* regime is constitutive and by definition has a somewhat provisional character. See Georg Dahm/Jost Delbrück/Rüdiger Wolfrum, *Völkerrecht*, vol. I/2 (Berlin: De Gruyter 2002), at 303-304.

[9] This finding is also confirmed by the official Russian answers to the IIFFMCG questionnaire related to legal issues: "Prior to the conflict Russia recognised Abkhazia and South Ossetia as constituent entities of Georgia."

[10] In continuation of the process of separation from Georgia, initiated in September 1990, the Ossetians participated in a "referendum" on the independence of South Ossetia from Georgia on 19 January 1992 in which the vast majority declared itself in favour of independence and unification with Russia.
On 29 May 1992, the South Ossetian Supreme Council issued the "Declaration of Independence of the Republic of South Ossetia" in which it proclaimed: "Implementing the Declaration on State Sovereignty of the Republic of South Ossetia, the Supreme council solemnly declares the independence of South Ossetia and establishment of the independent state of South Ossetia." In the "Constitution (Organic Law) of the Republic of South Ossetia", adopted on 8 April 2001, Article 1(1) states: "The Republic of South Ossetia is a sovereign democratic state based on law, which has been established by the right of nation to self-determination."

[11] Before 1999, Abkhazia was not opposed to a "Union of States" according to the model of a confederation, and to proposals to constitute a freely associated state either with Georgia or with Russia. All these proposals were, however, based on the sovereignty, the right to secession and the statehood of Abkhazia.

1. Defined territory

As government necessarily has to be related to a territory, the first condition of statehood is a certain coherent territory or a "particular territorial base upon which to operate."[12] A final settlement on the delimitation of the territory is not a prerequisite for the existence of a state; boundary disputes generally do not affect statehood.[13] Neither is there any rule requiring contiguity of the territory of a state.[14]

Therefore, despite the lack of agreement between the Georgian Government and the authorities of South Ossetia concerning the delimitation and status of its boundaries – both sides were controlling a part of the territory of the Former Autonomous Republic of South Ossetia[15] – and notwithstanding the fragmented character of the territory controlled by the authorities of South Ossetia – including even a number of enclaves - the minimum requirement of the existence of a "core" territory[16] was met in the case of South Ossetia.

In the case of Abkhazia, there are even fewer doubts concerning the criterion of an identifiable core territory, although the Georgian Government controlled a part of the territory, i.e. the upper Kodori Gorge that geographically belongs to Abkhazia.

2. Permanent population

The exact meaning of the second criterion, a "permanent population", is disputed in international legal doctrine. "Population" can be understood as an "aggregate of individuals" independent of these persons' nationality.[17] More narrowly, population can be understood in the sense of a people with a common nationality.[18]

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[12] This definition is used by Malcolm N. Shaw, *International Law* (6th ed. Cambridge University Press 2008), at 199. See also German-Polish Arbitration Court (1 August 1929), *Deutsche Continental-Gas-Gesellschaft v Etat polonais*, repr. in ZaöRV 2 (1931), 14-40, at 23: "il suffit que ce territoire ait une consistance suffisamment certaine … et que, sur ce territoire, il exerce en réalité la puissance publique nationale de façon indépendante."

[13] Crawford (above note 1), at 49.

[14] Crawford (above note 1), at 47.

[15] Before the outbreak of large-scale hostilities, the South Ossetian Government reportedly controlled about three fifths of the territory of the former administrative entity of South Ossetia, while the Georgian Government controlled about two fifths, several enclaves within South Ossetia and the entire district of Akhalgori in the Southeast of South Ossetia.

[16] According to Rosalyn Higgins, statehood might be questionable when there are "doubts of a serious nature" on the future frontiers (Rosalyn Higgins, *The Development of International Law through the Political Organs of the UN* (London: OUP 1963), at 20).

[17] Crawford (above note 1), at 52 states that the criterion "is not a rule relating to the nationality of that population." For Brownlie (above note 2), at 70-71 a "stable community" is sufficient.

[18] Alfred Verdross/ Bruno Simma, *Völkerrecht* (3d ed. Berlin: Duncker & Humblot 1984), at 225 speak of a "dauerhafter Personenverbund, der in der Geschlechterfolge fortlebt." Georg Jellinek, *Allgemeine Staatslehre*

For South Ossetia and Abkhazia, this aspect is important, because the overwhelming majority of the people living in these territories have voluntarily acquired Russian nationality (even after acquiring the "nationality" of South Ossetia and Abkhazia respectively).[19] Furthermore, there was a constant flux of the population due to internally displaced persons and migratory movements.[20] The changes within the demographic composition of the population were even greater in Abkhazia than in South Ossetia. Therefore, the existence of a stable group with a common nationality is doubtful for both regions.

However, the criterion of nationality is not very helpful, at least in the context of secession processes, because here nationality is, as a rule, defined only after having created a new state. As a rule, nationality seems to depend on statehood and not vice versa.[21] Therefore, the status of a (new) state cannot in legal terms be linked to the existence of a group of persons possessing a common nationality.

An "aggregate of individuals" that lived in both South Ossetia and Abkhazia can be broadly considered as constituting a population.

3. Effective government

The element of effective government is mostly viewed as one complex criterion.[22] Some authors subdivide it into "effective government" and "independence".[23] Despite this terminological difference, it is consented that the criterion of "effective government" has an "inward" and an "outward" aspect. These two aspects refer to the exercise of authority with respect to persons and property within the territory of the state, and to the exercise of authority with respect to other states.[24] In both relations independence is decisive: according to Ian Brownlie, it must be ascertained that there is no "foreign control overbearing the

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(3rd ed. Berlin: Julius von Springer 1920), at 183, demands that there is a "Volk" as a precondition of statehood in the legal sense. See in this sense also Doehring (above note 5), at 601, Dahm/Delbrück/Wolfrum 1988 (above note 3), at 127, Theodor Schweisfurth, *Völkerrecht* (Tübingen: UTB Mohr Siebeck 2006), at 10 and 296; Daillier/Pellet (above note 3), at 409.

19 The validity of Russian nationality on the international plane below Chapter 2.3.

20 See Chapter 2 "The conflicts in Abkhazia and South Ossetia: Peace Efforts up to 2008".

21 Crawford (above note 1), at 52.

22 That was the classical approach developed in the 19th century as enounced by Georg Jellinek. See in contemporary scholarship Karl Doehring, *Völkerrecht* (2nd ed. Heidelberg: CF Müller 2004), MN 49; Volker Epping in Knut Ipsen, *Völkerrecht* (5th ed. Munich: Beck 2004), at 59-67; Pierre-Marie Dupuy, *Droit international public* (9th ed. Paris: Dalloz 2008), at 95.

23 Notably Crawford (above note 1), at 55 *et seq*.

24 *Ibid*, at 55, fn 85.

decision-making of the entity concerned on a wide range of matters of high policy and doing so systematically and on a permanent basis."[25]

a) South Ossetia

South Ossetia had already established a new constitutional order in 1993, and in a revised form in 2001 with executive, legislative and judicial branches. Nevertheless, there are many doubts as to the effectiveness and independence of the system.

First, as the majority of people living in South Ossetia have acquired Russian citizenship, Russia can claim personal jurisdiction over them.[26] Russian legislation, for instance on health insurance or pensions, can therefore directly impact on their lives. On the basis of the Russian Constitution, Russian citizens have many rights and obligations, among them the right to vote (Article 32 para. 2 Russian Constitution) and the right to actively participate in the management of the state (Article 32 para. 1 Russian Constitution), as well as the obligation to pay taxes (Article 57 Russian Constitution) and the obligation to perform military service (Article 59 Russian Constitution). From the point of view of Russian constitutional law, the legal position of Russian citizens living in South Ossetia is basically the same as the legal position of Russian citizens living in Russia.[27] Russian passport holders in South Ossetia participate in Russian elections, e.g. in the Russian presidential elections of March 2008,[28] because Russian politics directly matters to them.

Second – and still more importantly – Russian officials already had *de facto* control over South Ossetia's institutions before the outbreak of the armed conflict, and especially over the security institutions and security forces. The *de facto* Government and the "Ministries of Defence", "Internal Affairs" and "Civil Defence and Emergency Situations", the "State Security Committee", the "State Border Protection Services", the "Presidential Administration" – among others – have been largely staffed by Russian representatives or South Ossetians with Russian citizenship that have worked previously in equivalent positions in Central Russia or in North Ossetia.[29] According to the South Ossetian Constitution, these

[25] Brownlie (above note 2), at 72.

[26] The effects of the conferral of Russian nationality on Georgian citizens and stateless persons are dealt with below in Chapter 2.3.

[27] Cf. Article 62(2) of the Russian Constitution: "Possession of the citizenship of a foreign state by the citizen of the Russian Federation shall not belittle his or her ranks and liberties or exempt him or her from the duties stemming from Russian citizenship unless otherwise stipulated by the federal law or international treaty of the Russian Federation."

[28] Civil Georgia, 3 March 2008.

[29] See official Georgian answers to IIFFMCG questionnaires.

officials are directly responsible to the *de facto* President of South Ossetia as "head of state" and of the executive branch (Art. 47 para. 1 of the Constitution). Still, despite this constitutional accountability, the fact that the decisive positions within the security structures of South Ossetia were occupied by Russian representatives, or by South Ossetians who had built their careers in Russia, meant that South Ossetia would hardly have implemented policies contrary to Russia's interests.

De facto control of South Ossetia was gradually built up by Moscow. Russian representatives were not as present within the South Ossetian leadership before summer 2004. Thus the process of state-building was not gradually stabilised after South Ossetia's declaration of independence in 1992, but suffered setbacks after 2004. Even if South Ossetia was not formally dependent on any other state, Russian foreign influence on decision-making in the sensitive area of security issues was so decisive that South Ossetia's claim to independence could be called into question.

To sum up, Russia's influence on and control of the decision-making process in South Ossetia concerned a wide range of matters with regard to the internal and external relations of the entity. The influence was systematic, and exercised on a permanent basis. Therefore the *de facto* Government of South Ossetia was not "effective" on its own.

b) Abkhazia

The effective control of the Abkhaz authorities over the relevant territory and its residents is problematic, because many inhabitants had acquired Russian citizenship and were – from the Russian perspective – under the personal jurisdiction of the Russian Federation. According to the information given by the Abkhaz authorities "practically all the inhabitants of Abkhazia are at the same time citizens of the Russian Federation."[30] Russian passport-holders participated massively in presidential and parliamentary elections in Russia.[31]

Russia's control over Abkhazia's security institutions seems to be less extensive than in South Ossetia. Contrary to the situation in South Ossetia, the will to remain independent from Russia has traditionally remained strong among the elites and Abkhaz public opinion. In the "presidential elections" of 2004/05, for instance, Moscow had to acknowledge the defeat of the candidate whom it had openly supported (Raul Khadjimba) and had to accept the victory

[30] See official Abkhaz answers to the IIFFMCG questionnaire related to legal issues, including international humanitarian law and human rights issues.

[31] Civil Georgia, 3 March 2008.

of Sergei Bagapsh. This means that the Abkhaz institutions were – at least at that particular moment – not completely under control of the Russian Government.

II. Conclusion

From the perspective of international law, South Ossetia was, at the time of the military conflict in 2008, an entity that had a territory, a population and a government acting on a newly established constitutional basis. But all usual criteria for statehood (in legal and in political terms) are gradual ones. Especially the third criterion, effectiveness was not sufficiently present in the case of South Ossetia, as domestic policy was largely influenced by Russian representatives from "within".

Thus, South Ossetia came close to statehood without quite reaching the threshold of effectiveness. It was – from the perspective of international law – thus not a state-like entity, but only an entity short of statehood.[32]

The status of Abkhazia is slightly different. Contrary to South Ossetia, the Abkhaz "government" has expressed its clear will to remain independent from Russia, even if its policies and structures, particularly its security and defence institutions, remain to a large extent under control of Moscow. Abkhazia is more advanced than South Ossetia in the process of state-building and might be seen to have reached the threshold of effectiveness. It may therefore be qualified as a state-like entity. However, it needs to be stressed that the Abkhaz and South Ossetian claims to legitimacy are undermined by the fact that a major ethnic group (i.e. the Georgians) were expelled from these territories and are still not allowed to return, in accordance with international standards.

[32] In political science, the concepts of "statehood" and "*de facto* state" are indeed defined for different purposes than for international law. The following definition of Scott Pegg for instance serves descriptive and explanatory objectives that are particular to political science. Pegg stresses a number of characteristics of a *de facto* state – such as the degree of domestic legitimacy and capacity to deliver public goods – which are not directly relevant for a legal definition of statehood: "A *de facto* state exists where there is an organized political leadership which has risen to power through some degree of indigenous capability; receives popular support; and has achieved sufficient capacity to provide governmental services to a given population in a specific territorial area, over which effective control is maintained for a significant period of time. The *de facto* state views itself as capable of entering into relations with other states and it seeks full constitutional independence and widespread international recognition as a sovereign state. It is, however, unable to achieve any degree of substantive recognition and therefore remains illegitimate in the eyes of international society." (Scott Pegg, *International Society and the De Facto State* (Aldershot i.a. 1998), at 26 *et seq*.).

III. Comment

South Ossetia should not be recognised because the preconditions for statehood are not met. Neither should Abkhazia be recognised. Although it shows the characteristics of statehood, the process of state-building as such is not legitimate, as Abkhazia never had a right to secession. Furthermore, Abkhazia does not meet basic requirements regarding human and minority rights, especially because it does not guarantee a right of safe return to IDPs/refugees.

3.2. Self-Determination and Secession

Both South Ossetia and Abkhazia consider the right to self-determination as the legal basis for their request for sovereignty and independence. Since the end of the 1980s, the two political entities have based successive declarations and constitutional steps on this principle.[33] Therefore it is necessary to discuss whether South Ossetia and Abkhazia could rely on self-determination, and whether they were allowed to secede from Georgia.

I. Self-Determination and Secession in International Law

Both the principle of self-determination of peoples and the principle of territorial integrity are fundamental principles of international law. They are explicitly acknowledged in the UN Charter. The promotion of self-determination is one of the purposes of the United Nations (Article 1 (2) UN Charter[34]), and is also endorsed in common Article 1 of both universal Human Rights Covenants of 1966. Self-determination is understood as "the right of cohesive national groups ('peoples') to choose for themselves a form of political organisation and their relation to other groups."[35] Generally speaking, the choice may be "independence as a state,

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[33] The preamble of Abkhazia's *de facto* Constitution of 26 Nov. 1994 (adopted by "referendum" on 3 October 1999) reads as follows: "We, the people of Abkhazia, exercising our right of self-determination … announce solemnly and decide on the constitution of the Republic of Abkhazia". Art. 1 sentence 1 states: "The Republic of Abkhazia (Apsny) is a sovereign, democratic rule-of-law-state which has been historically confirmed according to the right of the people to free self-determination." http://www.abkhaziagov.org/ru/state/sovereignty/index.php?print=Y; also http://rrc.ge/admn/url12subx.php?idcat=2&lng_3=en; Engl. transl http://www.isn.ethz.ch/isn/Digital-Library/Primary-Resources/Detail/?id=30523&lng=en. The preamble of South Ossetia's *de facto* Constitution adopted on the basis of a "referendum" on 8 April 2001, and effective in the version of December 2005, also refers to the principle of equal rights and self-determination of the people, and Art. 1 states: "The Republic of South Ossetia is a sovereign democratic rule-of-law-state which has been founded by virtue of the self-determination of South Ossetia's people." (http://www.sojcc.ru/zakoniruo/196.html).

[34] Article 1(2) UN Charter: "The purposes of the United Nations are: … To develop friendly relations among nations based on respect for the principle of equal rights and self-determination of peoples, and to take other appropriate measures to strengthen universal peace".

[35] Brownlie (above note 2), at 580.

association with other groups in a federal state, or autonomy or assimilation in a unitary (non-federal) state."[36] At the same time, the UN Charter upholds the principle of territorial integrity of any state (Article 2 (4) UN Charter[37]). The principle of territorial integrity is a major and foundational principle of international law and is acknowledged in numerous international documents, notably by the Friendly Relations Declaration of 1970 [38] and the Helsinki Final Act of 1975.[39] Both principles have equal value and form part of customary international law.[40]

The "internal" aspect of the right to self-determination, to be realised within the framework of a state, does not infringe on the territorial integrity of the state concerned. However, if the right to self-determination is interpreted as granting the right to secession (external right to self-determination), the two principles are incompatible.

As evidenced by state practice and United Nations resolutions, the right to secede unilaterally is uncontested for colonial peoples, and peoples subject to foreign occupation. This situation is not present in South Ossetia and Abkhazia.

Scholarship has remained divided on the question of whether international law allows secession outside the colonial context in extreme circumstances. A current of literature argues that secession is basically a fact of life not regulated by international law.[41] The doctrinal argument for this proposition is that, systematically speaking, the principle of territorial integrity does not apply within a state, and is thus not directed against groups within states.[42]

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[36] *Ibid*., at 580.

[37] Article 2(4) UN Charter: "The Organization and its Members, in pursuit of the Purposes stated in Article 1, shall act in accordance with the following Principles: … All Members shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any state, or in any other manner inconsistent with the Purposes of the United Nations."

[38] UN GA Res. 2625 (XXV) of 24 Oct. 1970.

[39] Part 1 (a) "Declaration on Principles Guiding Relations between Participating States", Principle III "Inviolability of frontiers"; Principle IV "Territorial integrity of States" including the commitment that no occupation or acquisition of territory in violation of that principle will be recognized as legal.

[40] Edward Mc Whinney, *Self-Determination of Peoples and Plural-Ethnic States in Contemporary International Law. Failed States, Nation-building and the Alternative, Federal Option* (Leiden, Boston: Martinus Nijhoff 2007), at 2 *et seq.*

[41] See Mc Whinney (above note 40), at 5; Karl Josef Partsch, "Self-Determination" in Rüdiger Wolfrum/Christiane Philipp (eds), *United Nations: Law. Practice, and Policy*, vol. 2 (Munich: Beck 1995), 1171-1179, para. 27; Dietrich Murswiek, "The Issue of a Right of Secession – Reconsidered" in Christian Tomuschat (ed.), *Modern Law of Self-Determination* Dordrecht/Boston/London: Martinus Nijhoff 1993) 21-39, at 37 *et seq.*

[42] See in this connection, e.g., Georges Abi–Saab, "Conclusions", in Marcelo Kohen (ed.) *Secession – International Law Perspectives* (Cambridge: CUP 2006), 470-76, at 474. "[T]here is no international norm prohibiting secession and therefore it is difficult to see an actual need for such a norm [authorising secession]. … still it would not make much sense to speak about a 'right to secession'" (Peter Hilpold, "Self-

However, this argument is not fully persuasive, especially as international law increasingly addresses situations within the territory of states. International law is not silent in that regard.

The potential tension between self-determination and territorial integrity is addressed in the General Assembly's "Friendly Relations Declaration"[43] which explains the right to self-determination and then adds in the so-called savings clause:

> *"Nothing in the foregoing paragraphs shall be construed as authorising or encouraging any action which would dismember or impair, totally or in part, the territorial integrity or political unity of sovereign and independent States conducting themselves in compliance with the principle of equal rights and self-determination of peoples as described above and thus possessed of a government representing the whole people belonging to the territory without distinction as to race, creed or colour."*

This paragraph endorses the principle of territorial integrity, but at the same time makes it conditional on a representative and non-discriminatory government. Some authors argue that it follows *e contrario* from this clause that territorial integrity need not be respected if the government does not represent the whole people, but discriminates against one group. The proposition is that if internal self-determination is persistently denied to a people, and when all peaceful and diplomatic means to establish a regime of internal self-determination have been exhausted, that people may be entitled to secession as the *ultima ratio* ("remedial secession").[44]

Determination in the 21st Century – Modern Perspectives on for an old Concept", *Israel Yearbook of Humanitarian Law* 36 (2006), 247-288, at 267-270, at 269). Hilpold continues: "but here we are already outside a legal framework … and it cannot be stated whether the normative framework will ever develop in this direction."

[43] UN GA Res. 2625 (XXV) of 24 Oct. 1970; cf also the similar wording of the Vienna Declaration and Programme of Action of 12 July 1993, A/CONF.157/23, part I.2., of the World Conference on Human Rights.

[44] Diagnosing and supporting remedial secession (as a rule of positive interational law derived from the savings clause of the Friendly Relations Declaration) Christian Tomuschat in Marcelo Kohen (ed.) *Secession – International Law Perspectives* (Cambridge: CUP 2006), 23-45, at 42: "[R]emedial secession should be acknowledged as part and parcel of positive law, notwithstanding the fact that its empirical basis is fairly thin, but not totally lacking ...". See also Schweisfurth (above note 18), at 382; and Markku Suksi, "Keeping the Lid on the Secession Kettle – a Review of Legal interpretations concerning Claims of Self-Determination by Minority Populations", *International Journal on Minority and Group Rights* 12 (2005), 189 *et seq*., at 225: "Unilateral secession from an existing State is not supported by public international law *except in some very special circumstances* that, against the background of the solutions in situations like Kosovo and Chechnya, are almost unlikely to materialise." South Ossetia and Abkhazia argue that they do constitute such an "extreme" case. See in state practice the Supreme Court of Canada, *Reference Secession of Quebec*, judgement of 20 August 1998, reprinted in ILM 37 (1998), 1340 *et seq*.. paras 134-5, 138, 122, which did not unequivocally endorse this position, but clearly leant towards it: Para 122. "… [I]nternational law expects that the right to self-determination will be exercised by peoples within the framework of existing sovereign states and consistently with the maintenance of the territorial integrity of those states. Where this is not possible, in the exceptional circumstances discussed below, a right of secession may arise. …". Para 134. A number of commentators have further asserted that the right to self-determination may establish a right to unilateral

However, this savings clause as such, figuring only in a non-binding General Assembly resolution, is not in itself hard law. It has so far not become customary law.[45] It rather constitutes a deviation from general state practice which might be explained by its drafting history and the desire to formulate a political compromise.[46] As Antonio Cassese writes: "Whatever the intentions of the draftsmen and the result of their negotiations, and whatever the proper interpretation of the clause under discussion, it cannot be denied that state practice and the overwhelming view of states remain opposed to secession."[47] The international community can react to extreme forms of oppression in other forms than by granting a right to secession, e.g. by adopting sanctions without questioning the territorial integrity of the oppressive state.[48] State practice outside the colonial context has been "extremely reluctant" to accept unilateral secession of parts of independent states, and since 1945 no state created by unilateral secession has been admitted to the United Nations against the explicit wish of the state from which it had separated.[49]

With a view to that state practice, the prevailing scholarly opinion shares the view that – as a matter of international law as it stands – the savings clause does not imply that whenever the principles of non-discrimination and adequate representation are violated a "people" can lawfully claim a right to secession.[50]

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secession under specific circumstances. Although this third circumstance has been described in several ways, the underlying proposition is that, when a people is blocked from the meaningful exercise of its right to self-determination internally, it is entitled, as a last resort, to exercise it by secession. The *Vienna Declaration* [CSCE Vienna meeting of 1989] requirement that governments represent "the whole people belonging to the territory without distinction of any kind" adds credence to the assertion that such a complete blockage may potentially give rise to a right of secession. Para 135. Clearly, such a circumstance parallels the other two recognized situations in that the ability of a people to exercise its right to self-determination internally is somehow being totally frustrated. While it remains unclear whether this third proposition actually reflects an established international law standard, it is unnecessary for present purposes to make that determination." 138: "In summary, the international law right to self-determination only generates, at best, a right to external self-determination in situations of former colonies; where a people is oppressed, as for example under foreign military occupation; or where a definable group is denied meaningful access to government to pursue their political, economic, social and cultural development. In all three situations, the people in question are entitled to a right to external self-determination because they have been denied the ability to exert internally their right to self-determination."

[45] Antonio Cassese, *Self-Determination of Peoples: A Legal Reappraisal* (Cambridge: CUP 1995), at 121.

[46] *Ibid*., at 123.

[47] *Ibid*.

[48] See the situation of the Kurds in northern Iraq, where the international community stressed the territorial integrity of Iraq despite continued Iraqi repression of the Kurds, but adopted a sanctions regime (Crawford (above note 1) at 404).

[49] Crawford (above note 1), at 390 and 415; cf. also the detailed analysis of State practice in *ibid*. at 391 *et seq*.

[50] Jean Combacau/Serge Sur, *Droit international public* (8th ed., Paris: 2008), at 273; Wolfgang Heintze, Völker im Völkerrecht, in: Knut Ipsen, *Völkerrecht* 5th ed. 2004, at 423; Donald Clark/Robert Williamson, *Self-Determination. International Perspectives* (Basingstoke: Macmillan Press 1996), at 30.

However, the legal status quo in this field is deplored as unfair by many authors[51] who discuss under which conditions secession should be possible.[52] Scenarios invoked in this context are violations of basic human rights, especially (attempted) genocide, the exclusion of a minority from the political process, or the outbreak of armed conflicts or despotic governments suppressing the rights of minorities.[53] It is also highlighted that any extraordinary permission to secede would have to be realised following the appropriate procedures, notably having recourse to a free and fair referendum on independence, ideally under international supervision.[54]

The uncertainty about the existence of an external right to self-determination "has itself contributed to many human tragedies the world has witnessed in the post-Word War II period by giving false hope to minority groups that they have rights to autonomy or independence against the states in which they are found, even absent a colonial history."[55] Since the unilateral declaration of independence of Kosovo in 2008, the discussion has gained momentum. However, most commentators remain sceptical.[56] Only a few international legal scholars have diagnosed a change of international law.[57]

In any case, it is more than doubtful that a new rule of customary international law has been created on the basis of the Kosovo case. The preamble to Kosovo's declaration of

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[51] See for an explicit critique: Allan Buchanan, *Justice, Legitimacy, and Self-Determination. Moral Foundations of International Law* (Oxford OUP 2007), at 339 *et seq*.

[52] See Shaw 2008 (above note 6), at 257: "Self-determination as a concept is capable of developing further so as to include the right to secession from existing states, but that has not as yet convincingly happened. "

[53] Cf. Cassese, *Self-Determination* (above note 45), at 359. Cassese reflects on a multinational intervention in extreme cases.

[54] See e.g. the Opinion No. 4 of the Badinter Commission on Bosnia-Herzegovina which required a referendum as a pre-condition for recognition by the EC (repr. in ILM 31 (1992), at 1501-3). In scholarship Anne Peters, *Das Gebietsreferendum im Völkerrecht* (Nomos: Baden-Baden 1995); Antonelli Tancredi, "A normative 'due process' in the creation of States through secession" in Marcelo Kohen (ed.) *Secession – International Law Perspectives* (Cambridge: CUP 2006), 171-207, at 190-91.

[55] Jonathan I. Charney, "Commentary: Self-Determination: Chechnya, Kosovo, and East Timor", *Vanderbilt Journal of Transnational Law* 34 (2001), 455 *et seq*., at 456.

[56] See, e.g., Per Sevastik, "Secession, Self-determination of 'Peoples' and Recognition – The Case of Kosovo's Declaration of Independence and International Law", in G. Engdahl (ed.), *Law at War: Liber Amicorum Ove Bring* (Leiden 2008), 231 et seq, at 237.

[57] Marc Weller, *Escaping the Self-determination Trap* (Leiden: Martinus Nijhof 2008), at 65: "While the question of repression or exclusion being constitutive of a new, remedial self-determination status in the sense of secession is therefore not clearly settled, it is at least this legitimising effect that can be clearly observed." See also *ibid*. at 146: "The hesitancy concerning a move towards what is sometimes called 'remedial self-determination' may have been reinforced by Russia's armed actions relating to Georgia. On the other hand, over time, the situation in Kosovo, Abkhazia, and South Ossetia may well stabilize, leading to a retroactive re-interpretation of these episodes as instances of state practice in favour of remedial secession." See in favour of a right to secession by Kosovo Katharina Parameswaran, "Der Rechtsstatus des Kosovo im Lichte der aktuellen Entwicklungen", *Archiv des Völkerrechts* 46 (2008), 172-204 at 178-182.

independence underlines that "Kosovo is a special case arising from Yugoslavia's non-consensual break-up and is not a precedent for any other situation."[58] The Council of the European Union[59] and the UN Secretary General[60] clearly stated that Kosovo is a *sui generis* case which does not constitute a precedent for other territorial conflicts.

In contrast, Russia, although opposing a right to secession generally, considers Kosovo as a precedent.[61] Precedents as such are not a source of international law; they can only give indications for the emergence of a new rule of customary law. Such a new rule requires a general practice over a certain period of time, accompanied by the opinion that this practice reflects law (*opinio iuris*).[62] Even if these requirements for the creation of new rules of customary law have been watered down in the past decades,[63] a single case leading to a major dispute within the international community does not satisfy even lenient standards, because it does not constitute a "general" practice and does not manifest the conviction of a number of states that this practice reflects an international legal rule.

Moreover, even if the declaration of independence and the ensuing recognition of Kosovo as an independent state by many other states were interpreted as triggering the creation of a new

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[58] http://www.assembly-kosova.org/?krye=news&newsid=1635&lang=en.

[59] Cf. Council of the European Union, Council conclusions on Kosovo (18 February 2008): "The Council reiterates the EU's adherence to the principles of the UN-Charter and the Helsinki Final Act, *inter alia* the principles of sovereignty and territorial integrity and all UN Security Council resolutions. It underlines its conviction that in view of the 1990 and the extended period of international administration under SCR 1244, Kosovo constitutes a *sui generis* case which does not call into question these principles and resolutions." Cf. on the *sui generis* thesis.

[60] Cf. the Letter dated 26 March 2007 from the Secretary-General addressed to the President of the Security Council (UN-Doc. S/2007/168 para. 15): "Kosovo is a unique case that demands a unique solution. It does not create a precedent for other unresolved conflicts. In unanimously adopting resolution 1244 (1999), the Security Council responded to Milosevic's actions in Kosovo by denying Serbia a role in its governance, placing Kosovo under temporary United Nations administration and envisaging a political process designed to determine Kosovo's future. The combination of these factors makes Kosovo's circumstances extraordinary."

[61] See among others the statement of the President of the Duma Boris Gryslov on 1 April 2008, Ria Novosti, http://de.rian.ru/world/20080515/107471636.html (accessed on 22 August 2008). According to the Russian President Dmitri Medvedev it would be impossible "to tell the Abkhazians and Ossetians (and dozens of other groups around the world) that what was good for the Kosovo Albanians was not good for them. In international relations, you cannot have one rule for some and another rule for others." Dmitry Medvedev, 'Why I had to Recognize Georgia's Breakaway Regions', *Financial Times*, 27 August 2008; an analysis of the differences and similarities between Kosovo on the one hand and the break-away regions in Georgia on the other hand is provided by Aleksandr Aksenenok, Self-determination between the law and realpolitik (Russian), Rossija v global'noj politike Nr. 5, 2006; http://www.globalaffairs.ru/articles/6214,html (accessed on 27 July 2008).

[62] See Article 38 lit b) of the Statute of the ICJ: "international custom, as evidence of a general practice accepted as law".

[63] Cf. on the discussion on "instant custom": Jörg Kammerhofer, "Uncertainty in the Formal Sources of International Law: Customary International Law and Some of Its Problems", *EJIL* 15 (2004), 523 – 553; Robert Kolb, "Selected Problems in the Theory of Customary International Law", *Netherlands International Law Review* 50 (2003), 119-150.

rule, the states denying Kosovo's right to secede would have to be considered as persistent objectors. Therefore those states would be excluded from relying on such a new rule themselves. The law does not permit arguing that other states have violated international law and then taking the rule created by the alleged violation as a new rule and to apply it (selectively) to other cases.

To sum up, outside the colonial context, self-determination is basically limited to internal self-determination. A right to external self-determination in form of a secession is not accepted in state practice. A limited, conditional extraordinary allowance to secede as a last resort in extreme cases is debated in international legal scholarship. However, most authors opine that such a remedial "right" or allowance does not form part of international law as it stands. The case of Kosovo has not changed the rules.

II. Self-Determination and Secession in Soviet Constitutional Law

Although all members of the United Nations are bound to observe the principle of self-determination, they have a wide discretion in implementing this principle in national law. The Soviet law was – at least on paper – especially permissive in this respect. *De iure* the Soviet Union was a federal state[64] composed of three different levels of governance: Union republics, Autonomous republics and Autonomous regions. According to the Soviet Constitution of 1977, only the Union republics were accorded the right to secession without any preconditions (Article 72). Moreover, their territories could only be changed with their consent (Article 78).

These rights were virtual only as long as all levels of authority in the Soviet state remained under firm control of the Communist Party. Yet, at the end of the 1980s, when such central control was weakening, the Soviet Union witnessed a "parade of sovereignties". Not only Union republics, but also territorial sub-units of the republics such as Autonomous republics and Autonomous regions adopted declarations of sovereignty[65] and/or independence.[66] The

[64] Cf. Article 70 of the Soviet Constitution (1977): (1) The Union of Soviet Socialist Republics is an integral, federal, multinational state formed on the principle of socialist federalism as a result of the free self-determination of nations and the voluntary association of equal Soviet Socialist Republics. (2) The USSR embodies the state unity of the Soviet people and draws all its nations and nationalities together for the purpose of jointly building communism.

[65] North Ossetia 20.7.1990, Kareliya 9.8.1990, Khakassiya 15.8.1990, Komi 29.8.1990, Tatarstan 30.8.1990, Udmurtiya 20.9.1990, Sakha 27.9.1990, Buryatiya 8.10.1990, Bashkortostan 11.10.1990, Kalmykiya 18.10.1990, Marii El 22.10.1990, Chuvashiya 24.10.1990, Gorno-Altay 25.10.1990, Tuva 1.11.1990, Karachay-Cherkessiya 17.11.1990, Checheno-Ingushetiya 27.11.1990, Mordova 8.12.1990, Karakalpak Republic (Uzbekistan) 14.12.1990, Kabardino-Balkariya 31.1.1991, Dagestan 15.5.1991, Adygeya 2.7.1991 and others.

law of the USSR from 4 April 1990 "On the procedure on the decision of questions connected with the secession of a union republic from the USSR"[67] tried to slow down the process of dissolution by building up certain barriers such as the organisation of certain types of referenda. Thus, the law opened the door to a so-called 'recursive secession': The populations living on territories of Union republics that wished to become independent would have in their turn the right to secede from those republics and to remain in the Soviet Union.[68] This law contradicted the Soviet Constitution – which prohibited the secession of territories from Union republics without the consent of those republics (Art. 78). In any case, it was not taken into consideration in the process of dismemberment of the Soviet Union, neither by the Soviet Republics nor by the international community. Importantly, all former Soviet Republics accepted the inviolability of their borders in all relevant subsequent treaties.[69]

III. Statehood and International Recognition of Georgia

The Guidelines on the Recognition of New States in Eastern Europe and in the Soviet Union, decided on 16 December 1991 by the Council of the Foreign Ministers of the European Community, defined recognition criteria for the entities that emerged from the dissolution of the Soviet Union.[70] Although the principle of self-determination was particularly emphasised at the beginning of that text,[71] the recognition policy of the EU focused only on the constituent states or component states of the dissolving federations.[72] Applying these principles, Georgia could be recognised as an independent state, but not Abkhazia or South Ossetia.

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66 E.g., on 6 September 1991 the newly elected Parliament of Chechnya declared the independence of the former Chechen-Ingush Autonomous Socialist Soviet Republic, whereas a part of the former autonomous Republic, Ingushetia, insisted on remaining part of the Russian Federation.

67 Vedomosti S'ezda narodnyh deputatov SSSR i Verhovnogo Soveta SSSR 1990, Nr. 15, at p. 252.

68 According to Article 3 of the Law, autonomous republics and autonomous entities had the right to decide independently whether to remain in the USSR or within the seceding republic and to raise the issue on their legal status.

69 The Protocol to the Agreement on the Establishment of the Commonwealth of Independent States of December 21, 1991 contains a guarantee of the existing borders of all CIS countries (Documents of Alma Ata of December 21, 1991, Diplomaticheskiy Vestnik 1992, No. 1, p. 6 *et seq*, English translation in ILM 31 (1992), at 147-154). The inviolability of existing borders is also confirmed in the Preamble to the 1994 CIS "Declaration on the Observance of Sovereignty, Territorial Integrity and Inviolability of Borders of States – Members of the Commonwealth of Independent States" of 8 Dec. 1991.

70 Reprinted in International Legal Materials (ILM) 31 (1992), at 1485 *et seq*.

71 "The Community and its Member States confirm their attachment to the principles of the Helsinki Final Act and the Charter of Paris, in particular the principle of self-determination…".

72 For Yugoslavia this was spelled out clearly in the Declaration on Yugoslavia (Extraordinary EPC Ministerial Meeting, Brussels, 16 December 1991): "The Community and its Member States agree to recognize the independence of all the Yugoslav *Republics"* fulfilling the conditions (repr. in ILM 31 (1992), at 1485).

This restrictive position is based on the opinions issued by the Arbitration Commission of the Conference on Yugoslavia (established by the European Communities under the chairmanship of Robert Badinter) in November 1991[73] and even more clearly in January 1992.[74] The commission based its view on the international legal principle of *uti possidetis*. This principle was first applied in the process of decolonisation of Latin America (19th century) and Africa (20th century) to prevent and solve potential border disputes. By virtue of this principle, the administrative borders drawn by the former colonial powers between the colonies are elevated to international borders at the moment the respective administrative area declares its independence.[75] Applied to the Soviet Union, the internal frontiers between the Union republics could become external frontiers of states in the sense of international law, but not those between Union and autonomous republics or between Union republics and autonomous regions.

This principle was observed by all members of the international community in recognising Georgia. It was confirmed by the founding documents of the CIS.[76] Based on the recommendation of the UN Security Council from 6 July 1992, the General Assembly admitted Georgia on 31 July 1992 as a member of the United Nations within the borders of the former Soviet Union Republic of Georgia.

This is the legal background against which South Ossetia's and Abkhazia's claims to self-determination and secession have to be assessed.

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[73] Cf. Opinion No. 2 (20 November 1991), in which the Badinter Commission advocated the internal right to self-determination of the Serbian population in Croatia and Bosnia-Hercegovina, but did not admit a right to secession: "… it is well established that, whatever the circumstances, the right to self-determination must not involve changes to existing frontiers at the time of independence (*uti possidetis juris*) except where the States concerned agree otherwise." (reprinted in *EJIL* 3 (1992), at 182 *et seq*.)

[74] Cf. Opinion No. 3 (11 January 1992): "Except where otherwise agreed, the former boundaries become frontiers protected by international law. This conclusion follows from the principle of respect for the territorial *status quo* and, in particular, form the principle of *uti possidetis*. … The principle applies all the more readily to the Republics since the second and fourth paragraphs of Article 5 of the Constitution for the SFRY stipulated that the Republics' territories and boundaries could not be altered without their consent." (reprinted in EJIL 3 (1992), at 182 *et seq*.)

[75] Cf. ICJ, *Case Concerning the Frontier Dispute* (Burkina Faso v. Republic of Mali), ICJ Reports 1986, 554, at 565; ICJ, *Case Concerning the Frontier Dispute* (Benin v. Niger), ICJ Reports 2005, at 90 *et seq*.; Malcolm Shaw, "Peoples, Territorialism and Boundaries", EJIL 3 (1997), 478 – 507, Christiane Simmler, *Das uti possidetis-Prinzip: Zur Grenzziehung zwischen neu entstandenden Staaten* (Berlin: Duncker & Humblodt 199), at 292; Joshua Castellino, *International Law and Self-Determination. The Interplay of the Politics of Territorial Possession with Formulations of Post-Colonial „National" Identity* (The Hague/Boston/London: Martinus Nijhoff 2000), at 109 *et seq*. This approach has been criticised by Steven Ratner, "Drawing a Better Line: *uti possidetis* and the Borders of New States", *American Journal of International Law* (AJIL) 90 (1996), 590-624; Peter Radan, *The Break-up of Yugoslavia and International Law* (London, New York: Routledge 2002), at 244 *et seq*.

[76] See above note 69.

IV. The Right to Self-Determination and Secession of South Ossetia

The Ossetians can be qualified as a "people" for purposes of international law.[77] This people can in principle rely on the right to self-determination.

Although the Ossetian population living in Georgia before the outbreak of the violence in August 2008 is only one part of that people, this sub-group may still claim a right to internal self-determination.

Thus, the South Ossetians could request that their interests be represented in governmental politics and that their cultural identity be preserved both in the Soviet Union and in the newly independent Republic of Georgia. This does not mean, however, that the South Ossetians could base their claim to raise the status of the South Ossetian "autonomous region" to that of an "autonomous republic" directly on international law, because the right to self-determination does not convey a specific privileged status in a given constitutional system.[78]

The demand of the South Ossetians to upgrade their status within the Soviet federal framework from an autonomous region to an autonomous republic, on par with the autonomous republic of North Ossetia within the Russian Federation, led to an open conflict with Tbilisi, which reacted on 11 December 1990 by suppressing the autonomous status of South Ossetia altogether. Under the given circumstances,[79] the result was that the cultural and political autonomy of the South Ossetian people was not guaranteed any more.

As explained above, international law does not grant an unqualified right to external self-determination in the form of secession in the event of violations of the internal right to self-

[77] A group is a "people" in the sense of international law if it has objective common characteristics such as a common language, culture, and religion, and if the group moreover has expressed the intention to form a political community of its own. Both the objective elements and the subjective intention seem to be present in the case of the South Ossetians.

[78] South Ossetia's status of autonomy was clearly defined in the Soviet Constitution in Article 87. Soviet federalism claimed to realise the right to self-determination of the various Soviet nations, but this was done in an authoritarian fashion. This policy created strong tensions among the various nations, and – in the case of Georgians and Ossetians – gave rise to opposing views on the implementation of the principle of national self-determination. Both nations felt discriminated against. This led to the rise of nationalism in the second half of the 1980s.

[79] Law of the Republic of Georgia on the abolition of the Autonomous Oblast' of South Ossetia of 11 December 1990 (Abolition of the decree of 20 April 1922 which fixed the establishment of an "Autonomous Area of South Ossetia), in: Tamaz Diasamidze, The Collection of Political-Legal Acts, Tbilisi 2008, p. 38-39. The withdrawal of the autonomous status was based on the following argumentation: "Taking into consideration the fact that the Autonomous Oblast of South Ossetia was established in 1922 in full disrespect of the local Georgian population and contradicted the best interest of the Georgian people and bearing in mind the fact that the Ossetian people have their statehood on their historical homeland – North Ossetia – and that only an insignificant portion of ethnic Ossetians live in the Autonomous Oblast of South Ossetia, where they enjoy, and will continue enjoying wide cultural autonomy rights, pursuant to the paragraphs 3 and 11 of Article 104 of the Constitution of the Republic of Georgia, …".

determination. Even if an extraordinary allowance to secede were accepted under extreme circumstances, such an exception was not applicable to South Ossetia.[80]

The international community (including Russia) consistently emphasised the territorial integrity of Georgia, both before and after the outbreak of the armed conflict of 2008. This was expressed notably in numerous Security Council resolutions,[81] and also in resolutions of other international organisations.[82] These statements indicate the denial of any allowance to secede based on self-determination.

Thus, although internal self-determination had not been granted to the South Ossetian people in the transitory period after the dissolution of the Soviet Union, South Ossetia could not claim a right to secession.

Conclusion: The aspirations of the South Ossetian people to self-determination were not fulfilled, neither *de facto* nor *de iure*, in the transitional period when Georgia became independent, especially because the autonomous status had been abolished without being

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[80] Both Russia and South Ossetia called the violent actions against the South Ossetians in the beginning of the 1990s "genocide". "Genocide" is clearly defined in international law (Article II of the Convention and Punishment of Genocide). Specific harmful acts must be "committed with intent to destroy, in whole or in part, a national, ethnical, racial or religious group, as such". The documentation provided by the Russian side to the IIFFMCG reported many cases of maltreatment and killing. Nevertheless, these seem to be incidents of violence typical for civil wars rather than systematic attempts to destroy the South Ossetians as an ethnic group. Investigations by Human Rights Watch in 23 January 2009 reached the conclusion that there had been "grave human rights violations", but neither genocide nor ethnic cleansing (*Up in Flames. Humanitarian Law Violations and Civilian Victims in the Conflict over South Ossetia*). The situation was therefore not fundamentally different from the situation of the Chechens in the Russian Federation or the Kurds in Iraq where the international community did not support a right to secession (see Charney, above note 55).

[81] See SC Res 876 (1993), SC Res 896 (1994), SC Res 906 (1994), SC Res 937 (1994), SC Res 971 (1995), SC Res 993 (1995), SC Res 1036 (1996) SC Res 1065 (1996), SC Res 1124 (1997), SC Res 1150 (1998), SC Res 1150 (1998), SC Res 1187 (1998), SC Res 1225 (1999), SC Res 1255 (1999), SC Res 1287 (2000), SC Res 1462 (2003), SC Res 1494 (2003), SC Res 1524 (2004), SC Res 1554 (2004), SC Res 1582 (2005), SC Res 1615 (2005), SC Res 1666 (2006), SC Res 1752 (2007), SC Res 1781 (2007), SC Res 1808 (2008).

[82] For the Organization for Security and Cooperation in Europe (OSCE): Decision of the OSCE Budapest Summit, 6 December 1994; decision of the Oslo OSCE Ministerial Council on Georgia, 1 December 1998; Resolution on the conflict in Abkhazia, Georgia, adopted by the OSCE Parliamentary Assembly, Warsaw, 8 July 1997; Resolution of the OSCE Parliamentary Assembly adopted at the seventeenth Annual Session on the security environment in Georgia, Astana, 29 June to 3 July 2008; Resolution of the Parliamentary Assembly adopted at the fourteenth annual session on the situation in Abkhazia, Georgia, Washington, D.C., 1 to 5 July 2005. For the EU: Extraordinary European Council, Brussels 1 September 2008, Presidency Conclusions, 12594/2/08 REV 2; For the Council of Europe: Council of Europe Parliamentary Assembly Report Fifth sitting, 28 January 2009 Add. 2: "The humanitarian consequences of the war between Georgia and Russia" (Recommendation 1857 (2009) Parliamentary Assembly, Provisional edition). "The Humanitarian Consequences of the War between Georgia and Russia" (Parliamentary Assembly Doc. 11789 of 12 January 2009). "The implementation of Resolution 1633 (2008) on the consequences of the war between Georgia and Russia" (Parliamentary Assembly Doc. 11800 of 26 January 2009). "The consequences of the war between Georgia and Russia" (Parliamentary Assembly Resolution 1633 of 30 September and 2 October 2008). "The implementation of Resolution 1633 (2008) on the consequences of the war between Georgia and Russia" (Parliamentary Assembly, Provisional edition, Resolution 1647 of 28 January 2009).

replaced by other reliable legal guarantees. Nevertheless, South Ossetia was not allowed to secede from Georgia under international law.

V. The Right to Self-Determination and Secession of Abkhazia

The Abkhaz people can also be qualified as a "people" and can therefore rely on the right to self-determination.

Under Soviet law, Abkhazia had the status of an "Autonomous Socialist Soviet Republic" (Article 85 of the Soviet Constitution). As the Soviet Constitution did not grant a right to secession to autonomous republics, Abkhazia was, from the perspective of domestic law, an integral part of the Republic of Georgia at the moment of Georgia's independence. From the perspective of international law, this legal assessment was in conformity with the *uti-possidetis principle* as explained above.

Contrary to the situation in South Ossetia, the autonomous status of Abkhazia was never withdrawn.[83] Nevertheless, *de facto* the rights of the Abkhaz people – including their rights to political representation and to preservation of their national identity - were not adequately protected in the Soviet period and in the first years of Georgia's independence. The entry of Georgian troops in Abkhazia in August 1992 – as analysed in Chapter 2 "Conflicts in Abkhazia and South Ossetia: Peace Efforts 1991 – 2008" – should be mentioned in this context.

The entry of Georgian troops into Abkhazia in August 1992 hightened the tension in the area and resulted in hostilities. A UN inquiry of October 1993 found serious human rights violations by both sides.[84] Considering the specific circumstances, it must be asked whether the situation in Abkhazia might be qualified as "exceptional", thus creating an extraordinary allowance to secede under international law. But as explained above, such a "remedial" right to secession does not form part and parcel of international law as it stands for the time being.

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[83] On 2 January 1992 the Georgian Constitution of 1978 was annulled by the Military Council of the Republic of Georgia and replaced by the Constitution of the Democratic Republic of Georgia of 21 February 1921. In this context the Military Council declared: "Without changing the current borders and State – territorial arrangement of the Republic of Georgia (with current status of Abkhazia and Ajara), it recognizes the international legal acts and supremacy of the Constitution of Democratic Republic of Georgia of February 21, 1921 and its implementation with due account of current realities." (Declaration of the Military Council of the Republic of Georgia, 21 February 1992, published on 25 February 1992 in the newspaper "Sakartvelos Respublica, No. 36), http://www.parliament.ge/files/1_5718_330138_27.pdf.

[84] See Report of the Secretary-General's Fact-Finding Mission to Investigate Human Rights Violations in Abkhazia, Republic of Georgia, S/26795, 17 November 1993. Annex.

After the ceasefire agreement in Abkhazia was reached in 1994, a CIS peacekeeping force and a UN military observer mission were to prevent the eruption of further large-scale violence. Russia and the UN also provided a format for negotiations on the legal status of Abkhazia within Georgia. This means that there was no situation which called for an "*ultima ratio*", where secession would have been the only possible solution to the conflict. This was also acknowledged by the international community which continued to confirm the territorial integrity of Georgia.[85]

Conclusion: The aspirations of the Abkhaz people to self-determination were not fulfilled in the transition period when Georgia became independent. Nevertheless, Abkhazia was not allowed to secede from Georgia under international law, because the right to self-determination does not entail a right to secession.

3.3. "Passportisation": Mass-Conferral of Russian Nationality on Residents of South Ossetia and Abkhazia

A. Statement of the Problem

I. Basic Questions

According to various sources,[86] the overwhelming majority of the residents of Abkhazia and South Ossetia have acquired Russian nationality through naturalisation. According to Georgia, "passportisation" began on a massive scale in summer 2002 and "continued more rigorously following the Russian-Georgian war in August 2008".[87] The latter period will not be treated in this Report.

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[85] See the resolutions quoted above in footnotes 81 and 82.

[86] PC.DEL/52/03 of 24 January 2003 (Georgian statement to the Permanent Council of the OSCE), quoted in Victor-Ives Ghebali, "The OSCE Mission to Georgia (1992-2004): The Failing art of Half-hearted Measures", *Helsinki monitor* 2004, no. 3, 280-292, at 285. Also Thomas Kunze, Krieg um Südossetien, Länderbericht der Konrad Adenauer Stiftung vom 12 August 2008, at 2-3 (http://www.kas.de/proj/home/pub/83/1/year-2008/dokument_id-14356/index.html); Igor Zevelev, Russia's Policy Towards Compatriots in the Former Soviet Union, Russia in Global Affairs No. 1, January-March 2008, at 4. According to the *de facto* Deputy Minister of Foreign Affairs of Abkhazia, Maksim Gvindzhia, roughly 80% of the population hold dual Abkhaz-Russian citizenship (statement of 6 Sept. 2006). See Pal Kolsto/Helge Blakkisrud, "Living with Non-recognition: State- and Nation-Building in South Caucasian Quasi-states", *Europa-Asia Studies* 60 (2008), 483-509, at 494. The authors note that if this figure is correct, it would necessarily include some ethnic Georgians as well (*ibid*., fn. 27).

[87] Official Georgian answer (question 2) to the IIFFMCG questionnaire related to legal issues; there is no special information given by Russia on that issue.

In factual terms, it is disputed whether, and in which numbers, the naturalisation of the residents of South Ossetia and Abkhazia was voluntary or the result of Russian pressure on the population.[88] It is also unclear to what extent ethnic criteria were relevant for granting Russian nationality.

In legal terms, there is dissent on the question of whether the residents of Abkhazia and South Ossetia had been stateless or citizens of Georgia before their naturalisation by Russia. Finally, the consequences of the conferral of the Abkhaz or South Ossetian nationality respectively on the persons living in the breakaway territories from the perspective of international law are disputed.

The conformity of large-scale Russian naturalisations of the residents of South Ossetia and Abkhazia with international law is a relevant issue in the conflict between Russia and Georgia. Georgia continuously protested against this policy at least since 2003.[89] It considers the policy as "a significant component of Russia's creeping annexation of the Tskhinvali Region/South Ossetia and Abkhazia, Georgia."[90] In the Georgian view, the "passportisation" policy is a violation of the "principles of territorial integrity and sovereignty of Georgia, non-interference in internal affairs of sovereign states and the principle of resolving disputes through peaceful means."[91] Russia, on the contrary, holds that there is "nothing that would warrant criticism for granting Russian citizenship to the aforementioned persons who were entitled to it in accordance with legislation of the Russian Federation."[92]

The international legality and validity of the Russian nationality of South Ossetian residents also matters for the legal assessment of the use of force by Georgia and Russia, because one argument advanced by Russia was the "protection of its citizens".

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[88] According to Russia, "Russian nationality was granted to residents of Abkhazia and South Ossetia exclusively where they wilfully chose to apply for it." Georgia speaks of "forcible passportisation of ethnic Georgians residing on the territory of the occupied Akhalgori district" after August 2008 (cf. Official Georgian and Russian answers (question 2) to the IIFFMCG questionnaire related to legal issues.

[89] See the various reports of the Secretary-General on the Situation in Abkhazia, Georgia: report of 13 January 2003 (UN Doc. S/2003/39) para. 4; report of 21 July 2003 (UN Doc. S/2003/751), para. 7; report of 17 Oct. 2003 (UN Doc. S/2003/1019), para. 12.

[90] Official Georgian answer (question 2) to the IIFFMCG questionnaire related to legal issues.

[91] *Ibid*.

[92] Official Russian answer (question 2) to the IIFFMCG questionnaire related to legal issues.

Against this background, there are three relevant legal questions:

- Have the residents of Abkhazia and South Ossetia automatically become citizens of Georgia, acquired Georgian nationality on the basis of the 1993 Georgian law on nationality or remained stateless? (Part B).

- Does Russia's "passportisation" policy violate international law and thus constitute an illegal act under international law? (Part C).

- What are the legal consequences of the conferral of Russian nationality on the residents of Abkhazia and South Ossetia, and is Russian nationality opposable to third states? (Part D).

II. Basic Concepts

In this Report, the term "nationality" is used in order to denote the international law concept of a legal bond between a state and a person. The Report avoids the term "citizenship" which is often used as a synonym for "nationality", but has also other meanings pertaining rather to the political than to the legal sphere.

Nationality, as a concept of international law, has been defined by the International Court of Justice as "a legal bond having as its basis a social fact of attachment, a genuine connection of existence and sentiments, together with the existence of reciprocal rights and duties. It may be said to constitute a juridical expression of the fact that the individual upon whom it is conferred, either directly by law or as a result of an act of the authorities, is in fact more closely connected with the population of the state conferring nationality than with that of any other state."[93]

It is not for international law, but for the internal law of each state to determine who is, and who is not, to be considered its national. The conferral of nationality is in the reserved domain (*domaine réservé*) of states.[94] For the purposes of domestic law, the determination of a person's nationality will be made only according to domestic law. But the effects of this act as regards other states occur on the international plane and are therefore to be determined by

[93] ICJ, *Nottebohm case (second phase)* (*Liechtenstein* v. *Guatemala*), ICJ Reports 1955, 4 at 23.

[94] PCIJ, *Nationality Decrees issued in Tunis and Morocco*, Advisory Opinion, PCIJ Reports (1923) Series B No. 4, at 24: "The question whether a certain matter is or is not solely within the jurisdiction of a State is essentially a relative question; it depends upon the development of international relations. Thus, in the present state of international law, questions of nationality are, in the opinion of the Court, in principle within this reserved domain." ICJ, *Nottebohm case* (above note 93), at 20: "[I]t is for every sovereign State, to settle by its own legislation the rules relating to the acquisition of its nationality, and to confer that nationality by naturalisation granted by its own organs in accordance with that legislation."

international law. Thereby the jurisdiction of a state to confer nationality may become limited by rules of international law.[95]

Naturalisation in a broad sense is the conferral of nationality upon someone who has not acquired the nationality of the state by birth, but is already a national of another state or stateless. Naturalisation in the narrower sense of the term (also called "individual naturalisation") is the conferral of nationality upon the concerned individual's request or application made by the alien for the specific purpose through a formal (administrative) act in that individual case. In contrast, "collective naturalisation" is the conferral of nationality by operation of a national law, *ipso iure* upon the fulfilment of certain prescribed conditions without individual application by the person concerned, and thus by definition applicable to a whole group.

The limits on naturalisation may differ from the limits on the regulation of the acquisition of an original nationality by birth, because naturalisation also affects the interests of the person's former state of nationality, which is not the case with regard to birth.

Broadly speaking, international law sets up limits on the naturalisation in order to protect two sets of interests: the interests of the affected persons and the interests of the former state of nationality.[96] These two sets of interests may coincide, but they may also be in conflict. Traditional international law focused more on the interests of the states, but in the contemporary era of human rights, the interests of the affected individuals are at least equally important.

B. Acquisition of Georgian Nationality by Residents of Abkhazia and South Ossetia

The question is whether the residents of Abkhazia and South Ossetia acquired Georgian nationality at the beginning of the 1990s or whether they have remained stateless.

I. Acquisition under the Georgian Law on Citizenship of 1993

This question must be first addressed on the basis of the Georgian law on citizenship. However, the conferral of Georgian nationality deploys effects in the international sphere and is opposable to other states when it observes the limits set by international law.

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[95] Robert Jennings/Arthur Watts, *Oppenheim's International Law*, vol. 1 part 1 (9th ed. Harlow: Longman House 1992), at 852.

[96] Cf. the preamble of the European Convention on Nationality of 6 Nov. 1997, ETS No. 166: "Recognizing that, in matter concerning nationality, account should be taken both of the legitimate interests of States and those of individuals."

According to the Georgian Law on Citizenship adopted on 25 March 1993 (entered into force immediately upon enactment),[97] citizens of Georgia were persons:

- having lived permanently in Georgia for not less than five years,
- living there at the time the law entered into force,
- who did not refuse the citizenship of Georgia in written form within three months and
- who received the documents confirming citizenship within four months.

This law was adopted during a period of transition after the collapse of the Soviet Union. Georgia had declared its independence on 9 April 1991, the end of the Soviet Union is dated the 25 December 1991. Soviet nationality had already lost its meaning for the residents of the territory of Georgia on 9 April 1991, and at the latest on 25 December 1991 at the moment of the dissolution of the Soviet Union, even if the Soviet passports were still used. In the transitory period before the adoption of the new law, the status of the former Soviet nationals in Georgia remained undetermined.[98] The new Georgian law was adopted only after the armed conflict between Georgia and South Ossetia (1991 - 1992) and during the armed conflict between Georgia and Abkhazia (1992 - 1994). At that time, South Ossetia had already adopted its declaration of independence (19 January 1992). Georgia had most likely already lost effective control over the two breakaway territories, and any exchange of written documents was very difficult if not impossible. That meant that the formal criterion "reception of the documents confirming citizenship within four months" could not be fulfilled.

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[97] Organic Law of Georgia "On Citizenship of Georgia" (as last amended in 2006, publication date 30 January 2006), available at: http://www.unhcr.org/refworld/docid/44ab816f4.html. See also Resolution of the Parliament of Georgia on the enforcement of the law on citizenship of Georgia, of 25 March 1993.

[98] Art. 15 of the Soviet Law on the procedure of deciding questions connected with the exit of union republics from the USSR of 3 April 1990 stated: "Citizens of the USSR on the territory of the existing republic are afforded the right of choice of citizenship, place of residence and employment. The existing republic compensates all expenses connected with the resettlement of citizens outside the confines of the republic." SND, SSR 1990, no. 15 item 252, quoted in English in George Ginsburg's, *From Soviet to Russian International Law: Studies in Continuity and Change* (The Hague: Martinus Nijhoff 1998), at 147, and in Ineta Ziemele, *State Continuity and Nationality: the Baltic States and Russia* (Leiden: Martinus Nijhoff 2005), at 178. Yet, the status and validity of this law is controversial.

The Georgian Law on Citizenship was revised on 24 June 1993.[99] The fourth criterion ("reception of the documents confirming citizenship within four months") was abolished and the time limit for the refusal of citizenship extended to six months.

Pursuant to this amendment, the acquisition of nationality no longer depended on formal criteria. Residents of the breakaway territories of Abkhazia and South Ossetia became Georgian citizens even without any documentation.

According to the wording of the Georgian statute, there was an option to refuse Georgian nationality. But consent was presumed when the person concerned did not protest within three or six months. Yet, in practice it might not have been possible to convey the refusal to the Georgian authorities, because they were no longer present within the territories of Abkhazia and South Ossetia in the aftermath of the armed conflict.

The practical difficulties that were not wilfully created by the Georgian authorities, but by the circumstances of the armed conflict, may be relevant. Most likely, a number of residents wanted to refuse Georgian nationality in 1993, but were not able to do so. The short delay for refusal of Georgian citizenship of only three and later six months (which is at the lower limit of delays granted in other states[100]), together with the administrative problems, might have rendered the right of the individual to refuse only virtual.

II. Conformity of Georgian Law with International Law

The question is whether the difficulty or even *de facto* impossibility to refuse Georgian nationality is contrary to international law. As will be explained below, international law generally requires the consent of the affected individual to the conferral of a new nationality (Part C.I.1.).

1. No international customary right of option in the event of state succession

However, the consent requirement does not apply in the event of an automatic change of nationality through a change of boundaries and of territorial sovereignty. The traditional and still valid rule on nationality in the event of territorial changes and creation of a new state is that the affected populations automatically acquire the new nationality.

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[99] http://www.coe.int/t/e/legal_affairs/legal_cooperation/foreigners_and_citizens/nationality/documents/national_legislation/Georgia%20Law%20on%20Citizenship_ENG.pdf

[100] State practice ranges from three months to six years. Yael Ronen, "Option of Nationality", Max Planck Encyclopedia of International Law online 2009, para. 22.

Such a territorial change normally occurs after the cession of territory by a peace treaty, but it also occurred in the event of the dissolutions of Yugoslavia and the Soviet Union. The general rule of international law is that in such a case, the nationality of the inhabitants of the territory follows sovereignty, and therefore changes automatically.

In state practice at least since the peace treaties after the First World War, the affected populations have often been granted a right of option.[101] The "option" is the right to decline the nationality of the new territorial state after a transfer of sovereignty, while remaining in that new state. But although this practice has been widespread, it has not been uniform. Also after the collapse of the Soviet Union, only some but not all CIS member states granted their populations a right of option by virtue of domestic statutes.[102] In the absence of general and longstanding practice, a right of option in the sense of a right to decline the nationality of the new territorial state after a transfer of sovereignty, while remaining in that new state, does not exist by virtue of customary law.[103] Accordingly, the Venice Commission in a declaration on the consequences of state succession for the nationality of natural persons, declared that in cases of state succession, "in matters of nationality, the state concerned 'shall respect, *as far as possible*, the will of the person concerned'", but did not assume a strict legal obligation in that sense.[104] International customary law does not impose on the states involved in a change of territorial sovereignty the option to grant to the inhabitants of the concerned territory the right to decline (or acquire) the nationality of those states. Although the manner in which an option is granted may be subject to international legal limitations, notably by treaty, the grant of the option as such is within the competence of the successor state and is not dictated by the rules of international law.[105]

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[101] Cf. e.g., Art. 18 of the Harvard Draft Convention on Nationality of 1929, AJIL 23, special suppl. (1929), 13 *et seq*.

[102] No right of option was granted in the laws on nationality of Azerbaijan, Georgia, Kyrgyzstan, Kazakhstan, and Tajikistan. An option was granted in the laws on nationality of Moldova (Art. 2 para. 3 sec. 2), Russia (Art. 13 para. 1), Turkmenistan (Art. 49), Uzbekistan (Art. 4 para. 1, 2) , Ukraine (Art. 2 para. 1); cf. Kommentarij zakonodatel'stva gosudarstv-u"astnikov SNG o gra!danstve, Moscow (1996; Russian).

[103] A right of "option" in the form of the *freedom to emigrate* is a different matter. Older authorities asserting a customary right of option often only have this freedom in mind (Paul Weis, *Nationality and Statelessness in International Law* (2nd ed. Alphen aan den Rijn: Sijthoof & Noordhoff 1979), at 156.

[104] Declaration on the consequences of State succession for the nationality of natural persons, adopted by the European Commission for Democracy through Law at its 28th Plenary Meeting, Venice, 13—14 September 1996 (CDL-NAT (1996) 007), para. 7.

[105] Yael Ronen, "Option of Nationality", Max Planck Encyclopedia of International Law online 2009, para. 11-12; Weis (above note 103), at 159; Ruth Donner, *The Regulation of Nationality in International Law* (2nd ed. Irvigton-on-Hudson: Transnational Publishers 1994), at 255-56. The International Law Commission's "Draft Articles on Nationality of Natural Persons in Relation to the Succession of States" of 1999 (GAOR 54th Sess.

2. Further international legal principles supporting automatic acquisition of Georgian nationality

The international rule of automatic acquisition of a successor state's nationality without a right of option in international law is supported by general international principles.

Although international law requires respect of the human rights of those affected by legislation on nationality, it also respects the sovereign rights of a newly independent state conferring its nationality on the residents within its territory. Further concerns are legal security and the achievement of a more coherent division of state jurisdiction.[106]

The right of Georgia to confer its nationality on those living within its borders can be derived from the recognition of the Georgian borders by the international community. The Georgian legislation on nationality is in line with the legislation in the other CIS states and cannot be regarded as excessive. Given the fact that Georgia excluded dual citizenship,[107] those persons who already possessed the nationality of another state did not acquire Georgian citizenship.

Finally, nationality has to be seen in line with the principles on state succession, notably with the *uti-possidetis* principle. Under *uti possidetis,* not only former administrative borders are transformed into state borders, but also territorial sub-units remain part of the newly independent state. If the population of the territorial sub-unit had the right to collectively refuse the new citizenship, the pacifying effect of the *uti-possidetis* principle would be undermined. This is another reason why the resident of the breakaway territories must be in principle regarded as Georgian nationals for the purposes of international law.

III. Conclusion

The residents of Abkhazia and South Ossetia who had not refused Georgian citizenship in a written form before 24 December 1993 became Georgian citizens for purposes of Georgian and international law. Their personal reservations against Georgian citizenship are irrelevant, as long as they did not exercise the right to refuse Georgian citizenship within the statutory delay. Eventual practical difficulties in exercising this right of refusal are immaterial from the

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Supp. 10, 13, suggests respect for the will of persons concerned in the event of state succession (Art. 11). But this is only a proposal *de lege ferenda* and not valid international law.

[106] Ronen (above note 105), para. 27.

[107] Cf. Art. 1 (2) of the Georgian Law on Citizenship (above note 97): "A citizen of Georgia may not simultaneously be a citizen of another state country except particular cases foreseen by the Constitution of Georgia. The President of Georgia may grant citizenship of Georgia to a foreign citizen for having special merits to Georgia or if the granting of Georgian citizenship is in the State interests of Georgia." The Constitution of Georgia (adopted on 24 August 1995) confirms this rule.

perspective of international law, because international law did not require Georgia to grant this option.

C. Conformity of the Russian "Passportisation" Policy with International Law

Neither Georgia nor Russia are bound by any international treaty regulating nationality.[108] Nevertheless, they are bound by international customary law and general rules of international law which will be briefly explained here.

I. Conditions for the International Legality of Naturalisation

1. Choice of the individual

A naturalisation in principle requires the consent of the person concerned.[109] However, there are important exceptions to this rule which will be discussed separately.

a) Legal bases of the consent requirement

The requirement of voluntariness can today be based on human rights law. Article 15 of the Universal Declaration of Human Rights of 1948 states: "(1) Everyone has the right to a nationality. (2) No one shall be arbitrarily deprived of his nationality nor denied the right to change his nationality." Article 4 of the European Convention on Nationality of 1997 repeats this wording in part.[110]

But the rule of consent is even older than the Human Rights Declaration and independent of the existence of a human right to nationality (which is in itself controversial).[111] For example, already the Harvard Draft Convention on Nationality of 1929 stated in Article 15: "Except as

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[108] The most important treaties in this area are the Hague Convention on Certain Questions Relating to the Conflict of Nationality Laws of 12 April 1930 (entered into force 1 July 1937; League of Nations Treaty Series, vol. 179, p. 89, No. 4137) and the European Convention on Nationality of 6 Nov. 1997 (entered into force 1 March 2000; ETS No. 166).

[109] See for case law Holland, Judicial Chamber of the Council for the Restoration of Legal Rights, The Hague, *Weber and Weber* v. *Nederlands Beheers Instituut*, judgments of 27 May 1953 and 4 July 1955, English translation in ILR 24 (1957), 431, at 431; German-Mexican Claims Commission, *Rau claim, decision of 14 January 1930*, Annual Digest of Public International Law Cases, ed. by Hersch Lauterpacht 6 (1931-32), No. 124 (p. 251, at 251); German Court of Appeals of Cologne, *Compulsory Acquisition of Nationality case*, judgement of 14 May 1960, English translation in ILR 32 (1966), 166, at 167.

[110] Art. 4: "The rules on nationality of each State Party shall be based on the following principles: (a) everyone has a right to a nationality; (b) … (c) No one shall be arbitrarily deprived of his nationality; (d) …".

[111] See Ineta Ziemele and Gunnar G Schram, "Article 15", in Gudmundur Alöfredsson/Asbjorn Eide (eds), *The Universal Declaration of Human Rights: A Common Standard of Achievement* (The Hague: Martinus Nijhoff 1999), 297-323, at 321.

otherwise provided for in this convention, a state may not naturalise a person of full age who is a national of another state without the consent of such person".[112]

The consent principle can also be derived from the international principle of self-determination. With respect to the dissolution of Yugoslavia, the Badinter Commission stated that by virtue of the right to self-determination, "every individual may choose to belong to whatever ethnic, religious or language community he or she wishes." According to the Badinter Commission, one possible implementation of that element of the principle of self-determination might be the conclusion of agreements among states in which the affected persons are recognised "as having the nationality of their choice".[113] The Badinter Commission thereby seemed to suggest that the principle of self-determination encompasses a right of option whose details must, however, be regulated by an inter-state treaty.

This rather cautious suggestion is in line with the traditional main exception to the consent requirement, namely the automatic change of nationality through a change of boundaries and of territorial sovereignty, as discussed above (Part B.II.).

b) Possible vitiation of the individual's consent

Individualised naturalisations are illegal under international law if the affected person's consent is not free. In that special case, both the interests of the former state of nationality and the interests of the individuals are disregarded, and therefore both concerns suggest the illegality of this type of naturalisation.

A lack of consent may be given in cases of clear pressure, threat, or force, because the individual's consent to acquire the new citizenship is vitiated if it is gained under threat or force. Resulting naturalisations would be illegal under international law.

A different situation is present when persons are lured into a new nationality by threat or by misrepresentations, or by promising advantages. In such a situation, it could be argued that the consent of the persons was "bought" and was not free. The "soft" means of imposing citizenship, the "selling of citizenship", e.g. by granting of social security to persons abroad already, could arguably vitiate the individual's consent. But this idea of a prohibition of even

[112] Art. 18 of the Harvard Draft Convention on Nationality of 1929, AJIL 23, special suppl. (1929), 13 *et seq*. The explanation given to that rule in 1929 was not based on the (then non-existant) idea of a human right to nationality. The comment on Art. 15 stated that an attempt to naturalise a person without his or her consent "would be a disregard of the interests of the state of which the person is a national, particularly in the view that nationality involves obligations as well as rights." (*ibid*., at 53).

[113] Opinion No. 2, repr. in *EJIL* 3 (1992), 183-4, para. 3.

"soft" imposition of citizenship does not seem to be part of international law as is stands. Moreover, fairness does not seem to require such a rule. As long as the advantages promised have some reasonable connection with the usual privileges traditionally accorded to nationals by their state, nothing prohibits a state from making active publicity for its nationality. International law allows states to grant advantages to one's nationals, such as social security or freedom of residence and movement. The promise of these advantages does not vitiate the consent of the applying persons.

c) Limits to individual choice of nationality

There is no absolute, unlimited, individual right of choice of nationality. Consent of the individual is a necessity, but not a sufficient condition for the international legality of a naturalisation. International law sets up additional limits, beyond individual consent, on naturalisations. The (controversial) human right to nationality does not prohibit setting up further conditions for the international legality and validity of naturalisations.

Article 15 of the Universal Declaration on Human Rights contains the rule: "No one shall be … denied the right to change his nationality," but the human rights declaration as such is no binding treaty. Not all of its provisions have acquired the status of a rule of customary international law. It is controversial whether there is a customary right to nationality and if yes, what are its exact scope and content.[114] The right to nationality is not contained in the International Covenant on Civil and Political Rights of 1966. Tellingly, the 1997 European Convention on Nationality does contain the principle that no one shall be arbitrarily *deprived* of his nationality, but does not contain the passage on nationality *change*. This shows that the idea of a free change of nationality is controversial.

Also the Badinter Commission did not imply that an unfettered right to chose one's nationality exists. The Commission stated only that the Yugoslav republics must afford the members of minorities all international human rights, "including, *where appropriate*, the right to choose their nationality."[115]

Even if a human right to change one's nationality existed, this right is in any case not absolute. As with most human rights, it may be limited in order to protect legitimate governmental interests.

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[114] Ziemele and Schram (above note 111), at 322-323 argue that article 15 UDHR may in certain situations or in relation to certain groups have acquired the force of customary law.

[115] Badinter Opinion No. 2, repr. in EJIL 3 (1992), 183-4, para. 4 (ii).

Ultimately, the issue is one of balancing the former home state's rights against the rights of the individual. The appropriate balance is struck by the requirement of a factual connection to the naturalising state.

2. Rights of the former state of nationality

A naturalisation does not only concern the individual, but also the home state of the person who acquires a new nationality because the former home state loses a citizen. The former state of nationality of a person has an interest in preventing its own nationals from acquiring a foreign citizenship completely at will, especially without having any connection to that other state. That interest is legitimate because the state is constituted by its citizens and would cease to exist as a state if all its citizens were naturalised elsewhere.

However, in modern international law, the individual character of a person's nationality and the human rights implications of nationality are probably in the foreground. Therefore, it is generally acknowledged that the validity of an (individual) naturalisation under international law does not, in principle, depend on the consent of the naturalised person's state of former nationality, but can be effective without that state's consent and against its opposition[116] – if, and only if, a factual connection to the naturalising state exists. So a state may not categorically prevent its citizens from acquiring a different citizenship. It may however refuse to "let go" its citizens if a factual connection to the naturalising state is missing. In that case, the former state's refusal to dismiss its citizens would not be arbitrary.[117]

It seems proportionate (and not arbitrary) to require a factual connection between the person and the naturalising state. Such an additional condition does not unduly curtail the (in itself controversial) human right to change one's nationality.

3. Factual connection to the naturalising state

In an international legal perspective, there must be a factual relationship between the person to be naturalised and the naturalising state's territory or its nationals.[118] So international law

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[116] Dahm/Delbrück/Wolfrum 2002 (above note 8), at 45.

[117] The prohibition of arbitrariness is a pervasive principle of the international law of nationality. The arbitrary withdrawal of nationality is prohibited (see. e.g. Art. 4 of the 1997 European Convention on Nationality), and also the arbitrary conferral of nationality is prohibited by customary international law (see below note 123.

[118] Albrecht Randelzhofer, "Nationality", in Rudolf Bernhardt (ed.), *Encyclopedia of International Law* (EPIL) vol. 3 (Amsterdam: Elsevier 1997), 501, at 504. Weis (above note 103), at 100; Dahm/Delbrück/Wolfrum 2002 (above note 8), at 46-47. See for case law German Constitutional Court (BVerfG), *German Nationality (Annexation of Czecheslovakia)* case, BVerfGE 1, 322, at 328-329 (1952), Engl. translation of some extracts in in ILR 19 (1952), No. 56, p. 319, at 320.

does not allow a state to confer its nationality by naturalisation upon persons possessing the nationality of another state, and to whom the conferring state has no factual relation at all.

The first reason for asking for some factual connection is that nationality has traditionally been in principle exclusive. The bond of nationality should have "as its basis a social fact of attachment."[119]

The second underlying consideration is that the states are to some extent constituted by their nationals. A political entity without a population can not be a state. By conferring its nationality on persons who were previously nationals of another state, a state therefore to some extent "enlarges" itself. Simultaneously, by the act of naturalisation a state loosens (or may even sever) the relationship between the individual and the state of its former nationality, and thus deprive the other state of parts of one of its components, namely its people. Thereby the conferring state necessarily interferes with the other state's personal jurisdiction. Therefore, the international legal rules on the acquisition of nationality, especially through the naturalisation of persons possessing a foreign nationality already, must strike a balance between a state's right to confer its nationality, the concerned individual's interests and rights, and the other state's jurisdiction over persons, which is one element of the state's sovereignty. A fair balance seems to be established by the condition that there must be a certain factual and real connection between the state and an applicant for naturalisation.

There is agreement on this principle. The only question is how intense this factual relationship or connection must be. The stricter view is that a genuine link in the sense of the ICJ *Nottebohm* judgment is required in order to render the naturalisation valid under international law and opposable to other states.[120] However, the *Nottebohm* case directly concerned only the ability of the conferring state (in that case Liechtenstein) to exercise diplomatic protection, and the International Court of Justice itself emphasised that its judgment had this restricted scope.[121] The strict requirement of a *Nottebohm*-type genuine or effective link for all cases of naturalisation would unduly limit and curtail the conferring state's sovereign right to confer its nationality upon persons according to its own rules. Even more importantly, it would create an element of uncertainty. If courts would have to investigate the genuineness of every

[119] ICJ, *Nottebohm*, 1953 (above note 93), at 23.

[120] OSCE High Commissioner on National Minorities, *The Bolzano/Bozen Recommendations on National Minorities in Inter-State Relations and Explanatory Note* (June 2008), para. 11: States should refrain from granting citizenship without the existence of a genuine link, referring to *Nottebohm*. In scholarship Brownlie (above note 2), at 407.

[121] ICJ, *Nottebohm* case, 1955 (note 93), at 17.

case of naturalisation, the effect would be to erode further the clarity of the rules of international law.[122]

The better view is therefore that the genuine link requirement applies only to the question of diplomatic protection and for resolving questions of dual nationality. For all other purposes, the factual relationship need not be very tight. Naturalisations are valid under international law unless they are arbitrary or abusive.[123] The factual connection must be objective and generally recognised.

A sufficient factual relationship is created by residence in the territory, when the person to be naturalised has a biological (family) relationship to the state, and when he or she was in the governmental service of the state.[124] It is an open question how close the family ties must be, whether e.g. very distant biological kinship would be sufficient.

4. No *per se* illegality of naturalisation without residence (extra-territorial naturalisation)

The main question of our case is whether the conferral of Russian nationality on persons living outside Russia, and without having any other connection to Russia, is *per se* illegal because of the lack of a substantial factual connection.

In historical periods with a strong concern for the preservation of national sovereignty, the prevailing international doctrine opined that the necessary factual relationship was not present when the person was not a resident of the naturalising state, especially when he or she continued to reside in her (former) state of nationality.[125]

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[122] Weis (above note 103), at 180; see also Dahm/Delbrück/Wolfrum 2002 (above note 8), at 47.

[123] See, e.g., German Federal Court, Criminal Chamber (*Bundesgerichtshof in Strafsachen*), BGHSt 5, 230, at 234 (1943), order of 29 Dec. 1953: The arbitral conferral of nationality is prohibited by international law if this results in a disadvantage for another state. The conferral of nationality without a generally recognised link is arbitrary. The link can be territorial (residence or prolongated stay) but may also consist in the entry into governmental or military service. Federal Republic of Germany, Court of Appeal of Berlin, *North-Transylvania Nationality case*, judgment of 21 December 1965, engl. Translation in ILR 43 (1971), 191, at 194: "Thus the State may not validly under international law grant its nationality arbitrarily but only to persons who are in a close and actual relationship to it." In scholarship Dahm/Delbrück/Wolfrum 2002 (above note 8), at 45 and 47-48.

[124] Dahm/Delbrück/Wolfrum 2002 (above note 8), at 48.

[125] See Art. 3(1) of the resolution of the Institut de Droit International on nationality of 1928 ; Institut de Droit International, Session de Stockholm, « la nationalité », 28 August 1928. http://www.idi-iil.org/idiF/resolutionsF/1928_stock_01_fr.pdf (accessed on 17 June 2009) ; Sec. 4 of the Model Statute adopted by the International Law Association in 1924; Harvard Draft Convention on Nationality of 1929 Article 14, AJIL 23, special suppl. (1929), 13 *et seq*. The comment on the Harvard Draft Convention on Nationality of 1929 stated: "It may be difficult to precise the limitations which exist in international law upon the power of a state to confer its nationality … If State A should attempt, for instance, to naturalise persons who have never had any connection with state A, who have never been within its territory, and who are

Under this traditional and strict view, Russia would not be allowed under international law to naturalise persons with a foreign, notably Georgian nationality, as long as they still resided in Georgia.

However, today "States are not prohibited by international law from naturalising persons not coming by residence under their territorial jurisdiction, *i.e.* persons residing outside the State territory."[126] Thus, the naturalisation of persons residing abroad is not *per se* illegal under international law. Put differently, the necessary factual connection to the naturalising state may lie in factors other than residence.

5. The illegality of selective naturalisation based on ethnic and racial criteria

The International Convention on the Elimination of All Forms of Racial Discrimination of 1965 (CERD),[127] to which Russia and Georgia are parties, prohibits discriminatory naturalisations. Article 5 lit. d) (iii) in combination with Article 1 guarantees a right to nationality without racial discrimination. Article 1(3) of the CERD states that "nothing in this Convention may be interpreted as affecting in any way the provisions of states Parties concerning nationality, citizenship, or naturalisation, *provided that such provisions do not discriminate against any particular nationality."*[128]

So from the perspective of individual rights, both the imposition (see above) and the discriminatory refusal to grant nationality are illegal under international law.

6. Collective naturalisation (without individual application)

A collective naturalisation is the conferral of nationality by operation of a national law without individual application by the person concerned. At times, states have thus imposed their nationality in a collective way, by law (*ex lege*), on persons residing for a specified time in their territory, for persons owning land, or on persons marrying a native or having native children.

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nationals of other states, it would seem that State A would clearly have gone beyond the limits set by international law. Thus, if State A should attempt to naturalise all persons living outside its territory but within 500 miles of its frontier, it would clearly have passed those limits." AJIL 23 (1929), spec. suppl., at 26. "In general, it may be said that a proper regard for other states makes it unreasonable for any state to attempt to extend the operation of its naturalisation laws so as to change the nationality of persons at the time resident in other states." *Ibid*., at 51.

126 Weis (above note 103), at 101.

127 CERD of 7 March 1966, UN Doc. A/6014 (1966), 660 UNTS 195.

128 In the same vein, Article 5 of the 197 European Convention on Nationality prohibits discrimination in nationality questions: Article 5 (1): "The rules of a State Party on nationality shall not contain distinctions or include any practice which amount to discrimination on the grounds of sex, religion, race, colour or national or ethnic origin" Russia and Georgia are not parties to that Convention.

a) The requirement of a right of refusal

Collective naturalisations are in conformity with international law only if there is "an element of voluntariness on the part of the individual acquiring" the new nationality, which "must not be conferred against the will of the individual."[129] So the concerned person must somehow, if only implicitly, have consented, e.g. by subsequent approval of the naturalisation.[130] The legislation foreseeing naturalisation only functions as an offer to the affected persons to accept the nationality.[131]

One reason for the reluctance of international law to recognise the validity of collective naturalisation is that it risks depriving the affected persons of the nationality they have acquired by birth. Collective naturalisations thus violate the liberty and dignity of the affected persons,[132] eventually the human right to privacy and family life, and last but not least the (controversial) human right to nationality. With a new nationality, persons acquire obligations towards the state, they owe the state allegiance and loyalty, and in an extreme case have to go to war for the state. For these reasons, they must have a say on their naturalisation.

In that perspective, any collective naturalisation can only take (international) effect if it encompasses a right for the concerned persons to refuse the proposed nationality.[133] However, this rule does not apply to situations of territorial changes such as the emergence of new states after the collapse of the Soviet Union. In that situation, no international customary rule of option exists,[134] and the interests of the successor state are deemed to prevail over the rights of the individual.

b) The requirement of residence for collective naturalisation

Collective naturalisation must furthermore satisfy the requirement of a factual connection to the state. Because collective naturalisations by definition affect groups of persons they

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[129] Weis (above note 103), at 110. A collective naturalisation, "provided that it reflects a sufficient connection with the naturalising state" "*may not* be contrary to international law – and certainly not if the person concerned has in some way consented" (Jennings/Watts (above note 95), at 874). This scholarly statement can be read as implying that individual consent might remedy the connection otherwise lacking, but might also mean that both (connection and consent) must be present in a cumulative way.

[130] This principle has long been acknowledged in the case law, even before the era of human rights. The traditional reason for asking for the individual's voluntary acceptance of the new nationality was not so much a concern for the individual's liberty and freedom of choice, but rather the concern for the former state of nationality which was divested of its citizens by collective naturalisations by another state.

[131] Weis (above note 103), at 110: "Legislation providing for the *ipso facto* acquisition must not be regarded as compulsory conferment, but as a permissive rule offering naturalisation subject to acceptance."

[132] Dahm/Delbrück/Wolfrum 2002 (above note 8), at 49.

[133] Dahm/Delbrück/Wolfrum 2002 (above note 8), at 42.

[134] See above Part B.II.

interfere more strongly with the interest and with the personal jurisdiction of the states whose nationals are, so to speak, "taken away." Therefore it seems that for collective naturalisations the factual connection between those groups of persons and the naturalising state would have to be more intense than in the case of individual naturalisations. The mere temporary dwelling in a state, possession of real estate, or professional activities would not be sufficient. A law on collective naturalisation which would rely on such weak factors only would therefore be illegal under international law.

These reasons have given rise to a basic rule of international law: The collective (i.e. *ex lege*) naturalisation of persons living outside the territory of the state seems to be contrary to international law.[135]

Paul Weis has qualified the example of a law "naturalising 'all persons living outside the territory but within 500 miles of its frontier'" as "inconsistent with international law […]: it purports to deprive other states of a number of their nationals, of the right of protection over a number of their subjects. It constitutes an encroachment upon the personal jurisdiction of these states and must be regarded, if it affects a considerable number of nationals, as an unfriendly or even hostile act against the state of nationality comparable to the violation of a state's territorial jurisdiction: it constitutes a threat to peaceful relations and is as such illegal."[136]

II. Application of the Principles to the Facts

1. The conferral of Abkhaz and South Ossetian "nationality" on residents of the breakaway territories

Both Abkhazia and South Ossetia have passed laws on nationality and conferred their own "nationality" on the residents of the territory.[137] According to various sources, the residents living in South Ossetia and Abkhazia were forced in many instances to assume South Ossetian or Abkhaz "nationality."[138]

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[135] Moreover, collective naturalisations forced upon populations in an occupied territory violate the international legal prohibition on annexation (Dahm/Delbrück/Wolfrum 2002 (above note 8), at 52).

[136] Weis (above note 103), at 112, referring also to p. 102.

[137] Art. 16 of the South Ossetian *de facto* Constitution of 8 April 2001 (above note 33) stipulates: "(1) The Republic of South Ossetia shall have its own citizenship. (2) Double-citizenship is admissible in the Republic of South Ossetia." The Abkhaz Constitution of 26 Nov. 1994 does not contain any provision on citizenship. Article 6 of the law on citizenship of the Republic of Abkhazia of 24 Oct. 2005 stipulates that a citizen of the Republic of Abkhazia is also entitled to obtain the citizenship of the Russian Federation.

[138] See Chapter 7 "International Humanitarian Law and Human Rights Law".

From an international law perspective, the nationality conferred by unrecognised states, state-like entities and entities short of statehood can be ignored by those states that do not recognise those entities as states.[139]

At the time of the writing of this Report, this means that South Ossetian and Abkhaz "nationality" can be disregarded by all states with the exception of Russia and Nicaragua.

2. Naturalisation of Georgian citizens living in Abkhazia and South Ossetia by Russia

a) Naturalisation on the basis of the Russian Law on Citizenship

The conferral of Russian nationality to residents of Abkhazia and South Ossetia must first be assessed on the basis of Russian law.

From 6 Feb. 1992 until 1st July 2002, Russian citizenship was acquired according to the 1991 Law on Citizenship (entered into force on 6 Feb 1992), as amended in 1993 and 1995.[140] Article 13 of the 1991 Law foresaw a right of option of nationality for persons permanently residing in the territory of the Russian Federation as of 6 Feb 1992 (the date of entry into force of the 1991 Law).[141] Art. 18 of the 1991 Law foresaw the acquisition of Russian citizenship by way of registration. The registration procedure was open to various groups of persons.[142] The only group of persons not resident in the territory of the Russian Federation that could acquire Russian nationality by way of registration were stateless persons permanently resident on the territory of other republics within the former USSR. They had to register by 6 Feb 1993. That means that the residents of Abkhazia and South Ossetia who remained there on a permanent basis and did not resettle in the Russian Federation could acquire Russian nationality only if they were of Russian ascendancy or if they were stateless. Even if they were regarded as stateless before the entry into force of the Georgian law on nationality on 25 March 1993, they would have had to register as Russians before February 1993. The Mission has no data on the number of residents of Abkhazia and South Ossetia who

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[139] Jennings/Watts (above note 95), at 854 fn. 14: "A nationality which is that of an unrecognised 'state' is not a true nationality in the international sense, and need not be recognised in other countries." In state practice New Zealand Court of Appeal, *Walter James Hunt* v *The Hon. Sir Arthur Hamilton Gordon*, judgment of 6 March 1884, New Zealand Law Reports vol. 2 (1884), 160, at 198-204.

[140] The Law of the Russian Federation on the Citizenship of the Russian Federation, No. 1948-I, of 28 Nov. 1991 (as amended on 17 June 1993, and 6 Feb 1995); first version in Ved. RSFSR 1992 No. 6 item 243, English transl. in Review of Central and East European Law 19 (1993), 293-318.

[141] See Ziemele (above note 98), at 178-79.

[142] It was open to persons with Russian ascendancy, second to nationals of the former USSR who resided in the territory of one of the former Republics and entered the territory of the Russian Federation after 6 February 1992 (here registration was possible until until 31 Dec. 2000). The last groups were stateless persons permanently resident on the territory of other republics within the former USSR; they could register up to 6 Feb 1993.

were registered in the Russian Federation. It can be assumed that the above-mentioned criteria were fulfilled only by a marginal group of residents.

The active "passportisation" policy of the Russian Federation started only at the beginning of the new century. Since July 2002, the new Russian Law on Citizenship of 2002 applies.[143] The derivative acquisition of Russian citizenship (other than by birth) for foreign citizens and stateless persons is regulated in Article 13 and 14 of that Law. Under the normal procedure of admission to Russian citizenship, a five year residence on Russian territory is required (Art. 13(1) (a)). The duration of stay in Russian territory may be reduced to one year in special cases, e.g. for professionally highly qualified persons.[144]

The admittance to Russian citizenship in a simplified procedure is regulated in Article 14. This simplified procedure applies to numerous, quite large groups of persons.[145] It contains a clause 4 under which foreigners and stateless persons who were former citizens of the USSR receive Russian nationality under a simplified procedure. That means that they do not have to have lived five years on the territory of the Russian Federation, they do not need to have sufficient means for subsistence as fixed by law, and they do not need to master the Russian language.[146] Some other procedural requirements remain, such as the necessity to turn to the authorities of the former state of nationality and to ask for the withdrawal of the former nationality (, %' / *1- - e 2&26. %,*). This is not necessary if this withdrawal is impossible due to reasons for which the person concerned is not responsible (*5/ - 26. %, 26 - 12(2 (4%+) %156' %1*' 2, 0 2+ *1 ' 5- / 7 1* , %- 5<; - 8 26 / - 9%34- : - 1).

[143] Federal Law No. 62-FZ of 31 May 2002, adopted by the State Duma on 19 April 2002, approved by the Council of the Federation on 15 May 2002, amended and supplemented on 11 Nov. 2003 and 2 Nov. 2004 (Statutes of the Russian Federation (Sobranie Zakonodatel'stva Rossijskoj Federacij)) 2002, No. 22, p. 2031; 2003, No. 46, p. 4447). Third amendment signed into law by the President in Jan. 2006, official publication on 3 Jan 2006 (and 11 Jan 2007), available at Immigration and Refugee Board of Canada, Russia: Russian Citizenship Law signed into law by the President in January 2006, 1 March 2007. RUS102357.E. Online. UNHCR Refworld, available at: http://www.unhcr.org/refworld/docid/46fa5381c.html [accessed 8 May 2009].

[144] Art. 13(2) of the Act of 31 May 2002 (above note 143).

[145] It applies for instance to persons having at least one Russian parent residing in Russia (cl. 1 lit. a)), to former USSR citizens residing in one of the former Soviet republics and who are now stateless (cl. 1 lit b); also to persons who received a higher education in Russia after 1st July 2002 (cl. 1 lit. c)).; persons born in the territory of the RSFR and who were former citizens of the USSR (cl. 2 lit. a)); persons married to a Russian citizen (cl. 2 lit b)); disabled persons with a Russian child (cl. 2 lit. c)). They all can ask for being conferred Russian citizenship.

[146] These conditions are laid down in Article 13 of the law and can be disposed of in the case of a simplified procedure.

The wish to become Russian has to be explicitly expressed. The time-frame for this option has continuously been extended. According to the last amendment, the wish has to be expressed before 1 July 2009.[147]

The preconditions for applying this simplified procedure are enshrined in the following ambiguous provision:

“Foreign citizens and stateless persons who were citizens of the USSR, who have come to the Russian Federation from states that were part of the USSR, who were registered at their place of residence in the Russian Federation as of 1 July 2002, or have received permission to stay in the Russian Federation on a temporary basis or a permit for residence in the Russian Federation, shall be granted Russian Federation citizenship under a simplified procedure without regard to the provisions of Items ‘a’, ‘c’ and ‘e’ of Part 1 of Article 13 of this Federal Law if, prior to 1 July 2009, they declare their wish to become citizens of the Russian Federation.”[148]

The phrase “who have come to the Russian Federation from states that were part of the USSR” (9: 2+B, A2/ , ' 8; ; 23; 4=D) /. /: *?2D 21 -8; =. *: ; <, , >8. 2, A2> , ; 8; <*, (((') can be read as a condition for every naturalisation. In this case extraterritorial naturalisations would be excluded; at least it would not be possible to become a Russian citizen without having entered the Russian Federation (even if leaving again afterwards). A different reading would be to understand the second alternative “or have received permission to stay in the Russian Federation on a temporary basis or a permit for residence in the Russian Federation” (52+8 985=@2, A2/ : *1: / A/ 72/ 7* , : / 6/ 778/ 9: 80 2, *72/ , ' 8; ; 23; 483) /. /: *?22 252 , 2. 7* 0 2</ 5C; <, 8) as an independent and *per se* sufficient condition for acquiring Russian nationality.

[147] The last version of the law dates from 28 June 2009.

[148] In Russian original: “ 01453#00<(&8#) ' #0(+ . +8# $(* &8#) ' #045%#, +/ (% +(&8#) ' #045%1 , 23+$<% +(% 144+, 4-6> ! (' (3#8+> +* &146' #345%, %71' +% +7 %4145#% , + *#3(&+453+31%#00<(21 / (456) +5(. =45%# % 144+, 4-1, ! (' (3#8++ 21 41451"0+> 0# 1 +> . " 2002 &1' # . +$1 21. 69+% +(3#*3(: (0+(0# %3(/ (001(231) +%#0+(% 144+, 4-1, ! (' (3#8++ +. + %-' 0#) +5(. =45%1, 23+0+/ #> 54" % &8#) ' #045%1 144+, 4-1, ! (' (3#8++ %6231; (001/ 213"' -($(* 41$. > ' (0+" 64. 1%-, , 23(' 64/ 153(00<7 260-5#/ + "#", "% + "' " 9#45+ 2(3%1, 45#5=+ 13 0#451"; (&1 ! (' (3#. =01&1 *#- 10#, (4. + 10+ ' 1 1 "0%#3" 2008 &1' # *#"%5 1 4%1(/) (. #0++ 23+1$3(45+ &8#) ' #045%1 144+, 4-1, ! (' (3#8++.“

All other alternatives of conferring Russian nationality[149] raise no international legal concerns. But exactly this particular option seems to be the one used for the naturalisation of the majority of the residents of Abkhazia and South Ossetia.

b) Conformity of naturalisation with international law

Under a broad reading of the statute, extraterritorial naturalisations are valid under Russian law. Accordingly, there is a presumption that other states have to accept them as valid. However, this presumption can be reversed if the conferral of nationality is not in line with the minimum requirements of international law and thus "excessive".

i) Voluntariness

The first question is whether the acceptance of Russian nationality was voluntary or imposed by threat or use of force. It might be argued that many residents of Abkhazia and South Ossetia were in a no-choice situation after the armed conflicts at the beginning of the 1990s and in the process of secession of the breakaway territories. In this context, it matters that the Russian Federation had introduced a visa regime for Georgian citizens, which took effect on 5 December 2000 against the will of Georgia.[150] It did so by denouncing the Agreement on the free movement of the citizens of the CIS countries on the territory of the Member states without visa (concluded on 9 October 1992) on 30 August 2000. The Russian plan to exempt the residents of Abkhazia and South Ossetia from these regulations has been implemented. The Parliament of the European Union has expressed strong objections to this policy.[151]

From a political point of view, Russia's policy was very welcome to Abkhazia and South Ossetia, because it distanced them from Georgia. The residents of the breakaway territories had economic and administrative reasons to accept the offer of a Russian passport in order to avoid applying for visas. Yet, this did not necessarily create a no-choice situation in which economic pressure would have the same effects as threats or the use of force. Georgia asserts that in some cases, individuals were pressured into Russian nationality, for instance by threats with "punitive taxes" or expulsions.

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[149] E.g. if the persons concerned were born in the Russian Federation or are married to a Russian citizen for at least three years (Article 14 para. 3).

[150] Cf. Statement of the Parliament of Georgia on introduction of visa regime between Russia and Georgia of 24 Nov. 2000, Archive of the Parliament of Georgia, http://www.rrc.ge/law/Statem_2000_11_24_e.htm?lawid=626&lng_3=en

[151] European Parliament resolution on the visa regime imposed by the Russian Federation on Georgia, 18 January 2001, http://www.europarl.europa.eu/intcoop/euro/pcc/aag/pcc_meeting/resolutions/2001_01_18.pdf.

Other motives for inhabitants of South Ossetia and Abkhazia to apply for Russian nationality were apparently the desire to receive a Russian pension,[152] and to be able to travel abroad.[153] Further advantages relate to medical care and education, and the ability to benefit from the EU Visa facilitation programme with Russia. Such incentives do not contradict international law, as explained above (Part B.I.1.).

It can therefore be assumed that the conferral of Russian nationality before August 2008 generally occurred on a voluntary basis.

ii) Factual connection

The second condition for the international validity of individual naturalisations is a factual connection between the person granted the new nationality, and the state conferring its nationality.

When Article 14 para. 4 of the Russian Law on Citizenship is interpreted in such a way as not to require residence in Russia, then the only legal preconditions for acquiring Russian nationality would be the former Soviet nationality and a temporary residence permit.

Former Soviet citizenship cannot be accepted as sufficient factual connection. Regardless of the qualification of the dissolution of the Soviet Union as a process of dismemberment or as a series of secessions, Russia is not identical with the Soviet Union as a state and as a subject of international law. Therefore the bond created by the Soviet citizenship between the citizens of the different Soviet Republics was irrevocably severed in 1991. On the basis of new laws on nationality, all former Soviet citizens redefined their status and determined to which of the CIS-States they wanted to belong. And even if the Russian nationality were considered to be the "former nationality", it would only be accepted as a sufficient factual connection if the person again took residence in Russia.[154]

The fact that the persons concerned must have received a temporary residence permit does not create a real link either, because such a permit can be granted in an arbitrary manner without any further preconditions.

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[152] According to the Human Rights Assistance Mission of the OSCE, "elderly Abkhaz with Russian passports are now reportedly eligible to receive a pension of 1 600 rubles, compared with that of 100 rubles offered by the Abkhaz government". (Human Rights Assessment Mission of the Office for Democratic Institutions and Human Rights, OSCE, *Human Rights In The War-Affected Areas Following The Conflict In Georgia*, 27 November 2008, at 67).

[153] Source: NATO PA, 2005 Annual Session, http://www.nato-pa.int/default.asp?SHORTCUT=683).

[154] Dahm/Delbrück/Wolfrum 2002 (above note 8), at 51.

The Russian law on Citizenship does not define any additional criteria. Common ethnicity might be relevant for the South Ossetian population in relation to the North Ossetian population, but not for the Abkhaz population. However, ethnicity is a very problematic criterion, as the protection of minorities is seen as the task of the state in which they live. Even unilateral measures of protection of kin-minorities are acceptable only under narrow conditions.[155]

That means that the conferral of Russian nationality to persons living outside the territory of the Russian Federation only because they had been citizens of the Soviet Union and have acquired a temporary residence permit does not fulfil the minimum requirement of a factual connection between the person and Russia.

III. The Illegality of Large-Scale Extraterritorial Naturalisation of Georgian Citizens by Russia

A "passportisation" policy aiming at the conferral of nationality on the citizens of another state without sufficient factual links, especially if it is implemented on a large scale, violates first the specific prohibition of extraterritorial collective naturalisations, and also several general principles of international law. The policy is thus not in conformity with international law.

1. Infringement of the prohibition of extraterritorial collective naturalisation

As stated above, the collective naturalisation of citizens of another state residing outside the naturalising state's territory is clearly prohibited by a special rule of international law.

The naturalisations of the residents of South Ossetia and Abkhazia are not collective naturalisations in a formal sense. They operate upon individual application and not *ex lege* (by law). However, the procedures are simplified. In practical terms, the naturalisations constitute a mass phenomenon. The question is whether they can be qualified as equalling prohibited extraterritorial collective naturalisations. In that case they might be qualified as *de facto* collective naturalisations of persons residing outside Russia which should fall under the international legal prohibition stated above.

The assessment of whether large-scale, simplified extraterritorial naturalisations amount to a *de facto* collective naturalisation must take into account the two sets of interests or values as

[155] European Commission for Democracy through Law (Venice Commision), Report on the preferential treatment of national minorities by their kin-state, adopted by the Venice Commission at its 4th plenary meeting (Venice, 19-20 October 2001), Doc. CDL-INF (2001) E.

explained above: The interests of Georgia (statehood, territorial and personal sovereignty) and the interests of the affected individuals (human rights to privacy and nationality, and human dignity).

The criterion of quantity: With regard to the interests of Georgia, what matters is the quantity of the persons affected. Looking at quantity, the naturalisations have the same effect as collective naturalisations, because the overwhelming majority of the populations in the territories have become Russians.

The criterion of consent: In the perspective of the affected persons, what matters are their rights and interests. Collective (*ex lege*) naturalisations are characterised by the absence of consent. Focusing on individual consent as the decisive criterion would mean that naturalisations upon individual application can not be placed on an equal footing with collective naturalisations. From that perspective, the naturalisations of South Ossetians and Abkhaz residents is legal, as long as their consent is free and informed.

In that situation, the interests of the individuals living in the territories and the interests of Georgia are in conflict. The question is now which criterion is decisive. Is the individual's free decision to change his or her nationality more important than the detrimental effects for Georgia? Put differently: Can their consent override the countervailing values of state sovereignty and jurisdiction?

The answer depends on the priorities assigned to these conflicting goods in international law. As already explained above, international law does not unequivocally acknowledge a human right to change one's nationality. Even assuming such a right, it is subject to limitations.

As a whole, the international legal rules on nationality still seem to accord a high value to the interests of states, because these are constituted by their nationals. Therefore, it seems fair to argue that the crucial element constituting the illegality of large-scale naturalisations is the quantity of persons affected and the resulting significant shrinking of the population.

Along this line, the leading treatise on nationality stated in 1979: "It is not the freedom of the individual whose nationality is at issue, but the rights of the state of which he is a national, that are the primary considerations in international law."[156] Arguably the normative foundations of international law have in the meanwhile shifted towards more consideration for the individual. Still, nationality crucially concerns his or her state as well. International

[156] Weis (above note 103), at 112.

law does not acknowledge an unfettered individualism concerning the choice of nationality. The interests of the affected state, notably if it is virtually divested of large parts of its constitutive element, its people, seem to outweigh that of the individual.

Along that line, the above quoted author wrote: "In view of the overriding importance of the right of the state to independence, even a possible tacit acceptance by the persons concerned would be irrelevant."[157] Arguably, even an explicit acceptance by the persons concerned would be irrelevant. Therefore the naturalisations of residents of South Ossetia and Abkhazia, if they are a massive phenomenon, can be equated to such formally collective (*ex lege*) naturalisations of residents of foreign states which operate without individual applications.

Conclusion: The large-scale naturalisations of residents of South Ossetia and Abkhazia with no other factual connection to Russia must be equated to so-called collective (*ex lege*) naturalisations of foreign residents. For this reason they are already prohibited by the specific international legal prohibition of extraterritorial collective naturalisations.

Additionally, general principles seem to be infringed by large-scale naturalisations, as will be discussed now.

2. Violation of Georgia's jurisdiction over persons

One component of sovereignty is the sovereign state's jurisdiction over persons. Large-scale naturalisations of Georgian citizens undermine the personal jurisdiction of Georgia, and to that extent affect Georgian sovereignty as well.

In that vein, it has been argued that "by conferring its nationality on the national of another state the naturalising state purports to deprive the other state of its right of protection."[158] The state's right to protect its nationals is indeed a traditional prerogative of sovereignty. It might be argued that under the premise that states are not ends in themselves, the protection offered to their own nationals is rather a duty and not a right of the state. However, the conflict under scrutiny demonstrates that the option to grant protection to their nationals is an important value for the states in conflict. Russia, especially, has attempted to justify its activities, including military activities in Georgia, by relying on its right to protect Russian nationals. Against this background, the deprivation of the right to protection indeed constitutes an infringement of sovereignty.

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[157] *Ibid*., at 113.

[158] Weis 1979 (note 103), at 101.

On the other hand, it could be argued that Georgian jurisdiction over the disputed territories is not effective anyway, so that Georgia is not able to protect its citizens there. But such an argument would be based on the (illegal) *fait accompli*. That fact can not be held in law against Georgia's sovereign right to protect its nationals, however virtual that right is in the territories.

Conclusion: The conferral of Russian nationality on a large scale is apt to deprive Georgia of its jurisdiction over persons, forecloses Georgian diplomatic protection for those persons, and may be a basis (or rather a pretext) for military intervention. The more individuals that are removed from the Georgian nation, the more plausible is the qualification of these actions as an infringement of Georgian sovereignty, which encompasses jurisdiction over persons.

3. Violation of Georgia's territorial sovereignty

The mere fact that foreign citizens are among the addressees of the Russian Law on Citizenship does not in itself infringe their home states' territorial sovereignty. But this principle may be affected by the fact that the Law specifically seeks to deploy effects on Georgian territory.

The principle of territorial sovereignty seeks to guarantee and protect the exclusive performance of state functions within the territory of a state.[159] "Between independent States, respect for territorial sovereignty is an essential foundation of international relations," the International Court of Justice stated.[160] Acts of foreign states that violate the territorial sovereignty of another state are prohibited by international law.

There is no infringement of territorial sovereignty when such an Act has effects only within the borders of the issuing state (in our case Russia). However, "[w]hen the law specifically aims at deploying its effects on foreign citizens in a foreign country abroad, its legitimacy is not so straightforward. It is not conceivable, in fact, that the home-State of the individuals concerned should not have a word to say on the matter."[161] So the principle of territorial sovereignty of states requires the consent of the home-state affected by the other state's measures.[162] This state's consent can be implied or presumed where merely cultural and

[159] *Palmas*-awards, arbitrator Max Huber, RIAA, Vol. II (1928), 829 at 838.

[160] ICJ, *The Corfu Channel Case* (Merits), ICJ Reports (1949), 4 at 35.

[161] *Ibid*., Part D a) i).

[162] See on consent as precluding the unlawfulness of an act Art. 20 ILC Articles on State Responsibility: "Consent: Valid consent by a State to the commission of a given act by another State precludes the

educational benefits are granted, because there is relevant international custom in that respect. Beyond this, however, the state's consent must be explicit.

According to the Venice Commission, respect for territorial sovereignty is especially necessary "when the document has the characteristic of an identity document".[163] "In such form, this document […] creates a political bond between these foreigners and their kin-State. Such a bond has been an understandable cause of concern for the kin home-States, which, in the Commission's opinion, should have been consulted prior to the adoption of any measure aimed at creating the documents in question."[164]

The Venice Commission's reasoning with regard to an identity-card-like document applies *a fortiori* to the conferral of nationality on persons residing in another state. This is all the more compelling if the conferral of nationality has the consequence of the extinction of the previous nationality.

Conclusion: The relevant clauses of the Russian Law on Citizenship have direct effects on Georgian citizens in a foreign country. Applied to Georgia, they infringe Georgian territorial sovereignty.

4. Interference in the internal affairs of Georgia

The conferral of Russian nationality constitutes interference in the internal affairs of Georgia, because Georgia does not allow dual citizenship.[165] This type of interference in internal affairs can not be belittled by the observation that Georgia could or should allow dual citizenship and could continue to treat dual nationals as Georgians and thereby avoid the reduction of the sum of Georgian nationals. International law leaves it to each state to decide freely which consequences it attaches in its internal law to the fact that a citizen acquires another nationality.[166] There has been a long standing tradition in international law, and also in the

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wrongfulness of that act in relation to the former State to the extent that the act remains within the limits of that consent." (Articles on the Responsibility of States for Internationally Wrongful Acts, adopted by the UN General Assembly on 12 Dec. 2001 in Resolution A/RES/56/83).

[163] European Commission for Democracy through Law (Venice Commision), Report on the preferential treatment of national minorities by their kin-state, adopted by the Venice Commisison at its 4th plenary meeting (Venice, 19-20 October 2001), Doc. CDL-INF (2001) 19, part D c).

[164] *Ibid*. The Commission opined that any document issued by the kin-state "should be a mere proof of entitlement to the services provided for under a specified law or regulation. It should *not aim at establishing a political bond between its holder and the kin-State and should not substitute for an identity document* issued by the authorities of the home-State".

[165] Art. 1(2) of the Georgian Law on Citizenship of 1993 (above note 97).

[166] See the preamble of the Convention on Nationality of 6 Nov. 1997, and also its Art. 15: "The provisions of this Convention shall not limit the right of a State Party to determine in its internal law whether: a) its nationals who acquire or posess the nationality of another State retain its nationality or lose it".

practice of states, to avoid dual nationality. In that tradition, many states foresee in their domestic law that a citizen who becomes naturalised in another state will lose his current nationality. Although in the age of globalisation, high mobility of persons, and tempered nationalism, the reduction of dual nationality is no longer an important international policy objective, the Georgian regulation is not unusual and is fully in conformity with international law.

So Georgia can not be compelled to admit dual citizenship and to revise its legislation, because states are free in that regard.

Conclusion: The Russian "passportisation" policy interferes with Georgia's internal affairs.

5. Violation of the principle of good neighbourliness

The mass conferral of Russian nationality on persons living in neighbouring states risks violating the international legal principle of good neighbourly relations. This principle is enounced in the Preamble of the UN Charter ("to practice tolerance and live together in peace with one another as good neighbours", and also explicitly in Article 74 UN Charter. It was spelled out in the General Assembly's "Friendly Relations Declaration" of 1970.[167] Also, the General Assembly's Resolution "Development and Strengthening of Good-neighbourliness between States" of 1984, calls "upon states, in the interest of the maintenance of international peace and security, to develop good-neighbourly relations…".[168] Although no concrete *positive* obligations can be derived from the principle of good neighbourliness, it arguably requires states to *refrain* from abusive activity towards their neighbouring states.

With the same approach, the Venice Commission's report on Hungarian extraterritorial "citizenship" found that the creation of a "political bond" without the consent of the home state of the persons runs against the "principle of friendly neighbourly relations".[169] This reasoning applies *a fortiori* to large-scale conferrals of nationality.

Conclusion: The "passportisation" policy runs counter to the principle of good neighbourliness.

[167] GA Res. 2625 (XXV) of 24 Oct. 1970.

[168] GA Res. 39/78, para. 2 (of 13 Dec. 1984).

[169] Venice Commission (above note 204) passim, also in part E (conclusions).

6. Possible violation of individual rights

Russian nationality shall not be imposed on persons. Any imposition by law or through pressure on individuals would be illegal.

According to information available to the IIFFMCG, the Russian "passportisation" policy was not, in general, based on use of force, but rather on political, economic and social incentives. These incentives do not violate the prohibition of an imposition of nationality against the will of the persons concerned.

If Russia conferred passports specifically to South Ossetian residents of a certain ethnic descent and refused the naturalisation of ethnic Georgians (factual question) this would violate the CERD. The question of how far the "passportisation" policy was based on racial discrimination will be dealt with by the International Court of Justice.[170] The Mission refrains from analysing this question while proceedings before the court are pending.

7. No justification on "humanitarian" grounds

Abkhazia justified the Russian naturalisation *en masse* of Georgian citizens living in South Ossetia and Abkhazia by the difficulties encountered by Abkhaz travelling abroad.[171] Indeed, residents of Abkhazia and South Ossetia could not travel abroad with the "passports" issued by the *de facto* authorities,[172] because these documents were not recognised by other states. Despite several attempts and concrete proposals, the United Nations did not succeed in bringing about a solution acceptable to all sides.

Nevertheless, these circumstances do not justify the large-scale naturalisation of Georgian citizens. Difficulties in travelling to Russia were created by the unilateral introduction of a visa regime by Russia. Therefore, Russia is estopped from "remedying" the problem to which it had contributed.

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[170] See ICJ, *Case concerning application of the international convention on the elimination of all forms of racial discrimination* (Georgia v. Russian Federation).

[171] See official Abkhaz answer to the IIFFMCG questionnaire related to legal issues, including international humanitarian law and human rights law issues.

[172] The Georgian side accepted a special card isssued by the South Ossetian authorities for travelling within Georgia. Yet, for travelling abroad it was necessary to use the Georgian passports with a special indication that the person came from South Ossetia. In the case of Abkhazia, Russia agreed to provide the Abkhaz with international-type Russian passports that enabled them to travel abroad.

IV. Large-Scale Naturalisation of Stateless Residents of South Ossetia and Abkhazia as an Abuse of Rights

1. No *de facto* statelessness

The naturalisation of stateless persons, even if it is not illegal under international law, is still apt to constitute an abuse of rights.

As explained above, the residents of South Ossetia and Abkhazia were, as a rule, not formally stateless, but Georgian citizens (Part B). One objection might be that South Ossetians and Abkhaz refusing Georgian citizenship are *de facto* stateless. De facto stateless persons are those who possess the nationality of a state but enjoy no protection by it "either because they themselves decline to claim such protection, or because the state, mostly for political reasons, refuses to protect them."[173] However, the idea of *de facto* statelessness of persons does not seem to enjoy widespread approval in state practice and scholarship. Moreover, Georgia did not refuse to protect the residents of South Ossetia and Abkhazia.

Only those residents of Abkhazia and South Ossetia who explicitly refused Georgian nationality in 1993 became and remained in legal terms stateless, because the "nationality" of South Ossetia and Abkhazia cannot be opposed to those states that do not recognise those two entities.

The naturalisation of stateless persons does not touch upon the interests of Georgia, or does so only marginally. From the point of view of international law, the principal requirement is the consent of the person concerned. Therefore the Russian nationality conferred on stateless persons living in South Ossetia and Abkhazia must in principle be recognised by third states including Georgia.

However, under certain circumstances, the extra-territorial naturalisations even of stateless persons, especially if they occur on a massive scale, may be abusive.

2. The contents of the international prohibition of abuse of rights

The prohibition of the abuse of rights[174] is known in many legal systems and is therefore accepted by most scholars and those in state practice as a "general principle of law" which

[173] Randelzhofer (above note 118), at 508; see also Weis (above note 103), at 164.

[174] See Alexandre Kiss, "Abuse of Rights", *Max Planck Encyclopedia of International Law* online 2009; Michael Byers, "Abuse of Rights: An Old Principle, A New Age", *McGill L.J.* 47 (2002), 389-431.

forms part of the body of international law,[175] or as a principle of international customary law. Various international treaties (e.g. Art. 300 of the Convention on the Law of the Sea,[176] Art. 263 of the Functioning of the European Union of Lisbon (Article 230 EC Treaty),[177] Art. 17 of the European Convention of Human Rights,[178] or Art. 3 of the Optional Protocol to the ICCPR[179]) prohibit the abuse of rights. In the case law of international courts and tribunals, abuse of rights has frequently been an issue.[180]

Abuse of rights is closely linked to the principle of good faith. The concept implies a distinction between the existence and the exercise of a right. The gist of the principle is that, despite the existence of a state's right, the manner in which it is exercised can still amount to an abuse. "A state which, though not with the actual object of breaking an international obligation as such, uses its right to apply certain laws, or to apply them in a certain way, in such a manner that the obligation is not in fact carried out, may be said to have committed an abuse of rights."[181]

An abuse of rights is present when a state does not behave illegally as such, but exercises rights that are incumbent on it under international law in an arbitrary manner or in a way which impedes the enjoyment by other states of their own rights, which, as a consequence, suffer injury.[182] The finding of an abuse of rights requires the finding that there has been some

[175] The 'general principles of law recognised by civilised nations' are, under Article 38(1) lit c) of the ICJ-Statute a source of international law. 'Abuse of rights' was specifically mentioned as an example for a general principle in the sense of the Statute by a member of the Committee of Jurists preparing the draft statute of the PCIJ. (The PCIJ Statute contained the same provision as now Art. 38 ICJ-Statute). See A. Ricci-Busatti, in League of Nations, Permanent Court of International Justice, Advisory Committee of Jurists Procès Verbaux of the Proceedings of the Committee June 16th July 24th 1920 (Van Langenhuysen Brothers: The Hague 1920), at 314-315 (quoted in Kiss para. 8).

[176] United Nations Convention on the Law of the Sea of 10 December 1982, entered into force 16 November 1994, UNTS vol. 1833 No. 397.

[177] Treaty on the Functioning of the European Union of 9 May 2008. OJ 2008, C 115/1.

[178] European Convention for the Protection of Human Rights and Fundamental Freedoms of 4 Nov. 1959, entered into force on 3 Sept. 1963, UNTS vol. 213, p. 221.

[179] Art. 3 of the Optional Protocol to the International Covenant on Civil and Political Rights of 16 December 1966, entered into force 23 March 1976, UNTS vol. 999, No. 14668, p. 302.

[180] See notably WTO, *United States – Import Prohibition of Certain Shrimp and Shrimp Products* (Complaint by the United States) (1998), WTO Doc. WT/DS58/AB/R (Appellate Body Report), para. 158.

[181] Gerald Fitzmaurice, "The Law and Procedure of the International Court of Justice, 1954-9: General Principles and Sources of Law", *British Yearbook of International Law* 35 (1959) 183-231, at 209. See in this sense also Kiss (above note 174), paras 3 and 32.

[182] Kiss (above note 174), paras 1 and 4. Another type of an abuse of rights is the situation that a state exercises a right for an end different from that for which the right was created, to the injury of another state (Kiss, *ibid*., paras 1 and 5). That second type of abuse of rights which resembles the French concept of 'détournement de pouvoir' is not relevant in our case.

injury.[183] Bad faith or an intention to harm is not necessary to constitute this form of abuse of rights.[184]

3. Application of the principle to the present case

Russia is in principle entitled to confer its nationality, in individualised procedures and upon individual application, on stateless persons living abroad. But by doing so on a wide and liberal scale, it may injure other states.[185]

The injury of Georgia lies in the reduction of one element of statehood, the population (understood in a large sense, independent of nationality[186]), and in the detrimental effects for Georgia's sovereignty over its territory.

The conferral of nationality is often used as an instrument of foreign policy. It creates tensions and problems without necessarily constituting an abuse of rights. However, the OSCE High Commissioner on National Minorities has recently warned of an abuse of rights through the *en masse* conferral of nationality to individuals abroad.[187]

Moreover, the Russian "passportisation" policy displays some specific circumstances that have to be taken into account. First, it is performed on a massive scale and concerns people living in breakaway territories in a neighbouring state. The more persons that are affected in number, the more plausible is the existence of an abuse of Russia's right to naturalise persons. Second, the policy was not only implemented during an on-going conflict of secession, but was even intensified at times of rising tensions. Third, it was well planned, organised and implemented. Fourth, the policy has been used as a lever to destabilise an already fragile country. Finally, it has been employed as a rhetorical justification for the use of force.

Under those very specific circumstances it can be argued that Russia has abused the right of conferring Russian nationality on stateless residents of those territories. This is especially true as Russia's role in the conflict was deemed to be that of a impartial mediator.

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[183] Kiss (above note 174), para. 31.

[184] Kiss, paras 6 and 32; Georg Dahm/Jost Delbrück/Rüdiger Wolfrum, *Völkerrecht*, vol. I/3 (2nd ed. Berlin: de Gruyter 2002), at 850.

[185] At the Hague conference of 1930, the delegate of Uruguay referred to the limitations of abuses under certain laws which might grant naturalisations on so wide and liberal a scale as to constitute an abuse of a recognised right. Minutes of the First Committeee, at 209, quoted in Weis (above note 103), at 113.

[186] See above text with notes 17 and 18.

[187] OSCE High Commissioner on National Minorities, *The Bolzano/Bozen Recommendations on National Minorities in Inter-State Relations and Explanatory Note* (June 2008), para. 11.

D. Consequences under International Law

I. Independent Scrutiny of the International Legality of Naturalisation by other States and International Bodies

Exorbitant attributions of nationality (those overstepping the limits of international law) may not have an international effect, notably no effect outside the state's territory.[188] Other states are not obliged to recognise exorbitant conferrals of nationality.[189] This principle has been endorsed by Art. 1 of the 1930 Hague Convention on Nationality,[190] and – in almost the same words – by Art. 3 of the 1997 European Convention on Nationality: "(1) Each State shall determine under its own law who are its nationals. (2) This law shall be accepted by other States in so far as it is consistent with applicable international conventions, customary international law, and the principles of law generally recognised with regard to nationality."[191] The rule stated here is part of customary international law. Russia and Georgia must comply with this rule, regardless of whether they ratified the mentioned conventions or not.

A state's assertion that, in accordance with its own law, a person possesses a nationality "creates a very strong presumption both that the individual possesses that nationality and that it must be recognised or acknowledged for international purposes."[192] However, this presumption can be reversed upon an examination of that fact.[193] Also, the issue of a passport does not conclusively establish, as against other states, that the person to whom it is issued has the nationality of the issuing state. It constitutes merely a *prima facie* evidence of nationality.[194]

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188 *Ibid*., at 853.

189 Cf. also ICJ, *Nottebohm case* (above note 93), at 20 and 43; cf. also ECJ, case C-369/90, *Micheletti v. Delegaciòn des Gobierno en Cantabria*, ECR 1992, I-4239, para. 10.

190 "It is for each State to determine under its own law who are its nationals. This law shall be recognised by other States *in so far as it is consistent with international conventions, international custom, and the principles of law generally recognised with regard to nationality.*" Art. 1 of the Hague Convention on Certain Questions Relating to the Conflict of Nationality Laws of 12 April 1930 (League of Nations Treaty Series, vol. 179, p. 89, No. 4137). The convention entered into force on 1 July 1937; Russia is not a party.

191 European Convention on Nationality of 6 Nov. 1997, ETS No. 166.. The Convention entered into force on 1st March 2000. Neither Russia nor Georgia is a party.

192 Jennings/Watts (above note 95), at 856. See in that sense also Brownlie (above note 2), at 384.

193 See French-Mexican Claims Commission, *Pinson* case, (France v. United Mexican States), award of 13 April 1928-24 June 1929, Reports of International Arbitral Awards (RIAA) vol. 5 (1928), 307-560, at 381. See also German-Mexican Claims Commission, *Rau claim, decision of 14 January 1930*, Annual Digest of Public International Law Cases, ed. by Hersch Lauterpacht 6 (1931-32), No. 124 (p. 251).

194 Jennings/Watts (above note 95), at 854-5 with fn. 16. Italian-United States Conciliation Commission, *Flegenheimer claim*, award of 20 Sept. 1958, English translation in ILR 25 (1958-I), 91-167 at 112.

So international tribunals and domestic actors are empowered to investigate by themselves the state's claim that a person is its national, if there are serious doubts with regard to the truth and reality of that alleged nationality.[195] This is particularly the case where the grant of nationality is questioned because of alleged non-conformity with international law.[196] But domestic courts are usually very reluctant to question the international legality of a state's grant of nationality to an individual.[197] The general rule seems to be that other states (and national courts) are allowed to refuse the recognition of a foreign nationality only in exceptional cases. The presumption of (international) lawfulness applies also to nationality acquired through naturalisation.

II. Non-Recognition of excessive conferral of Russian nationality

In those cases where the former Soviet nationality and a temporary residence permit in the Russian Federation are the only factual connection between Georgian citizens and Russia, their naturalisation is not, as just explained, in conformity with international law (see Part B).

The consequence of this non-conformity of the naturalisations on the international plane is that other states are not obliged to acknowledge the Russian nationality of the persons thus "naturalised". Neither Georgian authorities nor third states nor international tribunals must acknowledge the alleged Russian nationality in those cases.

That also means that Russia cannot exercise diplomatic protection for those persons. The diplomatic protection of nationals can never justify the use of force (see Chapter 6 "Use of Force"). This applies *a fortiori* if the bond of nationality is not recognised by international law.

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[195] Italian-United States Conciliation Commission, *Flegenheimer claim*, award of 20 Sept. 1958, English translation in ILR 25 (1958-I), 91-167 at 110.

[196] Jennings/Watts (above note 95), at 856. Such examinations of the international validity of a grant of nationality have been performed for instance by several courts in connection with the imposition of German nationality on certain inhabitants of the Sudetenland in violation of the Munich Agreement of 1938 (Judicial Chamber of the Council for the Restoration of Legal Rights of the Netherlands, *Weber and Weber* v. *Nederlands Beheers Instituut,* judgements of 27 May 1953 and 4 July 1955, English transation in ILR 24 (1957), 431; Judicial Division of the Council for the Restoration of Legal Rights of the Netherlands, *Ratz-Lienert and Klein* v. *Nederlands Beheers Instituut,* judgment of 29 June 1956, English translation in ILR 24 (1957), 536).

[197] For instance in the *Joppi* case, the plaintiff claimed Swiss citizenship and argued that the conferral of German nationality to them without residence in Germany was contrary to international law (and to the Swiss ordre public). But the Swiss Federal Tribunal held that it was not for the Swiss authorities "to determine whether the provisions of the foreign laws are in conformity with international law". Swiss Federal Tribunal (*Bundesgericht*), BGE 86 I 165, *Joppi* v. *Canton of Lucerne,* judgment of 15 July 1960, English translation in repr. in ILR 27 (1960), 236, at 237.

In those cases where the naturalisations have been and continue to be operated with the free consent of the affected persons, Georgia could *ex ante* consent to the naturalisations and thereby preclude their wrongfulness.[198] Georgia could also *ex post* waive its right to invoke the illegality of the naturalisations.[199]

If, however, a naturalisation was based on pressure, threat, or force, the concerned individual's rights are affected. In that situation, Georgian approval could not remedy the illegality, because it is not the state's rights alone that are at stake. Here wrongfulness could only be removed by a subsequent free consent of the affected person.

If a state already issued visas for persons residing in Abkhazia or South Ossetia although their naturalisation was illegal under international law, these visas would not remedy the illegality under international law, because it is not within the competence of third states to dispose of the rights in question.

This finding does not rule out that the conferral of Russian nationality on those residents of Abkhazia and South Ossetia who indeed have closer links to the Russian Federation (e.g. because of marriage or close family relations) is valid under international law and opposable to Georgia. This would have to be shown in individual cases.

III. No Loss of Georgian Nationality for Purposes of Georgian Domestic Law

Under Georgian law, dual citizenship is not accepted (Article 32 of the Law on citizenship[200]). However, that does not mean that former Georgian citizens having accepted Russian nationality have automatically lost their Georgian citizenship. As explained above, the conferral of the Russian citizenship was not opposable to other states on the international plane. Therefore third states, including Georgia, were free to recognise it or not.

According to Article 33 of the Georgian Law on Citizenship, a decision by the President is required for the loss of citizenship.[201] Since February 2009 a special procedure is prescribed.[202]

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[198] See on consent as a condition precluding wrongfulness Art. 20 ILC Articles on State Responsibility (above note 162).

[199] "Article 45 Loss of the right to invoke responsibility: The responsibility of a State may not be invoked if: (a) the injured State has validly waived the claim; (b) the injured State is to be considered as having, by reason of its conduct, validly acquiesced in the lapse of the claim."

[200] Organic Law of Georgia "On Citizenship of Georgia" (as last amended in 2006, above note 97): "A person loses the citizenship of Georgia in case if (…) d) he/she acquires the citizenship of another State".

[201] "The President of Georgia has the authority to take decisions on (…) d) the loss of citizenship of Georgia."

[202] Article 35 – Motion on Losing Citizenship of Georgia (19.12.2008 n. 802, in force since 1 February 2009): Motion on losing citizenship of Georgia is brought by the Court, Prosecution, Ministry of Internal Affairs and Ministry of Foreign Affairs. Motion on losing citizenship of Georgia against residents of foreign states is

According to the information provided by the Georgian authorities to the Venice Commission in spring 2009, these procedural requirements had not been fulfilled with respect to the people living in Abkhazia and South Ossetia.[203]

Conclusion: Residents of South Ossetia and Abkhazia who had, as explained above, acquired Georgian citizenship on the basis of the Georgian Law on Citizenship in 1993, were still Georgian citizens for purposes of Georgian law (and – as explained above – also for purposes of international law) at the beginning of the armed conflict between Russia and South Ossetia in August 2008.

IV. Illegality of Russian Extraterritorial Governmental Acts Related to Naturalisation

A different question is whether the naturalisation of non-residents (legal or not) can be effective within the territory of that other state (in this case Georgia) in which the concerned individuals still reside**.** The effects of Russian nationality, e.g. the right to receive pensions, would have to be realised by state authorities. However, international law prohibits Russian authorities to exercise governmental authority within the territory of Georgia. They are, for instance, not allowed to perform administrative acts, except the usual acts of consular authorities which are by customary law allowed as an exception to the prohibition on the exercise of extraterritorial jurisdiction. [204]

The performance of Russian state functions in South Ossetia and Abkhazia going beyond these traditional consular functions would violate Georgia's territorial sovereignty. The issuance of passports is an act based on governmental authority. To the Mission's knowledge, the passports were in many cases distributed on the territories of the breakaway entities. To the extent that these acts have been performed in Georgia without Georgia's explicit consent, Russia has violated the principle of territorial sovereignty.

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brought by appropriate diplomatic representations and consulate departments." Article 36 – Review of Issues on citizenship of Georgia (19.12.2008 n. 802, in force since 1 February 2009): The Agency reviews and prepares decisions on applications and motions on issues regarding citizenship of Georgia. In case the Agency discovers the fact of loss of citizenship by a person, without motions of the organs specified in Article 35 of this Law, the Agency considers the issue of loss of citizenship according to the rules of the first paragraph of this Article. Finally, the Agency presents all documentations to the President of Georgia.

[203] Opinion on the Law on Occupied Territories, adopted by the Venice Commission at its 78th Plenary Session (Venice, 13-14 March 2009) on the basis of comments by Bogdan Aurescu, James Hamilton and Angelika Nußberger, CDL-AD(2009)015.

[204] According to the Venice commission's report on the Hungarian case, "the official acts must be of ordinary nature, and the consulates must not be vested with tasks going beyond what is generally practiced and admitted." European Commission for Democracy through Law (Venice Commission), Report on the preferential treatment of national minorities by their kin-state, adopted by the Venice Commission at its 4th plenary meeting (Venice, 19-20 October 2001), Doc. CDL-INF (2001) 19, part D a) ii.

Again, the breach of territorial sovereignty could only be avoided or remedied by Georgia's consent to that performance.[205]

It is immaterial that Georgian territorial sovereignty is dormant in the regions under the control of South Ossetian and Abkhaz *de facto* authorities. South Ossetian and Abkhaz *de facto* authorities are not entitled and competent to dispose of Georgian territorial sovereignty and can therefore not validly consent to Russian extraterritorial acts in the breakaway regions.

Conclusion: Russia is not allowed under international law to issue passports directly in South Ossetia and Abkhazia, and to pay pensions there, except in consular institutions allowed by Georgia.

[205] Weis (above note 103), at 101: "[A]ny such naturalisation … requires, in order to be effective, the consent of the State in whose territory it shall have effect, as it means giving extraterritrial effect to municipal legislation." See on consent as a condition precluding wrongfulness Art. 20 ILC Articles on State Responsibility (above note 162).

Chapter 4

The Conflict: Views of the Sides

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For the purpose of this Report, and in order to proceed from what the sides directly concerned had to say, questionnaires related to the military, legal and humanitarian aspects of the events were sent to Tbilisi, Moscow, Tskhinvali and Sukhumi. In addition, the sides were asked to give their comprehensive views and an evaluation of the events. In this chapter, these comprehensive views of the sides are reproduced unaltered, exactly as they were submitted to the Fact-Finding Mission by the authorities of Georgia, the Russian Federation, South Ossetia and Abkhazia. The Fact-Finding Mission has provided an (unofficial) English translation of the original texts with the exception of the Georgian text, which was provided in English. All the original texts are to be found in Volume III.

1. The Georgian View[1]

On August 7th 2008, the Russian Federation launched a large-scale invasion on Georgia's sovereign territory. This use of force was illegal and unjustified under international law. It constituted an egregious breach of Georgia's political sovereignty and territorial integrity contrary to Article 2(4) of the UN Charter and customary international law. It violated also the key principle of non-intervention in international law and relations, and its magnitude and scale made it an act of aggression.

None of the existing (collective authorization, self-defence, consent) or purported (humanitarian intervention, protection of nationals, protection of peacekeepers, force in support of a legitimate self-determination claim) exceptions to this general prohibition justify or render lawful the Russian invasion.

There was no Security Council resolution authorizing such action (indeed many members of the Council deplored the invasion) nor was there an armed attack or "imminent threat" of armed attack by Georgia against the Russian Federation capable of activating a right to exercise force in self-defence nor was Russia invited by the Georgian State to use force on Georgian territory.

As for the purported exceptions to the prohibition of force, this memorandum[2] has shown that there is no right under international law to use unilateral, unauthorized force for humanitarian purposes. No such right has been articulated in state practice or in institutional settings, and

[1] Title of the original English text submitted by Georgia to the Fact-Finding Mission: "Executive summary. Use of Force Issues Arising Out of The Russian Federation Invasion of Georgia, 2008".

[2] The „memorandum" refers to the full version entitled "Use of Force Issues Arising Out of The Russian Federation Invasion of Georgia, 2008" that can be found in Volume III of the Report.

there are powerful policy arguments against supporting such a right. The Responsibility to Protect is concerned with the duties of sovereign states towards their own populations and with the role of the Security Council where such sovereign states fail these duties. It does *not* envisage unilateral and vigilant uses of force. Along with the absence of legal ground of this nature, there is not even factual ground capable of justifying Russia's use of force against Georgia in August 2008 even within the frames of this purported right for humanitarian intervention. Despite the significant escalation of the situation in Tskhinvali region/South Ossetia, the constant attacks on Georgian villages, and the casualties among Georgian peacekeepers, police and civilians, Georgia employed the utmost restraint and resorted to all available diplomatic measures to avoid the use of force. Russian claim about genocide committed by Georgians against ethnic Ossetians proved to be propaganda aimed at justification of Russia's illegal activities and encouragement of Ossetian proxy militants and other armed formations to commit brutalities against ethnic Georgians in revenge for the "genocide and mass killings."

The so-called right to protection of nationals abroad lacks status under international law. Invasions, sought to be justified on these grounds, have generally been criticized by most members of the international community. Moreover Russia fails to meet the international legal test of nationality with respect to the civilian population resident in Tskhinvali region/South Ossetia and Abkhazia as developed by the International Court of Justice in the *Nottebohm* case. After the ethnic cleansing of Georgians in these two regions in early 1990s, *en masse* distribution of Russian passports to the remaining civilian population represented a deliberate and well-constructed policy aimed at establishing a pretext of the military intervention of the Russian Federation on the territory of Georgia.

There is no general right to use force to protect peacekeepers operating in foreign states nor do any of the agreements between Georgia and the Russian Federation provide for such use of force. Peacekeeping is aimed *not* at offering a pretext for aggression but at preventing the sort of war that Russia engaged in August. The Russian attempt to justify its use of force as a means of protection of peacekeepers is legally and factually ungrounded. Georgia's defence operation started hours after the Russian invasion and no military clash between Georgian forces and peacekeepers had occurred before this. The first military clash between Russian peacekeepers and Georgian forces occurred at about 6 a.m. on August 8, while the large scale military deployment of the Russian troops started in the early morning of August 7. Moreover, the Russian peacekeeping base attacked by Georgian forces was directly

participating in the hostilities and they no longer enjoyed the protection normally accorded to them under international law. It must once again be noted that *only* those peacekeeping regiments and infrastructure have been attacked by the Georgian forces, which directly participated in hostilities, whereas other Russian peacekeeping posts continued to function throughout the hostilities and have never been subject to attack. It needs to be noted that the first casualties in the peacekeeping contingents were incurred from the side of Georgian peacekeepers. Two Georgian peacekeepers Shalva Trapaidze and Vitali Takadze were killed and five wounded on August 7 at around 14:00 as a Georgian peacekeepers checkpoint was shelled with 100 and 120mm artillery from the proxy regime-controlled village Khetagurovo. A proxy militant reported to superiors the fact of killing Georgian peacekeepers in a telephone conversation also intercepted by the Georgian Ministry of Internal Affairs on 07.08.2008. The transcript of this conversation can be found in annex 75 of the answer to question 1 of the military set of questions.

Finally, the Georgian response to the Russian armed attack was confined entirely to its own sovereign territory, was reluctantly undertaken, and was a proportionate, necessary and wholly justified exercise of its customary and Charter right to use force in self-defence.

2. The Russian View[3]

The aggression perpetrated by the Saakashvili regime against the people of South Ossetia in August 2008 became an unprecedented event in modern history both in terms of its recklessness and cruelty.

The term "Russian-Georgian war" is not appropriate in this respect. The treacherous attack launched by Georgia against the peaceful population of South Ossetia and the Russian peacekeepers, the number of casualties resulting from this attack as well as statements made by Georgia's political and military leadership demonstrated aggressive intent on the part of the Georgian side.

Against this backdrop Russia had no choice but to use its inalienable right to self-defence enshrined in Article 51 of the UN Charter. The actions taken by the Russian side while proactive in nature and commensurate to the scale of the attack were designed to achieve but one goal – to protect the civilian population and the Russian peacekeeping contingent from the unprovoked Georgian aggression and prevent such armed attacks against them in the

[3] Title of the text submitted by the Russian Federation to the Fact-Finding Mission: „Additional general remarks on the conflict in August 2008 on Georgia's aggression against South Ossetia in August 2008" (unofficial translation from Russian).

future. The Russian side never attacked the local population or any civilian facilities. Russia continued to use force in self-defence as long as the conditions requiring the same persisted. It should be noted that the Russian side fully complied with the agreements reached between D. Medvedev and N. Sarkozy on 12 August and 8 September 2008 respectively.

The relevant notice detailing the rationale behind Russia's actions undertaken in accordance with Article 51 of the UN Charter has been submitted to the Security Council. Immediately after Georgia had launched the military operation in South Ossetia, Russia brought this issue to the table at the UN Security Council. The situation was discussed through the night on 8 August 2008 at the 5951st as well as subsequent meetings of the Council.

There may be no justification for the Georgian Government's criminal attempt to "bring constitutional order" undertaken ever so cynically on the opening day of the Summer Olympics when traditionally all military actions should be halted. At that time there were ample opportunities to address the issue of Georgia's territorial integrity in a civilised manner. Various negotiating and peacekeeping formats directly involving the international community, UN and OSCE had been created to find a peaceful solution to the Georgian-Abkhaz and Georgian-South Ossetian conflicts. Russia complied with its peacekeeping and intermediary obligations in good faith, while trying to help in reaching peace agreements, and demonstrated self-restraint and patience in the face of provocations, unflinchingly maintaining its position even after Kosovo's unilateral declaration of independence.

We warned Mr. Saakashvili a number of times that any attempt to resort to a forceful solution would inevitably undermine the process of negotiations and lead to Russia's recognition of Abkhazia's and South Ossetia's independence. He was aware of what was at stake as well as the risks involved. However, the Saakashvili regime favoured the aggressive bloodthirsty approach, which from the very outset was doomed to fail. The Georgian Government bears the full brunt of responsibility for what happened.

Equally regrettable is the fact that all warnings issued by Russia pointing to the high probability of such a turn of events, were ignored by the international community. Furthermore, efforts have been made to lend moral and material support to Mr. Saakashvili's belligerent ambitions. Advisory help and offensive weapons provided by Washington, Kiev and a number of NATO member-states contributed to strengthening militarist trends in policies conducted by the Georgian Government.

Our frequent calls in favour of reaching an agreement to ban any use of force between Georgia and South Ossetia as well as Georgia and Abkhazia found no support amongst our Western partners. On the other hand, the fact that the anti-Russian propaganda characteristic of the Western Media during the initial stage of the military operation gave way to a more cautious and objective coverage of root causes behind the tragedy that took place in August 2008, goes to show that ultimately, "truth is valued more".

By launching an aggressive attack against South Ossetia on the night of 8 August 2008 causing massive casualties among the civilian population as well as Russian peacekeepers and other Russian nationals, and by harbouring plans to launch a similar attack against Abkhazia, Mr. Saakashvili singlehandedly reduced Georgia's aspirations to restore territorial integrity to zero. Constantly trying to use brutal military force against the very ethnic groups whom he purportedly wanted to see as a part of his state, Mr. Saakashvili left them with no other choice but to seek ways to ensure their security and the right to self-determination as independent nations. In this respect the Decrees issued by President Dmitry Medvedev of the Russian Federation recognising Abkhazia's and South Ossetia's independence offered the only opportunity to save the lives of people and prevent further bloodshed in the Transcaucasian region.

The fact that relations between Georgia and Russia were severed at the Georgian initiative further exacerbated the situation rendering these relations virtually "frozen", despite the traditionally close neighbourly ties between our countries deeply rooted in many centuries of history. It is apparent to us that it is not the Georgian people who should bear the blame for the aggression against South Ossetia but rather Mr. Saakashvili's criminal regime. Tbilisi's official propaganda is trying to this day to disorient ordinary citizens of this country. At the same time, Russia whose sentiments towards the Georgian people are truly amicable and warm, remains confident that sooner or later the Georgians at their own initiative and without any outside interference will be able to elect worthy leaders who would genuinely care about their own country and strive to develop equitable and friendly neighbourly relations based on mutual respect with all other nations in the Caucasus, in so doing strengthening security in the region.

3. The South Ossetian View[4]

The evolution of the modern-day Georgian-Ossetian conflict, which culminated in Georgia's armed aggression against the Republic of South Ossetia in August 2008, was predicated on a number of events that took place in the late 1980s. During that period, characterised by the Soviet highest leadership's inability to put an end to a number of centrifugal processes that ultimately brought about the irrevocable collapse of the former Soviet Union, various nationalist movements striving for independence from the central government gained traction in selected republics of the Union. In Georgia this process was heralded by the emergence of a radical nationalist named Z. Gamsakhurdia who was the first to proclaim the "Georgia for Georgians" agenda, which became the cornerstone of Georgia's subsequent state policy vis-à-vis its autonomous regions. It goes without saying that it was absolutely impossible for South Ossetia to remain a constituent entity of the "independent Georgian state" against such a backdrop.

Having decided to pursue the course of secession from the USSR, Georgia rejected South Ossetia's and Abkhazia's right to secede from Georgia despite the fact that this right was guaranteed in accordance with the Law adopted by the USSR in 1990 on "Procedures governing the resolution of disputes related to secession of republics from the Union of Soviet Socialist Republics", which also applied to autonomous entities that used to form part of the former Soviet republics. In 1991 Georgia proclaimed its independence and South Ossetia resorted to its constitutional right following a referendum held on 17 March 1991 and chose to remain a part of the Soviet Union.

By this time political struggle gave way to Georgia's unabashed military aggression against the population of South Ossetia. As a result more than one thousand people were declared missing or dead, around 2.5 thousand were wounded, 55 thousand refugees fled from South Ossetia to North Ossetia, and around 120 thousand ethnic Ossetians who had been residing in different regions of Georgia were forced to leave their homes.

The coup d'état that took place in Georgia in early 1992 and the ensuing civil war somewhat diminished the intensity of military operations against South Ossetia, however, in spring 1992 the Georgian-Ossetian conflict rapidly deteriorated. The city of Tskhinvali found itself completely blockaded. At this stage it was not only the informal Georgian paramilitary units and criminal gangs who took part in the hostilities directed against South Ossetia but also

[4] Unofficial translation from Russian provided by the Independent International Fact-Finding Mission on the Conflict in Georgia.

troops from the Georgian Ministry of the Interior and regular military forces. More than 100 ethnic Ossetian settlements were razed and destroyed in the territory of South Ossetia. Yielding to the pressure from Russia Georgia agreed to engage in negotiations, which resulted in the signing of the Dagomys agreements governing the principles of Georgian-Ossetian conflict resolution on 24 June 1992. These agreements stipulated that a Joint Control Commission (JCC) – a special body called upon to settle the Georgian-Ossetian conflict – be set up by the four parties, namely Georgia, South Ossetia, Russia and North Ossetia with the participation of the OSCE. On 14 July 1992 after the Joint Peacekeeping Forces (JPKF) consisting of three battalions from Russia, Georgia and Ossetia respectively, were deployed in the conflict area, hostilities came to an end.

Since that point in time the Republic of South Ossetia, which as of 1990 de facto seceded from the Georgian jurisdiction, obtained the status of an independent and sovereign state.

Despite the belligerent rhetoric constantly resorted to by high-ranking Tbilisi officials and directed at South Ossetia, the Republic continued to take part in the negotiations held in the internationally recognised format of JCC and the efficient efforts of the trilateral peacekeeping operation were acknowledged even by Georgia.

In early 2004 the Georgian-Ossetian conflict escalated again and the relations between South Ossetia and Georgia deteriorated further after M. Saakashvili came to power in Georgia and declared that he planned to integrate the territory of South Ossetia into Georgia at any cost. The political course chosen by the Georgian Government brought about increased tensions in the conflict area and ultimately culminated in Georgia's military aggression against the Republic of South Ossetia in July 2004. During this campaign Georgian troops attempted to occupy elevations strategically located around Tskhinvali, sustained significant casualties and retreated in late August 2004. We believe it should also be noted that the exclusively defensive campaign was conducted at that time by South Ossetia without any outside military assistance, not even from Russia. The Russian peacekeeping units that maintained presence in the conflict area never took part in the military operation, however, they tried to separate the parties engaged in the conflict and ensure safety and security of the local population in accordance with their mandate.

After the failed military attack of 2004 directed against South Ossetia, in early 2006 Georgia developed a new plan entitled "Tiger's Leap" designed to recapture the territory of South Ossetia. This plan envisaged a number of large-scale provocations against the Georgian

population of South Ossetia and the peacekeepers - the potentially high casualties among them would provide the excuse to unleash a new full-scale military aggression against South Ossetia, slated to take place in May 2006. According to the plan, Georgian forces were given seven days to capture all cities and towns in the Republic of South Ossetia and to complete their blockade of the Roki tunnel. However, this plan never materialised since the Georgian army's level of preparedness as well as its equipment were deemed insufficient by the country's high command.

This turn of events heralded a period of Georgia's unprecedented militarisation. The country's Government proclaimed its aspirations to join NATO within shortest possible timelines. Georgian authorities demonstratively augmented the military budget – by 2008 the imports of weapons reached USD one billion – an astronomical amount by Georgia's standards. The country continued to proactively procure offensive weapons in the United States and other EU and OSCE member countries. Ironically, it was the OSCE mission that acted as a mediator during the Georgian-Ossetian conflict resolution. The list of countries that shipped weapons systems to Georgia included the United States, United Kingdom, France, Greece, Turkey, Israel, Lithuania, Estonia, Ukraine, Serbia and others.

On 18 July 2006 Georgia's Parliament adopted a resolution terminating the peacekeeping operations underway in the Georgian-Ossetian and Georgian-Abkhaz conflict areas and mandating the withdrawal of the Russian peacekeeping units from the respective conflict areas. In practice, this resolution resulted in the Georgian battalion's withdrawal from the JPKF and the relevant JPKF Command structures. The Georgian Ministry of Defence was tasked to exercise command and control of the Georgian peacekeepers.

In Georgia it was no longer a secret that the country's armed forces were being trained by military instructors from the United States and Israel based on methodologies developed during the military operation in the former Yugoslavia, which were not defensive in nature but rather envisaged occupation of territories in neighbouring states and resolution of conflicts through the use of military force.

It should also be noted that by early 2008 the military leadership of Georgia was in the possession of detailed satellite maps depicting the territory of the proposed theatre of operations in South Ossetia and Abkhazia. Georgia was unable to produce such maps using its own limited resources. In violation of previous agreements the Georgian side continued several years in a row to rotate its peacekeeping contingent every 2-3 months instead of twice

a year. In so doing, by summer 2008 they managed to familiarise virtually all units from the 4th infantry brigade with the future theatre of operations. Later on this brigade spearheaded the attack launched against Tskhinvali on 7 August.

On 28 January 2008 President Kokoity of South Ossetia sent an official letter to President Saakashvili of Georgia proposing that a joint meeting be organised between the conflict parties in an international format with the Acting OSCE Chairman in attendance with a view to ensuring that both parties would sign an agreement banning any use of force and paving a way to resolving the Georgian-Ossetian conflict. This initiative had been proposed on a number of occasions prior to that however, the Georgian Government chose to demonstratively ignore it. On 15 March 2008 President Saakashvili officially rejected the idea of holding such a meeting. He stated that, Georgia had no intention of assuming any obligations that would rule out the use of force and reiterated that the military solution to the Georgian-Ossetian conflict in favour of Georgia was viewed by its Government as the only viable option. The fact that this statement was made during his address delivered in front of the personnel stationed at the military base in Gori built some 30 kilometres from Tskhinvali, speaks for itself.

On 4 March 2008 the Georgian side officially announced their withdrawal from the quadrilateral negotiations process brokered by the OSCE. This was in no way the first time when Georgia attempted to denounce the Dagomys agreements of 1992, block the negotiations process and eliminate the legal basis for the peacekeeping operation. The fact that Georgia abolished the office of the state minister responsible for conflict resolution and introduced the new office of "Minister of Georgia's Reintegration" also served the same purpose.

In the meantime the situation in the conflict area continued to rapidly deteriorate and by early summer 2008 it was deliberately brought to the boiling point by the Georgian side. Against the backdrop of political provocations orchestrated by Georgian authorities, for example a visit by foreign ambassadors accredited in Georgia to South Ossetia scheduled to take place in April 2008 was disrupted. Georgian intelligence services committed a number of terrorist attacks in Tskhinvali and several South Ossetian settlements adjacent to the Georgian territory that resulted in civilian casualties – mostly citizens of South Ossetia and Russia. Georgia demonstratively continued to prepare military bridgeheads to facilitate an attack against the Republic of South Ossetia and build up its military presence in the conflict area not only inside its own border areas but also in the territory of South Ossetia and in areas

predominantly populated by ethnic Georgians by redeploying weapons and personnel via previously laid bypass roads.

Regrettably, South Ossetia's frequent appeals addressed to the international community as well as international organisations and structures to put an end to the escalation of tensions and reduce the level of threat emanating from Georgia, would fall on deaf ears.

In late July a joint US-Georgian military exercise entitled "Immediate Response" was held in the territory of Georgia. The exercise was designed to test the tactics of running a military operation against South Ossetia. The Georgian army units that took part in the exercise were redeployed towards the South Ossetia border following the completion of the exercise. At the same time the Georgian Government continued to evacuate ethnic Georgian population on a massive scale from the future area of hostilities.

4. The Abkhaz View[5]

The preconditions for Georgia's potential military aggression against Abkhazia began to take shape long before the events that took place in August 2008. However, it was in 2008 that Georgian intelligence services stepped up their activities in the area adjacent to the Ingur river – they searched for possible troops deployment routes, fording sites across the Ingur river, and tried to ascertain the level of preparedness amongst the Abkhaz Armed Forces deployed along the right bank of the Ingur river. Georgia's multi-purpose UAVs were regularly sighted flying over Abkhazia's territory. It was obvious that Georgia tried to methodically collect intelligence data, monitor key strategic facilities and obtain information pertaining to the deployment of the Abkhaz Armed Forces.

In this regard, the Abkhaz side on numerous occasions attempted to draw the attention of the UN Mission in Georgia and the CIS peacekeeping force to these facts reiterating that Georgia's use of the Abkhaz airspace was unacceptable and that these flights were carried out in violation of the Agreement reached in Moscow in 1994. Paragraph 1 of this Agreement stipulates that "*the Parties shall strictly observe the terms and conditions of the ceasefire agreement be it on land, at sea and in the airspace...*"

Meanwhile Tbilisi openly engaged in war preparations – international military advisors were invited to the country, training sessions and joint exercises were held; Georgia purchased state-of-the-art offensive weapons systems capable of inflicting casualties and causing

[5] Title of the text submitted by Abkhazia to the Fact-Finding Mission: „A Brief Account of August 2008 Events" (unofficial translation from Russian).

destruction on a massive scale, including systems banned under international conventions. (It is common knowledge at this stage that the Government of Georgia purchased armament from a number of European countries. It is also known that the Georgian Parliament had approved the 2008 military budget totalling USD 800 million and then, in July, increased the military spending up to USD one billion).

Tensions in the area were exacerbated by a number of serious statements made by radical Georgian Parliament members who spoke openly of the possibility to resort to military force to restore their country's territorial integrity. According to Erosi Kitsmarishvili, the former Ambassador of Georgia to the Russian Federation, in April 2008 a close-knit circle of Georgian leaders discussed a possible offensive against Abkhazia. According to him, «*selected Georgian leaders stated that the US President supported the idea of launching a military action against Sukhumi... Saakashvili promised that as of August Sukhumi would become the new capital of Georgia.*»

Several influential politicians including those closely linked to Saakashvili himself openly stated that the military operation was not only possible but also necessary. One could get the impression that the only issue of concern for Georgian politicians was the status of Abkhazia and South Ossetia and not the issue of rebuilding trust or finding a peaceful solution to these conflicts. Georgia's primary goal was to restore its territorial integrity, if necessary, at any price. Indirectly the latter premise was substantiated by the Report of the UN Secretary General presented on 23 January 2008, which pointed out in particular that "*a widespread sense of uncertainty and alarm was fuelled throughout the period by an almost daily flow of inaccurate reports originating in the Georgian media and the Georgian authorities themselves. Such allegations have led to a growth in distrust and undermined security, ultimately increasing the chances of confrontation. There were also a growing number of such allegations levelled specifically at the CIS peacekeeping force. Those allegations proved mostly groundless."*

The political course admittedly chosen by Georgia with a view to finding a possible military solution to the Abkhaz issue and increasing the military presence in the Kodori Valley proved to be a destabilising force affecting the military and political situation in the region as a whole. At the same time any initiatives taken by the Abkhaz side vis-à-vis signing an agreement banning any use of force between Tbilisi and Sukhumi failed in the face of Georgia's reluctance.

As for the situation in the Kodori Valley, since 2006 it has continued to remain a source of constant provocations aimed against Abkhazia ever since this area referred to by the Georgian President M. Saakashvili as *"an exceedingly important strategic bridgehead…rendering us capable of reaching Sukhumi by air within a mere five minutes"*, had been captured. It should be emphasised that the Abkhaz side has undertaken multiple attempts to find a peaceful and diplomatic solution that would allow for a withdrawal of military units from the Kodori Valley and that it was only after Georgia's military operation against South Ossetia that the decision was taken to liberate this bridgehead that could at any moment be used against Abkhazia.

The operation in the valley was carried out by the Armed Forces of the Abkhaz Republic independently and was confined strictly to the territory of the Republic of Abkhazia. The Abkhaz authorities organised a corridor for the local population residing in the upper part of the Kodori Valley so that the residents could leave the area of hostilities. Immediately before the military operation began the population of the upper Kodori Valley received many warnings as to the preparations and execution of the military operation to liberate the upper Kodori and were provided with a humanitarian corridor made available both for the local civilian residents and military personnel. During the air strikes and artillery fire specific measures were taken to prevent any damage to local communities and avoid any civilian casualties. After the upper Kodori Valley was liberated all reserve units were redeployed from this area. Following a Decree issued by the President of the Abkhaz Republic a military administrative district was set up in this area, while a representative of the President of Abkhazia and an administrative official (commandant) were appointed.

Thus, the operation in the Kodori Valley was conducted without any casualties among the civilian population residing in this area. There was no damage or any violations of norms of international law during the operation, nor were there any instances of looting or arson.

Chapter 5

Military Events of 2008

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Security-related events in the Georgian-Abkhaz conflict zone preceding the outbreak of the August 2008 armed conflict

The steadily deteriorating political relationship between Georgia and the Russian Federation in 2006 - 2008 was accompanied by rising political tension, particularly in the conflict zones in Abkhazia and South Ossetia.

In spring 2008, a marked increase in military tension could be observed in the Georgian-Abkhaz conflict. One reason for this was the intensification of air activities over the conflict zone, including flights over the ceasefire line both by jet fighters and by unmanned aerial vehicles (UAVs). In the period of 18 March – 12 May, the United Nations Observer Mission in Georgia (UNOMIG)[1] was able to verify five Georgian reconnaissance UAVs and two jet fighter (the SU-25 type) flights over Abkhaz-controlled territory.[2] A number of Georgian UAVs were reportedly shot down by Abkhaz and Russian forces.[3]

The Georgians claimed that the purpose of the UAV flights was to monitor Russian military reinforcements in Abkhazia, but Sukhumi viewed them as a part of preparations for Georgian military operations in Abkhazia.

UNOMIG considered both the Georgian flights in the conflict zone as well as the actions taken by the Abkhaz and the Russian forces against Georgian UAVs (albeit in a defensive posture) as violations of the ceasefire regime since the Moscow Agreement on a Ceasefire and Separation of Forces prohibited the introduction and operation of heavy weapons in the zone of conflict.[4] The involvement of the Russian air force, not part of the Russian-manned CIS peacekeeping force (CIS PKF), in the downing of a Georgian UAV on 20 April 2008 was inconsistent with the Moscow Agreement and "was considered by the UN Security Council on 23 April and 30 May 2008".[5] UAV overflights were also observed in the Kodori

[1] http://www.un.org/depts/dpko/missions/unomig/.

[2] According to some international experts, these UAVs seemed to be Israeli Hermes 450 variants, designed for aerial reconnaissance and fire-control, but not for air-to-surface attack.

[3] Georgia Slams Russian Encroachment on Unrecognized Republics. Radio Free Europe / Radio Liberty (RFERL) Newsline 18.04.2008, http://www.rferl.org/content/article/1144095.html; accessed on 18.08.2009. Also: Abkhazia Claims to Have Shot Down Another Georgian Spy Plane. RFERL Newsline 21.04.2008, http://www.rferl.org/content/article/1144096.html; accessed on 18.08.2009.

[4] UNSC, Report of the Secretary-General on the situation in Abkhazia, Georgia, S/2008/631, 3 October 2008. Agreement on a Ceasefire and Separation of Forces. In: Tamaz Diasamidze, Regional Conflicts in Georgia (The Autonomous Oblast of South Ossetia, The Autonomous SSR of Abkhazia 1989-2008). Tbilisi 2008. pp. 179-181.

[5] UNSC, Report of the Secretary-General on the situation in Abkhazia, Georgia, S/2008/480, 23 July 2008.

Valley, both in its lower (controlled by the Abkhaz) and its upper (controlled by the Georgians) parts. None of the sides admitted to flying UAVs in the Kodori Valley.

In the period from 29 February to 5 March, the Abkhaz side conducted military exercises which involved tanks, small arms and mortar firings, including in the Ochamchira area close to the Georgian-Abkhaz ceasefire line[6].

In mid-April, the Abkhaz side complained about an alleged build-up of Georgian forces along the ceasefire line. UNOMIG carried out extensive patrolling of the area, but found no evidence to substantiate the Abkhaz allegations.[7]

At the end of April 2008, referring to the possibility of a further deterioration in the Georgian-Abkhaz conflict zone, the Russian Federation reinforced the CIS PKF with a 525-strong airborne battalion deployed in the Restricted Weapons Zone, pointing out that the CIS PKF would still remain below the authorized threshold of 3,000 personnel.[8] However, the new Russian battalion was reportedly equipped, *inter alia*, with 10 pieces of artillery[9], which do not traditionally belong to the inventory of a peacekeeping force. UNOMIG attempts to monitor the camp of the new CIS PKF contingent were obstructed by the Abkhaz *de facto* law enforcement agencies for a certain period.[10]

At the end of May 2008, referring to a presidential decision on the provision of humanitarian assistance to the Abkhaz side[11], the Government of the Russian Federation also introduced a 400-man strong military railway unit to Abkhazia to rehabilitate the local railway south of Sukhumi up to the town of Ochamchira. At the end of July, the unit completed the repair work and was withdrawn.

The Georgian Government considered both these measures aggressive in nature and demanded an immediate withdrawal of all additional Russian forces and equipment,

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[6] 2247, +11; 8 #. / 88 ' 8&. . ! && /. 5< 4731; +$: +1. %32 $ 34&(/ +1. = ")1+0 46. / / +4. . . $ *84&0. (. &9. . (Large Scale Exercises on Management of Artillery Fire and Strikes by the Air Force were Started by the Armed Forces of Abkhazia). Apsnypress 29.02.2008, http://www.apsnypress.info/archiv.htm; accessed on 18.08.2009.

[7] UNSC, Report of the Secretary-General… S/2008/480… *Op. cit.*

[8] Georgia, Russia Exchange New Accusations. RFERL Newsline 30.04.2008, http://www.rferl.org/content/article/1144103.html; accessed on 18.08.2009.

[9] UNOMIG source.

[10] UNSC, Report of the Secretary-General… S/2008/631… *op. cit.*

[11] Putin Tasks Government with Providing Further Assistance to Abkhazia, South Ossetia. RFERL Newsline 17.04.2008, http://www.rferl.org/content/article/1144094.html; accessed on 18.08.2009; Railroad Landing, 02.06.08, http://www.kommersant.com/p898706/r_l/Russia_to_repair_Abkhazian _railroads/.

including the railway troops. The Georgian side stated that the lack of advance notification and the introduction of an airborne battalion were in clear violation of a number of CIS regulations governing peacekeeping operations. As far as the railway troops are concerned, the Georgian authorities stated that the reinforcement of infrastructure in the conflict zone by the Russian military could only be viewed as preparation for an armed intervention in Georgia.[12] Russia's move was criticised by the U.S. Administration and the NATO Secretary General, who assessed it as a violation of Georgia's territorial integrity[13]. In its resolution of 5 June 2008, the EU Parliament stated that the Russian troops could no longer be considered neutral and impartial peacekeepers and that the peacekeeping format should therefore be revised.[14]

Additionally, the Georgian side argued that the above-mentioned military reinforcements confirmed that the Russian Federation was a party to the conflict and could no longer serve in either a mediating or a peacekeeping capacity.[15] Georgia intensified its calls for a change of the peacekeeping format and in particular proposed the replacement of the existing peace operation with a joint Georgian-Abkhaz police force under European Union and OSCE supervision and training, without excluding the possibility that the Russian Federation might play a role. Georgia announced that if a substantial change in the peacekeeping format was not achieved, it was ready to make a formal request for the withdrawal of the CIS PKF.[16]

For its part, the Abkhaz side insisted that the CIS PKF was strengthened in response to Georgian plans to carry out a military action. It reiterated its opposition to any change in the peacekeeping format and warned that a withdrawal of the CIS PKF would lead to a resumption of hostilities. The Abkhaz side also indicated that if the Government of Georgia should decide to withdraw its consent to the presence of the CIS PKF, it would propose an

[12] Tbilisi Condemns Russian 'Railway Troops' in Abkhazia. Civil Georgia 2.06.2008, http://www.civil.ge/eng/article.php?id=18445&search="Tbilisi%20Condemns%20Russian%20%`Railway%20Troops`%20in%20Abkhazia,; accessed on 24.07.2009.

[13] Daily Press Briefing, Sean McCormack, Spokesman, 30.04.2008, http://2001 – 2009.state.gov/r/pa/prs/dpb/2008apr/104228.htm; NATO Secretary General's statement on the Deployment of Russian Railway Troops into Georgia, 03.06.2008, http://www.nato.int/cps/en/SID-123EE2D2/861F1313/natolive/news_7760.htm?selectedLocale=en.

[14] European Parliament resolution of 5 June 2008 on the situation in Georgia. http://www.europarl.europa.eu/sides/getDoc.do?type=TA&reference=P6-TA-2008-0253&format=XML&language=EN; accessed on 18.08.2009.

[15] Georgian MFA: Moscow Tries to Legalize 'Ethnic Cleansing' in Abkhazia. Civil Georgia 18.07.2008, http://www.civil.ge/eng/article.php?id=18813&search=peacekeeping; accessed on 18.08.2009.

[16] President Saakashvili's Interview with Rustavi 2 TV. Civil Georgia 10.06.2008, http://www.civilgeorgia.ge/eng/article.php?id=18516; accessed on 18.08.2009. Russia Warns Tbilisi Against Peacekeepers' Withdrawal. Civil Georgia 17.06.2008, http://www.civil.ge/eng/article.php?id=18557&search=peacekeeping; accessed on 18.08.2009.

agreement on military cooperation with the Russian Federation to retain its military presence in Abkhazia.[17]

From mid-May until July 2008, a number of incidents occurred involving personnel of the CIS PKF and the Georgian Ministry of Internal Affairs, reflecting an alarming state of tension in the area as well as in the Georgian-Russian relationship.

In June, UNOMIG noted that the Georgian side had increased the number of trainees and training areas as well as the frequency of training conducted for its law enforcement agencies (in the Security Zone) and its military (in the Restricted Weapons Zone).[18]

From the end of June until mid-July 2008, a series of bomb blasts occurred in public places on the Abkhaz side of the ceasefire line as well as roadside explosions on the Georgian side.[19] The bombings resulted in four fatalities, including the head of the Gali branch of the Abkhaz *de facto* security service, and left 18 people injured, mostly civilians.

Referring to security considerations, as of 1 July the Abkhaz authorities closed the Inguri bridge, a main communication link over the ceasefire line for the local, mainly Georgian, population.[20]

On 20 June 2008, Abkhaz *de facto* Vice-President Raul Khajimba publicly stated that the use of force might be needed in order to seize control of the Georgian-controlled upper Kodori Valley.[21] On 9 July, there was a clash between Abkhaz and Georgian forces on the Achamkhara heights in the lower Kodori Valley, resulting in several personnel being injured on both sides. Tensions rose further after allegations by the Georgian side of mortar firing into the Kvabchara Valley, an area in the Georgian-controlled upper Kodori Valley, on 26

[17] UNSC, Report of the Secretary-General… S/2008/480… *Op. cit.*

[18] UNSC, Report of the Secretary-General… S/2008/480… *Op. cit.*

[19] E.g. " ! &9%, , , = *6 34, ; %561> 9 . ' +4>' %0 ' %(4%0 , # 7970 * / , : (Ministry of Internal Affairs of Abkhazia is looking for persons involved in blasts in Gagra and Sukhumi). Kavkazskiy Uzel 1.07.2008, http://www.kavkaz-uzel.ru/articles/138629; accessed on 18.08.2009. +21* . 218 / , . 6% &9%, , , 47+, , 342, +2< / 2 ; *6> 4* ' +4>' %(Four explosions in the Georgian-Abkhaz conflict zone). Kavkazskiy Uzel, 6.07.2008, http://www.kavkaz-uzel.ru/newstext/news/id/1224811.html; accessed on 18.08.2009. &9%, , 342(4*0 */ ' +4>' :)' 2* 32(, &< , 9 (Blast in Abkhazia kills two). Kavkazskiy Uzel, 7.07.2008, http://www.kavkaz-uzel.ru/newstext/news/id/1224842.html; accessed on 18.08.2009.

[20] &9%, $ +% 4>/ %(4%1, : 7 5 47+, *- 1%1*234*) */ *11> - 542. (Abkhazia closes its border with Georgia for indefinite period). Kavkazskiy Uzel 1.07.2008, http://www.kavkaz-uzel.ru/articles/138613; accessed on 18.08.2009.

[21] Apsnypress 20.06.2008, http://www.apsnypress.info/archiv.htm; accessed on 18.08.2009.

July. UNOMIG began conducting independent investigations into the incidents, but had to suspend them because of the August hostilities.[22]

Security-related events in the Georgian-Ossetian conflict zone[23]

In the course of summer 2008, the main focus of tension shifted from the Abkhaz to the Ossetian conflict zone, accompanied by subversive attacks as well as by intensified exchanges of fire between the Georgian and South Ossetian sides, including mortar and heavy artillery fire.

Tension in the Georgian-South Ossetian conflict zone started to rise in mid-June 2008 with explosions and mine incidents close to the Georgian-administrated villages of Kekhvi, Ergneti and Tamarasheni and the *de facto* South Ossetian militia post in Kokhati as well as with the exchange of fire between the Georgian-administered villages of Sveri and Prisi and the South Ossetian-administered villages of Andzisi and Zemo Prisi respectively. Prolonged exchange of fire also took place in the southern environs of Tskhinvali and nearby Georgian villages. These incidents were a clear violation of the ceasefire agreement, resulted in a number of dead and wounded and caused collateral damage to houses on both sides.[24]

The overall precarious security situation in the zone of the Georgian-South Ossetian conflict dramatically deteriorated in early July 2008. On 3 July, explosions in the Ossetian-administered village of Dmenisi killed Nodar Bibilov, leader of the *de facto* South Ossetian militia.[25] A few hours later on the same day, another device was reportedly targeted against the pro-Georgian leader of the Temporary Administrative Unit of South Ossetia, Dimitri Sanakoyev (while he was travelling on the by-pass road linking the Small and Big Liakhvi Georgian enclaves), causing injuries to three Georgian special forces policemen.[26]

An extensive exchange of light arms fire and mortar shelling occurred in Tskhinvali and its southern environs during the night of 3-4 July, causing several casualties and property damage.[27] In a public statement, the South Ossetian leadership blamed the Georgian side for

[22] UNSC, Report of the Secretary-General… S/2008/631… *Op. cit.*

[23] The texts on the "Security-related events in the Georgian-Ossetian zone of conflict" and in some other parts of the Chapter on the "Military Events of 2008" are largely based on the information received from the international organizations present in the region. The IIFFMCG respects their explicit wish not to be quoted.

[24] *Ibid.*

[25] *Idem.*

[26] *Idem.*

[27] *Ibidem*.

initiating the fire exchange and qualified it as an act of aggression against South Ossetia.[28] In an official statement, the Georgian Ministry of Internal Affairs blamed the South Ossetian side for firing against Georgian villages and claimed that the Georgian side returned fire in order to protect the civilian population in the area.[29]

The shelling on 3-4 July was followed by an exchange of fire between the South Ossetian-administered village of Ubiati and the Georgian-administered village of Nuli.[30] Another exchange of fire erupted between the newly established Georgian and Ossetian peacekeeping posts on the strategically important Sarabuki heights, overlooking both the South Ossetian Geri by-pass road as well as the Eredvi-Kheiti by-pass road, the only functional road linking the Georgian enclave north of Tskhinvali, with a population of about 10 000, with the rest of Georgia.[31]

In the night of 7-8 July, four Georgian armed forces servicemen were detained by the South Ossetian *de-facto* authorities. In the evening of 8 July they were released with the assistance of the OSCE Mission to Georgia.[32] On the same day, four Russian military aircraft entered into Georgian airspace around the zone of the Georgian-Ossetian conflict.[33] These events took place at the time of a visit to Georgia by representatives of the Permanent Missions of the OSCE member-states from Vienna (6-10 July)[34] and on the eve of a visit to Georgia by U.S. Secretary of State Condoleezza Rice (9 July).[35]

In a statement on 9 July, the Ministry of Foreign Affairs of Georgia qualified the incident as an "open aggression directed against the country and a brutal and undisguised attempt to infringe on its sovereignty and territorial integrity".[36] In statements on 10 and 14 July, the

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[28] ! (' *0+1. +# " %& $ 4.07.2008 (A Statement of the MFA of the Republic of South Ossetia 4.07.2008). The Ministry for Press and Mass Media of the Republic of South Ossetia, http://cominf.org/en/node/1166477530; accessed on 18.08.2009.

[29] 47-. ' -(' *0' +6 2) 2) 564+0+ ++ 5+0 & , 12/ $ 5+6. +/ (Georgia claims South Ossetia fired at Georgian villages). Kavkazskiy Uzel 6.07.2008, http://www.kavkaz-uzel.ru/articles/138811; accessed on 18.08.2009. Also: Two Killed in Overnight Shelling… *op. cit.*

[30] . 6+0. & , 12/ $ 5+6. . 3425' 6 %255. 9 2 -(8 . 6+ (South Ossetian population asks Russia for protection). Kavkazskiy Uzel, 4.07.2008, http://www.kavkaz-uzel.ru/articles/138754; accessed on 18.08.2009.

[31] See Footnote 23.

[32] *Ibid.*

[33] *Ibid.*

[34] OSCE Ambassadors, Danish FM Visit Georgia. Civil Georgia 7.07.2008, http://www.civil.ge/eng/article.php?id=18710&search=; accessed on 18.08.2009.

[35] Rice Arrives in Tbilisi. Civil Georgia 9.07.2008, http://www.civil.ge/eng/article.php?id=18738&search=; accessed on 18.08.2009 and related articles.

[36] Statement of the Ministry of Foreign Affairs of Georgia. http://www.mfa.gov.ge/index.php?lang_id=ENG&sec_id=59&info_id=6975; accessed on 18.08.2009.

Ministry of Foreign Affairs of the Russian Federation explained the violation of Georgian airspace as a "forced extreme" measure aimed at preventing an "armed attack" on South Ossetia and an alleged attempt by Tbilisi to liberate its detained servicemen.[37]

On 10 July, Georgia presented an appeal to the UN to probe the violation of its airspace by convening an extraordinary session of the UN Security Council.[38] Also at Georgian request, a special meeting of the OSCE Permanent Council was convened in Vienna on 14 July to discuss the situation.[39] These two events may serve as an additional indication of the seriousness of the situation in the region at that time.

The overall security situation in the zone of the Georgian-Ossetian conflict continued to deteriorate further in the second half of July. From 24 to 28 July, several explosions occurred in the southern environs of Tskhinvali and in the Georgian-administered village of Avnevi, close to the post of the Georgian Peacekeeping Force (PKF) battalion.[40] From 29 to 31 July, exchanges of fire were reported between the Georgian-administered village of Sveri and the South Ossetian-administered village of Andzisi in the Sarabuki area, where the Georgian and Ossetian JPKF battalions established their posts after the events of 3 July[41]. On the same day, exchanges of fire also took place in the area of Khetagurovo between the South Ossetian militia post and the Georgian police post on the Georgian Avnevi-Zemo Nikozi by-pass road. On 29 July, a Joint Monitoring Team of the Joint Peacekeeping Forces (JPKF) came under fire, but neither side admitted responsibility for the incident.[42]

In the meantime, both sides started to strengthen their positions and to build new fortifications in various strategic locations in the conflict zone, including in the villages of

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[37] " 866/7<*: 23 /9*: <*6/7<* 27> 8: 6*?22 2 9/@*<2 # ! &8;;22 , ;,)12 ; ;2<=*?2/3 , (0783 %;/<22, (Commentary on the situation in South Ossetia, Press and Information Department of the Ministry of Foreign Affairs of Russia 1014-10-07-2008, http://www.mid.ru/brp_4.nsf/0/CCF2BD3D05F81BB1C325748200449D3D; accessed on 18.08.2009. " 866/7<*: 23 /9*: <*6/7<* 27> 8: 6*?22 2 9/@*<2 # ! &8;;22 8<78;2</5B78 , 81680 78-8 8+;=0 ./72) ;2<=*?22 , (0783 %;/<22 , ' %%$, (Commentary on the possible discussion of the situation in South Ossetia by the Security Council of the UN, Press and Information Department of the Ministry of Foreign Affairs of Russia) 1035-14-07-2008, http://www.mid.ru/brp_4.nsf/0/1623764C4DE2D64EC32574860055E227; accessed on 18.08.2009.

[38] Statement of the Ministry of Foreign Affairs of Georgia. http://www.mfa.gov.ge/index.php?lang_id=ENG&sec_id=59&info_id=7056; accessed on 18.08.2009.

[39] http://www.osce.org/documents/pc/2008/07/32215_en.pdf; accessed on 18.08.2009.

[40] See Footnote 23.

[41] *Ibid.*

[42] *Idem* ; " 8483<A: (07*) %;/<2) *./4, *<78 8<,/<2<7* 9: 8, 84*?22 :=122 (Kokoity: South Ossetia will give an adequate response to Georgian provocations). Kavkazskiy Uzel, 29.07.2008, http://www.kavkaz-uzel.ru/articles/139737; accessed on 18.08.2009.

Tliakana, Khetagurovo, Zemo Prisi, Didi Gromi, Kverneti, Kusireti, Chorbauli and the Tsunarishba reservoir on the Ossetian side and, on the Georgian side, in the village of Prisi and close to the Georgian by-pass road running from Avnevi to Zemo Nikozi.[43] Also reported were the completion of construction by a Russian company of a military base (Ugardanta) in the Java district and a so-called military rehabilitation centre in the north-western part of Tskhinvali.[44]

In early July, the South Ossetian authorities introduced restrictions on the freedom of movement of vehicles and people to and from the Georgian side. The OSCE observers encountered difficulties with visiting South Ossetian positions.[45]

In mid-July, a yearly U.S.-led military exercise called "Immediate Response" took place at the Vaziani base outside Tbilisi, involving approximately 2 000 troops from Georgia, the United States, Armenia, Azerbaijan and Ukraine.[46]

From 15 July to 2 August 2008, Russian troops carried out large-scale training exercises known as "Kavkaz-2008" (Caucasus-2008) in the North Caucasus Military District, near the Russian-Georgian border and on the Black Sea. The Russian exercise officially involved approximately 8 000 Russian troops. [Some analysts believe that the number of troops involved "may have been intentionally understated"][47]. Apart from the "Kavkaz-2008" exercise, there were a number of signals from the Russian side that it would intervene in case of a Georgian military operation in South Ossetia.[48]

The beginning of August 2008 was marked by an even further deterioration of the security situation in the Georgian-Ossetian conflict zone. On 1 August, an improvised explosive device that went off on the Georgian Eredvi-Kheiti road by-passing Tskhinvali left five Georgian policemen injured.[49] During the evening and night of 1-2 August, a series of intense and extensive exchanges of fire including sniper fire and mortar shelling occurred in the

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[43] See Footnote 23.

[44] /)1*- # $, ! ' 4/ *32&. , / 0(' &(0- / ' (%+ / 0- " 2*3, , ? (Andrei Areshev: Will there be a new war in South Osetia ?). 6.11.2007, http://www.fondsk.ru/article.php?id=1051; accessed on 18.08.2009.

[45] See Footnote 23.

[46] U.S. Troops Start Training Exercise In Georgia. RFERL 15.07.2008, http://www.rferl.org/content/U.S._Troops_Training_In_Georgia/1183750.html; accessed on 18.08.2009.

[47] "The Guns of August 2008. Russia's War in Georgia". From Sukhumi to Tskhinvali: The Path to War in Georgia by *Johanna Popjanevski*.

[48] Russia Warns It Won't Stand Back In Georgian Region. http://www.rferl.org/articleprintview/1188612.html. See also: http://www.mid.ru/brp_4.nsf/0/1623764C4.

[49] See Footnote 23.

conflict zone, causing fatalities and casualties.[50] The events on 1-2 August were assessed by the OSCE Mission to Georgia as the most serious outbreak of fire since the 2004 conflict. Exchanges of fire continued in the nights of 2-3 and 3-4 August.[51]

In early August 2008, the South Ossetian authorities started to evacuate their civilian population to locations on the territory of the Russian Federation.[52]

Beginning in the afternoon of 6 August fire was exchanged along virtually the whole line of contact between the Georgian and South Ossetian sides, with particular hotspots in the Avnevi-Nuli-Khetagurovo area (west of Tskhinvali) and the Dmenisi-Prisi area (east of Tskhinvali). After a short break in the morning, firing, involving mortars and artillery, continued on 7 August, reportedly causing human casualties and fatalities. The same day, international observers could see significant movements of Georgian troops and equipment towards Gori from the east and west. Other troops and equipment were observed stationary north of Gori, just outside the zone of conflict.[53]

Diplomatic efforts were undertaken on 7 August, involving the Georgian State Minister for Reintegration, Temuri Yakobashvili, the Russian Special Envoy for the Georgian-Ossetian conflict, Ambassador Yuri Popov and the Commander of the JPKF, Major-General Marat Kulakhmetov. They aimed to arrange for high-level Georgian-South Ossetian peace talks but did not bring any positive results.[54]

In the afternoon of 7 August, Georgian representatives left the JPKF Headquarters in Tskhinvali.[55]

At 19.00 hours (Tbilisi time) on 7 August, Georgian President Mikheil Saakashvili stated in a televised address that he had just ordered Georgian troops to unilaterally cease fire. He called on the South Ossetian and Russian sides to stop the bloodshed and to meet at the negotiating table in either bilateral or multilateral format.[56] For some hours, the ceasefire seemed to be

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[50] *Ibid.*

[51] *Idem.*

[52] 3%%&+! (,), +!/ 6"!(1'.1%*4*' $%05*', 0-.!"')!/5/%#, $+ '& 2'+"!)! (Another column evacuating children left Tskhinvali today). The Ministry for Press and Mass Media of the Republic of South Ossetia, http://cominf.org/node/1166477833; accessed on 18.08.2009.

[53] See Footnote 23.

[54] *Idem.*

[55] *Idem*.

[56] President Saakashvili's Televised Address on S. Ossetia. Civil Georgia 7.08.2008, http://www.civil.ge/eng/article.php?id=18934&search=; accessed on 18.08.2009.

stable and was also observed by the South Ossetian side, until firing was reportedly resumed again at around 22.00 hours.[57]

Outbreak of large-scale hostilities

The rising tension in South Ossetia in the period of June-early August 2008, which was characterized by some analysts as a low-intensity war, culminated in a large-scale Georgian military operation against the South Ossetian capital of Tskhinvali and the surrounding areas, undertaken in the night of 7-8 August 2008.

On 7 August at 23.35 hours Georgian artillery units began firing smoke bombs and, subsequently, at 23.50 hours, opened fire on both fixed and moving targets of the "enemy forces" on the territory of South Ossetia.[58] According to Georgian Government officials, this interval was supposed to allow the civilian population enough time to leave dangerous zones or to find protection/shelters.[59]

In the early morning of 8 August, Georgian troops launched a ground attack against the city of Tskhinvali as well as operations on the left flank of the city (by the 4th Infantry Brigade coming from Vaziani) and on the right flank (by the 3rd Infantry Brigade coming from Kutaisi). The flank operations seemed to aim, *inter alia*, at occupying important heights surrounding Tskhinvali and then at moving further northwards to take control of the strategically important Gupta bridge and the roads, including the Ossetian-controlled Dzara by-pass road, leading from the Roki tunnel to Tskhinvali to block movements of the Russian troops from the north.

After securing the heights in the vicinity of Tskhinvali, the Georgian forces (including Ministry of Interior special forces), supported by artillery and tanks, moved into the town. By the afternoon of 8 August, the Georgian forces reportedly managed to seize control of a great part of the town of Tskhinvali (with the exception of its northern quarters and a part of its centre) and a number of villages, including Znauri, Muguti, Khetagurovo, Kokhati, Tsinagari, Orchosani, Didmukha, Gromi, Artsevi and Dmenisi.

However, the Georgian troops in Tskhinvali and vicinity started to encounter growing fire power from the opposite side, including from the Russian air force and artillery. The flank

[57] See Footnote 23.

[58] Official Georgian chronology of events, provided to the IIFFMCG.

[59] Interview of the IIFFMCG with the Chief of the Joint Staff of the Georgian Armed Forces, Major General Devi Chankotadze. 4 June 2009.

operations of the Georgian forces were generally not particularly successful and they did not manage to achieve their main goal of blocking the Gupta bridge and the main routes leading to Tskhinvali from the Roki tunnel and the Java base. In the meantime the Gupta bridge was targeted by Georgian artillery and aircraft (4 Su-25) and reportedly damaged, but the bridge was quickly repaired by the Russian and the South Ossetian forces.

Russian forces engaged in the armed conflict, including ground and air forces as well as the Black Sea Fleet, also attacking targets on Georgian territory outside South Ossetia. In the morning of 8 August, Russian air forces reportedly started their attacks in central Georgia (Variani, Gori), gradually extending them to other parts of Georgia including the Senaki military base (9 August), military targets in the port of Poti and the capital of Tbilisi. Some civilian targets were also damaged.

Experiencing growing resistance, in the evening of 8 August the Georgian forces withdrew from the centre of Tskhinvali but still held their positions in the southern parts of the town. Then they were regrouped and reinforced by the 2nd Infantry Brigade from Senaki. Reportedly, the 4th Brigade reinforced the Ministry of Interior special forces in Tskhinvali, while positions and objectives of the 4th Brigade on the left flank were transferred to the 2nd Brigade.[60]

After regrouping, the Georgian forces undertook attempts to regain their control of position in Tskhinvali in the afternoon of 9 August but met with resistance, suffered losses and had to withdraw.[61] Meanwhile, elements of the 2nd Infantry Brigade engaged a column of Russian armoured vehicles heading towards the north-western entrance of Tskhinvali with the Commander of the 58th Army, Army General Anatoly Khrulyov, who was injured in the ambush.[62]

With Russia's intervention advancing and its forces gaining superiority on the ground, signs of collapse of morale seemed to appear among the Georgian troops in the afternoon of 10 August.

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[60] *Ibidem*.

[61] #. , * * 0' 5/ 3# 14)** %8 - * %23/ - *64 ! (. / + 2' 3** (Tanks and infantry entered the capital of South Ossetia). Kavkazskiy Uzel, 9.08.2008, http://www.kavkaz-uzel.ru/articles/140242; accessed on 18.08.2009. 14)*" 2/ / $9 #' 3, 73/ % %&*3 %+2, #*) ! (. / + 2' 3** (Georgia declares troop withdrawal from South Ossetia). Kavkazskiy Uzel, 10.08.2008, http://www.kavkaz-uzel.ru/articles/140268; accessed on 18.08.2009.

[62] Russian general wounded in Georgia's rebel region. Reuters 9.08.2008. http://www.reuters.com/article/europeCrisis/idUSL9494498; accessed on 18.08.2009.

On 10 August, the Georgian side declared that it would observe a unilateral ceasefire and would move its forces out of South Ossetia.[63] The opposite sides did not follow suit.

By midnight on 10 August, most Georgian troops had left the territory of South Ossetia in the direction of Gori. On 11 August, the Georgian forces withdrew from Gori to the town of Mtskheta, and started preparing a defensive line in the mountainous terrain for protection of Tbilisi, the capital.[64] In the process of withdrawal, a significant quantity of military equipment was reportedly left behind.

The withdrawing Georgian troops were followed by Russian forces, who entered deeper into Georgian territory by crossing the administrative boundaries of South Ossetia and occupying a number of locations, including the town of Gori (on 12 August). While in Gori, Russian forces reportedly destroyed installations and barracks at the local military base.[65] The Russian forces were occasionally accompanied or followed by South Ossetian militia who committed serious human rights violations, particularly in the Georgian villages of South Ossetia. (More on this issue in Chapter 7: "International Humanitarian Law and Human Rights Law").

Military operations on the second (western) front

In early August, tension also grew along the Georgian-Abkhaz ceasefire line, particularly in the Kodori Valley. The Georgian side repeatedly claimed that it had information about an impending Abkhaz and/or Russian offensive into the valley, whereas the Abkhaz side alleged of a build-up of Georgian troops there. Both sides also made claims that the other side was hiding heavy military equipment in the section of the valley under their control.

The dramatic escalation of hostilities in South Ossetia on 7-8 August and the Russian-Georgian military confrontation had profoundly affected the situation in the Georgian-Abkhaz conflict zone.

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[63] Georgia Announces Ceasefire, Pulls Out Troops. Civil Georgia 10.08.2008, http://www.civil.ge/eng/article.php?id=19025&search=; accessed on 18.08.2009. Also *Interfax*, 10 August 2008.

[64] The Guns of August 2008. Russia's war in Georgia. After August 7: The Escalation of the Russia-Georgia War by Pavel Felgenhauer, pp. 174-175

[65] Timeline of Overnight Attacks. Civil Georgia 11.08.2008, http://www.civil.ge/eng/article.php?id=19040&search=Gori; accessed on 18.08.2009. Six Die in Gori Bombing – Official. Civil Georgia 12.08.2008, http://www.civil.ge/eng/article.php?id=19063&search=Gori; accessed on 18.08.2009. +. %&&, ! ( ) ' $-0), , &&") ("&! &) +&*) #&'/ &$ (Russian planes bomb Gori in Georgia causing fatalities). Kavkazskiy Uzel, 12.08.2008. http://www.kavkaz-uzel.ru/articles/140367; accessed on 18.08.2009.

On 8 August, the Abkhaz side began introducing heavy weapons into the Restricted Weapons Zone, in violation of the 1994 Moscow Agreement on a Ceasefire and Separation of Forces, disregarding protests by UNOMIG.[66]

In the early morning of 9 August, several Russian vessels from the Black Sea Fleet deployed to the Ochamchira port, in Abkhazia, close to the Georgian-Abkhaz ceasefire line.[67] The same day, the Black Sea Fleet set up a so-called "maritime security zone" along a large portion of the Georgian coast, including the port of Poti, to deny the area to Georgian and international maritime movement.[68]

In the afternoon of 9 August, the Abkhaz authorities requested a UNOMIG team monitoring the Kodori Valley to immediately leave its base in Adjara in the Georgian-controlled upper part of the valley.[69] After the departure of UNOMIG personnel, aerial bombardments of the upper Kodori Valley started on the same day.[70]

In the night of 9-10 August, Abkhaz forces crossed the ceasefire line on the Inguri river and made incursions into Georgian-controlled territory for reconnaissance purposes and in order to cut some Georgian communication and supply lines.[71]

On 10 August, the Russian Federation continued its military build-up in Abkhazia, deploying additional ground forces by sea to the Ochamchira port and also by air to the Babushera airport near Sukhumi, with some 9 000 troops and 350 units of armoured vehicles. The troops were not part of the CIS peacekeeping force and therefore were clearly operating outside the 1994 Ceasefire Agreement.[72] The same day, the Abkhaz authorities introduced

[66] UNSC. Report of the Secretary-General… S/2008/631… *op. cit.*

[67] 90- A0 " 9; +, 63) 0; 8979; <59. 9 (69=+ ' =9*= - # 9; <594 5- +=9; 33 $? +7 ? 3; + (Warships of the Black Sea Fleet Deployed in the Coastal Waters of Ochamchira). Apsnypress 10.08.2008, http://www.apsnypress.info/archiv.htm; accessed on 18.08.2009.

[68] ; >23* 9, - 38*0= &9<<3C - 9 - =9; 1 0833 (Georgia accuses Russia of an invasion). Kavkazskiy Uzel, 9.08.2008, http://www.kavkaz-uzel.ru/articles/140205; accessed on 18.08.2009. ' # ! ; >233: - ; 02>6B=+=0 , 97, +; / 3; 9- 53 &9<<304 %9=3 3 ' 08+53 0<=B: 9. 3, @30 (Georgian mass media: Russian bombardment of Poti and Senaki take lives). Kavkazskiy Uzel, 9.08.2008, http://www.kavkaz-uzel.ru/articles/140206; accessed on 18.08.2009.

[69] UNSC. Report of the Secretary-General… S/2008/631… *op. cit*.

[70] *Ibid*.

[71] Russian official answers to the IIFFMCG questionnaire related to military issues. Abkhaz official answers to the IIFFMCG questionnaires.

[72] UNSC. Report of the Secretary-General… S/2008/631… *op. cit*.

martial law in the districts of Gali, Ochamchira and Tkvarcheli, adjacent to the Georgian-Abkhaz ceasefire line, and announced partial mobilisation.[73]

In the late evening of 10 August, the Russian forces crossed the Georgian-Abkhaz ceasefire line on the Inguri river moving deep into Georgian territory and occupying a number of locations, including the towns of Zugdidi, Senaki and Poti (12 August), without encountering any armed resistance from the Georgian side. The Russian forces destroyed installations in the military sector of Poti port and the Georgian navy vessels there, and plundered the Senaki military base.[74]

The Russian military advances in the Zugdidi district and in other areas south of the Inguri river created a risk of encirclement for the Georgian security forces deployed in the upper Kodori Valley. In the night of 11-12 August, Georgian forces left the upper Kodori Valley with most of the local population. Abkhaz and Russian forces occupied the area on 12-13 August.[75]

In an attempt to justify its armed incursion into the upper Kodori Valley, the Abkhaz side referred to the presence of the Georgian security forces in the area as a "threat to the Abkhaz statehood".[76] However, the Russian authorities acknowledged that the Abkhaz side had been planning its military operation in the upper Kodori Valley "in case of Georgian military actions against Republic of South Ossetia".[77] Indeed, the operation against the upper Kodori Valley seems to have been well-prepared in advance and the forces assigned to this operation reportedly started their deployment in the lower Kodori Valley already on 6 August.

On 12 August, Abkhaz armed personnel entered the Ganmukhuri and Kurcha pockets north of the Inguri river on the Georgian side of the ceasefire line, which the Abkhaz occupied till 9 September.[78] UNOMIG patrols were denied access to this and other areas in the lower Gali district till 4 September. Up to 15 August, Abkhaz forces occasionally crossed the ceasefire

[73] "/!&' +"2 #($*3 1!-.' 1*!) +"' (' &0' ' #+$**+$, +(+%$*' $ (Partial mobilisation and martial law announced in Abkhazia). Kavkazskiy Uzel, 10.08.2008, http://www.kavkaz-uzel.ru/articles/140281; accessed on 18.08.2009.

[74] Interview by the IIFFMCG with commanding officers at the Senaki military base on 31.05.2009.

[75] Russian official answers to the IIFFMCG questionnaire related to military issues.

[76] Abkhaz answers to the IIFFMCG questions.

[77] Russian official answers to the IIFFMCG questions related to military issues.

[78] UNSC. Report of the Secretary-General… S/2008/631… *op. cit.*

line in other locations as well, entering Georgian villages on the southern side of the Inguri river.[79]

Georgian operations

According to available sources, Georgian ground forces engaged in the 2008 August conflict consisted mainly of the following units: the 2nd, 3rd and 4th Infantry Brigades, 1st Artillery Brigade, 53rd Infantry Battalion, artillery and mechanized elements of the 1st Brigade, Separate Tank Battalion, Separate Infantry Battalion and Air Defence Battalion. In addition to the forces under the Defence Ministry, anti-riot and counter terrorism battalion-size units of the Ministry of Internal Affairs (special police forces) also took part in the operations. The total strength was estimated at 10 000-11 000 personnel.[80]

The Georgian air force used Su-25 aircraft and Mi-24, Mi-8/17 and UH-1H type helicopters. However, due to its huge numerical inferiority vis-à-vis the Russian air force, it did not seem to play a significant role in combat and conducted a limited number of sorties, mainly in the morning of 8 August.

On 8 August, President Saakashvili declared a mobilisation of the reserve National Guard, assembling around 5 000 men, but they reportedly failed to play a noteworthy role in the August armed conflict. Meanwhile, 2 000 of the best-trained Georgian soldiers of the elite 1st Infantry Brigade were deployed in Iraq. On 10-11 August, US transport facilities flew them back to Georgia[81] but in the end they did not take part in combat, having arrived too late.

Most international experts believe that the Georgian artillery and air defence performed quite well and generally better than other units in the course of the August hostilities. Many of them also believe that the massive Russian military action in August 2008 caught the Georgians off guard and unprepared both strategically and tactically. At the time, the Georgian military seems to have been more prepared for a mobile, mostly offensive war in either Abkhazia or South Ossetia, but not for simultaneous large-scale combat with superior,

[79] *Ibidem* and the Russian official answers to the IIFFMCG questions related to military issues.

[80] The Georgian and Russian official answers to the IIFFMCG questionnaire, related to military issues.

[81] Georgia Recalls All Troops from Iraq – Saakashvili. Civil Georgia 9.08.2008, http://www.civil.ge/eng/article.php?id=18993&search=Iraq; accessed on 18.08.2009. Georgian Troops Back from Iraq – Saakashvili. Civil Georgia 10.08.2008, http://www.civil.ge/eng/article.php?id=19027&search=Iraq; accessed on 18.08.2009. Iraqi Troops Take Over From Withdrawn Georgians. RFERL 15.08.2008. http://www.rferl.org/content/Iraqi_Troops_Take_Over_From_Withdrawn_Georgians/1191269.html; accessed on 18.08.2009.

heavily armed, and air-supported enemy forces entering from Abkhazia and South Ossetia, i.e. on both fronts, at the same time.[82]

Russian Operations

The official Russian material submitted to the IIFFMCG in July 2009 holds that "On 8 August at 14.30 units of the 693rd and 135th Motorised Rifle Regiments of the 19th Motorised Rifle Division charged with the task of carrying out the peacekeeping mission entrusted to the Russian Federation and protecting Russian citizens were deployed from the territory of the Russian Federation to the territory of South Ossetia through the Roki tunnel and began to move into South Ossetia. The air force and artillery units launched strikes against Georgian military facilities to restrict movements of the enemy reserves, disrupt its communications, incapacitate base airfields, destroy warehouses and bases containing fuel and lubricants and to seal off the areas of hostilities."[83]

In addition to the two regiments of the 19th Motorised Rifle Division of the 58th Army referred to in the Russian information mentioned above, previous inormation provided to the IIFFMCG by the Russian authorities in mid-May 2009 stated that a number of other military units participated in the Russian operation on the eastern front (South Ossetia) including elements from the 42nd Motorised Rifle Division (from Chechnya), the 76th Assault Division (Pskov), the 98th Airborne Division (Ivanovo), the 20th Motorised Rifle Division (Volgograd), the 234th Assault Division, the 205th Separate Motorised Rifle Brigade, the 429th and 71st Motorised Rifle Regiments, the 104th Assault Regiment, the 331st Parachute Regiment and the 45th Special Purpose Regiment (Moscow district).[84]

According to the Georgian official material submitted to the IIFFMCG the 33rd Motor Rifle Mountain Brigade (Dagestan), the 114th Rocket Brigade (Astrakhan district), the Separate Anti-Aircraft Rocket Brigade (Volgograd) and the 10th Special Forces Brigade (Krasnodar district) also participated in the Russian operation on the eastern front.[85]

[82] The Guns of August 2008. Russia's War in Georgia. After August 7: The Escalation of the Russia-Georgia War, by Pavel Felgenhauer, page 165.

[83] The official Russian answers to the IIFFMCG questions related to military issues

[84] Short Chronology. Peacekeeping Operation to Force Georgia to Peace, handed over to the IIFFMCG by the Russian authorities on 15 May 2009.

[85] Georgian official answers to the IIFFMCG questionnaire related to military issues.

Some experts assess that over 12 000 Russian troops were deployed on the eastern front, i.e. in South Ossetia and beyond, in the course of the August crisis.[86]

Separately, elements from the 7th Assault (Mountain) Division (Novorossiysk), the 34th Rifle Mountain Brigade (Karachai-Cherkessia), the 31st Separate Assault Brigade (Ulianovsk), the 526th, 131st and 15th Separate Motorised Rifle Brigades as well as the 2nd, 108th and 247th Assault Regiments deployed in Abkhazia and beyond its administrative boundaries (Zugdidi, Senaki, Poti)[87] and some of these troops may have taken part in the Russian operations on the western (second) front in Georgia.

According to some sources, Russia deployed up to 15 000 troops in Abkhazia in total. The overall number of Russian troops moved into Georgia in August 2008 amounted to 25 000 - 30 000 supported by more than 1 200 pieces of armour and heavy artillery. Also involved in the action were up to 200 aircraft and 40 helicopters.[88] Several thousand armed Ossetians and volunteer militias from the North Caucasus supported the Russian forces on the eastern front as well as up to 10 000 Abkhaz troops and militia forces with armour and guns on the western front.[89]

Russian air operations reportedly opened in the morning of 8 August with the first attacks targeting the Georgian air defence installations in the Gori district.[90] Units employed during the armed conflict in August 2008 seemed to have come mainly from the 4th Air Forces and Air Defence Army (Rostov district) and included Su-24, Su-25, Su-27 and Su-29 aircraft as well as Mi-8 and Mi-24 helicopters.[91]

The target set was focused on Georgian operational ground and air assets. Air defence radar sites and airbases were attacked, with regular repeat attacks against Marneuli, Vaziani and Bolnisi. These targets were well away from the main conflict zone. Hence, rather than to

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[86] The Guns of August 2008. Russia's War in Georgia. After August 7: The Escalation of the Russia-Georgia War, by Pavel Felgenhauer, page 171

[87] Short Chronology. Peacekeeping Operation to Force Georgia to Peace, handed over to the IIFFMCG by the Russian authorities on 15 May 2009

[88] "Pyatidnevnaya voyna", (The five-day war), Vlast, 18 August 2008.

[89]) ' %1. / + 2' 3** %! (. 49 2' 3*9 / 301#%*, *28 2' - 8 37 2"6 & $1/ %, 85' %(Seven thousand volunteers left North Ossetia for South Ossetia). Kavkazskiy Uzel, 9.08.2008, http://www.kavkaz-uzel.ru/articles/140241; accessed on 18.08.2009. Abkhaz separatists strike disputed Georgia gorge. Reuters 9.08.2008, http://www.reuters.com/article/gc07/idUSL932653720080809; accessed on 18.08.2009. After August 7: The escalation of the Russia-Georgia War *by Pavel Felgenhauer*, The Guns of August 2008, Russia's War in Georgia, M.E. Sharpe, Inc..,2009, page 173.

[90] RIA Novosti – 0920, 0925 08 August, page 22 / 5-Day War – 0941 08 August, page 153

[91] Georgian official answers to the IIFFMCG questionnaire related to military issues.

provide close air support to ground forces in contact, the Russian air raids seemed to be strategically intended to support a broader military objective, including to deprive the Georgian brigades engaged in South Ossetia of any support from second echelon forces, particularly air support. Given this primary objective, the targets also included port installations along the Black Sea coast, air traffic radar sites, aircraft manufacturing and maintenance plants. As the Georgian withdrawal continued, Russian efforts diverted to supporting Russian ground troops in order to accelerate Georgian withdrawal. In the course of the August hostilities, the Russian air force reportedly lost several aircraft, including one strategic bomber and reconnaissance aircraft Tu-22M3.[92]

The Russian Black Sea Fleet, deployed in Georgian territorial waters and/or in its vicinity reportedly consisted of around 13 vessels, including its flagship - guided missile cruiser "Moskva",- as well as landing, antisubmarine and patrol ships, and minesweepers .[93]

Russian military operations in Georgia in August 2008 appear to most analysts to have been well-planned and well-executed. The operational planning had been validated in practice during the "Kavkaz-2008" military exercise (and previous similar exercises since 2005), which ended on 2 August 2008. After the exercise, some units returned to their garrisons, but others seem to have remained and deployed in a precautionary move near the Georgian border.[94] Therefore, they could quickly move to South Ossetia through the Roki tunnel when ordered to do so.

Cyber war

Reported cyber attacks were one of the particular features of the Russian-Georgian conflict in August 2008.[95] It looks quite apparent that significant cyber attacks were launched against Georgia in the course of the conflict. Most Georgian Government and media sites were unavailable or defaced at some time during the first days of the conflict. A number of websites were then relocated to US, Estonian and Polish[96] servers. Some experts believe that these attacks may have reduced Georgian decision-making capability, as well as its ability to

[92] Mikhail Baranov in Moscow Defence Brief 3-2008

[93] Georgian official answers to the IIFFMCG questionnaire related to military issues

[94] From Moratorium to War. The Causes and Consequences of Russia's Suspension of the CFE Treaty. Georgian Institute for Russian Studies. 29.06.2009. http://eng.girs.org.ge/index.php?newsid=25; accessed on 19.08.2009.

[95] *Stephen W. Korns*, Joshua E. Kastenberg, Georgia's Cyber Left Hook. "Small Wars Journal Parameter", winter 2008-2009 issue, http://www.carlisle.army.mil/usawc/Parameters/08winter/korns.pdf; accessed on 20.08.2009.

[96] E.g. Polish "www.president.pl"

communicate with allies, thereby possibly impairing the operational flexibility of Georgian forces.

The most significant occurrences include the following:[97]

- On 20 July, President Saakashvili's website was shut down for 24 hours;
- On 7 August, several Georgian servers and the Internet traffic were seized and placed under external control;
- On 8 August, large-scale cyber attacks against sites in Georgia began. The source of the cyber attacks was uncertain. Some reports attributed them to an organization called the "Russian Business Network".[98]
- At this time, it was reported that all Georgian Government websites were unobtainable from US, UK and European cyberspace. The Turkish AS9121 TTNet server, one of the routing points for traffic into the Caucasus, was blocked, reportedly via COMSTAR;
- On 9 August, the Georgian Ministry of Foreign Affairs website was defaced by hackers, who replaced it with offensive photographs. Other Georgian websites which also suffered cyber or hacker attacks included those of the Ministry of Internal Affairs, the Ministry of Defence and the website of Sanakoyev's pro-Georgian Interim Administration of South Ossetia. In addition, reportedly the National Bank of Georgia was defaced and Georgian news portals were affected by DDoS (distributed denial of service) attacks.[99]
- By 12 August, President Saakashvili's website and a popular Georgian TV website (www.rustavi2.com) were transferred to Tulip Systems. Tulip was then also attacked;
- On 12-13 August, the Ministry of Defence website experienced extensive cyber attacks and two periods of downtime.

More limited attacks of no particular significance may have been launched against some Russian sites, too. For example, the RIA Novosti website was offline because of DDoS attacks for over 10 hours.

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[97] Georgian Government Accuses Russia Of Waging 'Cyberwarfare'. RFERL 12.08.2008, http://www.rferl.org/content/Georgian_Government_Accuses_Russia_Of_Cyberwar/1190477.html; accessed on 18.08.2009. http://georgiamfa.blogspot.com/2008/08/cyber-attacks-disable-georgian-websites.html.

[98] Http://intelfusion.net/wordpress/?p=388

[99] " 2 ' 4' #*6, 5 (/#(0 ! . 1& ' $&- +#, 3#) %#+' (The official website of the Georgian MFA has been broken by hackers). INTERFAX, 9.08.2008.

If these attacks were directed by a government or governments, it is likely that this form of warfare was used for the first time in an inter-state armed conflict. However, the nature of defence against cyber attacks at this stage of its development means that such attacks are easy to carry out, but difficult to prevent, and to attribute to a source.

Ceasefire Agreement

On 12 August, French President Nicolas Sarkozy, in his capacity as President of the Council of the European Union, visited Moscow and Tbilisi in a move to end the military hostilities. A six-point ceasefire plan was agreed upon, providing, *inter alia*, for cessation of hostilities and withdrawal of forces to the positions occupied prior to the armed conflict.[100] On the same day, the ceasefire arrangement was publicly confirmed by Russian President Dmitry Medvedev. Russian troops were to stop military activities at 15.00 on 12 August[101]. However, Russian and South Ossetian forces reportedly continued their advances for some time after the 12 August ceasefire was declared and occupied additional locations, including Akhalgori/Leningori (16 August).

Most of the Russian troops withdrew from their positions beyond the administrative boundaries of South Ossetia and Abkhazia after 22 August, some of them remained in the so-called buffer zones and withdrew much later, after an implementation agreement, as a complement to the 12 August ceasefire agreement, was reached on 8 September 2008 in Moscow.[102] On 9 October 2008, the Russian Foreign Ministry officially confirmed the completion of the withdrawal of the Russian forces from the „zones adjacent to South Ossetia and Abkhazia."[103] However, the issue of full compliance by the parties with the above two agreements have remained a subject of diverging interpretations and remain contentious to date.

Contentious issues

1. At an early stage of the operation, the Commander of the Georgian contingent to the Joint Peacekeeping Forces (JPKF) Brig. Gen. Mamuka Kurashvili[104] publicly stated that the

[100] See Volume III of the IIFFMCG Report.

[101] Official Russian answer to the IIFFMCG questions related to military issues.

[102] Russia Agrees Troops Pullout From Georgian Heartland Within "Month'. RFERL 9.09.2008. http://www.rferl.org/content/Russia_Agrees_Troops_Pullout_From_Georgia_Heartland/1197424.html; accessed on 18.08.2009.

[103] http://www.mid.ru/brp_4.nsf/0/04ABEF7ADD27CBFBC32574DD005AA32B; accessed on 18.08.2009.

[104] The full title of Brig. Gen. Mamuka Kurashvili was Chief of Staff for Peacekeeping Operations in Georgia's Conflict Zones in Abkhazia and South Ossetia.

objective of the operation was to restore "constitutional order" in the territory of South Ossetia[105]. Somewhat later the Georgian authorities refuted Kurashvili's statement as unauthorised and, as justification of the operation, emphasized a countering of the Russian incursion.

The official Georgian information provided to the IIFFMCG says in this regard that "in order to protect the sovereignty and territorial integrity of Georgia as well as the security of Georgia's citizens, at 23.35 on August 7, the President of Georgia issued an order to start a defensive operation with the following objectives:

- Protection of civilians in the Tskhinvali Region/South Ossetia;
- Neutralization of the firing positions from which fire against civilians, Georgian peacekeeping units and police originated;
- Halting of the movement of regular units of the Russian Federation through the Roki tunnel inside the Tskhinvali Region/South Ossetia."[106]

The Georgian allegations of a Russian invasion were supported, *inter alia*, by arguments of illegal entry into South Ossetia of a large amount of Russian troops and armour, prior to the commencement of the Georgian operation. According to the official Georgian answers to the IIFFMCG questions, the process of the build-up of Russian forces in South Ossetia started in early July 2008 and continued in the course of August, including troops and medical personal, tents, armoured vehicles, tanks, self-propelled artillery and artillery guns. This process allegedly intensified in the night of 6-7 August and in the late evening of 7 August.

Georgian allegations concerning a Russian military build-up in South Ossetia prior to 8 August 2008 were denied by the Russian side. According to Russian official information provided to the IIFFMCG, the first Russian units entered the territory of South Ossetia and the Russian air force and artillery started their attacks on Georgian targets at 14.30 on 8 August,[107] i.e. immediately after the decision on an intervention was made by the leadership of the Russian Federation.

[105] Georgia Decided to Restore Constitutional Order in S.Ossetia' – MoD Official. Civil Georgia 8.08.2008, http://www.civil.ge/eng/article.php?id=18941&search=Kurashvili; accessed on 18.08.2009.

[106] Georgian official answers to the IIFFMCG questions related to military issues.

[107] Russian official answers to the IIFFMCG questions related to military issues.

At the time of the writing of the Report, the Mission was not in a position to consider the Georgian claim concerning a large-scale Russian military incursion into South Ossetia before 8 August 2008 as substantiated. However, there are a number of reports and publications, including of Russian origin, indicating the provision by the Russian side of training and military equipment to South Ossetian and Abkhaz forces prior to the August 2008 conflict. They also indicated an influx of irregular forces from the territory of the Russian Federation to South Ossetia in early August as well as the presence of some Russian forces in South Ossetia, apart from the Russian PKF battalion, prior to 14.30 hours on 8 August 2008.[108] Also, it seems that the Russian air force started its operations against Georgian targets, including those outside South Ossetian administrative boundaries, already in the morning of 8 August, i.e. prior to the time given in the Russian official information.[109]

2. In the course of the armed conflict, subsequently named a "five-day war" (7–12 August 2008), and its immediate aftermath, the Russian side justified its military intervention in Georgia by the intention to stop an allegedly ongoing genocide of the Ossetian population by the Georgian forces as well as to protect Russian citizens residing in South Ossetia and the Russian contingent of the Joint Peacekeeping Forces, deployed in South Ossetia in accordance with the Sochi Agreement of 1992. In this connection, the Russian side claimed that in the morning of 8 August 2008 two Russian peacekeepers were killed and five wounded by the Georgian attacks on the peacekeepers' premises in Tskhinvali, which casualties "gave the right to the leadership of the Russian Federation to take a decision on the introduction of troops into South Ossetia"[110]. The Georgians denied their deliberate attacks on the Russian peacekeepers, arguing that the Georgian troops entering Tskhinvali were fired at from the Russian peacekeepers` compounds and that they had to return fire. At the time of the writing of this Report, the Mission did not have access to reliable independent reports which could substantiate or refute the allegations of either side in this regard. Albeit, taking into account the existing dangerous environment on the ground, casualties among the Russian

[108] Ossetian tragedy. The White Book of Crimes Against South Ossetia. August 2008. Europe Publishing House. Moscow. 2009, pages 40, 44, 138, 277 and 278. War timeline. Ministry of Foreign Affairs of Georgia, http://www.mfa.gov.ge/index.php?lang_id=ENG&sec_id=556; accessed on 20.08.2009. " $ #' -) *((%" ! , +/ . 4@431 @91>7A1<=; 4<7@?; +73?7@AD; = 2=8<4 2 . 5 <=8 (@4A77 (Life continues. A Conversation with Captain Denis Sidiristiy on the war in South Ossetia). http://www.otechestvo.org.ua/main/20089/0407.htm; accessed on 20.08.2009.) 4?; @974 @?: 31AD =9161: 7@E 2 F>7C4<A?4 2=8<D (Soldiers from Perm in epicenter of war). "Permskiye Novosti", http://www.permnews.ru/stat_st.asp?st=2912; accessed on 20.08.2009. &1; 1, <1@=A>?12: 0GA2 . 5 <BG (@4A7G (Mother, we are being sent to South Ossetia). "Viatskiy Krai", http://www.vk-smi.ru/2008/2008_08/vk_08_08_15_03.htm; accessed on 20.08.2009.

[109] Russian official answers to the IIFFMCG questions related to military issues.

[110] *Ibidem*.

PKF personnel were likely. There were no reports on clashes between the Georgian forces and the Russian peacekeepers outside Tskhinvali.

As far as the Russian accusations of genocide are concerned, they became less frequent in later months as the casualties among the Ossetian civilian population turned out to be much lower than initially claimed. Russian officials stated initially that about 2 000 civilians had been killed in South Ossetia by the Georgian forces and eventually the figure of overall civilian loses in the course of the August 2008 conflict was reduced to 162.[111]

3. A number of foreign politicians and international analysts have criticised the Russian military operation in Georgia in August 2008. In particular, the crossing by the Russian forces of the administrative boundaries of South Ossetia and Abkhazia and their advancements deep into Georgia's territory were qualified as an unjustified and "disproportionate use of force". Moscow called its military actions in Georgia a "peace enforcement operation", while Tbilisi characterized it as an "aggression".

The Russian side justified its military advances/attacks deep into the Georgian territories[112] by operational needs on the eastern front (prevention of possible Georgian counter-attacks from the Gori region) and by the alleged danger of an imminent Georgian attack on Abkhazia in the west.[113]

Notwithstanding the legal aspects of the issue, the following comments may be noted in this context:

- The Georgian armed forces were hardly ever able to conduct military operations on two fronts at the same time, i.e. South Ossetia and Abkhazia simultaneously. Certainly, such operations were even less feasible after the commencement of the large-scale Russian intervention in the region;

- In practical terms, there were no Georgian combat troops in western Georgia when the Russian operation there started, since the Georgian 2nd Infantry Brigade from Senaki and the 3rd Infantry Brigade from Kutaisi were deployed on the eastern front and were already largely defeated by the Russian forces by that time. The Georgian security forces in the upper

[111] Official Russian answers to the IIFFMCG questions.

[112] Russian convoy moves deeper inside Georgia: witness. Reuters 15.08.2008, http://www.reuters.com/article/wtMostRead/idUSLF7284720080815; accessed on 18.08.2009.

[113] Official Russian answers to the IIFFMCG questions related to legal issues.

Kodori Valley (2 800-strong according to the Russian official assessment[114] and 500-800-strong according to assessments by UNOMIG officers[115]) with their fortified positions there seemed to have defensive tasks in August 2008. Taking into account the mountainous terrain, most military experts also believe that any operation against the Abkhaz-controlled territories initiated from the upper Kodori Valley could have only a supportive role to a larger operation across the Inguri river and from the Black Sea, but such Georgian operations in August 2008 were not at all feasible.

Casualties and material loses

Killed, wounded, missing, POWs.

According to official sources of the parties to the conflict, about 850 persons were killed in the course of the August armed conflict, and 2 300 - 3 000 were wounded. On the Georgian side, 160 Georgian military personnel were reportedly killed, 10 missing in action and 973 wounded. Also 11 Georgian policemen were killed, 3 were missing in action and 227 wounded. Among the Georgian civilian population, 228 persons were killed and 547 wounded.[116] Among civilians, 2 local journalists and 1 foreign journalist were killed and 4 wounded.

However, the number of losses among personnel in Georgian power structures alone was reportedly assessed by Russian military intelligence at about 3 000.[117]

The Russian casualties reportedly consisted of 67 military personnel killed,[118]

3 missing in action and 283 wounded.[119] According to the Georgian authorities, the Russian loses in the August war amounted to 400 servicemen killed.[120]

According to a Russian official agency, 162 South Ossetian civilians were killed and 255 wounded in the armed conflict of 7-12 August 2008.[121] The Russian agency did not refer to

[114] Short Chronology. Peacekeeping Operation to Force Georgia to Peace, handed over to the IIFFMCG by the Russian authorities on 15 May 2009.

[115] Information given to the IIFFMCG team by UNOMIG officers at UNOMIG HQ in Sukhumi on 28 May 2009.

[116] Official Georgian answers to the IIFFMCG questionnaire related to military issues (Vol. III).

[117] http://www.lenta.ru/news/2008/09/15/victims/; accessed on 21.08.2009.

[118] http://lenta.ru/news/2009/08/07/losses/; accessed on 21.08.2009.

[119] According to Russia's Deputy Defence Minister General Nikolai Pankov, statement from 21.02.2009 (http://uk.reuters.com/article/idUKTRE51K1B820090221; accessed on 21.08.2009).

[120] http://www.kommersant.ru/doc.aspx?DocsID=1010801&print=true

South Ossetian non-civilian casualties. The Russian press assessed that about 150 South Ossetian military and paramilitary personnel (including volunteers from North Ossetia) were killed.[122] The South Ossetian side presented a list of 365 South Ossetian residents killed in the fighting between 7 and 12 August 2008, but it is unclear how many civilians and servicemen were among them. [123]

Reportedly 42 Georgian POWs were exchanged for 12 Russian POWs.

Refugees, IDPs

In his report of 15 May 2009, the Commissioner for Human Rights of the Council of Europe estimated that "a total number of approximately 138 000 people were displaced in Georgia" by the August 2008 conflict.[124] Most of them have already returned to their homes.

According to the Georgian Government estimates, however, about 38 000 IDPs will not return in the foreseeable future. The figure includes 19 000 IDPs from South Ossetia, nearly 2 000 from the upper Kodori Valley and over 11 000 from the areas adjacent to South Ossetia, who can not return for reasons such as security or destruction of property, and some 5 000 IDPs from Akhalgori district.[125]

According to Russian sources, about 2 000 refugees remained in North Ossetia out of estimated 30 000 – 35 000 who fled South Ossetia in August 2008.[126]

In addition to the hardship of the new IDP population, in Georgia alone approximately 220 000 IDPs from territories of Abkhazia and South Ossetia have been living in protracted displacement for the last 16-18 years as a consequence of the armed conflicts there in early 1990s.[127]

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[121] Official Russian data, see: http://lenta.ru/news/2009/08/07/losses/; accessed on 21.08.2009. According to the Russian side, this number may increase. See also: http://sledcomproc.ru/news/6967/ (accessed on 21.08.2009).

[122] "Moscow Defense Brief" (September 2008, http://www.mdb.cast.ru/mdb/3-2008/item3/article1/; accessed on 31.08.2009).

[123] http://osetinfo.ru/spisok; accessed on 21.08.2009.

[124] Commissioner for Human Rights of the Council of Europe. Report on human rights issues following the August armed conflict. 15 May 2009. Comm. DH (2009)22, para 9.

[125] Office of the United Nations Resident/Humanitarian Coordinator, *Situation report No. 35 on the situation in Georgia, 6-13 November 2008*

[126] http://www.unhcr.org/48f862c52.html; accessed on 22.08.2009

[127] *Report of the Representative of the Secretary-General on the human rights of internally displaced persons*, Walter Kälin, A/HRC/10/13/Add.2,op.cit., Para. 11, with footnotes included.

Material losses

According to an official Russian source, during the armed conflict on the territory of South Ossetia 655 houses were fully destroyed, and 2 139 damaged.[128]

The Georgian material losses were reportedly estimated at USD 1 billion by the Georgian Government.[129]

According to the Russian newspaper "Niezavisimaya Gazeta", which referred to figures provided by the Moscow Centre for Analysis of Strategies and Technologies, the overall costs of the five-day war was estimated at 12,5 billion roubles for Russia (about USD 508 million).[130]

[128] http://lenta.ru/news/2009/08/07/losses/ (*op. cit*.).

[129] http://www.usatoday.com/news/world/2008-08-27-Georgia-damage_N.htm; accessed on 22.08.2009.

[130] http://www.ng.ru/politics/2008-08-20/4_price.html; accessed on 22.08.2009.

Chapter 6

Use of Force

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Introduction

I. Ius ad bellum vs. ius in bello

In international law, the legality of military force can be assessed under two headings. Under the first heading, one asks whether the use of force as such was justified in a specific case. The starting point is that the use of force is generally prohibited in international relations, but can be allowed in exceptional cases. The analysis of what is called *ius ad bellum*, or in modern terminology *ius contra bellum*, thus centres on the analysis of exceptional justifications for the use of force, one of which is self-defence.

The second question is how military force was applied in a specific case. The rules of *ius in bello* are applied to any party to a conflict irrespective of the legality or illegality of the use of force. Even a state entitled to use force must not overstep certain limits of warfare and must not violate human rights and humanitarian laws.

The questions of *ius ad bellum* will be analysed in this chapter, whereas the questions linked to the *ius in bello* form part of Chapter 7 on "International Humanitarian Law and Human Rights Law".

In this Chapter, Part 1 deals with threats of force by all parties involved. Part 2 deals with the use of force by Georgia against South Ossetia and against Russia. Part 3 analyzes use of force by South Ossetia, and Part 4 treats the use of force by Russia. Use of force in Abkhazia is dealt with in Part 5.

This Report uses the terms armed conflict, hostilities, military force and similar terms but does not speak of war because war is no longer a legal term. In historical state practice, the term war was applied only when the parties had a hostile intent (*animus belligerendi*), and this normally required a declaration of war. In legal texts adopted after World Ward II, the term war was replaced by armed conflict to prevent conflicting parties from arguing that their military measures did not constitute a war and to close a loophole.

II. The beginning of large-scale armed hostilities

The armed conflict in August 2008 was both an internal conflict between Georgia and South Ossetia (an entity short of statehood – see Chapter 3 "Related Legal Issues") and between Georgia and Abkhazia (a state-like entity), and at the same time it was also an international

conflict between Georgia and Russia.[1] To a certain extent, it might be artificial to separate the different conflicts as they are closely intertwined. Yet, for the sake of clarity in assessing the responsibilities of the respective parties, it is advisable to distinguish the three armed conflicts.

Generally, the beginning of the armed conflict between Georgia and South Ossetia is dated at 7 August 2008 at 23.35, the open hostilities between Georgia and Russia are considered to have started on 8 August 2008[2], and the bombardment of the upper Kodori Valley by Abkhaz forces started on 9 August[3]. In fact, however, a violent conflict had already been going on before in South Ossetia. In previous years, tensions had been constantly rising, involving more and more open clashes between Georgian security forces and the militia of the breakaway territories.[4] Already in spring 2008, military incidents also occurred involving Georgia and Russia, such as the downing of a Georgian unmanned aerial vehicle (UAV) by the Russian air force over Abkhazia on 20 April 2008.[5] Bombing raids and military clashes were reported both in Abkhazia and in South Ossetia throughout the first half of 2008. The military escalation first concentrated more over Abkhazia, but the focus later shifted to South Ossetia. The tensions intensified in the beginning of July when three improvised explosive devices killing Nodar Bibilov, the local chief of the South Ossetian militia in Dmenisi, and another bombing raid allegedly targeted Dimitri Sanakoyev, Head of the Georgian Temporary Administration of South Ossetia. Russia was directly involved in the conflict, sending four combat aircraft across the international border into the conflict zone. Fighting intensified in the first days of August. There is sufficient evidence to support the finding that all the conflicting parties – Georgia, Russia, South Ossetia, and Abkhazia – prepared for armed

[1] See on the legal qualification of the armed conflict in detail Chapter 7 "International Humanitarian Law and Human Rights Law".

[2] Official Georgian version: at 02:37 a.m., Deputy Minister of Foreign Affairs of Russia Grigory Karasin telephoned Georgian Minister of Foreign Affairs Grigol Vashadze and informed him that Russian armed forces were starting military operation in Tskhinvali Region/South Ossetia citing casualties among Russian peacekeepers as a reason for this decision. In fact, the first contact between Georgian forces and Russian peacekeepers took place at 6:00, at least three hours after Karasin's phone call; see Document "Major hostile actions by the Russian Federation against Georgia in 2004-2007", p. 13. According to the official Russian version, the Russian armed forces entered South Ossetia on 8 August 2008 at 14:30.

[3] Official Georgian version: At 15.50, the *de facto* Abkhaz Government announced that it had decided to send its armed forces towards the administrative border and to start a military operation in order to oust Georgian police from upper Abkhazia/Kodori Gorge; see Document "Major hostile actions by the Russian Federation against Georgia in 2004-2007), p. 16.

[4] In South Ossetia first culminations were the anti-smuggling campaign in summer 2004, in Abkhazia the attacks on freighters and fishing boats along the Abkhaz coast in 2004 and the setting up of a "government of Abkhazia in exile" in the Upper Kodori Valley in 2006.

[5] *Cf*. the report of the UNOMIG Fact Finding Team issued on 26 May 2008 assessing both the Georgian UAV flights and the downing of the UAV by a Russian aircraft as violations of the 1994 Moscow Agreement on the demilitarization of the security and restricted weapon zone.

confrontation in the summer of 2008, with preparations being intensified and concentrated at the beginning of August.

President Saakashvili's order on 7 August 2008 at 23.35 and the ensuing military attack on Tskhinvali turned a low-intensity military conflict into a full-scale armed conflict. Therefore this action justifiably serves as the starting point for the legal analysis of this conflict. Nevertheless, it has to be seen as but one element in an on-going chain of events for military violence had also been reported before the outbreak of the open hostilities on 7 August 2008.

Part 1: The legality of threats of force issued by the parties prior to the outbreak of armed conflict

I. The prohibition of threats of force in international law

Art. 2(4) of the UN Charter requires that states refrain not only from the use of force but also from the threat of force. It will be shown here that, beyond their use of military force, the parties to the conflict unlawfully made use of military threats. The focus of the analysis is on the spring and summer of 2008, and on events leading to the outbreak of open hostilities on 7 August. It is during this period that tension between the parties rose to maximum anticipation of the use of force; efforts to defuse the crisis, to the extent that they were made, failed. While this is the most relevant period for an analysis of any threats issued, the possibility remains that the parties engaged in unlawful threats of force at earlier periods.

II. What is a threat of force?

Unlike the use of force, the prohibition of the threat of force is expressly regulated only in one provision of the Charter of the UN: in Art. 2(4).[6] On three occasions, the International Court of Justice held that a threat of force need not be explicit but could be implicit.[7] In judging whether implicit behaviour compromised the UN Charter, the Court consistently paid

[6] Authors who have discussed the threat of force include: Nikolas Stürchler, *The Threat of Force in International Law* (Cambridge University Press 2007); Olivier Corten, *Le droit contre la guerre: L'interdiction du recours à la force en droit international contemporain* (Paris: Pedone 2008), at 123-170; Romana Sadurska, "Threats of Force", *American Journal of International Law* 82 (1988), 239-268.

[7] In 1949, the Court's test was whether the actions of the British Navy had amounted to "a demonstration of force for the purpose of exercising political pressure" on Albania (ICJ, *Corfu Channel Case (United Kingdom v. Albania), Merits*, ICJ Reports 1949, 4, at p 35). In 1986, the ICJ stated that US military exercises staged near the borders of Nicaragua "in the circumstances in which they were held" did constitute a threat of force. (ICJ, *Military and Paramilitary Activities in and Against Nicaragua (Nicaragua v. USA), Merits*, ICJ Reports 1986, 14, para. 227). In 1996, the Court declared that the possession of nuclear weapons itself could "indeed justify an inference of preparedness to use them" and that lawfulness of such preparedness depended on whether it was "directed against the territorial integrity or political independence of a State, or against the Purposes of the United Nations" (ICJ, *Legality of the Threat or Use of Nuclear Weapons (Advisory Opinion)*, ICJ Reports 1996, 226, para. 48).

particular attention to the context of a dispute. It asked whether the circumstances of the dispute were such as to convey the impression that military force would indeed be used.

State practice since 1945 reinforces this interpretation. A threat may be conveyed implicitly, through demonstrations of force, where credibility for the use of force is established through the physical presence of military authority.[8]

According to State practice, however, not all militarised acts amount to a demonstration of force and thus to a violation of Art. 2(4) of the UN Charter. Many are routine missions devoid of any hostile intent and are meaningless in the absence of a sizeable dispute. But as soon as they are non-routine, suspiciously timed, scaled up, intensified, geographically proximate, staged in the exact mode of a potential military clash, and easily attributable to a foreign-policy message, the hostile intent is considered present and the demonstration of force manifest.

Official statements on the use of force, such as those often made to the media or through diplomatic channels, may also qualify as threats of force. The requirement is that there be some specificity in formulating demands and in clarifying what happens if these demands are not met.

Finally, the actual use of force, too, may occasionally constitute a threat of force. Although the threat of force and the use of force are conceptually different, in fact many incidents involving limited use of force, such as frontier incidents, retaliatory strikes or naval blockades, are best described as projections of force in the sense of Art. 2(4) of the UN Charter. They create fear of further force on a larger scale.

Overall, the emphasis of the practice of states is on credibility. A threat is credible when it appears rational that it may be implemented, when there is a sufficient commitment to run the risk of armed encounter. It is enough to create a calculated expectation that an unnamed challenge might incur the penalty of military force within a dispute, without which – as the International Court of Justice agrees – a threat is neither present nor perceived. There is *no* requirement that certainty exists as to whether force really will be used, or under what conditions it will be triggered, or that there is an urgent and imminent danger of its deployment. There is also *no* requirement that a threat has to be styled in terms of an

[8] Any militarised act qualifies as a demonstration of force, such as military deployments, troop build-ups, manoeuvres, or tests provided that they signal readiness and resolve to use armed force on a particular issue at dispute with another state.

ultimatum, tied to specific demands and a deadline for a reply. All that matters is that the use of force is sufficiently alluded to and that it is made clear that it may be put to use.

III. Threats issued by Georgia

This Report established that Georgia: (1) launched air surveillance over the Abkhaz conflict zone in spring 2008, (2) participated in repeated exchanges of fire in South Ossetia, and (3) had engaged in a comprehensive military build-up with the assistance of third parties such as the US, including the acquisition of modern weaponry.[9] These actions must be read against the backdrop of previous Georgian behaviour that tended to aggravate, rather than alleviate tension. The handling of the "Adjara Crisis" in 2004 and the "Kodori problem", together with militant statements used by some Georgian officials, fostered a sense that the Georgian side might resort to force.[10] As a matter of fact, both breakaway territories increasingly insisted that prior to resuming negotiations, Tbilisi needed to issue pledges regarding the non-use of force.

In contrast, the military exercise with NATO troops named "Immediate Response 2008" appears to have been a regular exercise. Virtually paralleling Russia's exercise in July, it involved inter alia US troops, apparently to increasing troop interoperability for NATO operations and coalitions in Iraq.[11] Its operational purpose and the fact that most of the troops involved had left Georgia by the time of the outbreak of the armed hostilities, suggests that there was no hostile intent. It is difficult to interpret this exercise as an indication that in the event of a military encounter with Russian troops, Georgian troops might be assisted by NATO member states. Nevertheless, in the climate of crisis in the summer of 2008, the actions described may have contributed to a perception that Georgia was considering larger military intervention in South Ossetia and in Abkhazia.[12]

Taken together, Georgia's actions amounted to a threat of force. That Georgia was hardly in a position to substantially harm Russian political and territorial integrity by military means is not relevant. It suffices that Georgia signalled a readiness to use force against its adversaries, which may have included Russian troops on Georgian soil, if they were not withdrawn.

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[9] See Chapter 5 "Military Events of 2008" and Chapter 1 "Historical Background and International Environment".

[10] *Ibid*.

[11] *Ibid*.

[12] On the interrelation between the conflicts see e.g. the *Report of the Secretary-General on the situation in Abkhazia*, S/2008/631 (3 October 2008), para. 6-10; *Report of the Secretary-General on the situation in Abkhazia*, S/2008/480 (23 July 2008), para. 75.

IV. Threats issued by Russia

The Report established the following facts for the spring and summer of 2008 (see Chapter 1 "Historical Background and International Environment"): (1) In April, Russia warned Tbilisi that Georgian NATO membership would result in the permanent loss of its breakaway territories and that Russian military bases would be established there.[13] (2) Also in April, the Russian Foreign Ministry issued a warning stating that Moscow was prepared to use military force if Georgia started an armed conflict with Abkhazia and South Ossetia.[14] (3) Russian warplanes repeatedly flew over Abkhaz and South Ossetian territory in a clear warning to Tbilisi. Moscow claimed a right to conduct the flights, while denying Georgia the right to fly reconnaissance drones in the same area.[15] At least one Georgian drone was shot down by a Russian combat plane. (4) In May, Russia increased its troop levels in Abkhazia and sent railway construction troops on a "humanitarian mission" into the region, without permission of Georgia.[16] In July, Russian troops performed the "Kavkaz 2008" military exercise. Although it was declared as a regular exercise, numerous features made it appear an extraordinary threat. Moreover, after completion of the exercise, some Russian troops remained in the area and on increased levels of alert.[17]

All these facts are legally relevant against the background of the tension prevailing between Georgia and Russia at the time. Since its independence in 1991, Georgia's relations with Russia had gone through a series of military crises. Rising defence budgets and and arms build-up between 2004 and 2008 fed a general perception of insecurity and anticipation of the use of force in the region.[18] On the part of Russia, this was fostered through a gradual increase in activities conducive to reinforcing Georgian fears of territorial disintegration, such as the imposition of economic sanctions, the expulsion of ethnic Georgians from Russia, the withdrawal from the 1996 CIS restrictions on Abkhazia and the establishment of direct political

[13] See Chapter 1 "Historical Background and International Environment".

[14] *Ibid*; see also International Crisis Group, *Georgia and Russia: Clashing over Abkhazia*, Europe Report No. 193 (5 June 2008), p. 3: "In any case we will not leave our citizens in Abkhazia and South Ossetia in difficulty, and this should be clearly understood… if war is unleashed, we will have to defend our compatriots even through military means. We will use every means to do this; there should be no doubt about this" (Russian Foreign Ministry, statement of 25 April 2008).

[15] *Ibid*; see also International Crisis Group, *Russia v. Georgia: The Fallout*, Europe Report No. 195 (22 August 2008), p. 1.

[16] *Ibid*.

[17] *Ibid*.

[18] *Ibid*.

ties to their political leadership, and the omission of any reference in Russian statements to the territorial integrity of Georgia.[19]

By any reasonable definition, the sum of actions undertaken by Russia by mid-2008 amounted to a threat of force vis-à-vis Georgia. For Tbilisi, both official statements by Moscow and the military operations it authorised on the border and within Georgian territory generated a definite sense that, within the context of earlier experiences and of the latest developments, Georgia ran a substantial risk of Russian military intervention. This risk involved the *de facto* partition of Georgia and thus a re-definition of its territorial boundaries. While some of the political steps undertaken by Russia, such as the granting of Russian nationality, did not in and of themselves constitute a threat of force because they lacked a specific reference to the use of force, they contributed to a perception of a threat and to crisis escalation. The Russian side did not limit its threats to the exclusive objective of discouraging an armed attack, but sought to gain additional political concessions.

V. Threats issued by South Ossetia and Abkhazia

The facts with regard to South Ossetia and Abkhazia are less certain. As early as April 2008, there were increasingly frequent shootouts, mortar attacks, car bombings and other violent incidents between Georgian and South Ossetian forces.[20] Bomb attacks also took place in May, July and August.[21] Eduard Kokoity, the pro-Russian *de facto* President of South Ossetia, threatened to attack Georgian cities and to call for irregulars from the North Caucasus.[22] South Ossetian forces also detained Georgian soldiers in July.[23] In Abkhazia, the *de facto* authorities claimed to have downed Georgian reconnaissance aircraft in spring.[24] Moreover, both breakaway territories seem to have welcomed the supply of military training and weapons by Russia,[25] as well as the arrival of irregulars from other regions of the Caucasus, on whose help they would rely in case of Georgian military intervention.[26] Furthermore, on 20 June 2008,

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[19] *Ibid*. For the sanctions lift see *Georgia and Russia: Clashing over Abkhazia* (above note 14), 1.

[20] *Russia v. Georgia: The Fallout* (above note 15), 1.

[21] Jim Nichol, *Russia-Georgia Conflict in South Ossetia: Context and Implications for U.S. Interests*, CRS Report for Congress 24 October 2008, 4-5.

[22] Nichol, *Russia-Georgia Conflict* (above note 21), 5.

[23] *Russia v. Georgia: The Fallout* (above note 15), 1.

[24] *Georgia and Russia: Clashing over Abkhazia* (above note 14), 4.

[25] See Chapter 5 "Military Events of 2008"; Yury E. Federov, *The Sleep of Reason: The War on Georgia & Russia's Foreign Policy*, Association of International Affairs Research Paper 5/2008 (December 2008), 4.

[26] Roy Allison, *Russia Resurgent? Moscow's Campaign to 'Coerce Georgia to Peace'*, International Affairs, vol. 84, 1145-1171, at 1147.

Abkhaz *de facto* President Raul Khajimba publicly stated that the use of force might be required to seize control over the Georgian-controlled upper Kodori Valley.[27]

It is unclear to what extent these incidents formed part of a concerted effort directed against Georgia which was orchestrated or actively condoned by the *de facto* authorities of the two breakaway territories. With regard to South Ossetia, the publicly-announced intention to attack Georgian cities suggests this was the case, while in Abkhazia's case, the public claim to have downed Georgian spy planes would serve the same purpose. Both breakaway regions sought the assistance of Russia in the hope that they would receive support should armed hostilities break out, and consequently undermined efforts to defuse the crisis. In this sense, their behaviour is hardly consistent with the provisions of Art. 2(3) of the UN Charter, namely the obligation to seek the settlement of disputes by peaceful means, and also, at least potentially in contradiction to Art. 2(4).

VI. The lack of justification for the threats of force issued

Based on the foregoing, all parties to the Georgian conflict share responsibility for crisis escalation. At least two parties, Georgia and Russia, employed military threats inconsistent with Art. 2(4) of the UN Charter.

In principle, threats can be justified either as a measure of self-defence or when authorised by the UN Security Council.[28] But even if one or both of these grounds applied, the threats issued must still be necessary and proportionate.[29]

Art. 51 of the UN Charter regulates the case of self-defence. It declares that states retain the right of individual or collective self-defence *if an armed attack* occurs. At face value, this implies that no justification can be gained for any threat of force until an armed attack is under way, and not before.[30]

However, it makes sense that a threat, narrowly construed to deter an attack and thus to prevent an unlawful use of force, is not prohibited. The UN Charter does grant states a right to defend themselves by military means pending UN Security Council action, and it cannot be

[27] See Chapter 5 "Military Events of 2008".

[28] An authorisation of the Security Council was not given in this case and need not be discussed further.

[29] Albrecht Randelzhofer, in Bruno Simma (ed), *The Charter of the United Nations: A Commentary*, vol. I (Oxford University Press 2002), Article 42 para. 8; Article 51 para. 42; Judith Gardam, *Necessity, Proportionality and the Use of Force by States* (Cambridge University Press 2004), chapters 5-6.

[30] Robert Kolb, *Ius contra bellum: Le droit international relatif au maintien de la paix* (2nd edn, Helbing Lichtenhahn/Bruylant 2009), at 291.

unlawful for governments to repeat that this right exists and would be exercised.[31] This interpretation is supported by the International Court of Justice, which declared in 1996 that "[t]he notions of 'threat' and 'use' of force… stand together in the sense that … to be lawful, the declared readiness of a State to use force must be a use of force that is in conformity with the Charter."[32]

Conformity with the Charter, however, implies compliance not only with Art. 2(4), but also with Art. 2(3). The UN Charter requires conflict parties to exercise self-restraint. It does not encourage threats of force designed to achieve more than the abstention of force.

This is especially true in the context of protracted conflicts, where conflicting parties are particularly sensitive to any militarised acts and where unilateral actions or provocations are likely to set off a spiral of violence. Indeed, state practice indicates that the international community is clearly not willing to tolerate military threats *by any party* in such cases. The reasoning behind this is that no real distinction between aggressor and victim of aggression can be made and thus no scenario exists where the justification of self-defence can meaningfully be applied. Thus, to be justified, a threat of force must be narrowly construed to deter an armed attack. In situations of severe crisis between longstanding adversaries, governments must refrain from any kind of military threat, even when their actual use of force might be justified.[33]

The available evidence suggests that none of the parties in the 2008 crisis over South Ossetia can claim to have met these requirements. Tension in South Ossetia and Abkhazia had boiled over into full military crises on several occasions since Georgia's independence in 1991.[34] The conflict setting was clearly of a protracted nature, suggesting that in fact no party was legally entitled to invoke self-defence for military threats issued. Indeed, in the case of Abkhazia, the UN Security Council had repeatedly called on all parties in the region to exercise self-restraint.[35] In April 2008, it strongly urged "all parties to consider and address seriously each

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[31] Stürchler, *Threat of Force* (above note 6), at 267.

[32] ICJ, *Legality of the Threat or Use of Nuclear Weapons* (above note 7), para. 47.

[33] Stürchler, *Threat of Force* (above note 6), p. 266. See in favour of a so-called asymmetrical view on the relationship between use of force and threat of force, which also means that a threat is not necessarily illegal if the use of force would be illegal; Sadurska, "Threats of Force" (above note 6), at 249. But see for the symmetrical view Corten, *Droit contre la guerre* (above note 6), at 157.

[34] Information based on the International Crisis Behavior Project, http://www.cidcm.umd.edu/icb/.

[35] S/RES/1752 (13 April 2007), para. 8; S/RES/1716 (13 October 2006), especially para. 8 ("to avoid steps which could be seen as threatening"); S/RES/1666 (31 March 2006), especially para. 6 ("to avoid steps which could be seen as threatening and to refrain from militant rhetoric"); S/RES/1615 (29 July 2005), para. 8; S/RES1582 (28 January 2005), para. 9; S/RES/1554 (29 July 2004), para. 8; S/RES/1524 (30 January 2004),

other's legitimate security concerns, to refrain from any acts of violence or provocation, including political action or rhetoric, to comply fully with previous agreements regarding ceasefire and non-use of violence, and to maintain the security zone and the restricted-weapons zone free of any unauthorized military activities".[36]

Moreover, even if an entitlement to self-defensive threats in the case of South Ossetia existed, none of the actions undertaken by the conflict parties in mid-2008 can be described as genuinely self-defensive under the UN Charter. None of them limited their threats to the exclusive objective of discouraging an armed attack, but sought to gain additional concessions at the deliberate risk of open hostilities.

VII. Conclusions: Illegal threats of force on all sides

It follows that the threats of force issued by Russia and Georgia, and (to the extent that they did amount to such) of South Ossetia and Abkhazia are not justifiable under Art. 51 of the UN Charter and were thus illegal.[37] Both Georgia and Russia violated the prohibition of threats of force under Art. 2(4) of the UN Charter. The mutual threats created a climate of mutual distrust, which escalated over the years up to the foreseeable serious crisis.

Part 2: Use of force by Georgia

A. Use of force by Georgia against South Ossetia

I. Facts

It is not contested that the Georgian armed forces started an armed offensive in South Ossetia on the basis of President Saakashvili's order given on 7 August 2008 at 23.35.[38] It is also uncontested that this offensive was directed – at least among other aims – against South Ossetian militia.[39] Finally, it is also uncontested that as a result of this attack both civilians

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para. 13; S/RES/1494 (30 July 2003), para. 13; S/RES/1462 (30 January 2003), para. 16 ("to dissociate themselves from militant rhetoric and demonstrations of support for military options"); S/RES/1427 (29 July 2002), para. 14; S/RES/993 (12 May 1995), para. 5.

[36] S/RES/1808 (15 April 2008), para. 6. See also S/RES/1781 (15 October 2007), para. 6.

[37] Since none of the parties can claim justification for the threats of force they issued, it is therefore immaterial, first, whether or not South Ossetia and Abkhazia were entitled to invite and thus to validate Russia's use of threats, second, which side began to issue threats of force, and third, to what extent any of the threats met the additional requirements of necessity and proportionality.

[38] This order and the ground offensive of the Georgian forces are confirmed by the Georgian side (Answer to question 1 – military).

[39] According to the information given by the Georgian side, the offensive had the following aims: (1) to protect civilians in South Ossetia; (2) to neutralize the firing positions from which the fire against civilians, Georgian

and South Ossetian militiamen died, and that a considerable number of buildings were destroyed in Tskhinvali and in the surrounding villages.

II. Legal qualification of the Georgian offensive

The use of military force is prohibited by Art. 2 (4) of the UN Charter and by customary law, and the prohibition is also endorsed in the Helsinki Final Act of 1975.[40] Related concepts include an "act of aggression" (Art. 39 of the UN Charter), which empowers the Security Council to make recommendations or to decide on measures for the purpose of restoring international peace and security, and an "armed attack" (Art. 51 of the UN Charter), which justifies the right to self-defence. It must first be clarified whether these rules are applicable to military operations within the territory of Georgia itself.

1. Application of the prohibition of the use of force to the armed conflict between Georgia and South Ossetia

The armed conflict between Georgia and South Ossetia took place exclusively within the borders of the sovereign state of Georgia as they had been internationally recognized at the time when Georgia became member of the United Nations. The use of force by Georgia was directed against an entity short of statehood that formally belonged to the territory of Georgia and was therefore neither sovereign nor independent (see Chapter 3 "Related Legal Issues").

Under Art. 2 (4) of the UN Charter, the use of force is prohibited only if it is directed against "the sovereignty, territorial integrity or political independence of another State", or if it is "in any other manner inconsistent with the Charter of the United Nations". Consequently, a government is generally not prevented from using armed force in internal conflicts, e.g. against insurgents starting a civil war or against territorial entities fighting violently for secession.[41]

In the Georgian–South Ossetian armed conflict, the use of force is "inconsistent with the Charter of the United Nations", and therefore the prohibition of the use of force is applicable

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peacekeeping units and police originated; and (3) to halt the movement of regular units of the Russian Federation through the Roki Tunnel inside Tskhinvali Region/South Ossetia; *cf.* Document provided by the Georgian authorities: "The Chronology of Russian Aggression against Georgia in 2008".

[40] Part 1 (a) "Declaration on Principles Guiding Relations between Participating States", Principle II, "Refraining from the threat or use of force".

[41] Albrecht Randelzhofer, in Bruno Simma (ed), *The Charter of the United Nations: A Commentary*, vol. 1 (Oxford University Press 2002), Article 2(4) of the UN-Charter, para. 28. Examples of such a situation during the cold war were the military conflicts between North Korea and South Korea, and between North and South Vietnam, where the majority of states rejected the applicability of Article 2(4) of the UN Charter; for a detailed analysis of state practice see Corten, *Le droit contre la guerre* (above note 6), pp. 205-220.

to the conflict, for the following reasons. First, the Sochi Agreement concluded in 1992 between the Republic of Georgia (represented by Eduard Shevardnadze) and the Russian Federation (represented by Boris Yeltsin)[42] reaffirms in its preamble "the commitment to the UN Charter and the Helsinki Final Act". This clause is a clear indication that Georgia accepts the applicability of the prohibition of the use of force in its conflict with South Ossetia. South Ossetia is not a party to that Agreement; parties are only Russia and Georgia. Yet, the purpose of the 1992 Agreement was to "bring about the immediate cessation of bloodshed and achieve comprehensive settlement of the conflict *between Ossetians and Georgians*".[43] The reference to the UN Charter would not make any sense if it did not include the prohibition of the use of force, as this is the centrepiece of the Charter. This interpretation is also in line with the spirit of the Sochi Agreement aiming at the termination of hostilities between the opposing parties, i.e. between Georgia and South Ossetia.

Second, the legal obligation of Georgia to refrain from the use of force in its relations with South Ossetia is enshrined in the 1994 Agreement "On the further development of the process of the peaceful regulation of the Georgian-Ossetian conflict and on the Joint Control Commission".[44] This Agreement states: "The Parties to the conflict reiterate pledged commitments to settle all the issues in dispute exclusively by peaceful means, without resort to force or threat of resort to force." There are four parties to the 1994 Agreement: Georgia, Russia, South Ossetia and North Ossetia. The status of the contracting parties differs: While Georgia and Russia are full subjects of international law, North Ossetia is, under Russian constitutional law, part of a federation with limited competence to conclude international treaties.[45] South Ossetia, as a party to an armed conflict, has limited treaty-making power to conclude international treaties related to the military conflict, especially armistices.[46] The legal nature of the document is not that of a treaty in its own right. The 1994 "Agreement" is rather based on the above-mentioned Sochi Agreement of 1992. Although there are not only two, but four partners to the 1994 Agreement, it is closely linked to the 1992 Agreement between Russia and Georgia. The 1994 Agreement builds on the compromise reached in 1992

[42] "Agreement on Principles of Settlement of the Georgian-Ossetia Conflict of 24 June 1992", in Tamaz Diasamidze, *Regional Conflicts in Georgia* (Tbilisi 2008), p. 110.

[43] Preamble of the Sochi Agreement of 24 June 1992 (emphasis added).

[44] "Agreement of 31 October 1994", in Tamaz Diasamidze, *Regional Conflicts in Georgia* (Tbilisi 2008), p. 192.

[45] According to Article 72 lit. n) of the Russian Constitution, the constituent entities of the Russian Federation may establish their own "international and foreign economic relations", i.e. are granted limited treaty-making power at least in those areas where they have exclusive jurisdiction. The coordination of these activities falls within the joint jurisdiction of the Federation and the constituent entities.

[46] Anne Peters, "Treaty-Making Power", in Rüdiger Wolfrum (ed), Max Planck Encyclopedia of Public International Law (Oxford University Press 2009), paras 61-62, www.mpepil.com (online database).

and develops it further. It can therefore be qualified as "subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation" in the sense of Art. 31 para. 3(b) of the Vienna Convention on the Law of Treaties (VCLT). This means that the second text is an important guideline for the interpretation of the Sochi Agreement.

Third, the "Memorandum on Measures to Provide Security and Strengthen Mutual Trust between Sides in the Georgian-South Ossetian Conflict" of 16 May 1996 explicitly states: "We have agreed on the following: (1) The Parties to the conflict shall denounce application of force or threat of force …."[47] The reference to the "UN Charter, fundamental principles and decisions of the OSCE, and universally recognized norms of international law" is repeated as well. The document was signed by the representative of Georgia (Minister of Foreign Affairs), by the representatives of South Ossetia and North Ossetia. Mediators were the Russian Minister of Foreign Affairs for the Russian Federation, and finally the OSCE. Like the 1994 Agreement, the 1996 Memorandum constitutes "subsequent practice" in the sense of Art. 31 para. 3 (b) of the VCLT, and thus a guideline for the interpretation of the 1992 Agreement. It is true that the formal parties of those three texts are not identical. For instance, Russia is not a formal party to the 1996 Memorandum (but signed only as a "mediator"), and South Ossetia is not a party to the 1992 Sochi Agreement. Yet, the Memorandum also indicates how the original 1992 Agreement must be understood. It is important to note that these three agreements not only prohibit the use of force in search of a solution to the conflict, but also establish peace-building mechanisms in order to prevent further conflicts. Additionally, it may be noted that the Security Council condemned the use of force in the Georgian-Abkhaz conflict on several occasions.[48]

This finding guides not only the applicability of Art. 2(4), but also of Art. 51 of the UN Charter. According to the wording of Art. 51, this provision applies only to UN member states. Yet, if the use of force is prohibited in the relations between a state and an entity short

[47] "Memorandum on Necessary Measures to be Undertaken in Order to Ensure Security and Strengthening of Mutual Trust between the Parties to the Georgian-Ossetian Conflict", in Tamaz Diasamidze, *Regional Conflicts in Georgia* (Tbilisi 2008), p. 244.

[48] Concerning the armed conflict between Georgia and Abkhazia, the Security Council in Res. 876 (1993) "demands that all parties refrain from the use of force" and condemns violations of the ceasefire agreement between Georgia and forces in Abkhazia (Res. 876 of 19 October 1993, paras 4 and 2). Again in SC Res. 1187 (1998), para. 11, the Security Council "calls upon the parties …to refrain from the use of force". The subsequent Security Council resolutions on Abkhazia do not mention the prohibition of the use of force, but merely regularly call on the parties to refrain from action that might impede the peace process. Some of the Resolutions additionally condemned any violations of the 1994 Moscow Agreement on a Ceasefire and a Separation of Forces (SC Res. 1494 (2003), para. 19; SC Res. 1524 (2004), para. 22; SC Res. 1554 (2004), para. 22; SC Res. 1582 (2005), para. 24; Res. 1615 (2005), para. 25.

of statehood, then self-defence must be available to both sides as well. The scope of both rules *ratione personae* must be identical, because otherwise the regime of use of force would not be coherent. This means that self-defence is admissible also for an entity short of statehood.

Conclusion: Despite the differing status of the parties to the conflict (Georgia as a state, South Ossetia as an entity short of statehood and legally a part of Georgia), the prohibition of the use of force as endorsed in the UN Charter applies to their relations.

2. The Georgian attack on Tskhinvali and the surrounding villages as prohibited use of force

The next question is whether the Georgian shelling and ground offensive was "use of force" in the sense of Art. 2(4) of the UN Charter. The prohibition of the use of force covers all physical force which surpasses a minimum threshold of intensity.[49] Two General Assembly resolutions, the so called "Friendly Relations Declaration" of 1970,[50] and the General Assembly Resolution "Definition of Aggression" (3314 (XXIX)) of 1974[51] offer guidance for determining the material scope of Art. 2(4) of the UN Charter. The latter Resolution was primarily adopted for defining the term "aggression" in the sense of Art. 39 of the UN Charter, which is not identical with "use of force" in terms of Art. 2(4) of the UN Charter. However, the threshold for "use of force" is lower than that of "aggression". Put differently, when an act of military violence constitutes an aggression, it *a fortiori* also constitutes prohibited use of force.[52]

Resolution 3314 distinguishes different forms of attacks in its Art. 3. The following are relevant in the context of the Georgian action in South Ossetia:

"(a) The invasion or attack by the armed forces of a State of the territory of another State, or any military occupation, however temporary, resulting from such invasion or attack, or any annexation by the use of force of the territory of another State or part thereof;

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[49] Only very small incidents lie below this threshold, for instance the targeted killing of single individuals, forcible abductions of individual persons, or the interception of a single aircraft. (See Kolb, *Ius contra bellum* (above note 30), p. 247).

[50] GA Res. 2625 (XXV) of 24 Oct. 1970, principle on the use of force. This resolution was referred to by the ICJ for determining whether "use of force" was present in ICJ, *Case Concerning Armed Activities on the Territory of the Congo* (*Democratic Republic of the Congo v. Uganda*), ICJ Reports 2005, 116, paras 162-63, and has in scholarship been called an "authentic interpretation" of Article 2(4) UN Charter (Kolb, *Ius contra bellum* (above note 30), p. 245).

[51] Definition of aggression, Resolution No. 3314 (XXIX) of the General Assembly of 14 December 1974, UN Yearbook 1974, p. 846 (quoted as Resolution 3314).

[52] *Cf.* Corten, *Le droit contre la guerre* (above note 6), p. 67.

(b) Bombardment by the armed forces of a State against the territory of another State or the use of any weapons by a State against the territory of another State;

c) An attack by the armed forces of a State on the land, sea or air forces, or marine and air fleets of another State".

Although there were no internationally determined borders dividing the territory of Georgia and the territory of South Ossetia, the city of Tskhinvali and the villages west of Tskhinvali were under South Ossetian *de facto* jurisdiction. Therefore the attacks by the armed forces of Georgia against the city of Tskhinvali and the villages by means of heavy weapons might even be qualified as acts of aggression under Art. 3 (a) and (b) of UN Resolution 3314, and *a fortiori* as prohibited use of force. They were not directed against the territory of "another state", but against the territory of an entity short of statehood outside the jurisdiction of the attacking state. But as argued above, the prohibition of the use of force applies here as well.

The attack was primarily targeted at the South Ossetian militia defending the city of Tskhinvali and the surrounding villages. Therefore it might fall under Art. 3 (d) Resolution 3314, and *a fortiori* constituted "use of force" in the sense of Art. 2(4) of the UN Charter.

III. Justification of Georgia's use of force against South Ossetia

The fundamental question therefore is whether the use of force by Georgia against South Ossetia can be justified under international law. Georgia's base argument claims self-defence.

1. Facts

The long history of hostilities between Georgian security forces (paramilitary, heavily armed "police") and South Ossetian militia considerably intensified after spring 2008 both in quality and quantity. In July 2008 several armed clashes took place. For a legal assessment of the Georgian air and ground offensive starting on 7 August it is important to note the incidents that were extensively described by the Georgian side.[53]

2. Legal assessment: "Armed attack" by South Ossetia on Georgia?

The underlying question is whether the military operations of the South Ossetian militia preceding the Georgian air and ground offensive constituted an "armed attack" on Georgia which could justify the use of force by Georgia as an act of self-defence based on Art. 51 of

[53] See Chapter 5 "Military Events of 2008".

the UN Charter. To assess the justification of the Georgian reaction, it is necessary to take into account the series of incidents that had occurred since the beginning of August.

a) Attacks on Georgian villages by South Ossetian forces as "armed attack" on Georgia

Although both terms are not explicitly linked in the UN Charter, General Assembly Resolution 3314 on the Definition of Aggression can serve as the reference for the definition of the notion of "armed attack".[54] The threshold of an "armed attack" is higher, hence not every "aggression" is considered an "armed attack".[55] Still, states relied on Resolution 3314 to determine what is considered an "armed attack".[56] ICJ case-law confirms that at least some graver actions which qualify as aggression under that Resolution also constitute an armed attack in terms of Art. 51 of the UN Charter.[57]

The attacks on Georgian villages (Zemo Nikozi, Kvemo Nikozi, Avnevi, Nuli, Ergneti, Eredvi and Zemo Prisi) by South Ossetian forces can be qualified as equivalent to an "attack by the armed forces of a State on the territory of another State" resembling the situations described in Art. 3(a) of UN Resolution 3314. In this context, the delineation of the territories of South Ossetia and Georgia follows *de facto* jurisdiction of the South Ossetian entity short of statehood. Because the Georgian villages attacked by South Ossetian forces were not under the jurisdiction of South Ossetia before 8 August 2008, the actions by the South Ossetian militia are equivalent to an attack on the "territory of another State".

To the extent that heavy artillery was used,[58] the attacks against Georgian villages by South Ossetia can also be qualified as "bombardment by the armed forces of a State against the territory of another State or the use of any weapons by a State against the territory of another State" (*cf.* Resolution 3314, Art. 3(b)). These acts were serious and surpassed a threshold of gravity and therefore also constituted an "armed attack" in terms of Art. 51 of the UN Charter.

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[54] *Cf.* Christine Gray, *International Law and the Use of Force* (3rd edn, Oxford University Press 2008), p. 183.

[55] Yoram Dinstein, *War, Aggression and Self-defence* (Cambridge University Press 2005), p. 184; Corten, *Le droit contre la guerre* (above note 6), p. 615 note 27.

[56] See the references to governmental statements in that sense during the drafting debate of Res. 3314 in Corten, *Le droit contre la guerre* (above note 6), p. 615 fn. 28.

[57] ICJ, *Nicaragua* (*Merits*) (above note 7), para. 195; ICJ, *Case Concerning Armed Activities on the Territory of the Congo* (above note 50), para. 146.

[58] See the description of the fighting on 6 August Chapter 5 "Military Events of 2008".

b) South Ossetian attacks on the Georgian peacekeepers and police as an "armed attack"

The South Ossetian attacks on the villages were primarily directed against Georgian peacekeepers[59] and against Georgian police.[60] This constitutes an attack by the armed forces of South Ossetia on the land forces of Georgia, as also described in Art. 3 (d) UN Resolution 3314.[61]

c) Military action by South Ossetia beyond a minimum threshold

Military actions constitute an armed attack in the sense of Art. 51 of the UN Charter only if they surpass a certain threshold. According to the ICJ, it is necessary to distinguish the gravest forms of the use of force (those constituting an armed attack) from other less grave forms.[62] There may be military operations which amount to a use of force but nevertheless do not yet constitute an armed attack in the sense of Art. 51 of the UN Charter. To be deemed an armed attack, an operation must have a minimum "scale and effects".[63] On the other hand, the ICJ has assumed that a cumulative series of minor attacks may constitute an armed attack.[64]

According to the findings of the Mission, the acts preceding the outbreak of the hostilities led to several fatalities on both sides. They not only involved *de facto* border guards, but also the inhabitants of the villages that were attacked. From 6 August on, continuous heavy fighting took place. As explained in the section on International Humanitarian Law, the firing caused many civilians to leave their villages.[65]

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[59] See the description of the incidents on 7 August in Chapter 5 "Military Events of 2008".

[60] See Chapter 5 "Military Events of 2008".

[61] There might be doubts whether the Georgian peacekeeping forces can be qualified as "land forces" of Georgia. As they were not neutral, but belonged to one of the conflicting parties, the attack against Georgian peacekeepers can be seen as directed against Georgia as a state. This is all the more true after the Georgian peacekeepers had left the PKF Headquarters. The situation is different for the Russian peacekeepers, as will be discussed below.

[62] ICJ, *Nicaragua* (*Merits*) (above note 7), para. 191; ICJ, *Oil Platforms Case*, ICJ Reports 2003, 161, para. 51.

[63] ICJ, *Nicaragua* (*Merits*) (above note 7), para. 195. In the Nicaragua case, the Court specifically distinguished an armed attack from a mere "frontier incident" below the threshold. Mere frontier incidents are not apt to trigger the right to self-defence. *Ibid*. See for the debate in scholarship Gray, *Use of force* (above note 54), pp. 177-181. This approach has been upheld in the Eritrea/Ethiopia Claims Commission Award: "Localized border encounters between small infantry units, even those involving the loss of life, do not constitute an armed attack for purposes of the Charter." (Eritrea/Ethiopia Claims Commission, Award on Ethiopia's Ius ad Bellum Claims 1-8, 45 ILM (2006), 430). The General Assembly Resolution on the definition of aggression also contains a *de minimis* clause to exclude minor incidents from the category of "aggression" (which is, as stated above, not identical, but related to the concept of an "armed attack"). The acts themselves or their consequences must have a "sufficient gravity". (Art. 2 of GA Res. 3314 (XXIX)).

[64] ICJ, *Oil Platforms* (above note 62) para. 64.

[65] See Chapter 7 "International Humanitarian Law and Human Rights Law".

It can therefore be assumed that the South Ossetian attacks on Georgian villages as well as on Georgian peacekeepers and police had a minimum scale and effects, but further conditions must be met in order to allow for the Georgian claim of self-defence, which will discussed next.

3. Burden of proof for the armed attack

The problem remains that it cannot be clearly determined which side began the fighting prior to the Georgian air and ground offensive. The situation was highly explosive, and both sides seem to have prepared for use of force and were ready to use force. It is impossible to decide who fired the first shot in the incidents noted above.

In a trial, the state which seeks to rely on self-defence would have to demonstrate that it was the victim of an "armed attack" by the other state such as to justify the use of armed force in self-defence; and the burden of proof of the facts showing the existence of such an attack rests on the potential victim state.[66] Concerning the incidents before the outbreak of a war, this rule of evidence applies to both conflicting parties, to the extent that they claim that they had to react to attacks by the other side. When Georgia argues that its air and ground offensive on 7 August 2008 is justified by self-defence because of a cumulative armed attack by South-Ossetia, the burden of proof falls on Georgia.

4. Notification of self-defence to the UN Security Council

According to Art. 51 of the UN Charter, a conflicting party relying on the right to self-defence has to report immediately to the Security Council.

Georgia stated in the emergency meeting of the Security Council of 8 August at 1.15 (New York time) that the "Government's military action was taken in self-defence after repeated armed provocations and with the sole goal of protecting the civilian population and preventing further loss of life among residents of various ethnic backgrounds. … The Government acted because the separatists not only defied the ceasefire but also sharply escalated the violence, killing several peacekeepers and civilians within hours of the ceasefire. Additional illegal forces and military equipment were and are entering Georgian territory from Russia through the Roki tunnel, threatening even worse violence."[67] With this statement, Georgia claimed self-defence both against South Ossetia and against Russia. Nevertheless,

[66] ICJ, *Oil Platforms* (above note 65), para. 57. The ruling of the court with respect to the standards of evidence has been criticized by several judges, *cf.* Higgins paras 30-9, Buergenthal paras 33-46, Owada paras 41-52.

[67] Statement of the Georgian representative in the Security Council debate of 8 August 2008, 1.15 a.m. (UN-Doc. S/PV.5951), p. 5.

and contrary to Russia, Georgia did not formally and "immediately" notify the Security Council that it acted in self-defence, as required by Art. 51 of the UN Charter.

This reporting requirement is procedural. According to the International Court of Justice, the absence or presence of a report to the Security Council "may be one of the facts indicating whether the State in question was itself convinced that is was acting in self-defence".[68] An eventual failure to notify the Security Council does not in itself destroy Georgia's claim to self-defence.[69]

5. Adequacy of the Georgian Reaction

The Georgian response was justifiable as self-defence only if its modalities satisfied established legal criteria.

a) Immediacy of the Georgian reaction

Self-defence must be immediate and may not happen when an attack has ended. It is generally accepted that there may be a time-lag between the original armed attack and the response of the victim state, because it is necessary to prepare self-defensive operations.[70] A stricter minority view holds that self-defence may only be undertaken while the armed attack is in progress.[71] The South Ossetian attacks on Georgian villages near Tskhinvali and the attacks on Georgian "police" and peacekeepers that had started in the beginning of August were a protracted action. They were still on-going when the Georgian military operation began on 7 August 2008. Therefore the Georgian reaction was still "immediate" even under the stricter view.

b) Necessity and proportionality of the Georgian reaction

Self-defence must be necessary and proportionate.[72] This requirement has been confirmed and substantiated in the case-law of the International Court of Justice.[73] The criteria of necessity

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[68] ICJ, *Nicaragua* (*Merits*), (above note 7), para. 200.

[69] See in detail Judge Schwebel, dissenting opinion, in ICJ, *Nicaragua* (*Merits*), (above note 7), paras 221-7. In scholarship Gray, *Use of Force* (above note 54), p. 122.

[70] *Cf.* Dinstein, *War* (above note 55), p. 200.

[71] Gamal Moursi Badr, "The Exculpatory Effect of Self-defence in State Responsibility", Georgia Journal of International and Comparative Law 10 (1980), 1-28, p. 26.

[72] See in detail Corten, *Le droit contre la guerre* (above note 6), pp. 705-735; Gardam, *Necessity* (above note 29), pp. 158-173, both with extensive reference to state practice.

[73] ICJ, *Nicaragua* (*Merits*), (above note 7), para. 194. In that case, the US-mining of Nicaraguan ports was not proportionate to the aid received by the Salvadorian opposition from Nicaragua (*ibid.*, para. 237). See also ICJ, *Legality of the Threat or Use of Nuclear Weapons* (above note 7), para. 141; ICJ, *Oil Platforms* (above

and proportionality overlap, and proportionality has been mostly considered just as one aspect of necessity, or as the other side of the coin.[74] Whether a military reaction is, in the way it is conducted, necessary and proportionate in the sense of Art. 51 of the UN Charter depends on the facts of the particular case.

The assessment of what is "necessary" is not at the discretion of the reacting state. "Necessity" is a legal term which must be defined in an objective manner, taking into account the situation as a neutral observer putting himself in the place of the victim state could reasonably evaluate it. The subjective impression and judgment of the affected state about what was necessary is not decisive.[75]

Necessity (in terms of Art. 51 of the UN Charter) has been understood by some writers to denote a situation in which it is unavoidable to rely on force in response to the armed attack, where no alternative means of redress is available.[76] However, necessity has, in practice and in case-law on self-defence not been understood in the very strict sense that a defensive measure is necessary only if it is absolutely indispensable, and when no other peaceful option is available. Although state practice shows that peaceful means for resolving a dispute are preferred, states never were asked to demonstrate that they had exhausted all peaceful means before resorting to military means in self-defence.[77] Rather, necessity means what is essential and important, and what is useful to reach the objective of defence.[78]

Proportionality has in scholarship been defined in different terms. According to one view, the scale and effects of force and counter-force must be similar.[79] But according to the prevailing view, there need not be proportionality between the conduct constituting the armed attack and

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note 62), paras 43, 51, and 73-78; ICJ, *Case Concerning Armed Activities on the Territory of Congo* (above note 50), para. 147.

74 Roberto Ago, Special Rapporteur, *Addendum to the Eighth Report on State Responsibility*, YB ILC 1980 II (1), para. 121 (p. 69).

75 *Cf.* ICJ, *Nicaragua* (*Merits*), (above note 7), paras 222 and 282. The requirement does not leave room for any measure of discretion or margin of appreciation of the victim (ICJ, *Oil Platforms* (above note 62), paras 43 and 73).

76 This strict view can be related to the Caroline formula (below note 105).

77 Corten, *Le droit contre la guerre* (above note 6), pp. 719-20; Gardam, *Necessity* (above note 29), p. 153; Kolb, *Ius contra bellum* (above note 30), p. 293.

78 Corten, *Le droit contre la guerre* (above note 6), p. 723. In the *Oil Platforms* case, the destruction of the Iranian oil platforms by the US military was qualified as unnecessary: "In the case of both of the attack on the Sea Isle City and the mining of the USS Samuel B Roberts, the Court is not satisfied that the attacks on the platforms were necessary to respond to those incidents." (ICJ, *Oil Platforms* (above note 62), para. 76). One reason for qualifying it as unnecessary was that the USA had not complained that the Iranian platforms had been used for military purposes (*ibid.*). They were thus not military objectives.

79 Kolb, *Ius contra bellum* (above note 30), pp. 294-95. Dinstein, *War* (above note 55), p. 237 favours this notion of proportionality only for on-the-spot reactions (as opposed to full wars of self-defence).

the opposing conduct, but only between reaction and its objective. In the latter view, a reaction is proportionate if there is a reasonable relationship between the measures employed and the objective, the only permissible objective being the repulsion of the armed attack.[80] The operation needed to halt and repel the attack may well have to assume dimensions much greater than the attack suffered, and may still be proportionate to the objective of countering the attack. The latter view seems to be the more appropriate one, because otherwise the requirement would lack the necessary flexibility and thereby become unacceptable.[81]

In this context it makes sense to distinguish between on-the-spot reactions and national self-defence. On-the-spot reactions relate to the "employment of counter-force by those under attack or present nearby", whereas national self-defence involves "the entire military structure".[82]

The fighting before 7 August can be seen as an on-the-spot reaction by Georgia against the attack by South Ossetia. In contrast, the Georgian military offensive starting on 7 August at 23.35 went much further and involved substantial parts of the Georgian military forces (10 000 to 11 000 troops).[83]

Therefore, the necessity and proportionality of the Georgian response to the alleged shelling of the villages and the attack on peacekeepers and police has to be analysed in two steps: first with a view to the on-the-spot responses and second with a view to the air and ground offensive.

i) Necessity and proportionality of the on-the-spot response

When considering the necessity of the immediate on-the-spot reactions to the alleged attacks by the South Ossetian side, it must be kept in mind that in July 2008 and at the beginning of August the mechanism for preventing the outbreak of hostilities established on the basis of the 1992 Sochi Agreement still existed.[84] But it had been undermined by all parties and was not functioning properly any more.

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[80] Dissenting opinion Judge Higgins in ICJ, *Legality of the Threat or Use of Nuclear Weapons* (above note 7), pp. 583-84 (para. 5); in scholarship Gardam, *Necessity* (above note 29), p. 158; Corten, *Le droit contre la guerre* (above note 6), pp. 730 and 733.

[81] Ago, *Addendum* (above note 74), para. 121 (p. 69).

[82] Dinstein, *War* (above note 55), pp. 192-3. Dinstein stresses that there is only a quantitative and not a qualitative difference between the two forms of self-defence.

[83] Georgian and Russian answers to military questions.

[84] The Sochi Agreement was denounced by Georgia on 29 August 2008.

Therefore the alleged attacks on Georgian villages, peacekeepers and police in July/August 2008 could no longer be countered by the JPKF. Because the peacekeeping mechanism had broken down, reactivating the peacekeeping mechanism was not an alternative means of redress available for Georgia. So Georgian on-the-spot self-defence was necessary, even under a narrow conception of necessity, but this does not suffice to justify the Georgian reaction.

The on-the-spot reaction must additionally have been proportionate. According to the findings of the Mission, the reactions were proportionate under both concepts of proportionality: scale and effects of force and counter-force were similar, and the Georgian on-the-spot reaction was reasonable in relation to the permissible object of the Georgian reaction, namely to halt the South Ossetian attack on the Georgian villages.

To conclude, the condition of proportionality was met with regard to the on-the spot reaction of Georgia in the phase of hostilities before the full armed conflict began.

ii) Necessity and proportionality of the Georgian air and ground offensive

The question remains whether the large-scale offensive starting on 7 August at 23.35 was also justified under the heading of self-defence. Due to the malfunctioning of the peacekeeping mechanism, a military reaction was arguably necessary to stop the repeated outbreaks of violence. The Russian Commander of the Joint Peacekeeping Forces in Tskhinvali, General Marat Kulakhmetov, reported on 7 August at 17:00 that he could not stop the attacks by the *de facto* regime irregular forces.[85] In this sense the attack might have been "necessary", but again this is not the only requirement.

Furthermore, every act has to be in keeping with the principle of proportionality. As stated above, proportionality basically means that there has to be a reasonable relationship between the measures employed and the objective, the only permissible objective being the repulsion of the armed attack. According to Roberto Ago, "what matters in this respect is the result to be achieved by the 'defensive action', and not the forms, substance and strength of the action itself."[86] Retaliatory or punitive actions are excluded.[87]

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[85] Georgian version; Document "Major hostile actions by the Russian Federation against Georgia in 2004-2007), p. 12.

[86] Ago, *Addendum* (above note 74), 69-70.

[87] Albrecht Randelzhofer, in Bruno Simma (ed), *The Charter of the United Nations: A Commentary*, vol. I, (Oxford University Press 2002), Article 51, para 42; Gray, *Use of Force* (above note 54), at 150.

Therefore it is not *per se* decisive that the offensive ordered by President Saakashvili exceeded the South Ossetian armed attacks on Georgian villages, police and peacekeepers by far in quality and the quantity. Proportionality must be judged on the basis of the answers to the following questions: Was the objective of the Georgian air and ground offensive indeed nothing else but the repulsion of the armed attacks on the Georgian villages, peacekeepers and police? Was there a reasonable relationship between the form, substance and strength of the attack on Tskhinvali and this objective?

There is convincing evidence that the Georgian operation of August 2008 was not meant only as a defensive action. A first indication is that the responsible commander of the Georgian peacekeeping troops Brig. Gen. Kurashvili stated immediately after the attack that the aim was the "restoration of the constitutional order."[88] But he later withdrew the statement[89] and President Saakashvili explicitly contradicted it. More important is the targeting of the capital of Tskhinvali.[90] This indicates that the action was not only meant as an immediate reaction to the preceding incidents, but had rather a political objective. Furthermore, it is not evident for an outside observer that the bombardment of Tskhinvali constituted a reasonable measure to stop the fighting in the villages.

Taking into account all these factors, it can be said that the air and ground offensive against Tskhinvali on the basis of the order given by President Saakashvili was not proportionate and therefore the use of force by Georgia could not be justified as self-defence.

IV. Conclusions: no self-defence by Georgia beyond on-the-spot reactions

To the extent that the attacks on Georgian villages, police and peacekeepers were conducted by South Ossetian militia, self-defence in the form of on-the-spot reactions by Georgian troops was necessary and proportionate and thus justified under international law.

On the other hand, the offensive that started on 7 August, even if it were deemed necessary, was not proportionate to the only permissible aim, the defence against the on-going attacks from South Ossetia.

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[88] Statement made shortly before midnight of 7 August 2009 on Georgian State TV.

[89] See: Temporary (Ad hoc) Parliamentary Commission on Investigation of the Military Aggression and other Actions of the Russian Federation Undertaken against the Territorial Integrity of Georgia (www.parliament.ge).

[90] See for the details in Chapter 5 "Military Events of 2008".

B. Use of force by Georgia against Russia

I. Facts: Military operations against Russian peacekeepers, irregulars and regular Russian troops

Georgia did not use force against Russian troops on Russian territory, but only on Georgian territory. At the beginning of the armed conflict it was controversial whether Georgian forces had attacked Russian peacekeepers at all. The Georgian representative stated at the Security Council meeting on 8 August: "I can say with full responsibility that Georgian troops are *not targeting peacekeepers*. I want to stress that the Government's actions were taken in self-defence after repeated armed provocations and with the sole goal of protecting the civilian population". "[W]e never targeted the peacekeepers. Those who were targeted were mercenaries from the Russian Federation … Georgia never targeted the peacekeepers on the ground."[91] In contrast, the Russian representative stated in the same meeting that "the firepower of tanks, military combat vehicles and helicopters *is being aimed directly* at peacekeepers."[92]

In the statements addressed to the IIFFMCG both conflicting parties admitted that Russian peacekeepers were involved in the shooting from the very beginning. Yet, Russia argued that the Russian peacekeepers were attacked and responded to the fire.[93] Georgia, on the contrary, claimed that Russian peacekeepers were shooting first, whereas Georgian soldiers responded the fire.[94]At the time of writing of this Report, the controversial fact of a Georgian attack on the Russian peacekeeping base is still an open issue.

Furthermore, it is uncontroversial that irregulars from southern Russia and the North Caucasus were involved in the fighting.[95] The involvement of Russian peacekeepers and North Caucasian irregulars was rather marginal, though it was important because it was linked

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[91] Statements of the Georgian representative at the Security Council debate of 8 August 2008, 16.20. (UN-Doc. S/PV.5952), pp. 3 and 10 (emphasis added).

[92] Statement of the Russian representative at the Security Council debate of 8 August 2008, 16.20 p.m. (UN-Doc. S/PV.5952), p. 4 (emphasis added).

[93] "Responses to questions on military aspects posited by the IIFFMCG on the events that took place in the Caucasus in August 2008", not paginated (submitted to the Mission on 8 July 2009).

[94] *Cf.* the Document "Major Hostile Actions by the Russian Federation against Georgia in 2004-2007, p. 14: "At around 06:00, … The MIA special forces encountered sniper and massive armoured vehicle cannon fire from the Russian peacekeeping headquarters "Verkhniy Gorodok" located on the south-western edge of the town and were compelled to return fire and ask for tank support as well."

[95] See Chapter 5 "Military Events of 2008".

to the beginning of the armed conflict. Nevertheless, the bulk of the military conflict took place between regular Russian and regular Georgian troops.[96]

II. Legal qualification: use of force in terms of Art. 2(4) of the UN Charter by Georgia

From a legal point of view, the issue is whether the Georgian military action against Russian troops was "use of force" in the sense of Art. 2(4) of the Charter. Significantly, the prohibition of the use of force can also apply in a state's own territory, and certainly if it is directed against another state.

As explained above, grave acts described as "aggression" in Resolution 3314 may constitute an "armed attack" in the sense of Art. 51 of the Charter and also "use of force" in terms of Art. 2(4). The Resolution mentions the "attack by the armed forces of a State on the land, sea or air forces, or marine and air fleets of another State" in Art. 3 lit. (d). It therefore *a fortiori* also constitutes use of force prohibited by international law.

III. Justification: self-defence by Georgia?

The Georgian use of force against Russian troops might have been justified under the title of self-defence. Self-defence by Georgia is permitted only if Georgia reacted against an armed attack by Russia. The following scenarios have to be analysed: first, there might have been an on-going or an imminent attack by Russia which the Georgian military sought to prevent. Second, the employment of the Russian armed forces in violation of the Sochi Agreement might be qualified as an "armed attack" under Art. 51 of the UN Charter. Third, the same might be true for Russia's support for South Ossetian militia and irregulars from the North Caucasus and the South of Russia involved in the conflict already before 8 August 2008.

1. The requirement of an armed attack by Russia

a) The entry of Russian troops into Georgia was not a prior armed attack

In order to justify a military reaction by Georgia, the alleged Russian armed attack must have occurred *before* that reaction. In the information given to the Fact-Finding Mission the Georgian side claimed that Russian troops had invaded the country already before the offensive on 7 August 2008.[97]

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[96] *Ibid*.

[97] Use of Force issues arising out of the Russian Federation Invasion of Georgia, August 2008, p. 24.

As explained above, the invasion of the territory of another state is a serious aggression in the sense of Art. 3 (a) of Resolution 3314, and can therefore in principle also constitute an "armed attack" in the sense of Art. 51 of the UN Charter.

However, the Georgian view that Russian soldiers had entered Georgian territory through the Roki tunnel already before the Georgian air and ground offensive started on 7 August 2008 at 11.35 p.m. could not be verified by the Mission. Any later entry of Russian troops on Georgian soil did not legally constitute a prior armed attack on Georgia, which would have justified the Georgian offensive as self-defence. This finding mirrors the information available to the Mission in August 2009. It is not excluded that new evidence might show that Russian soldiers had already entered Georgian territory at that point in time.

b) Possible Russian preparations were not an imminent armed attack

However, not only the entry of Russian forces into Georgia, but also the mere preparation of this operation might have constituted an armed attack on Georgia. Art. 51 of the UN Charter does not give any indication on self-defence *before* an armed attack has been actually launched by another state. The wording of the provision speaks of self-defence "if an attack occurs". It is therefore controversial whether self-defence against future attacks is permitted. There is agreement that the decisive criterion is the objective reality of a threat as opposed to a merely presumed threat of an armed attack. On this basis, two situations must be distinguished: first, the existence of an objectively verifiable, concretely imminent attack. The prime example for this type of situation is a troop concentration on the borders of a state. The second situation is that there is no objectively verifiable imminent attack, but a potential or abstract threat which might amount to an imminent attack, as determined in a subjective manner by the state which feels threatened (example: the accumulation of weapons of mass destruction).

It is basically agreed among writers and in state practice that "self-defence" against presumed and abstract threats is not allowed under international law (neither under Art. 51 nor under parallel customary law).[98] The reason is that such a type of self-defence would ultimately lie

[98] *Cf*. ICJ, *Case Concerning Armed Activities on the Territory of the Congo* (above note 50), para. 148. Before 2002, the most important case was the Israeli attack on an Iraqi nuclear reactor in 1982. This act of self-defence against a putative and abstract danger was unanimously and strongly condemned in Security Council Resolution 487 (1981) as a "clear violation of the Charter of the United Nations". In 2002, the National Security Strategy of the United States of America proclaimed a wide reliance on "self-defence" including reactions to abstract and putative dangers. (reprinted in HRLJ 24 (2003), 135 *et seq*. Chapter V). But almost all states refused to accept that strategy as a reflection or development of international law (See for the references to state practice Anne Peters, "The Growth of International Law between Globalization and the

within the discretion of the state making use of it. This would be incompatible with the object and purpose of the UN Charter which seeks to cut back to a minimum the unilateral use of force in international relations.[99] State practice, even after 2002, has not led to an evolution of customary law in the sense of an extension of the right to self-defence as encompassing also defence against putative and abstract threats.[100] According to Susan Gray, states prefer to take a broad view of armed attack rather than openly claim self-defence against future attacks.[101]

In contrast, there is no consensus whether self-defence against concrete imminent attacks is permitted.[102] In this context, some authors refer to pre-existing customary law based on the so-called Caroline incident. Here the conflicting parties deemed a military response justified where the "necessity of that self-defence is instant, overwhelming, leaving no choice of means, and no moment for deliberation."[103] However, many authors reject this approach dating back to the 19th century.

In this Report, it is not necessary to decide on the admissibility of self-defence against concrete and objectively verifiable imminent attacks, because there is not enough evidence to ascertain such an imminent attack by Russia.

There were signs of an *abstract* danger that Russia might carry out its repeated threats of use of force,[104] but no *concrete* danger of an imminent attack. Despite all the tensions between the conflicting parties in the night of 7 to 8 August, and although there were Russian troops near the Georgian border north of the Roki tunnel, which had been deployed there for the "Kavkaz 2008" exercise, it could not be verified that they were about to launch an attack on Georgia. Neither could an alleged "large-scale incursion of Russian troops into Georgian territory"

Great Power", *Austrian Review of International and European Law* 8 (2003), 109-140, pp. 125-26). Also the UN Secretary General clearly condemned the doctrine of pre-emption. UN Secretary-General's Address to the General Assembly, 23 September 2003 (http://www.un.org/webcast/ga/58/statements/sgeng030923.htm). See in scholarship for the illegality of "pre-emptive" strikes against putative dangers Antonio Cassese, *International Law* (2nd ed. Oxford: OUP 2005), p. 361; Ian Brownlie, *Principles of International Law* (7th ed. Oxford OUP 2008), pp. 733-34.

99 Randelzhofer, Article 51 (above note 87), para. 39 with references on the literature.

100 2002 is important because of the adoption of the new US National Security Strategy, see above note 98. According to Brownlie, *Principles of International Law* (above note 98), p. 734, the practice of States since 1945 has generally been opposed to "self-defence" against putative and abstract threats.

101 Gray, *Use of Force* (above note 54), p. 161.

102 See the references on the scholarly debate in Kolb, *Ius contra bellum* (above note 30), pp. 278-79.

103 Mr. Webster, US Secretary of State, to Lord Ashburton, British plen., 6 August 1842, repr. in J.B. Moore, A Digest of International Law Vol. II, p. 412 (1906). Reaffirmed by the International Military Tribunal (Nuremberg), Judgment of 1 October 1946, 41 *AJIL* 172,p. 205 (1947). This opinion prevails in the older international legal literature.

104 On the threats of the use of force see above.

starting already in the morning of 7 August 2008[105] be verified by the Mission, although there are strong indications of some Russian military presence in South Ossetia beyond peacekeepers prior to 8 August 14.30 p.m.[106]As explained above, not even the more generous position on self-defence against future attacks claims that an abstract danger would allow a military response under the title of self-defence. [107] Such a response would in any case not be allowed under international law, independently of the views one takes on the admissibility of self-defence against concrete imminent threats.

To conclude, the Russian invasion itself did not occur prior to the Georgian operation and therefore did not constitute an armed attack in the sense of Art. 51. The mere Georgian expectation that Russia might plan an invasion did not justify Georgian self-defence either.

2. Breach of stationing agreements by Russia as an "armed attack"?

Besides the actual invasion of Georgia, other Russian activities might have constituted an armed attack on Georgia. Georgia has complained on many occasions of the "creeping annexation" of the breakaway territories by Russia, among other means through an alleged abuse of the agreements on stationing of Russian forces. The question is whether such abuses might also constitute an armed attack which might be apt to trigger Georgian self-defence.

Under Art. 3(e) of UN Resolution 3314, the following scenario is regarded as an "act of aggression": "The use of armed forces of one State which are within the territory of another State with the agreement of the receiving State, in contravention of the conditions provided for in the agreement or any extension of their presence in such territory beyond the termination of the agreement." In the sense of Art. 51 of the UN Charter; the pre-condition for self-defence is an "armed attack"; an "act of aggression" would not be sufficient (see above). So the first question is whether the breach of a stationing agreement may also constitute an "armed attack". Second, it must be determined whether Russia used its peacekeepers in contravention of the Sochi Agreement and of the subsequent agreements concluded by the conflicting parties.

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[105] *Cf*. Document „Use of force issues arising out of the Russian Federation Invasion of Georgia, August 2008, p. 24.

[106] See Chapter 5 "Military Events of 2008".

[107] Even authors such as Yoram Dinstein, who favour a generous interpretation of self-defence, emphasise that the difference between a real and a suspected armed attack is crucial (Dinstein, *War* (above note 55), at 191). Even from that perspective, "[s]elf-defence cannot be exercised merely on the ground of assumptions, expectations or fear." (*ibid*.).

As explained above, the ICJ has interpreted some parts of the "Definition of Aggression" as reflecting customary law, and case-law and scholarship also consider serious acts of aggression as "armed attacks" in the sense of Art. 51 of the UN Charter. But this does not apply to all the alternatives enumerated in Art. 3 of the Resolution. In legal scholarship, Art. 3(e) of the Definition of Aggression tends to be interpreted restrictively. That means that minor violations of stationing agreements are not sufficient to reach the threshold of an "armed attack". The breach of the agreement must have the effect of an invasion or occupation in order to equal an armed attack.[108]

The presence of the Russian peacekeeping troops in South Ossetia on the basis of the Agreement could have amounted to an "armed attack" if the peacekeepers had acted against their explicit mandate, if (many) more soldiers were deployed than allowed under the agreement, or if the presence of the peacekeeping troops was abused for the re-armament of one of the conflicting parties.

The Mission does not have evidence that Russian peacekeepers acted directly against their mandate, e.g. by directly attacking Georgian peacekeepers, Georgian police or Georgian villages. Such attacks were rather initiated by the South Ossetian militia.

There is no evidence that the number of Russian peacekeepers present in South Ossetia was higher than allowed. According to the Sochi legal framework, Joint Control Commission decision No.1, each side (Russia, Georgia and Ossetia) was allowed to have 300 troops in reserve.[109] Therefore, the Sochi Agreement covered the first Russian troops (300). But any such deployment had to be authorized by the JCC beforehand. Moreover, the replacement of personnel should have been conducted only in daylight from 7:00 to 18:00.[110] Although the lack of notification of additional deployments and of JCC consent might be qualified as a mere procedural shortcoming which does not lead to the illegality of the presence of the additional troops as such, as long as they were covered by the agreement, secret deployments, if they took place, do not constitute *bona fide* implementation of the Sochi Agreement.

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[108] Randelzhofer, Article 51 (above note 87), para. 28.

[109] Article 2 of JCC Decision No. 1 of 4 July 1992.

[110] See JCC Annex # 1, Protocol No. 38, meeting of Sept. 30 – Oct. 2 2004, Decision on the progress of implementation of the previous JCC decisions on ceasefire, withdrawal of illegal armed units and measures for further stabilisation of the situation in the conflict zone. http://rrc.ge/admn/url12subpirx.php?idstruc=89&idcat=6&lng_3=en

Clearly, despite the limitations in the Agreements, all conflicting parties started to build up their military capacity concomitant with tensions in the political arena. Yet, it has not been shown that the peacekeepers were directly involved in those actions.

On the basis of the findings of the Mission, there was therefore no armed attack by Russia against Georgia in the form of a massive violation of the stationing of forces agreements

3. Support of armed formations and militias, especially from North and South Ossetia, as an "armed attack" by Russia?

Finally, it must be analysed whether the military activity by North Caucasian irregulars and South Ossetian militia in villages inhabited predominantly by ethnic Georgians (see below on the activity by South Ossetian militia) can be attributed to Russia. In that case, these military activities would eventually constitute an armed attack by Russia itself, which would be likely to trigger Georgian self-defence.

a) Factual allegations by the sides

The Georgian side claims that irregulars from the North Caucasus and southern Russia were deployed in South Ossetia already before the Georgian air and ground offensive took place.[111] Moreover, Georgia has consistently asserted that the South Ossetian authorities and armed forces were under the control and direction of the security and defence agencies of the Russian Federation.[112] Georgia stated that "Abkhazia and South Ossetia have been within the power or effective control of Russia since Georgia lost control over those regions following the hostilities" of the 1990s."[113]

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[111] *Cf.* "Use of Force Issues Arising Out of the Russian Federation Invasion of Georgia, August 2008, p. 23 et seq.

[112] See ICJ, *Case Concerning Application of the International Convention on the Elimination of all Forms of Racial Discrimination* (*Georgia v. Russian Federation*), Request for the indication of provisional measures, order of 15 Oct. 2008, para 3: " Georgia states that: the Russian Federation, acting through its organs, agents, persons and entities exercising elements of governmental authority, and through South Ossetian and Abkhaz separatist forces under its direction and control, … is intended to provide the foundation for the unlawful assertion of independence from Georgia by the *de facto* South Ossetian and Abkhaz separatist authorities". *Ibid*., para 13*:* "Georgia asserts that 'the *de facto* separatist authorities of South Ossetia and Abkhazia enjoy unprecedented and far-reaching support from the Russian Federation in the implementation of discriminatory policies." See also *ibid*., paras 20, 22, 33a,b. See also the statement of the Georgian representative in the Security Council debate of 8 August 2008, 1.15 a.m. (UN-Doc. S/PV.5951), p. 4.

[113] ICJ, *Racial Discrimination Case* (above note 112, para. 92. The paragraph continues: "Georgia adds that the Russian invasion and deployment of additional military forces within Abkhazia and South Ossetia in August 2008 has only served to consolidate further its effective control over those regions." *Ibid*., para. 44: Georgia contends that "the Russian Federation has consolidated its 'effective control' over the occupied 'Georgian regions of South Ossetia and Abkhazia, as well as adjacent territories which are situated within Georgia's internationally recognized boundaries'", and that therefore "South Ossetia, Abkhazia, and relevant adjacent regions, fall within the Russian Federation's jurisdiction." *Ibid*., para. 55: Georgia claims that "Russia

In contrast, Russia claimed that "[t]he Russian Federation is not exercising effective control vis-à-vis South Ossetia and Abkhazia … Acts of organs of South Ossetia and Abkhazia or armed groups and individuals are not attributable to the Russian Federation."[114] In its answers submitted to the Fact-Finding Mission, Russia stated: "We can presume that in the course of the military operation there was a certain degree of interaction between the Russian, South Ossetian and Abkhaz armed forces. It came about as we understand it in an ad-hoc fashion as the conflict evolved."[115] Russia also maintained that the Russian Federation "does not at present, nor will it in the future, exercise effective control over South Ossetia and Abkhazia" and emphasised that Russia "was not an occupying power in South Ossetia and Abkhazia, that it never assumed the role of the existing Abkhaz and South Ossetian authorities, recognized as such by Georgia itself, which have always retained their independence and continue to do so. (…) [T]he Russian presence, apart from its participation in limited peacekeeping operations, has been restricted in time and lasts only for a few weeks".[116]

b) Legal requirement: "sending" and "effective control"

North and South Ossetian military operations are attributable to Russia if they were sent by Russia and if they were under effective control by Russia. This follows from Art. 3 (g) of UN Resolution 3314 which states: "The sending by or on behalf of a State of armed bands, groups or irregulars, which carry out acts of armed force against another State of such gravity as to amount to the acts listed above, or its substantial involvement therein." According to the ICJ, these activities constitute not only an "act of aggression", but also an "armed attack" justifying self-defence.[117]

In contrast, the provision of weapons and logistical support alone does not amount to a substantial involvement in sending of private groups and can, according to the Court, not be considered as an armed attack.[118]

For the purpose of determining the possible international legal responsibility of Russia, and also for identifying an armed attack by Russia, the use of force by South Ossetians and by

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exercises significant control over the Georgian territories under its occupation, and also controls the separatist regimes in Abkhazia and South Ossetia." See also *ibid*. paras 34b, 34c, 42, 43.

[114] ICJ, *Racial Discrimination Case* (above note 112), para. 83.

[115] Quoted in the Russian document "Responses to questions posed by the IIFFMCG on the events that took place in the Caucasus in August 2008 (legal aspects)."

[116] Submission of the Russian Federation, quoted in ICJ, *Racial Discrimination Case* (above note 112), para. 74.

[117] *Nicaragua* (*Merits*), (above note 7), para. 195.

[118] *Ibid*.

other volunteers from North Caucasus, might be attributed to Russia under two headings. First, the other actors might have been *de facto* organs of Russia in the sense of Art. 4 ILC Articles.[119] Under this first heading, the volunteer fighters could be equated with Russian organs only if they acted "in complete dependence" of Russia of which they were ultimately merely the instrument.[120]

Second, South Ossetian or other acts are attributable to Russia if they have been "in fact acting on the instructions of, or under the direction or control of, that state" (Art. 8 ILC Articles). Under that second heading, the actions of volunteers were attributable to Russia also if they acted under control of Russia. In the law governing state responsibility, and arguably also for identifying the responsibility for an armed attack, control means "effective control".[121] This requires "a real link between the person or groups performing the act and the State machinery." Attribution to the state is not possible when the incriminated conduct "was only incidentally or peripherally associated with an operation and which escaped from the State's control or direction".[122] It has so far not been spelled out in case-law what this implies in concrete terms. The two leading cases have found only that effective control was absent, without positively defining when effective control would be present. The Court only stated that effective control must be verified for each individual and each concrete action: it is necessary that "the state's instructions were given in respect of each operation in which the alleged violations occurred, not generally in respect of the overall actions taken by the

[119] Art. 4 ILC: "Conduct of organs of a state: 1. The conduct of any state organ shall be considered an act of that state under international law, whether the organ exercises legislative, executive, judicial or any other functions, whatever position it holds in the organization of the state, and whatever its character as an organ of the central Government or of a territorial unit of the state. 2. An organ includes any person or entity which has that status in accordance with the internal law of the state."

[120] ICJ, *Case Concerning the Application of the Convention on the Prevention and Punishment of the Crime of Genocide* (*Bosnia and Herzegovina v. Serbia and Montenegro*), ICJ Reports 2007, 91, para. 392: "[P]ersons, groups of persons or entities may, for purposes of international responsibility, be equated with state organs even if that status does not follow from internal law, provided that in fact the persons, groups or entities act 'in complete dependence' on the state, of which they are ultimately merely the instrument."

[121] ICJ, *Nicaragua* (*Merits*), (above note 7), para. 115; ICJ, *Genocide Bosnia* (above note 120), paras 396-407. In the *Nicaragua* case, the ICJ required the "effective control" by the state over non-state armed groups as a pre-condition for the imputation of their activity to the "sending" state for establishing the international responsibility of that state for human rights violations and violations of international humanitarian law (*ibid.*, para. 115). However, the ICJ did not clearly state that this would also be a pre-requisite for qualifying the acts committed by those groups as an armed attack by the "sending" state.

[122] ILC Report on the work of its 53d sess., Yearbook of the International Law Commission, 2001, vol. II, Part Two, p. 47.

persons or groups of persons having committed the violations" of international law.[123] Mere "influence, rather than control" of the persons acting does not suffice.[124]

c) Application of the principles to the case

As explained in detail in Chapter 2 "Related Legal Issues", already before the outbreak of the armed conflict Russian officials had *de facto* control over the *South Ossetian* security institutions and security forces. The *de facto* Ministries of Defence, Internal Affairs and Civil Defence and Emergency Situations, the State Security Committee, the State Border Protection Services, and the Presidential Administration were largely staffed by Russian representatives or South Ossetians with Russian nationality who had previously worked in equivalent positions in Central Russia or in North Ossetia. Nevertheless, all those security officials were formally subordinated to the *de facto* President of South Ossetia.

There is hardly any doubt that irregulars from the North Caucasus and Southern Russia were present in South Ossetia, and that they involved in the fighting after the Georgian offensive. However, it has not been shown that they carried out the armed attacks on Georgian villages *before* the Georgian offensive, and it has not been shown that Russia was controlling them.

The Fact-Finding Mission has no information on the internal orders given before the *South Ossetian* attacks on Georgian villages, peacekeepers and police. The shootings that occurred before 7 August seemed to have been rather spontaneous actions where it was not clear who provoked whom. The Mission is unable to determine to what extent Russia had effective control over South Ossetia for the purpose of attributing an eventual South Ossetian armed attack to Russia.

d) Conclusions: no imputation of North Caucasian or South Ossetian action to Russia

The pre-conditions for an armed attack by Russia through the "sending" of North Caucasian and other fighters in the sense of Art. 3 (g) Resolution 3314 are not fulfilled.[125]

It does not seem that the armed attack by South Ossetia on Georgia could be imputed to Russia under any other type of "effective control" of South Ossetian militia. Yet, even if

[123] ICJ, *Genocide Bosnia* (above note 120), para. 400.

[124] *Cf. ibid*., para. 412.

[125] In the case of the South Ossetian militia it cannot be claimed that they were "sent" by Russia. Therefore Article 3(g) cannot be applied in this context either.

Russia had effective control over South Ossetian forces, self-defence by Georgia would have been allowed only within the narrow limitations described above.

IV. Conclusions: no self-defence until Russian military action extending into Georgia

The Georgian military operation in Tskhinvali on 7/8 August 2008 cannot be justified as self-defence. There was no clear proof of an on-going or imminent Russian armed attack against Georgia when Georgia started to apply military force. Although Russia did use force against Georgia, this occurred later. Self-defence against a putative Russian attack was not permitted. Minor breaches by Russia of the stationing of forces agreements between Russia and Georgia did not constitute an armed attack suited to warrant Georgian self-defence. Military operations by South Ossetia could not be imputed to Russia as constituting a Russian armed attack. Only *later*, to the extent that extended Russian military action reached out into Georgia and was conducted in violation of international law (see below Part 4), were Georgian military forces acting in legitimate self-defence under Art 51 of the UN Charter.

Part 3: Use of force by South Ossetia against Georgia

The assessment of the use of force by South Ossetia against Georgia is the reverse side of the assessment of the use of force by Georgia against South Ossetia. Therefore a detailed analysis is not necessary. It is enough to summarize the main findings.

I. Facts

As explained above, the South Ossetian militia were involved in shooting at Georgian villages, police and peacekeepers before the outbreak of the armed conflict. After the air and ground offensive by the Georgian army the South Ossetian militia probably tried to defend their positions.

II. Legal qualification: use of force, but partly justified as self-defence

To the extent that South Ossetian militia initiated the shooting on Georgian villages, police and peacekeepers before the outbreak of the armed conflict, South Ossetia violated the prohibition of the use of force, which was applicable to the conflict.

South Ossetian use of force could have been justified as self-defence only in the event of an armed attack by Georgia on South Ossetia. However, self-defence is not possible against self-

defence by the other side.[126] To the extent that the Georgian on-the-spot reaction against previous South Ossetian armed attacks was necessary and proportionate, and therefore justified as self-defence (see above), South Ossetia's reliance on self-defence is *a limine* precluded. However, as explained above, the Georgian military operations were to a large extent not necessary and proportionate to repulse South Ossetian attacks, and were therefore not justified as self-defence. This opens the way for potential South Ossetian self-defence.

Given the fact that the Georgian military operation in Tskhinvali and the surrounding villages, which had started on 7 August 2008 at 23.35, had a substantial scale and effects (concerning the number of soldiers involved,[127] the arms used[128] and the fatalities and destructions of building resulting from it[129]) it qualifies as an "armed attack". Therefore South Ossetia was in principle allowed to use force to defend itself against this attack. The South Ossetian military operations up to 12 August 2008 can be seen as necessary and proportionate and were therefore justified under the title of self-defence.

Use of force by South Ossetia after 12 August 2008 is not justifiable as self-defence, because there was no longer any on-going attack by Georgia. A ceasefire agreement had been concluded. The Georgian army had by that time retreated from the territory of South Ossetia. Use of force was therefore illegal from the *ius ad bellum* perspective. The *ius in bello* issues will be analysed in Chapter 7 "International Humanitarian Law and Human Rights Law".

Part 4: Use of force by Russia against Georgia

I. Facts

Russia was involved in the conflict in several ways. First, Russian peacekeepers who were stationed in South Ossetia on the basis of the Sochi Agreement were involved in the fighting in Tskhinvali. Second, Russian regular troops were fighting in South Ossetia, Abkhazia and deeper in Georgian territory. Third, North Caucasian irregulars took part in the fighting. Finally, Russia supported Abkhaz and South Ossetian forces in many ways, especially by training, arming, equipping, financing and supporting them.

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[126] Dinstein, *War* (above note 55), p. 268.

[127] It is estimated that the overall strength of the units involved in the first attacks amounted to about 10 000 - 11.000 with about 400 heavy armoured vehicles and artillery systems and several hundred wheeled vehicles.

[128] Infantry, artillery and air strikes.

[129] The exact number of the casualties in the first attack is not available.

II. Legal qualification of the Russian involvement in the conflict

Under Art. 2(4) of the UN Charter and the parallel customary law, the military operations of the Russian army as described in Chapter 5 "Military Events of 2008"[130] in the territory of Georgia (including South Ossetia and Abkhazia and elsewhere in Georgia) in August 2008 constituted a violation of the fundamental international legal prohibition of the use of force. The main legal issue is whether these activities could be justified as legally recognized exceptions.

III. No justification of the use of force as self-defence

1. Self-defence of Russia against a Georgian attack on Russian peacekeepers

The Russian Federation stated that the principal explanation and justification of the Russian resort to military force was self-defence against Georgian attacks on Russian peacekeepers.[131]

Because "there is no self defence against self-defence",[132] Russia could in principle only rely on self-defence if the Georgian attack on the Russian military base was not in turn itself justified as an act of self defence against Russia. As stated above, the Georgian operation was not justified as self-defence.

a) Bases outside Russian territory as objects of an armed attack

Russian self-defence requires a preliminary armed attack by Georgia. As explained above, the General Assembly Resolution "Definition of Aggression" (3314 (XXIX) of (1974) can be referred to in order to circumscribe and define the notion of "armed attack" in terms of Art. 51 of the UN Charter. Under the Resolution's Art. 3(d) "an attack by the armed forces of a state on the land, sea or air forces, or the marine and air fleets of another State" "shall qualify as an act of aggression". The Resolution does not say where the land forces of the victim state must be stationed in order to count as an object of an armed attack. The text cannot be interpreted narrowly so as to exclude military bases outside the territory of the victim state, because a systematic interpretation of this provision shows that land forces *outside* their own state are the very object of this provision. Concerning land forces within the victim state, the provision of Art. 3(d) of the Resolution would be superfluous, because forces within a state's own territory are already protected by the general rule prohibiting attacks on foreign territory. This

[130] The Russian regular armed forces are organs of the state. Their actions are therefore imputable to the state of Russia and apt to trigger the international legal responsibility of Russia (Art. 4 ILC Articles).

[131] See the Russian answers to the IIFFMCG questionnaire on military issues.

[132] Dinstein, *War* (above note 55), p. 268, see also *ibid.*, p. 178.

interpretation of Art. 3(d) has been endorsed in case law and scholarship.[133] Protected land forces abroad include troops lawfully stationed *in the territory of the attacker* state. These may constitute the object of an armed attack.[134]

To conclude, an attack by Georgian forces on Russian peacekeepers deployed in Georgia – if not in self-defence against a Russian attack (which was, as discussed above, not present) – equals an attack on Russian territory which is apt to trigger Russia's right to self-defence. However, as stated above, the fact of the Georgian attack on the Russian peacekeepers' basis could not be definitely confirmed by the mission.

b) Lawfulness of the Russian military installations

The Georgian attack on the Russian military bases would not be an armed attack apt to trigger Russian self-defence if the Russian military forces were not lawfully stationed in Georgian territory. Only force used against military installations "*legitimately* situated within [the attacker's] territory … may constitute an armed attack".[135]

The Russian troops' presence in South Ossetia had a treaty basis. The Sochi Agreement between the Russian Federation and the Republic of Georgia of 26 June 1992 foresaw "joint forces to be co-ordinated by the parties … under the control commission."[136] Georgia could not argue that it was an "unequal treaty" and therefore invalid. The doctrine of unequal treaties is not recognized in international law as it stands.[137] Georgia denounced the Sochi Agreement only after the August 2008 events. The presence of the Russian peacekeepers was therefore lawful. There was no illegal deployment which could have excluded that the troops could be a suitable object of an armed attack which is apt to trigger self-defence.

c) Peacekeepers' bases as objects of an armed attack

The case under scrutiny here is special because the military bases attacked by Georgian forces were not Russian bases officially deployed in the (Russian) national interest, but were an international base of peacekeepers. An attack on the Russian peacekeepers' basis might *not* constitute an armed attack in terms of Art. 51 of the UN Charter, because the peacekeepers

[133] Randelzhofer, Article 51 (above note 87), para. 24; Corten, *Le droit contre la guerre* (above note 6), pp. 614-615; Kolb, *Ius contra bellum* (above note 30), p. 241.

[134] Dinstein, *War* (above note 55), pp. 197 and 200; Corten, *Le droit contre la guerre* (above note 6), p. 614 fn. 21.

[135] Dinstein, *War* (above note 55), p.197 (emphasis added).

[136] Article 3(3) Sochi Agreement.

[137] Anne Peters, "Unequal Treaties", in Rüdiger Wolfrum (ed), The Max Planck Encyclopedia of Public International Law (Oxford University Press 2008), www.mpepil.com (online database).

were not regular Russian troops, and because attacking them might not specifically have targeted Russia as a state.

So the question is whether a peacekeepers' base is a suitable object that can trigger Russian self-defence, especially if the specific Georgian intent to target Russia as a state is unclear. In such a situation, it is not entirely clear that Georgian military action against the base was *aimed specifically* at Russia – which would be a precondition to qualify as an armed attack on Russia.[138] The requirement of a specific intention to target the state which claims self-defence is especially important if the asserted attack occurs, as here, in a military conflict between two other parties, namely Georgia and South Ossetia.[139]

It is necessary to look at the rationale of Art. 51 of the UN Charter: Military bases in foreign territory are placed on an equal footing with the victim state's territory and are included in the scope of protection by self-defence because they represent the (attacked) state and because they fulfil official governmental functions abroad, and specifically a core function, namely military security abroad. This means that the official and military character of the Russian premises is crucial for their qualification as a potential object of an armed attack within the meaning of Art. 51 of the UN Charter.

Attacks on *private* Russian property in Georgia could not trigger self-defence by Russia.[140] Attacks on Russian citizens acting as private persons can not, according to state practice and the prevailing doctrine, trigger self-defence either, although this is subject to some scholarly debate (see below).

Keeping this rationale in mind, it can be questioned whether the Russian military bases are a suitable object of a Georgian armed attack in terms of Art. 51, because they formed part of a peacekeeping mandate under the Sochi Agreement, and were not Russian forces proper. It can not be argued that, because the Russian forces were "internationalized" and had an

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138 *Cf.* ICJ, *Oil Platforms* (above note 62), para. 64; Gray, *Use of Force* (above note 54), p. 145.

139 The case under scrutiny here is in this respect parallel to the Oil Platforms case decided by the ICJ. That case concerned the war *between Iraq and Iran*. Iranian forces allegedly attacked a US military vessel in the Gulf, and the USA relied on self-defence against Iran. The ICJ here formulated the requirement of a specific intent to attack the third party (USA). The Court did not accept the US American claim that Iran had specifically aimed at the United States, and that mines were laid with the specific intention of harming US vessels. ICJ, *Oil Platforms* (above note 62), para. 64.

140 See Dinstein, *War* (above note 55), p. 200: "Taking forcible measures against any *public* (military or civilian) installation of the victim state, located outside the national territory, may also amount to an armed attack" (emphasis added). *Cf.* in this sense also Gray, *Use of Force* (above note 54), p. 145, commenting the Oil Platform case: There is considerable doubt as to whether a single attack on a merchant vessel (as opposed to a military vessel) could constitute an armed attack. An attack on a US-owned, as opposed to a US-flagged vessel could not amount to an attack on the state.

international mandate, they did not represent Russia, and did not perform Russian governmental functions. The peacekeeping base was, although untypical, properly considered as one of the "*State instrumentalities* such as warships, planes, and embassies" which are protected under Art. 51.[141] Although those troops were not "*regular* forces of a State" which are "instruments for safeguarding its [Russia's] political independence", and which are therefore within the scope of Art. 51,[142] an attack by Georgia on such peacekeeping troops can be assessed in a parallel fashion as an attack on Russian territory for the following reasons.

It does not seem appropriate to exclude the Russian base from the scope of Art. 51. The peacekeeping operation here was not a UN organ that acted under the overall control of the United Nations. Under the Sochi Agreement, the ultimate military command lay with Russia, because the so-called "joint" or "united" military command was always to be headed by a Russian commander.[143] It was also foreseen that international responsibility for eventual violations of the Sochi Agreement would be incumbent on the troop-allocating state itself.[144] The Commander of the Joint Forces was always to be from the Russian side, appointed by the JCC upon recommendation of the Russian Ministry of Defence.[145]

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[141] Oscar Schachter, *International Law in Theory and Practice* (Dordrecht: Martinus Nijhoff Publishers 1999), p. 152 (emphasis added).

[142] Randelzhofer, Article 51 (above note 87), para. 24 (emphasis added).

[143] Annex 1 to Protocol No. 3 of the JCC Session of 12 July 1992, provision on joint peacekeeping forces (JPKF) and Law and Order Keeping Forces (LOKPF) in the Zone of Conflict, Article 2: "The joint forces shall subordinate to the joint military command and the JCC." Article 6: "The joint forces, in their daily activities, shall be guided by the requirements of this Provision, as well as decisions of the JCC and the joint military command." Regulation concerning the basic principles of operations of the military contingents and of the groups of military observers designated for the normalisation of the situation in the zone of the Georgian-Ossetian conflict of 6 Dec. 1994, Article 2: "The military contingents and the military observers are subordinate to the united military command which consists of the representatives of Russian, Georgian, and Ossetian sides. *The united military command is headed by a commander from the Russian side.* A decision on the use of military contingents and military observers in case the conditions of the ceasefire are violated by one of the sides will be taken by the commander of the JPKF with the aim of restoring peace; and the JCC will be notified." Article 6: "In their daily activity, the military contingents and the military observers will be guided by the requirements of the present Decision, by the decisions of the JCC, and by the orders and directives of the united military command." (Emphasis added). http://rrc.ge/admn/url12subpirx.php?idstruc=89&idcat=6&lng_3=en.

[144] Protocol No. 2 of the Meeting of the Joint Control Commission (JCC) of 6 July 1992. http://rrc.ge/admn/url12subpirx.php?idstruc=89&idcat=6&lng_3=en.

[145] Regulation concerning the basic principles of operations of the military contingents and of the groups of military observers designated for the normalisation of the situation in the zone of the Georgian-Ossetian conflict of 6 Dec. 1994, Article 14: "(…) The commander of the joint forces for maintaining peace will be appointed by the JCC on the recommendation of the Ministry of Defence of the Russian Federation. (…)".http://rrc.ge/admn/url12subpirx.php?idstruc=89&idcat=6&lng_3=en

The Commander's duty was to coordinate the operations of the joint forces, and to organize the "mutually agreed operations" through the senior military chiefs of the sides.[146] He was empowered to decide on the "combined use of the units of the Joint Forces in case of threat of the outbreak of armed conflict in the zone of responsibility."[147] The Commander also held the disciplinary authority over the servicemen.[148]

This entire legal arrangement suggests that actions of the peacekeeping forces were attributable to their respective states, and that the peacekeeping forces in that respect resembled "state instrumentalities" which may legally be an object of an "armed attack" according to the terms of Art. 51 of the UN Charter.

Conclusions: Under these circumstances, the Georgian attacks against the Russian peacekeepers' base would equal an attack on an ordinary Russian base in foreign territory, and were therefore specifically addressed against Russia as a state, but this does not constitute a sufficient condition for self-defence. Moreover, as stated above, the fact of the Georgian attack on the Russian peacekeepers' basis could not be definitely confirmed by the mission.

d) Military operations beyond a minimum threshold

As explained above, military operations constitute an armed attack in the sense of Art. 51 of the UN Charter only if they surpass a certain threshold.

According to Russian statements in the Security Council meetings of 8 and 10 August 2008, the attacks by the Georgian armed forces were performed with tanks, military combat vehicles and helicopters and were – according to the Russian account – "being aimed directly at peace-keepers."[149] "[T]he military action by Georgia began when they started to attack our peace-keepers and to seize the camps where our peacekeepers live. They attacked with tanks, aircraft and heavy artillery. As members know, there have been deaths and casualties among

[146] Annex No. 1 to the Regulation concerning the basic principles of operations of the military contingents and of the groups of military observers designated for the normalisation of the situation in the zone of the Georgian-Ossetian conflict of 6 Dec. 1994, Article 1 and 2. http://rrc.ge/admn/url12subpirx.php?idstruc=89&idcat=6&lng_3=en

[147] *Ibid*., Article 7.

[148] *Ibid*., Article 5.

[149] Statement of the Russian representative in the Security Council debate of 8 August 2008, 16:20 (UN-Doc. S/PV.5952), at p. 4. At that time, the Russian representative stated: "As a result, more than 10 peacekeepers have died, and more than 30 have been injured." These figures were later corrected.

our peacekeepers".[150] In its submission to the Fact-Finding Mission, Russia described the first casualties as "2 servicemen killed and 5 wounded".[151]

Conclusions: If the Russian allegations were true, the attack by Georgian armed forces on the Russian military base would surpass the minimum threshold in scale and effects required for an "armed attack" in the sense of Art. 51 of the UN Charter. In such a case, Georgia could not justify its operation against the peacekeepers as self-defence necessary to respond to an on-going or imminent attack by Russia. Therefore there was an armed attack by Georgia in the sense of Art. 51.[152] That means that Russia's military response could be justified, but only if all the other conditions needed for self-defence under Art. 51 were met as well.

2. Notification of self-defence to the UN Security Council

Russia formally informed the Security Council in a letter of 11 August 2008, signed by Ambassador Vitaly Churkin, that "the Russian side had no choice but to use its inherent right to self-defence enshrined in Art. 51 of the Charter of the United Nations."[153] The letter stated that the use of force by Russia "pursues no other goal but to protect the Russian peacekeeping contingent and citizens of the Russian Federation … and to prevent future armed attacks against them." Dispatched three days after the beginning of the Russian military operation, this letter was an "immediate" report in the sense of Art. 51 of the UN Charter, and thus an indication that Russia was itself convinced that it was acting in self-defence.

3. Necessity and proportionality

In order to be deemed a lawful act of self-defence, the Russian military reaction to the attack of its military base had to be necessary and proportionate.[154] Whether a military reaction is necessary and proportionate in the sense of Art. 51 of the UN Charter depends on the facts of the particular case.

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[150] Statement of the Russian representative in the Security Council debate of 10 August 2008 (UN Doc. S/PV.5953). The Russian representative stated: "12 of our peacekeepers died on the first day." This figure was later corrected.

[151] "Responses to questions on military aspects posited by the IIFFMCG on the events that took place in the Caucasus in August 2008", not paginated (submitted to the Mission on 8 July 2009).

[152] In a trial, the burden of proof for the Georgian attack would be incumbent on Russia (see above text with note 69).

[153] UN Doc S/2008/545. See also the statement of the Russian representative in the Security Council debate of 10 August 2008 (UN Doc. S/PV.5953), at 9: "Force will be used only in accordance with Article 51 of the Charter, in exercise of the right to self-defence by the Russian Federation."

[154] On proportionality and necessity see references above note 72.

a) Specific circumstances of an attack on peacekeeping forces stationed abroad

The specific problem of the case at hand is that self-defence by Russia was not triggered by an attack against Russian territory, but by an alleged attack on Russian peacekeepers stationed abroad. Neither the independence nor the sovereignty of Russia as a state nor the security of the Russian population living within the borders of Russia were endangered by the Georgian attack. As argued above, the Georgian attack on the peacekeeping bases must nevertheless be considered as an armed attack on Russia under Art. 51 of the UN Charter. But the circumstances have to be taken into account when assessing the necessity and proportionality of the Russian reaction.

In this context it must be remembered that peacekeeping operations are very specific. The two special attributes of a traditional peacekeeping operation are that it is established and maintained with the consent of all the states concerned and that it is not authorized to take military action against any state beyond defending the peacekeeping forces.[155] In the 1990s, a more "robust" type of peacekeeping emerged under the auspices of the United Nations. These more robust operations have been allowed to use force beyond self-defence, depending on their specific mandate.

Yoram Dinstein distinguishes between two forms of self-defence of peacekeeping operations: the "specific right to self-defence, applicable to peacekeeping forces" and the "much broader right to self-defence vested in States." He further argues: "A peacekeeping force's exercise of self-defence is more akin to a military unit's self-defence, in the context of on-the-spot reaction."[156]

The Russian reaction can be subdivided in two phases: first, the immediate reaction of the Russian peacekeepers shooting at Georgian armed forces, and second, the invasion of regular Russian troops to fight back the Georgian army.

There is no doubt that the Russian peacekeepers, if they had been directly attacked, had the right to immediate response. An immediate military response was necessary and proportionate under that condition. Still, doubts remain whether the Russian peacekeepers were attacked in the first place.

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[155] Dinstein, *War* (above note 55), at p. 266 with reference to ICJ, *Advisory Opinion on Certain Expenses of the United Nations (Article 17, Paragraph 2, of the Charter)*, ICJ Reports 1962, 170, p. 177.

[156] Dinstein, *War* (above note 55), p. 267.

It is more difficult to decide whether the entire military campaign against Georgia was necessary and proportionate.

b) Necessity

As explained above,[157] necessity is understood by some authors quite narrowly as a situation where it is unavoidable to rely on force in response to an armed attack since no alternative means of redress is available. From that perspective, a relevant question would be whether the withdrawal of Russian peacekeepers would have been a peaceful alternative that would have rendered the resort to military force by Russia unnecessary and thus illegal under the heading of self-defence. In its broader sense, necessary rather means what is essential and important.

However, the special aspect of this case is that Russia was allegedly attacked while fulfilling its peacekeeping role. Given the fact that Russia was fulfilling an international task, Russia could have been expected to ask for international support in such a situation. This would have been a reasonable political option. However, such a step is no strict precondition for the admissibility of self-defence, under the broad conception of "necessity".

c) Proportionality

As stated above, a reaction is proportionate if there is a reasonable relationship between the measures employed and the objective, the only permissible objective being the repulsion of the armed attack.

i) The objective of the reaction

The aim of the reaction must only be to halt an attack, and to eliminate the threat, but it must not go further than that. The requirement of proportionality thus very importantly functions as a barrier against retaliatory or punitive actions that are meant to be a sanction or to teach the attacker a "lesson".

ii) Further factors to be taken into account

Further factors to be taken into account are the targets selected, the scale of the military action, the effect on third states' rights, the level of destruction of the enemy forces, and finally damage to territory and damage to the infrastructure of the target state and to the environment generally.

[157] See above text with notes 79-81.

In more detail: The nature of the targets plays a part. If the targets are not military objects, their destruction is not efficient, and thus also not necessary in terms of Art. 51 of the UN Charter.

The manner and scope of the reaction must be assessed. This includes the selection of weapons used and destruction caused, the territory covered, the extension in time of the military action, and the overall scale of the whole operation. The defending state is not restricted to the same weapons or the same number of armed forces as the attacking state.[158]

The geographical scope of the reaction is also a factor to be taken into account.[159] However, the reaction need not be confined to the space where the armed attack was launched.[160]

Proportionality does not mainly imply a comparison of the material damages caused. The damages brought about by the reaction are normally greater than the damages caused by the attack, but this does *not* render the reaction disproportionate as such.

The causalities and damage sustained must be compared. Such a comparison can only be drawn *a posteriori*, weighing in the balance the acts of force and counter-force in their totality (from the first to the last moment of fighting).[161] However, there seems little evidence in state practice that the overall level of combatant casualties counts as a constraining factor for assessing *ius ad bellum*-proportionality.[162] The level of collateral civilian damage is generally not articulated as a factor of relevance to proportionality in *ius ad bellum* (as discussed here),[163] but this concern underlies the accepted factors of the choice of weapons and targets, and can therefore be counted as a relevant criterion.[164] There is little state practice to indicate the relevance of factors such as the possible long-term effects on the civilian population,

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158 Gray, *Use of Force* (above note 54), at 150.

159 ICJ, *Case Concerning Armed Activities on the Territory of the Congo* (above note 53), para. 147. Here the Court observed in a dictum that "the taking of airports and towns many hundreds of kilometres from Uganda's border would not seem proportionate to the series of transborder attacks it claimed had given rise to the right of self-defence, nor to be necessary to that end." See in scholarship on the geographical factor Kolb, *Ius contra bellum* (above note 30), at 296.

160 It was for instance proportionate for the USA to attack far away regions in Afghanistan in reaction to a terrorist attack on the USA on 9/11.

161 Dinstein, *War* (above note 55), p. 237. But Dinstein considers this type of balancing appropriate only in the event of small on-the-spot-incidents, but not for a defensive war.

162 Gardam, *Necessity* (above note 29), p. 172.

163 In the distinct body of *ius in bello* (international law of armed conflict or international humanitarian law), the principle of proportionality must also be observed. But that "*ius in bello*-proportionality" relates to different issues, and constitutes a separate and distinct standard from the "*ius ad bellum*- proportionality" analysed here. See for "*ius in bello*-proportionality" Chapter 7 "International Humanitarian Law and Human Rights Law".

164 Gardam, *Necessity* (above note 29), p. 162.

including the creation of a large refugee outflow.[165] A larger amount of destruction and civilian causalities is rather an indication that the objective pursued was not legitimate, and went beyond the mere stopping of the attack and eradication of the threat.[166]

Overall, the criteria for assessing necessity and proportionality are very flexible, and they are not only quantitative, but also qualitative.

iii) The facts of the case under scrutiny

Russia bombarded Georgian positions in South Ossetia. It also conducted military activities outside the South Ossetian administrative borders and posted military vessels in the Black Sea before the Georgian harbour of Poti. Due to Russian bombs on Poti, oil deliveries from Baku to the port city of Supsa had to be temporarily suspended. Also the railway track from Tbilisi to the coast was damaged. Oil transport on that railway was interrupted. Thereby the entire Georgian economy was affected.

According to the Georgian representative in the Security Council, as of 19 August 2008 the total number of people killed in the conflict reached 250 on the Georgian side, civilians and Georgian Ministry of Defence personnel combined. Over 1 469 were injured.[167] The data given to the Fact-Finding Mission in mid 2009 differ substantially: about 410 people killed (170 military, 228 civilian, and 12 police), 1 747 wounded.[168]

iv) Assessments of governments

At the Security Council emergency session of 10 August 2008 Russia explained its actions in the Black Sea as follows: "The aim of that operation is to ensure that we protect Russian citizens who are in that region, to provide support to the Russian peacekeeping contingent if there should be a military attack against them, and also to provide humanitarian assistance to the civilian population who are in the zone of the conflict. With the aim of preventing incidents in the area patrolled by Russian ships, we have established a security zone. These actions do not seek to establish a maritime blockade of Georgia. Force will be used only in

[165] Gardam , *Necessity* (above note 29), p. 172.

[166] For instance, the majority of states qualified the Israel war on Lebanon in summer 2006 as disproportionate, pointing to the scale of damage caused to the infrastructure of the state and the number of civilian causalities. These political statements did not make clear whether they referred to *ius ad bellum* or *ius in bello*, but most likely mixed up both.

[167] Statement of the representative of Georgia, Security Council debate of 19 August 2008 (UN Doc. S/PV.5961), p. 5.

[168] Document "Major Hostile Actions by the Russian Federation against Georgia in 2004-2007", p. 22.

accordance with Art. 51 of the Charter, in exercise of the right to self-defence by the Russian Federation."[169]

In the answers given to the Fact-Finding Mission, Russia explained that "the deployment of additional Russian troops [in Abkhazia] was necessary since there were compelling reasons to believe that an attack similar in scale was to be launched against Abkhazia once the Ossetian issue was resolved. The assumption that Georgia harboured such plans was confirmed by the information gathered by Russian and Abkhaz intelligence services."[170]

In contrast, various Security Council members gathered in emergency sessions during August repeatedly estimated the Russian activities to be disproportionate.[171] The representative of the United Kingdom stated: "Russian forces have certainly violated respect for the international norms of peacekeeping, and it is a gross distortion by Russia to claim peacekeeping duties as the reason for its action."[172]

d) Conclusions: Lack of necessity and proportionality

As an act of self-defence against the attack on the Russian military bases, the only admissible objective of the Russian reaction was to eliminate the Georgian threat for its own peacekeepers. The expulsion of the Georgian forces from South Ossetia, and the defence of South Ossetia as a whole was not a legitimate objective for Russia, because Russia could not rely on collective self-defence in favour of South Ossetia, as will be shown below. The admissible Russian objective was therefore limited.

The military reaction of Russia went beyond the repulsion of the Georgian armed attack on the Russian bases and was thus not necessary. Russia mainly targeted military objectives, and at least some of the targeted military objectives were related to the Georgian attack in South Ossetia. Nevertheless, Russian military support for the use of force by Abkhazia against Georgia cannot be justified in this context. The bombing of large parts of the upper Kodori Valley was in no relation to any potential threat for the Russian peacekeepers in South Ossetia

[169] Statement of the Russian representative in the Security Council debate of 10 August 2008 (UN Doc. S/PV.5953), p. 9.

[170] Quoted in the Russian document "Responses to additional questions posited by the European Union fact-finding mission on the events that took place in the Caucasus in August 2008 (legal aspects)."

[171] Security Council debate of 10 August 2008: Statement of the US representative (UN-Doc. S/PV.5953, p.6); statement of the representative of Panama (*ibid.*, p. 15). In the Security Council debate of 19 August 2008: statement of the representative of France (UN-Doc. S/PV.5961, at 6); statement of the US representative (*ibid.*, p. 9).

[172] Statement of the representative of the UK in the Security Council debate of 10 August 2008 (UN-Doc. S/PV.5953), p. 11.

(see below). The same applies to the posting of the ships in the Black Sea. An impartial observer, putting himself in the place of Russia, would not have qualified the Russian reaction as reasonably related to the objective of halting the Georgian attack on the Russian peacekeepers stationed in South Ossetia.

The means employed by Russia were not in a reasonable relationship to the only permissible objective, which was to eliminate the threat for Russian peacekeepers. In any case, much of the destruction (see Chapter 5 "Military Events in 2008") after the conclusion of the ceasefire agreement is not justifiable by any means. According to international law, the Russian military action taken as a whole was therefore neither necessary nor proportionate to protect Russian peacekeepers in South Ossetia.

IV. No justification of Russian use of force as fulfilment of the peacekeeping mission

Russia claimed that both the peacekeeping units and the further reinforcing units "continued to carry out their peacekeeping mission until the European Union Monitoring Mission was deployed in accordance with the "Medvedev-Sarkozy" agreements (…)."[173]

As explained above, peacekeeping units are defensive in nature. They have to be neutral and must not take sides with either of the conflicting parties. They are normally equipped only with light weapons for self-defence; their number is clearly limited.

According to the 1992 Sochi Agreement, the Russian peacekeepers were a part of joint forces "under" the Control Commission (Art. 3(3)). The Joint Control Commission's task was "to exercise control over the implementation of ceasefire, withdrawal of armed formations, disbanding of forces of self-defence and to maintain the regime of security in the region." (Art. 3 (1) of the Sochi Agreement). "In case of violation of provisions of this Agreement, the Control Commission shall carry out investigation of relevant circumstances and undertake urgent measures aimed at restoration of peace and order and non-admission of similar violations in the future." (Art. 5).

These provisions show that any unilateral support for one of the conflicting parties cannot be justified as a peacekeeping mission. Furthermore, it is not possible to combine a peacekeeping task and a military action based on self-defence. The status of a victim of an armed attack is incompatible with the neutral status of a peacekeeper. Whoever is drawn into a conflict can no

[173] Russian Document "Responses to questions on military aspects posed by the IIFFMCGon the events that took place in the Caucasus in August 2008", not paginated, at p. 4.

longer act as peacekeeper.[174] The peacekeeping mission was limited to a small number of lightly armed troops which could not be reinforced or replaced by heavily armed "fresh reinforcement units". Greater use of force was not only against the spirit of the Sochi Agreement, but also against the very idea of peacekeeping.

Conclusion: Russia could not justify its use of force as a mere reinforcement and fulfilment of its peacekeeping mission.

V. No justification of the use of force by invitation of the South Ossetian authorities

Russia argued that it intervened with military means "following a request from the government of South Ossetia".[175] It is very controversial whether such an invitation is in principle apt to legalize an intervention.

1. The special situation of a war of secession

Most historical cases have been civil wars in which two political parties strive to govern and control an *entire* country. The accompanying scholarly debate on intervention upon invitation relates to this type of situation. The case under scrutiny is distinct because initially it was a war of secession. The two competing parties did not fight over the state of Georgia, but only over the control over South Ossetia. This means that the "civil war" scenario was present (only) with regard to one portion of Georgian territory. But because the war of secession was a regionally limited "civil war" over the rule of South Ossetia, the legal concept of intervention upon invitation is in principle applicable with regard to this territory.

In a civil war situation, it is controversial whether one of the competing governments - and if so which - is competent to "invite" a third state and thus can lawfully consent to the third state's use of force. State practice has been chaotic in this field. In scholarship, three legal answers have been suggested.

2. Legal doctrines on "invitation" of foreign support in civil wars

a) Entitlement to invite foreign support only for established government

A first answer was given in traditional writing. This answer relies on a distinction: only the established and internationally recognized government can pronounce an invitation with legal

[174] Direct involvement in a conflict is different from the general problem of the blurring of peacekeeping and peace-enforcement operations in the UN-practice since the 1990s.

[175] See the Russian document "Responses to questions on military aspects posited by the IIFFMCG on the events that took place in the Caucasus in August 2008".

effect.[176] This legal view leads to an asymmetrical situation: military intervention was deemed permissible in support of the established government (in our case the Georgian Government), but not in support of the "rebels" (in our case South Ossetia). It has even been argued that specifically in wars of secession, a third party may lawfully intervene upon invitation of the established government (which would in our case justify intervention in favour of the Georgian Government only).[177] However, state practice does not support this assertion. Third parties have not availed themselves of a right to intervene in any instances of attempted secession solely on the grounds that the government had asked them to intervene and to fight against the seceding parties.[178]

Moreover, this traditional view presents the problem that third states enjoy discretion as to which government to recognize. Different third states may lawfully recognize different pretending governments of the state. If third states could lawfully support the government of their choice by military means, the consequence would be that the prohibition of the use of force (Art. 2(4) of the UN Charter) would not apply at all to civil wars with foreign intervention. This consequence is undesirable.[179]

b) New doctrine: the inadmissibility of military intervention in a civil war or secession war

To avoid undesirable consequences, the most recent trend in scholarship is to acknowledge that in a state of civil war, none of the competing fractions can be said to be effective, stable, and legitimate. Therefore, it is argued that the principle of non-intervention and respect of the international right to self-determination[180] renders inadmissible any type of foreign intervention, be it upon invitation of the previous "old" government or of the rebels. Any

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[176] ICJ, *Nicaragua* (*Merits*) (above note 7), para. 246. See in scholarship: Georg Nolte, *Eingreifen auf Einladung: Zur völkerrechtlichen Zulässigkeit des Einsatzes fremder Truppen im internen Konflikt auf Einladung der Regierung* (Berlin: Springer 1999), pp. 219 and 604-5; *ibid*., "Secession and External Intervention", in Marcelo Kohen (ed) *Secession – International Law Perspectives* (Cambridge University Press 2006), 65-93.

[177] Nolte, *Eingreifen auf Einladung* (above note 176), p. 576.

[178] See Corten, *Le droit contre la guerre* (above note 6), p. 480 with references.

[179] Randelzhofer, Article 2(4) (above note 41), para. 30.

[180] This argument can be based on the wording of Article 2(4) UN Charter, which says that use of force "inconsistent with the purposes of the United Nations" is prohibited. One of the purposes of the UN is to develop respect for the self-determination of peoples (Article 1(2) UN Charter). The international right to self-determination is incumbent on peoples, and not on governments or on competing fractions aspiring to become or remain the government of the country. If in a civil war none of the warring factions clearly represents the state's people, the principle of self-determination mandates abstaining from intervention, because such an intervention would interfere with the people's right to self-determination (Corten, *Le droit contre la guerre* (above note 6), pp. 448-9). This reasoning applies to South Ossetia, where two peoples are involved with competing self-determination claims.

taking of sides and intervention in civil law is in that perspective forbidden. This reasoning leads to the conclusion that a military intervention by a third state in a state torn by civil war will always remain an illegal use of force, which cannot be justified by an invitation (doctrine of negative equality).[181]

c) Invitation by both sides allowed after territorial stabilisation?

Given the fact that past state practice has provided no conclusive guidance, it could be argued that no international legal prohibition of intervention has crystallised, so that intervention on either side of a civil war (or war of secession) is allowed (doctrine of positive equality). But the ICJ has rejected this solution: "The Court therefore finds that *no such general right of intervention, in support of an opposition* within another State, exists in contemporary international law. (…) Indeed, it is difficult to see what would remain of the principle of non-intervention in international law, if intervention, which is already permissible at the request of a government of a State, were also to be allowed at the request of the opposition."[182]

However, an important strand of scholarship supports the doctrine of positive equality from that moment on when in an internal war the control of the state's territory is divided between warring parties.[183] The argument is that these situations resemble an inter-state war, and therefore both sides must be allowed to ask for foreign support. That condition is fulfilled in the case under scrutiny, because the territory of Georgia was already clearly divided and the two sides had territorial control over different parts of the territory before August 2008. Only if the doctrine of positive equality were to be applied (which is, however, not recommended as will be explained below), could South Ossetia have invited Russia to intervene and thereby could have created a legally valid permissibility to intervene with military means and to apply military force (at least within the territory of South Ossetia).

[181] Association de droit international, "The Principle of Non-Intervention in Civil Wars", Resolution (eighth Commission) of 14 August 1975 (in: Institut de Droit International, Annuaire (AIDI) 56 (1975), pp. 544-549). However, this resolution explicitly does not apply to "armed conflicts between political entities which are separated by an international demarcation line or which have existed *de facto* as states over a prolonged period of time, or conflicts between any such entity and a state" (Art. 1(2) lit b)) – and this is exactly our case. See also Gray, *Use of Force* (above note 54), p. 81 for a reference to a UK policy document of 1984 endorsing this position. See in this sense also Kolb, *Ius contra bellum* (above note 30), p. 328. Randelzhofer, Article 2(4) (above note 41), para. 31 seems to lean towards this solution, although he is uncertain whether it really conforms to the law as it stands.

[182] ICJ, *Nicaragua* (*Merits*), (above note 7), paras 209 and 246 (emphasis added).

[183] Gray, *Use of Force* (above note 54), p. 81.

3. No valid invitation by South Ossetia

One argument against the permissibility of an invitation extended to Russia by South Ossetia is that even if this political entity has a right to self-determination, it is not entitled to use force to exercise this right.

Military force is never admissible as a means to carry out a claim to self-determination, including internal self-determination. There is no support in state practice for the right to use force to attain self-determination outside the context of decolonization or illegal occupation. Still less is there support by states for the right of ethnic groups to use force to secede from existing states.[184] This means that the use of force by secessionist groups is in any case illegal under international law, even assuming that a right to secede exists. The general rule is that South Ossetian authorities and armed forces were not themselves entitled to use force in order to attain self-determination. This also means that a secessionist party cannot validly invite a foreign state to use force against the army of the metropolitan state.

In any case, even if one were to accept the academic opinion that the South Ossetian authorities were in principle competent to invite the Russian intervention on the grounds of the international right to (internal) self-determination, they were not competent to authorize intervention in the whole of Georgia. The use of force within the territory of Georgia beyond the administrative boundaries of South Ossetia cannot be justified by "invitation", whatever position is taken in the doctrinal debate.

4. Discussion and conclusions: no permissible invitation by South Ossetia

The doctrine of positive equality, even if it is limited to situations of stable territorial control, condones the escalation of military force and is therefore not in conformity with the objectives and principles of the United Nations. It is very open to abuse.

In contrast, the legal solution to prohibit intervention in a civil war or a war of secession (doctrine of negative equality) is prudent from a policy perspective, because it removes the pretext of "invitation" relied on by third states in order to camouflage interventions motivated by their own policy objectives. This solution is also more operational and practical than the contrary one, because it relieves lawyers of the difficult task of identifying and proving a valid invitation. Finally, state practice rather seems to confirm the legal solution. In many

[184] *Ibid*., p. 64.

historical cases, states have condemned and declared inadmissible interventions supposedly conducted upon invitation.

To conclude, both under the doctrine of asymmetry and under the new doctrine of negative equality concerning intervention in a civil war, the South Ossetian authorities could *not* validly invite Russia to support them by military means. This conclusion is corroborated by the argument that secession may never be lawfully carried out by military means, even if it were justified under exceptional circumstances, which is not the case here. And if the seceding party is prohibited from the use of force, it must also be prohibited from inviting third states to use military force. This means that the use of force by Russian troops in the territory under control of South Ossetian armed forces and authorities was not justified by the invitation.

VI. No justification of the use of force by collective self-defence

Sergey Lavrov, Foreign Minister of the Russian Federation, spoke on 27 Sept. 2008 at the 63rd session of the UN General Assembly. He described the Russian objectives of the military action in Georgia as follows: "*Russia helped South Ossetia to repel aggression*, and carried out its duty to protect its citizens and fulfil its peacekeeping commitments."[185] He thereby claimed that Russia relied on collective self-defence, defending South Ossetia against an armed attack by Georgia.

Art. 51 of the UN Charter expressly speaks of "collective" self-defence. Collective self-defence in favour of South Ossetia presupposes that there was an armed attack on South Ossetia and that South Ossetia at least implicitly and covertly requested Russian help. As explained above, South Ossetia had a right to self-defence under Art. 51 of the UN Charter against the Georgian operation starting on 7 August 2008.

1. Request for help by South Ossetia

The consent of the attacked entity (in this case South Ossetia) is a pre-condition for collective self-defence against military operations by the intervening military power (in this case Russia) in its own territory. Consent manifests itself in the declaration of an armed attack, and the attacked party's request for help addressed to the third state (Russia). Normally such a declaration and request are made in state practice.

[185] Emphasis added.

Some authors opine that no collective defence is possible if the state which deems itself a victim of an armed attack has not requested help.[186] According to this opinion, Russia would have to await a call for help from the entity it purportedly sought to assist *before* its additional troops were allowed to enter Georgian territory. (These troops numbered above the threshold allowed under the Sochi Agreement.)

But the prevailing opinion is that such a request can also be informal and implicit. An explicit and express declaration of the victim state (or entity, in this case South Ossetia) that it deems itself the victim of an armed attack is not a formal condition of the legality of collective self-defence.[187] The International Court seems not to consider a declaration and request as a legal condition.[188] The ICJ merely takes the absence of such a declaration and request as a confirmation that there had been no armed attack.[189] To sum up, a formal request is only one factor to be taken into account in the assessment of the legal grounds for collective self-defence: it is not a *conditio sine qua non.*[190]

The South Ossetian authorities requested formal assistance from Russia only at 11:00 on 8 August 2008.[191] However, according to the prevailing opinion as discussed above, an implicit previous request for help would have been sufficient.

To conclude, the three requirements for collective self-defence, namely an armed attack on South Ossetia, South Ossetia's consent to supportive military activity within the territory under South Ossetian control, and a request for help, however informal, addressed to Russia by South Ossetia, were probably met. But this does not yet resolve the issue.

2. No collective self-defence through intervention of a third state

Even if self-defence by an entity short of statehood were allowed (which is highly controversial, as shown above), this does not inevitably mean that Russia could rely on collective self-defence as well. The fact that Russia also signed the 1996 Memorandum as a

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[186] Antonio Cassese in Jean-Pierre Cot, Alain Pellet and Mathias Forteau, *La Charte des Nations Unies: Commentaire article par article* (3rd edn, Paris: Economica 2005), Art. 51, p. 1354; Dinstein, *War* (above note 55), pp. 268-70.

[187] Randelzhofer, Article 51 (above note 87), para. 38.

[188] ICJ, *Nicaragua* (*Merits*) (above note 7), paras 195 and 199. This judgment has been understood by some authors to require a declaration and request as a necessary condition of self-defence. Also the Oil Platform judgment has been understood to mean that a request by the state that considers itself a victim of an armed attack is a precondition for reliance on collective self- defence (ICJ, *Oil Platforms* (above note 62), para. 51).

[189] See the discussion in Gray, *Use of Force* (above note 54), pp. 185-86.

[190] *Ibid*., p. 186.

[191] See Chapter 5 "Military Events of 2006".

mediator does not *per se* entitle it to defend South Ossetia because a mediator's role is to facilitate the resolution of conflicts by peaceful, not military, means. The involvement of Russia in the open hostilities is a specific question which, in scholarship, is mostly discussed under the heading "intervention upon invitation". Scholarship and state practice show that a third state is not allowed to intervene in a war of secession upon invitation of and in support of "rebels" (see above).

In practice, collective self-defence overlaps with military intervention upon invitation. In doctrinal terms, the two concepts are distinct, but the legal evaluation of a situation must be parallel and come to an identical result, independently of the legal heading under which the situation is assessed, for the following reason: the inadmissibility of an intervention upon invitation by the South Ossetian *de facto* Government would be undermined by allowing collective self-defence in favour of South Ossetia. Therefore, in order not to create a self-contradictory legal regime, both potential grounds of intervention must be assessed identically.

It is not inconsistent to allow an entity short of statehood to defend itself against armed attacks, while at the same time limiting its right to "invite" foreign support. Individual self-defence and collective self-defence are not logically linked, especially where the right to individual self-defence flows, as here, not unequivocally from Charter law or customary law, but mainly or even exclusively from the special treaties between the sides. The right to individual self-defence is a necessary counterpart to the prohibition on the use of force. If South Ossetia is bound to refrain from the use of force, it must in consequence also be entitled to defend itself. These two concomitant rules serve to appease the conflict. It is another question whether military intervention in the form of collective self-defence is allowed. Such a right would not de-escalate, but escalate the conflict and therefore run counter to the objectives of the United Nations.

The conclusion is that, although South Ossetia could rely on unilateral self-defence in order to repel Georgian attacks, collective self-defence was not allowed.

3. Necessity and proportionality

Even if it were admitted that collective self-defence was possible in favour of South Ossetia, Russian collective self-defence would still have to be necessary and proportionate.

Proportionality means a reasonable and fair relationship between the means employed and the objective pursued.[192]

The Russian objective in pursuing collective self-defence in protection of South Ossetia differed from the objective to defend its own peacekeepers in individual self-defence. The legitimate objective of collective self-defence was to bring to a halt the Georgian attack on South Ossetia. However, according to the criteria and factors set out above, the Russian reaction was disproportionate to this objective as well.

4. Conclusions

Russian military activities against the Georgian military forces were not justified as collective self-defence under international law.

VII. No justification of the use of force as "humanitarian intervention"

Russia did not explicitly claim a "humanitarian intervention". However, President Medvedev pointed out in his statement on the situation in South Ossetia on 8 August 2008 that "Russia has historically been a guarantor of the security of the peoples of the Caucasus, and this remains true today." He also pointed out that "[c]ivilians, children, and old people, are dying today in South Ossetia".[193] Also, the frequent Russian use of the term "responsibility to protect" has some overlap with the new international concept of a responsibility to protect, which relates to the protection of populations independent of their nationality. With these statements, the question of a humanitarian intervention has at least implicitly been raised by Russia.

Humanitarian intervention means a coercive, notably military action across state borders by a state or a group of states aimed at preventing or ending widespread and grave violations of human rights of individuals other than its own citizens, without the permission of the state in whose territory force is applied.[194] While this scholarly definition is clear, the entire debate on humanitarian intervention often does not distinguish between the protection of own nationals and the protection of people of a different nationality. The term is frequently used to designate military interventions with the objective of preventing or terminating human rights violations, independently of the victims' nationality.

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[192] See text in Footnotes 75-76.

[193] Available at the President of Russia: official web portal. http://president.kremlin.ru/eng/speeches/2008/08/08/1553_type82912type82913_205032.shtml.

[194] Judith L. Holzgrefe, "The Humanitarian Intervention Debate", in Robert Keohane and Judith Holzgrefe (eds), *Humanitarian Intervention* (Cambridge University Press 2003), 15, p. 18.

Under international law as it stands, humanitarian interventions are in principle not admissible and remain illegal. The intense scholarly and inter-state debate in the aftermath of NATO's Kosovo intervention of 1999 has not yet led to a development of international law in favour of unilateral humanitarian interventions without a Security Council mandate.[195] State practice and *opinio iuris* do not support the claims scholars have made in favour of a rule on humanitarian intervention without a Security Council mandate, and the law has not developed in the direction of the experts' proposals, however morally desirable such a rule might be. The cautious endorsement of the concept of "responsibility to protect" by international actors barely affected the law on unilateral interventions, because the "responsibility to protect" was quickly limited to UN-authorized operations. So the potentially emerging international principle of a "responsibility to protect" only allows humanitarian actions authorized by the Security Council, (if at all).[196]

Moreover, Russia has consistently and persistently objected to the justification of NATO's Kosovo intervention as a humanitarian intervention. It is therefore estopped from invoking this very justification for its own intervention. And as a directly neighbouring state, Russia has geostrategic interests in South Ossetia. In such a constellation with dominant geostrategic considerations, humanitarian interventions are not permitted.[197]

Even some proponents of a right to humanitarian intervention admit that one condition of the legality of such an intervention would be a collective action, based on deliberations among a group of states, such as within NATO.[198] A unilateral intervention decided upon by one single state would not meet this procedural criterion of legality.

To conclude, the Russian use of force cannot be justified as a humanitarian intervention.

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[195] Simon Chesterman, *Just War or Just Peace? Humanitarian Intervention and International Law* (Oxford University Press 2001), esp. p. 226.

[196] 'A more secure world: our shared responsibility', Report of the High-level Panel on Threats, Challenges and Change of 2 December 2004 (UN-Doc. A759/565), para. 203; Resolution adopted by the General Assembly, World Summit Outcome, UN-Doc. A/RES/60/1 of 24 October 2005, para. 139.

[197] European Parliament, "Right to Intervention on Humanitarian Grounds", Res. A3-0227/94 of 20 April 1994, para. I 10 d) (OJ 1994 C 128, 225, at 227).

[198] Jost Delbrück, "Effektivität des UN-Gewaltverbots – Bedarf es einer Modifikation der Reichweite des Art. 2(4) UN-Charta?" *Die Friedens-Warte* 74 (1999), 139-158, p. 153; Walter Kälin, "Humanitäre Intervention: Legitimation durch Verfahren? Zehn Thesen zur Kosovo-Krise", *SZIER* 10 (2000), 159-176, p. 170.

VIII. No justification of the use of force as action to rescue and protect nationals abroad

1. Invocation by the Russian Federation

The Russian Federation invoked the need to protect Russian citizens abroad. Under Art. 61(2) of the Russian Constitution of 12 Dec 1993, "[t]he Russian Federation guarantees its citizens defence and patronage beyond its boundaries." On 8 August 2008, in a statement on the situation in South Ossetia, President Medvedev said: "Last night, Georgian troops committed what amounts to an act of aggression against Russian peacekeepers and the civilian population in South Ossetia. (...) Georgia's acts have caused loss of life, including among Russian peacekeepers. (…) In accordance with the Constitution and the federal laws, as President of the Russian Federation it is my duty to protect the lives and dignity of Russian citizens wherever they may be."[199]

Foreign Minister Lavrov stated on 9 August, 2008: "According to our Constitution there is also a responsibility to protect … This is an area where Russian citizens live. So the Constitution of the Russian Federation, the laws of the Russian Federation make it absolutely unavoidable to us to exercise responsibility to protect."[200]

2. State practice

The question is whether the protection of nationals abroad can justify a military operation. Since 1945, numerous states have led military actions on the grounds of the need to protect and rescue their own nationals abroad; but these interventions were often used only as a pretext for masking other objectives such as the overthrow of a government.[201] And no international court or tribunal has pronounced on the question whether the objective to protect and rescue own nationals abroad can constitute a justification for the use of military force, and

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[199] Available at the President of Russia: official web portal. http://president.kremlin.ru/eng/speeches/2008/08/08/1553_type82912type82913_205032.shtml. Also on 31 August 2008, President Medvedev stated: "[P]rotecting the lives and dignity of our citizens, wherever they may be, is an unquestionable priority for our country." Interview given by President Medvedev to Television Channel One, Rossia NTV, Sochi, August 31, 2008, posted on the official web portal of the President of Russia. See also Russian document "Responses to questions on military aspects posited by the IIFFMCG on the events that took place in the Caucasus in August 2008" (submitted to the Mission on 8 July 2009), not paginated, referring to Article 61 of the Constitution of the Russian Federation.

[200] Interview of Minister of Foreign Affairs of the Russian Federation. Sergey Lavrov. by BBC, Moscow, 9 August 2008, available at Ministry of Foreign Affairs of the Russian Federation, Information and Press Department, http://www.ln.mid.ru/brp_4.nsf/e78a48070f128a7b43256999005bcbb3/f87a3fb7a7f669ebc32574a100262597?

[201] See Gray, *Use of Force* (above note 54), at 88-92 on state practice; Kolb, *Ius contra bellum* (above note 30), pp. 317-320 on doctrinal arguments.

if so, under what conditions. In diplomatic practice, these actions have been followed normally by rather mild condemnations, or have even met with approval.[202]

3. No stand-alone customary law exception to the prohibition of the use of force

Some scholars have argued that there is a customary law entitlement to rescue own nationals abroad. However, state practice and *opinio iuris* do not support a specific right to intervention in order to protect or rescue own nationals abroad as an independent legal title in itself. On the contrary, states have consistently rejected such a specific title to intervention. Those states which did undertake such actions in order to protect or rescue their nationals always relied on other grounds to justify their behaviour, e.g. on self-defence (see also below).[203] Therefore, no specific customary law entitlement to protect or rescue own nationals abroad exists.[204]

Such operations could therefore only be justified under a different legal heading. Here it is crucial to distinguish between full-scale interventions involving the occupation of territory from strictly limited and focused "Blitz"-type actions.[205] If at all, only "Blitz"-type actions might be justified under international law. A "Blitz"-type action is legal if it does not fall under the scope of the prohibition on the use of force, because it remains below the threshold of gravity, and/or because it is not "directed against the territorial integrity or political independence" of a state, as formulated in Art. 2(4) of the UN Charter.

But as soon as a rescue operation exceeds a minimum intensity and thus falls within the scope of Art. 2(4), the protection of own nationals does not, according to the prevailing opinion of writers, constitute an autonomous, additional justification for the use of force. There is probably not one single instance in state practice where a state invoked an independent, stand-alone entitlement to rescue its nationals, without relying on one of the classic grounds of justification.[206] In state practice, none of the arguments advanced by states in order to justify military interventions in favour of their nationals has been accepted by the entire community

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[202] The best known case is the Entebbe incident of 1976. Here an Israeli special military unit conducted a rescue action at Entebbe airport in Uganda in order to liberate Israeli air passengers who had been taken hostage by Palestinian terrorists. Another example is the evacuation of 120 persons, among them 20 Germans, from the Albanian capital Tirana in 1997 by German military helicopters. Both incidents were limited in scope and were not condemned by the majority of states.

[203] See Corten, *Le droit contre la guerre* (above note 6), pp. 803-04 with extensive reference to state practice.

[204] Randelzhofer, Article 2(4) (above note 41), paras 59-60; Corten, *Le droit contre la guerre* (above note 6), p. 792.

[205] As in the Entebbe incident (above note 202).

[206] Corten, *Le droit contre la guerre* (above note 6), pp. 788 and 803. For instance, Israel relied on Article 51 of the UN Charter to justify the Entebbe action (UN-Doc S/PV.1939 of 9 July 1976, repr in ILM 15 (1976), pp. 1228-1231). But see in scholarship Robert Kolb, admitting a "soft" entitlement under very restrictive conditions (Kolb, *Ius contra bellum* (above note 30), p. 318).

of states. The prevailing reactions were rather reprobation, e.g. in the case of the Congo, Grenada and Panama.[207] From a policy perspective, the danger of abuse counsels against generous acceptance of such a principle. To conclude, the protection of nationals abroad does not constitute an independent exception to the prohibition of the use of force, and therefore does not provide a legal basis justifying a military intervention.[208]

4. Rescuing Russians as a case of self-defence?

Sergey Lavrov, Foreign Minister of the Russian Federation, said before the Parliamentary Assembly of the Council of Europe: "Protection of Russian citizens abroad, who stay in the territory of South Ossetia on a legal basis, *is a ground for the right to self-defence*."[209]

Antonio Cassese has argued that the current state of international relations, with its multiplicity of civil wars which endanger the life of foreign residents, justifies an extensive interpretation of Art. 51 of the UN Charter. He suggests that the Charter has not abolished the more ancient customary entitlement to use military force abroad in order to rescue own nationals from extreme danger, which had been notably asserted after the First World War. Cassese then finds that this old entitlement can be subsumed under Art. 51 if a number of very strict conditions are met. They are as follows: there must be a very serious danger for the nationals, no peaceful other means are available, the use of force must be strictly proportionate to the danger, the use of force must be immediately terminated when nationals have been rescued, the Security Council must be notified, and reparations must be awarded to victims.[210]

The basic argument here is that putting in danger and violating the rights of a state's nationals equals an "armed attack" on those nationals. According to one possible but unconvincing argument, because nationals constitute one element of statehood, an "armed attack" on nationals must be treated as analogous to an armed attack on territory and is therefore apt to trigger self-defence.

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[207] Corten, *Le droit contre la guerre* (above note 6), p. 791, with references. But see Gray, *Use of Force* (above note 54), p. 159: It seems as if third states are willing to acquiesce in the forcible evacuation of nationals.

[208] Dinstein, *War* (above note 55), p. 201; Corten, *Le droit contre la guerre* (above note 6), p. 792.

[209] CoE, PA, 2009 ordinary sess., report, fifth sitting, 28 January 2009, Add. 2 (emphasis added). Lavrov also stated: "Russia resorted to the inalienable right to self-defence in the first place because of Georgia's attacks on its peacekeepers – on the armed forces of the Russian Federation."

[210] Cassese in Cot/Pellet/Forteau (above note 186), Art. 51, p. 1350. Similar criteria have been formulated by other authorities, beginning with the legal advisor to the UK, for justifying the rescue of British citizens in the Suez crisis in 1956. See the references in Gray, *Use of Force* (above note 54), p. 158.

This analogy is not convincing, because putting in danger or even killing a limited number of persons is not comparable in intensity to an attack on the other state's territory. Unlike an attack on territory, attacking members of the nation is not apt to jeopardize the independence or existence of the state. The better view therefore is that self-defence can therefore not be invoked on the grounds of attacks on Russian nationals in Georgia.

5. Application to this specific case

Even if it were accepted that a Georgian attack on Russian citizens were in principle apt to constitute a case of self-defence, the legal conditions for self-defence were not met in the case at hand.

First of all, the Russian intervention in Georgia was not limited to a "Blitz"-type action and was not solely focused on rescuing and evacuating Russian citizens. Its intensity surpassed the minimum threshold of intensity required by Art. 2(4) of the UN Charter. It cannot be said that the military action was not "directed against the territorial integrity or political independence" of Georgia, because it did support the territorial separation of South Ossetia.

The constitutional obligation to protect Russian nationals (Art. 61(2) of the Russian constitution, quoted above) cannot serve as a justification for intervention under international law. Domestic law can in principle not be invoked as a justification for a breach of an international legal rule.[211] At most, domestic constitutional law could be invoked as a defence against obligations imposed on a state by international law if those obligations contradict core elements of the national constitution. But this situation is not present here, because Art. 61(2) is not a basic principle of Russian constitutional law, which would be constitutive of Russian constitutional identity. Moreover, it is not clear that this provision required Russian authorities to take military action. Russia cannot argue that the international legal obligation to refrain from intervening in Georgia violates a core principle of its constitution.

Furthermore, a distinction must be drawn between those citizens who have possessed Russian citizenship for a long time, and those citizens who have only recently acquired Russian citizenship in the course of the broad Russian policy to confer Russian nationality in a simplified procedure (see Chapter 3 "Related Legal Issues"). With regard to this latter group of "new" Russians, it seems abusive to rely on their need for protection as a reason for intervention, because Russia itself has created this reason for intervention through its own

[211] *Cf.* with regard to the observation and respect of international treaties Art. 26 VCLT.

policy.[212] This is especially the case if an effective or genuine link between Russia and those new citizens is lacking. Although the conferral of citizenship and nationality lies in the *domaine reservé* of states, citizenship will be recognized by international law for the purpose of diplomatic protection only if there is a sufficiently genuine link between the persons concerned and the state. Put differently, a state is entitled to exercise diplomatic protection only for those "genuine" citizens. The ICJ has in the *Nottebohm* case described the genuine link "with regard to the exercise of protection" as follows: preference must be given "to the real and effective nationality, that which accorded with the facts that based on stronger factual ties between the person concerned and one of the States whose nationality is involved. Different factors are taken into consideration, and their importance will vary from one case to the next: the habitual residence of the individual concerned is an important factor, but there are other factors such as the centre of his interests, his family ties, his participation in public life, attachment shown by him for a given country and inculcated in his children, etc."[213]

This rather strict requirement also applies to other types of protective activity abroad, including military protection.[214] Because this type of protective action is – contrary to diplomatic action – controversial in itself, the requirements concerning the relationship between the protecting state and the protected persons must arguably be even closer. With regard to most citizens living in South Ossetia, a genuine link in the sense just described is obviously lacking (see above Chapter 3 "Related Legal Issues").

In conclusion, the Russian intervention in Georgia cannot be justified as a rescue operation for Russian nationals in Georgia.

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[212] *Cf.* Angelika Nußberger, "Völkerrecht im Kaukasus", *Europäische Grundrechte-Zeitschrift* 35 (2008), pp. 457-466, p. 465.

[213] ICJ, *Nottebohm Case (second phase)* (*Liechtenstein v. Guatemala*), ICJ Reports 1955, p. 22.

[214] It must be noted that diplomatic protection can only be exercised by peaceful means. The possibility of "diplomatic" protection by military means had been initially proposed by the Special Rapporteur in the International Law Commission, but was clearly rejected. See ILC Report 58th session, 1 May-9 June, 3 July-11 August 2006, A/61/10, para. 8 p. 27 "The use of force, prohibited by Article 2, paragraph 4, of the Charter of the United Nations, is not a permissible method for the enforcement of the right of diplomatic protection."

Part 5: Use of force in Abkhazia

I. Facts

In the morning of 9 August 2008 Abkhaz authorities demanded UNOMIG to leave Upper Abkhazia; UNOMIG left the area. This was a clear indication that a military operation in the Kodori Valley was imminent.

According to the Georgian account, between 13:40 and 14:40, Russian military aircraft bombed the villages controlled by the central government in the upper Kodori Valley. At 15:50 the Abkhaz *de facto* Government announced that it had decided to send its armed forces towards the administrative border and to start a military operation. On 10 August at 17:40, the Abkhaz *de facto* President Sergey Bagapsh declared mobilisation and martial law on the territory of Abkhazia. By 18:30 Russian troops and Abkhaz militia were deployed along the administrative border at the Inguri River, and the Kodori Valley was bombed by artillery and aircraft. On 11 August Russian troops and Abkhaz militia reportedly started to occupy villages in the upper Kodori Valley. The civilian population had been evacuated.[215]

According to the Abkhaz side, air attacks started on 9 August at 14:30.[216] The Abkhaz views submitted to the Fact-Finding Mission note that "the operation in the gorge was carried out by the Armed Forces of the Abkhaz Republic without any outside assistance and was confined strictly to the territory of the Republic of Abkhazia."[217]

According to the Russian side, on 9 August 2009 "by 18:00 the Armed Forces of Abkhazia augmented their troup presence in the area designated as a CIS peacekeeping force observation post (NP No. 107) in order to carry out an operation in the Kodori gorge. During the night of 9 to 10 August 2008, units of the Abkhaz Armed Forces conducted a raid along the southern bank of the Inguri River to identify any Georgian military presence." Further it is stated that "the Abkhaz troops aided by the airborne battalion task force undertook a sequence of actions and occupied the Kodori Valley virtually without encountering any resistance."[218]

As a matter of fact, most ethnic Georgians left the upper Kodori Valley. The territory was occupied by Abkhaz forces, supported by Russian paratroopers.

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[215] Document "Major hostile actions by the Russian Federation against Georgia in 2004-2007", p. 9 et seq.

[216] Document "Sources and reasons for what happened in August 2008. View from the Abkhaz side", p. 9 (translation from Russian).

[217] Document "Views of the sides on the armed conflict and the legality of the use of force", p. 10.

[218] Russian document "Responses to questions on military aspects posited by the IIFFMCG on the events that took place in the Caucasus in August 2008" (submitted to the Mission on 8 July 2009), not paginated.

II. Legal qualification of the Abkhaz and Russian offensive: violation of the prohibition of the use of force and armed attack on Georgia

As explained in Chapter 3, Abkhazia is a state-like entity. The prohibition of the use of force is applicable. This is also explicitly confirmed by the 1994 Moscow Agreement (Agreement on a ceasefire and separation of forces) which states: "The parties shall scrupulously observe the ceasefire on land, at sea and in the air and shall refrain from all military operations against each other."[219]

Although there was no clear ceasefire line in the Kodori Valley, the upper Kodori Valley did not belong to Abkhaz-controlled territory under the provisions of the Moscow Agreement. The attack on the upper Kodori Valley by Abkhaz troops supported by paratroopers must therefore be qualified as use of force prohibited by Art. 2(4) of the Charter and moreover as an "armed attack" on Georgia in the sense of Art. 51 of the UN Charter.[220]

III. Legal qualification of the Georgian operation: self-defence

The military operation in the upper Kodori Valley was, for the reasons just explained, an armed attack on Georgia. The use of force by Georgia was justified as self-defence.

IV. No justification of the Abkhaz and Russian use of force against Georgia

1. Argumentation by Abkhazia and Russia

The Abkhaz side gives basically four explanations for the use of force. First, Abkhazia claimed that the operation was "launched to liberate the Kodori Gorge."[221]

Second, Abkhazia claimed that military action was necessary to counter terrorist attacks. Thus in the context of explaining why refugees were prevented from returning it was stated: "Shortly before the events of August the Georgian special services carried out a series of terrorist attacks in Abkhaz cities, targeting the civilian population. Innocent people suffered as

[219] Agreement on a ceasefire and separation of forces, signed on 14 May 1994 in Moscow.

[220] *Cf.* Article 3(a), (b), and (d) Resolution 3314.

[221] "Replies to questions on legal issues related to the event of last August", document prepared by the Republic of Abkhazia Ministry of Foreign Affairs for subsequent submission to the Fact-Finding Mission on the events that took place in August in the Caucasus, not paginated, answer 8, at p. 8. This idea is repeated by Abkhazia in the document "The Abkhaz view (A brief Account of August 2008 Events): "… that it was only after Georgia's military operation against South Ossetia that the decision was taken to recapture (liberate) this bridgehead that could at any moment be used against Abkhazia." Document "Views of the sides on the armed conflict and the legality of the use of force" at p. 10.

a consequence and on 6 July 2008, a terrorist attack in the city of Gali caused the deaths of four people and serious injuries to several others."[222]

Third, Abkhazia claimed self-defence against an imminent threat of Georgian attack. In this respect, the official explanation in the address given by *de facto* President Bagapsh on 9 August at 13:00 is the following: "In connection with military provocations that took place in the security zone last night, with the shooting at Abkhaz posts by the Georgian side we have taken the decision to lead subdivisions of the Abkhaz army into the region of Gali, into the zone of collective responsibility of peacekeeping forces. The Commander of the peacekeepers and the UN Mission have been informed about all our actions. Clearly knowing that in this way Abkhazia violates the Moscow Agreement, with the full understanding that this is a violation of the Moscow Agreement, we have nevertheless taken this decision, because there was no other solution. I repeat once more that our actions are absolutely justified; their aim is to ensure the security of the people, the Abkhaz State."[223] The introduction of the state of war has been explained as follows: "In connection with the armed attack of Georgia against South Ossetia, and also with the direct threat of an aggression by Georgia against the Republic of Abkhazia …".[224]

Fourth, Abkhazia argues that it was obliged "to open a second front" in order to distract the Georgian forces from South Ossetia. This purported obligation was derived from the Treaty on Friendship and Cooperation between the Republic of Abkhazia and the Republic of South Ossetia, concluded on 19 September 2005.

The justification given by the Russian side is the following: "Despite the fact that the Georgian side never attacked Abkhazia, the deployment of additional Russian troops in the territory was necessary since there were compelling reasons to believe that an attack of some size was to be launched against Abkhazia once the Ossetian issue was resolved. The

[222] "Replies to questions on legal issues related to the event of last August", document prepared by the *de facto* Ministry of Foreign Affairs of the Republic of Abkhazia for subsequent submission to the IIFFMCG on the events that took place in August in the Caucasus, not paginated, at p. 6.

[223] "Sources and reasons for what happened in August 2008". View from the Abkhaz side ("putting together political and military aspects", subheading "Chronology of the events", "prepared by the MID RA (Ministry of Foreign Affairs of the Republic of Abkhazia) together with the Ministry of Defence and the SGB RA for the presentation to the International Commission of Inquiry on the events in the Caucasus in August", p. 9, quote under the subheading "9 August 2008", at p. 9 (unofficial translation).

[224] *Ibid*., under the heading "10 August", at p. 9 (unofficial translation).

assumption that Georgia harboured such plans was confirmed by the information gathered by Russian and Abkhaz intelligence services."[225]

All these arguments can constitute a legally permissible justification only to the extent that they point to an armed attack by Georgia on Abkhazia. Only in the event of an armed attack by Georgia (which was not present, as will be shown), could Abkhazia have relied on self-defence.

Russian involvement could not be justified as collective self-defence in favour of Abkhazia, because third-party involvement in an internal military conflict in support of the seceding party is not allowed for the reasons explained above.

2. No previous "armed attack" by Georgia

a) No Georgian military operation in the Kodori Valley by Georgia

Abkhazia argues that it had to "liberate" the Kodori Valley. This refers to a Georgian operation or military occupation of Abkhaz territory. Such action might qualify as "aggression" in the sense of Art. 3(a) Resolution 3314, and therefore also as an armed attack in the sense of Art. 51 of the UN Charter.

Yet, even if Abkhazia shows all characteristics of a state-like entity, it had no right to secession under international law (see Chapter 3 "Related Legal Issues"). Abkhazia had no legal title to that territory. This also follows from the Moscow Agreement under which the Kodori Valley falls outside the jurisdiction of Abkhazia.

Conclusions: For these reasons, the presence of Georgian police or military in the Kodori Valley cannot be considered as an armed attack on Abkhazia.

b) No preceding terrorist attacks sponsored by Georgia

The Abkhaz military operation cannot be justified by alleged earlier terrorist attacks attributable to Georgia either. The involvement of Georgia could not be confirmed by UNOMIG.

c) No imminent armed attack on Abkhazia as a whole by Georgia

As explained above, it is very controversial whether an imminent attack confers the right to self-defence. In any case, Abkhazia cannot claim that a Georgian attack on Abkhazia as a

[225] Russian Document "Responses to additional questions posited by the IIFFMCG on the events that took place in the Caucasus in August 2008 (legal aspects)", not paginated, at p. 1-2.

whole was imminent. When the Abkhaz operation in the Kodori Valley started with Russian support, the Georgian troops were already “on the run”. Even if there had been a Georgian plan to attack Abkhazia, it was evident that on 9 August 2008 no such attack was “imminent” or even feasible. International law does not allow self-defence against putative attacks or attacks that might have been planned, but were never carried out.

3. Military support by Abkhazia for South Ossetia

As explained above, neither collective defence nor the principle of intervention upon invitation legally justified the Russian military support of South Ossetia. Abkhazia’s military actions were not even supportive of South Ossetia, but aimed at conquering additional territory. Therefore they cannot be justified as collective self-defence in support of South Ossetia.

4. Conclusion

The use of force by Abkhazia was not justified under international law and was thus illegal. The same applies to the Russian support for Abkhaz use of force.

Chapter 7

International Humanitarian Law and Human Rights Law

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I. Introduction

This chapter follows a structure based on thematic issues and notions derived from HRL, IHL and the law on IDPs. While the primary task is to establish facts relating to the origins and course of the conflict, there are two main reasons for the choice of a framework that is not merely narrative and descriptive. First, the mandate of the mission refers to international law, IHL and HRL and accusations made in the context of the conflict, including war crimes. Also, given that the task required is to provide a legal assessment of those facts, the proposed structure prevents repetition between the section on facts and the one on legal analysis.

Taking the above remarks into account, this chapter proceeds first with a brief overview of the applicable international law. Next it seeks to present, thematically, the main facts relating to the armed conflict between Russia and Georgia and its aftermath, examining them from the points of view of IHL and HRL, within the scope as described earlier. For each of the thematic issues the main substantive rules applicable will be recalled, followed by an establishment of the facts and a conclusion discussing whether or not there has been a violation. Where some facts cannot be established – and consequently cannot be legally assessed – in a definite and conclusive fashion, alternatives will be described. For each thematic issue a distinction between the three areas (South Ossetia, Abkhazia and the rest of Georgia) will be made when necessary.

The Fact-Finding Mission would like to underline that its use of names, terms and expressions, particularly with regard to the conflict regions, should not be construed as implying any form of recognition or non-recognition or having any other political connotation whatsoever. A special note of caution seems necessary, too, as regards allegations of violation of International Humanitarian Law and Human Rights and also as regards allegations of war crimes and genocide. The EU Council of Ministers directed the Mission to investigate these allegations. At the same time, the Mission only started its work at the end of 2008. Consequently, it was necessary to base much of its fact-finding on investigations which had been carried out soon after the conflict by a number of regional organisations such as the OSCE and the Council of Europe, as well as respected international non-governmental organisations such as Human Rights Watch, Amnesty International, the International Crisis Group and others. The Mission also had several meetings with representatives of the International Committee of the Red Cross. Additionally, the Mission was able to collect first-hand evidence from witnesses and victims. It should be noted that the factual basis thus established may be considered as adequate for the purpose of fact-finding, but not for any

other purpose. This includes judicial proceedings such as the cases already pending before International Courts as well as any others.

II. Applicable international law

Two main sets of norms constitute the applicable legal framework: IHL and HRL. First, both branches of international law are applicable in times of armed conflict. Second, given that the current report covers a longer period than the duration of the armed conflict *per se*, human rights law is also directly relevant.

The special issue of displaced persons is governed both by specific rules of IHL and HRL and by different sets of guidelines or rules depending on whether they are classified as IDPs or refugees.

Finally, norms of public international law relating to state responsibility and international criminal law also constitute important parts of the applicable legal framework. Individual criminal responsibility is triggered in cases of war crimes, in particular where there have been grave breaches of the Geneva Conventions or Additional Protocol I.

A. International Humanitarian Law

International humanitarian law (IHL) regulates the conduct of hostilities and protects persons who do not or who no longer participate directly in hostilities, in order to limit the effects of warfare. Its primary aim is to ensure the protection of certain persons and objects. While the IHL norms applicable vary depending on the character of an armed conflict (whether it is regarded as an international or a non-international armed conflict), the humanitarian goal remains equally important in both types of conflict. This is exemplified by the increasing convergence between the rules of IHL applicable in an international armed conflict and those applicable in a non-international armed conflict.

IHL comprises both conventional law and customary law. Georgia and the Russian Federation are parties to the main IHL treaties, including the four Geneva Conventions of 1949 and the two additional protocols of 1977, together with the 1954 Convention for the Protection of Cultural Property in the Event of Armed Conflict. The Russian Federation is also a party to the 1907 Hague Convention (IV) respecting the Laws and Customs of War on Land.

Furthermore, it is well recognised that the rules contained in this latter instrument have become part of customary international humanitarian law.[1]

The IHL treaty law applicable to non-international armed conflict is far less developed than the body of norms applicable to international armed conflict. The former primarily includes Common Article 3 of the Geneva Conventions and Additional Protocol II. It is now well recognised, however, that the customary international humanitarian law applicable to internal armed conflicts goes beyond those provisions[2] and encompasses fundamental principles on the conduct of hostilities.

The question remains whether, when the cease-fire occurred on 12 August 2008, IHL ceased to apply in relation to the August 2008 conflict. While it could be said that it is fairly easy to determine when IHL starts to apply, it seems more difficult to identify the moment when its application ends, mainly owing to the different formulas used in conventional law. Geneva Convention IV, for example, speaks about the "general close of military operations" (Article 6(2)), whereas Additional Protocol II uses the expression "end of the armed conflict" (Article 2(2)). The International Criminal Tribunal for the former Yugoslavia (ICTY), in its decision of 2 October 1995 in the *Tadic* case, tried to clarify this point by indicating that: "International humanitarian law applies from the initiation of such armed conflicts and extends beyond the cessation of hostilities until a general conclusion of peace is reached; or, in the case of internal conflicts, a peaceful settlement is achieved." The ICTY thus rejected the factual criteria that signify the cessation of hostilities. This implies that a cease-fire – whether temporary or definitive – or even an armistice cannot be enough to suspend or to limit the application of IHL. Relevant conventional instruments stipulate that a number of provisions continue to apply until the emergence of a factual situation completely independent of the concluding of a peace treaty. Thus, to quote only some examples, the protection provided for people interned as a result of the conflict (in particular, prisoners of war and

[1] See also Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion, ICJ Reports 2004, p. 172, para. 89.

[2] Prosecutor v. Tadic, IT-94-1-AR72, Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, 2 October 1995, para. 118. See also J-M. HENCKAERTS, L. DOSWALD-BECK (eds), Customary International Humanitarian Law, Volumes I and II, Cambridge, ICRC, Cambridge University Press, 2005. Out of the 161 customary rules identified by the ICRC, 159 are applicable to non-international armed conflicts. HENCKAERTS, J-M., "Study on customary international humanitarian law: A contribution to the understanding and respect for the rule of law in armed conflict", in: International Review of the Red Cross, No. 857, 2005, p. 189.

civilian prisoners) applies until their final release and repatriation or their establishment in the country of their choice.[3]

a) IHL of international and non-international armed conflict

The hostilities between Georgia and the Russian Federation constitute an international armed conflict between two states as defined by Common Article 2 of the 1949 Geneva Conventions: "cases of declared war or of any other armed conflict which may arise between two or more of the High Contracting Parties, even if the state of war is not recognized by one of them." This was asserted by both the Russian Federation[4] and Georgia.[5] Consequently, IHL applicable to this category of armed conflict is relevant.

The hostilities between South Ossetia and Abkhazia on the one hand, and Georgia on the other, are governed by the IHL applicable to non-international armed conflict, since both are recognised internationally as being part of Georgia and, at the time of the 2008 conflicts, this was undisputed. The Russian Federation also reached this conclusion.[6] However Georgia seems to classify it overall as an international armed conflict: "in relation to the period from 7 to 12 August 2008, objective evidence shows that there was resort to armed force by the separatists, the Russian Federation and the Republic of Georgia. Therefore, it is beyond doubt that there was an international armed conflict in existence from 7 to 12 August 2008."[7] This could be the case if one considers that Russia exercises sufficient control over the Abkhaz/South Ossetian forces, as will be discussed later.

Given the organised and responsible command of South Ossetian and Abkhaz armed forces, as well as the territorial control exercised by the authorities, the criteria set out in Additional Protocol II for its application are met.[8] Common Article 3 of the Geneva Conventions and

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[3] This exception is based on Article 5 of Geneva Convention III, Article 6(4) of Geneva Convention IV and Articles 3(b) of Protocol I and 2(2) of Protocol II; it is also mentioned by the ICTY in the *Tadic* decision of 2 October 1995 (para. 69).

[4] Russia, Responses to Questions Posited by the IIFFMCG (Legal Aspects), p. 10.

[5] Georgia, APPLICATION UNDER ARTICLE 33 OF THE EUROPEAN CONVENTION ON HUMAN RIGHTS AND RULES 46 AND 51 OF THE RULES OF COURT, Application No. 38263/08, 6 February 2009, document submitted by Georgia to the IFFMCG, pp. 46-47.

[6] Russia, Responses to Questions Posited by the IIFFMCG (Legal Aspects), *op. cit.*, p. 10.

[7] Georgia, APPLICATION UNDER ARTICLE 33 OF THE EUROPEAN CONVENTION ON HUMAN RIGHTS AND RULES 46 AND 51 OF THE RULES OF COURT, Application No. 38263/08, 6 February 2009, document submitted by Georgia to the IFFMCG, pp. 46-47.

[8] Article 1 of Additional Protocol II defines the applicability with regard to "all armed conflicts (…) which take place in the territory of a High Contracting Party between its armed forces and dissident armed forces or other organized armed groups which, under responsible command, exercise such control over a part of its territory as to enable them to carry out sustained and concerted military operations and to implement this Protocol."

Additional Protocol II both apply in the current situation, in addition to relevant customary law.

b) IHL of international armed conflict because of Russia's control over Abkhaz/South Ossetian forces

An armed conflict between a State and an armed group may be qualified as international if this group, under certain conditions, is under the control of another State, i.e., a second State. Georgia and the Russian Federation hold opposing views on whether the latter exercised control over the Abkhaz and Ossetian forces. Given the difficulty of reaching a definite factual conclusion, and in view of the current state of the law, the current legal arguments and positions are outlined.

For the purpose of classifying an armed conflict, in the *Tadic Case* the Appeals Chamber of the ICTY discussed the criteria for control by a State over an individual or a group of individuals. It held that "the requirement of international law for the attribution to States of acts performed by private individuals is that the State exercises control over the individuals" and that "the *degree of control* may, however, vary according to the factual circumstances of each case."[9] First the ICTY considered that the "test" of "effective control" applied by the International Court of Justice (ICJ) in the *Nicaragua Case*,[10] to determine whether an individual may be held to have acted as a *de facto* organ of a State, was persuasive in only two cases:

"the case of a private individual who is engaged by a State to perform some specific illegal acts in the territory of another State. In such a case, it would be necessary to show that the State issued specific instructions concerning the commission of the breach in order to prove – if only by necessary implication – that the individual acted as a de facto State agent (...)"; or

"when an unorganised group of individuals commits acts contrary to international law. For these acts to be attributed to the State it would seem necessary to prove not only that the State exercised some measure of authority over those individuals but also that it issued specific instructions to them concerning the performance of the acts at issue."[11]

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[9] ICTY, *Prosecutor* v. *Tadic*, IT-94-1-AR72, the Judgement of the Appeals Chamber, 15 July 1999, para. 117.

[10] The test was whether the individual had specifically "directed or enforced" the perpetration of particular acts.

[11] ICTY, *Prosecutor* v. *Tadic*, IT-94-1-AR72, the Judgement of the Appeals Chamber, 15 July 1999, para. 118. The Appeals Chamber gives "for instance, kidnapping a State official, murdering a dignitary or a high-ranking State official, blowing up a power station or, especially in times of war, carrying out acts of sabotage" as examples of such acts.

Georgia and the Russian Federation have two completely opposing views on the question of control. While Georgia claims that the Russian Federation acted through the separatist South Ossetian and Abkhaz forces under its direction and control,[12] the Russian Federation has stated that "the conduct of the South Ossetian and Abkhaz authorities is not conducted by organs of the Russian Federation."[13] It must be stressed that the terms used before the ICJ seem to frame the discussion within the context of the rules of attribution under international law on state responsibility for wrongful acts. The Russian Federation reaffirmed its stance by stating: "Russia exercises no degree of control (effective or actual) over South Ossetian military personnel, civilians or the territory of this Republic."[14]

The composition of the Abkhaz and South Ossetian forces remains unclear. Human Rights Watch described the South Ossetian forces as "consisting of several elements – South Ossetian Ministry of Defence and Emergencies, South Ossetian Ministry of Internal Affairs, South Ossetian Committee for State Security, volunteers, and Ossetian peacekeeping forces" – who also participated in the fighting.[15] Various testimonies contain accounts of foreign volunteers such as Chechens operating in the territory of South Ossetia.[16] The presence of 300 volunteers from the Russian Federation was mentioned by the representatives of the Georgian Ministry of Internal Affairs when meeting with the IIFFMCG experts in June 2009. *De facto* authorities from South Ossetia confirmed to the IIFFMCG in June that volunteers had fought with South Ossetian military forces. The regular armed forces of the *de facto* South Ossetian authorities unquestionably constitute "an organised and hierarchically structured group", while the Abkhaz army is described as being made up of "regular" forces and a "well-trained reservist component" with "a command hierarchy."[17] On the other hand, the situation may be different for isolated armed groups or individuals who acted on their own during the hostilities. In the former case, "overall control" would need to be established in order to render the armed conflict between Georgia and the Abkhaz and South Ossetian armed forces international.

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[12] Case concerning Application of the International Convention on the Elimination of All Forms of Racial Discrimination (*Georgia* v. *Russian Federation*), Request for the indication of provisional measures, International Court of Justice, ICJ, 15 October 2008, p. 2, para. 3.

[13] *Ibid*, p. 19, para. 75.

[14] Russia, Responses to Questions Posited by the IIFFMCG (Legal Aspects), *op. cit.*, p. 11.

[15] HRW, *Up In Flames – Humanitarian Law Violations and Civilian Victims in the Conflict over South Ossetia*, *op. cit.*, p. 5.

[16] This was confirmed through an interview conducted in March 2009 by a Mission's expert. Some interviewees clearly identified Chechens and Uzbeks among the military forces that looted and set fire to their houses.

[17] *De facto* Abkhaz authorities, Replies to questions on legal issues related to the events of last August, submitted to the IIFFMCG in April 2009, pp. 3-4.

When the Appeals Chamber of the ICTY turned to the *de jure* and factual relationship between the Russian Federation and the Abkhaz and South Ossetian forces, the elements it considered shed some light on the nature and degree of this control. For example the fact that "the controlling State is *not the territorial State* where the armed clashes occur or where at any rate the armed units perform their acts" has to be taken into account, and it calls for "more extensive and compelling evidence."[18] The Appeals Chamber specified that the control has to go beyond "merely coordinating political and military activities" and "beyond mere coordination or cooperation between allies."[19] It analysed the forms of assistance provided, and the command structure in place.[20]

The statements made by the Russian Federation and the *de facto* Abkhaz authorities reject any allegation of overall control. The Russian Federation has declared that "prior to the conflict in August one could only speak of cooperation between the Russian peacekeeping contingent and South Ossetian and Abkhaz military units wherever peacekeeping forces may be present within parameters commonly accepted in similar situations in other countries. These relations were governed by the mandate of the peacekeeping force."[21] While strong economic, cultural and social ties exist between the Russian Federation and the authorities of Abkhazia,[22] those authorities have stated that, in the course of the operation in the Kodori Valley, "the Abkhaz army, while remaining in contact with Russian forces acting from Abkhaz territory, operated independently."[23] Further aspects of the assistance and the military structure and command linking the Russian Federation and those entities would need to be substantiated in order to establish such control. According to Georgia, "the Abkhaz and South Ossetian military formations did not independently control, direct or implement the military operations during either the armed conflict or the occupation periods. Rather, these military formations acted as

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[18] ICTY, *Prosecutor* v. *Tadic*, IT-94-1-AR72, the Judgement of the Appeals Chamber, 15 July 1999, para. 138.

[19] *Ibid*., para. 152.

[20] The ICTY Appeals Chamber ruled as follows: "Over and above the extensive financial, logistical and other assistance and support which were acknowledged to have been provided by the VJ to the VRS, it was also uncontested by the Trial Chamber that as a creation of the FRY/VJ, the structures and ranks of the VJ and VRS were identical, and also that the FRY/VJ directed and supervised the activities and operations of the VRS. As a result, the VRS reflected the strategies and tactics devised by the FRY/JNA/VJ" (para. 151). The Trial Chamber found that the various forms of assistance provided to the armed forces of the *Republika Srpska* by the Government of the FRY were "crucial" to the pursuit of their activities and that "those forces were almost completely dependent on the supplies of the VJ for carrying out offensive operations" (para. 155). See ICTY, *Prosecutor* v. *Tadic*, IT-94-1-AR72, the Judgement of the Appeals Chamber, 15 July 1999.

[21] Russia, Responses to Questions Posited by the IIFFMCG (Legal Aspects), *op. cit.*, p. 5.

[22] See, for example, Abkhaz authorities, Replies to questions on legal issues related to the events of last August, submitted to the IIFFMCG in April 2009, p. 2.

[23] *Ibid*., p. 4.

agents or *de facto* organs of the Respondent State and as such constituted a simple continuation of the Russian Federation's armed forces."[24]

In factual terms, one may have to draw a distinction with regard to the nature of the relationship between Russia and South Ossetia on the one hand, and between Russia and Abkhazia on the other. In the former, ties seem to be stronger. During the meeting between the IIFFMCG experts and the representatives of the Ministry of Internal Affairs of Georgia, the representatives stressed the political and economic links between Russia and South Ossetia. They also claimed that Russia exercises control over South Ossetia through various channels ranging from financial help to the presence of Russian officials in key military positions in the South Ossetian forces.[25]

At this point it is appropriate to underline that although the classification of an armed conflict as international or non-international is important in terms of the responsibilities of the various parties involved, when it comes to the effective protection by IHL of the persons and objects affected by the conflict it does not make much difference. Indeed, it is generally recognised that the same IHL customary law rules generally apply to all types of armed conflicts.

c) IHL of military occupation

Under IHL, the law of military occupation primarily includes the 1907 Hague Regulations concerning the Laws and Customs of War on Land and Geneva Convention IV relative to the Protection of Civilian Persons in Time of War, as well as some provisions of Additional Protocol I. As Geneva Convention IV does not provide a definition of what constitutes an occupation, it is necessary to rely on the Hague Regulations. A territory is considered "occupied" when it is under the control or authority of the forces of the opposing State, without the consent of the government concerned. More specifically, according to Sassòli and Bouvier, "the rules of IHL on occupied territories apply whenever a territory comes, during an armed conflict, under the control of the enemy of the power previously controlling that territory, as well as in every case of belligerent occupation, even when it does not encounter armed resistance and there is therefore no armed conflict."[26] In the former case, pursuant to Article 42 of these Regulations, a "territory is considered occupied when it is actually placed

[24] Georgia, APPLICATION UNDER ARTICLE 33 OF THE EUROPEAN CONVENTION ON HUMAN RIGHTS AND RULES 46 AND 51 OF THE RULES OF COURT, *op. cit.*, para. 160.

[25] IIFFMCG Meeting with Representatives of the Ministry of Internal Affairs of Georgia, 4 June 2009.

[26] SASSÒLI, M. and BOUVIER, A., *How Does Law Protect In War*, 2nd Edition, Vol. I, Geneva, ICRC, 2006, p. 187.

under the authority of the hostile army. The occupation extends only to the territory where such authority has been established and can be exercised."[27] For the second situation, Geneva Convention IV provides that "the Convention shall also apply to all cases of partial or total occupation of the territory of a High Contracting Party, even if the said occupation meets with no armed resistance."[28]

As stressed by the ICJ in the case of the *Armed Activities on the Territory of the Congo (Democratic Republic of the Congo* v. *Uganda)*, "to reach a conclusion as to whether a State, the military forces of which are present on the territory of another State as a result of an intervention, is an "occupying Power" in the meaning of the term as understood in the *jus in bello*, the Court must examine whether there is sufficient evidence to demonstrate that the said authority was in fact established and exercised by the intervening State in the areas in question."[29] Ascertaining the existence of a state of occupation is a determination based on facts.[30] The critical question is the degree and extent of the control or authority required in order to conclude that a territory is occupied.

Two perceptions exist in this regard, which are not mutually exclusive but rather constitute two stages in the application of the law on occupation. These two stages reflect growing control by the occupying power. This means that, for a part of the law of occupation to apply, it is not necessary for the military forces of a given State to administer a territory fully.

The Commentary on the Geneva Conventions states the following with respect to Article 2(2) of Geneva Convention IV: "the word 'occupation' has a wider meaning than it has in Article 42 of the Regulations annexed to the Fourth Hague Convention of 1907. So far as individuals are concerned, the application of the Fourth Geneva Convention does not depend upon the existence of a state of occupation within the meaning of the Article 42 referred to above. The relations between the civilian population of a territory and troops advancing into that territory, whether fighting or not, are governed by the present Convention. There is no intermediate period between what might be termed the invasion phase and the inauguration of a stable

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[27] See Article 42 of the Regulations concerning the Laws and Customs of War on Land and Geneva Convention IV relative to the Protection of Civilian Persons in Time of War. See also *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion, ICJ Reports 2004*, p. 167, para. 78 and p. 172, para. 89: "a territory is considered to be occupied when it is actually placed under the authority of the hostile army, and the occupation extends only to the territory where such authority has been established and can be exercised."

[28] Art. 2 of 1949 Geneva Convention IV.

[29] *Armed Activities on the Territory of the Congo (Democratic Republic of the Congo* v. *Uganda), Judgment, 19 December 2005, ICJ Report 2005*, para. 173.

[30] ICTY, *Prosecutor v. Mladen Naletilic, aka "Tuta"*, para. 172.

regime of occupation. Even a patrol which penetrates into enemy territory without any intention of staying there must respect the Conventions in its dealings with the civilians it meets."[31] While this stage does not of course entail a full application of the law of occupation under Geneva Convention IV, the mere fact that some degree of authority is exercised on the civilian population triggers the relevant conventional provisions of the law of occupation on the treatment of persons. In a further stage, the full application of the law on occupation comes into play, when a stronger degree of control is exercised. This is reflected in a number of military manuals which require it to be established that "a party to a conflict is in a position to exercise the level of authority over enemy territory necessary to enable it to discharge *all* the obligations imposed by the law of occupation."[32] The new United Kingdom military manual calls for a twofold test: "[f]irst, that the former government has been rendered incapable of publicly exercising its authority in that area; and, secondly, that the occupying power is in a position to substitute its own authority for that of the former government."[33]

The determination must be made on a case-by-case basis. This is particularly relevant when considering the present issue of whether, during the conflict in Georgia, territories were occupied by the Russian Federation and, if so, which territories, taking into account the facts and the period of time. Georgia claims that a number of different areas were occupied by Russia both during and after the conflict. For the purpose of determining the existence of a state of occupation for each of those places, it is worth briefly listing them as presented by Georgia, as the conclusion may differ depending on the territory concerned and the time.

First, in its Request for the indication of provisional measures of protection submitted to the ICJ on 12 August 2008 Georgia asserted that the territories of South Ossetia and Abkhazia, including the upper Kodori Valley, were occupied by Russian forces.[34] On 23 October, the Parliament of Georgia adopted a law declaring Abkhazia and South Ossetia "occupied territories" and the Russian Federation a "military occupier."[35] This claim was reiterated in

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[31] Commentary on the Geneva Conventions of 12 August 1949, Jean Pictet (ed.), Geneva, p. 60.

[32] Daniel Thürer, ICRC statement, "Current challenges to the law of occupation," November 2005, available at http://www.icrc.org/web/eng/siteeng0.nsf/html/occupation-statement-211105

[33] *The Manual of the Law of Armed Conflict*, United Kingdom Ministry of Defence, Oxford, Oxford University Press, 2004, para. 11.3, p. 275.

[34] AMENDED REQUEST FOR THE INDICATION OF PROVISIONAL MEASURES OF PROTECTION SUBMITTED BY THE GOVERNMENT OF GEORGIA, Request to the International Court of Justice, p. 5, para. 13.

[35] See the "Law on Occupied Territories of Georgia," adopted on 23 October 2008. Clause 2 of this law reads as follows:
"For the purpose of this Law "the occupied territories and territorial waters" (hereinafter "The Occupied Territories") shall mean:

Georgia's application to the ECHR against Russia on 6 February 2009.[36] In describing the "current occupation" Georgia also stated: "the western part of the former 'buffer zone' (the village of Perevi in the Sachkhere District) remains under Russian occupation."[37] In addition to those territories that are still occupied by Russian forces at the time of writing this report, according to Georgia the following territories were occupied in the aftermath of the conflict: "In Eastern Georgia South of the conflict zone Russian forces occupied most parts of the Gori District, including the City of Gori; South-west of the conflict zone Russian forces occupied part of the Kareli District; West of the conflict zone Russian forces occupied part of the Sachkhere District; in Western Georgia they occupied the cities of Zugdidi, Senaki and Poti. Following the Russian withdrawal from the City of Gori on 22 August 2008, Russian forces still occupied the northern part of the Gori District right up to the southern administrative boundary of South Ossetia. This territory constituted part of the 'buffer zone' that was created by Russian Forces around the territory of South Ossetia and absorbed territories that used to be under the control of the Georgian central Government. Russian forces withdrew from this buffer zone, except in upper Kodori Valley, the Akhalgori district and the village of Perevi (in the Sachkhere District), on 8 October 2008."[38] More generally, Georgia alleged the

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a) Territory of the Autonomous Republic of Abkhazia;
b) Tskhinvali region (territory of the former Autonomous Republic of South Ossetia);
c) Waters in the Black Sea: territorial inland waters and sea waters of Georgia, their floor and resources, located in the aquatic territory of the Black Sea, along the state border with the Russian Federation, to the South of the Psou River, up to the administrative border at the estuary of the Engury River, to which the sovereign right of Georgia is extended; also the sea zones: the neighbouring zone, the special economic zone and the continental trail where, in compliance with the legislation of Georgia and international law, namely the UN Convention on Maritime Law (1982), Georgia has fiscal, sanitary, emigration and customs rights in the neighbouring zone and the sovereign right and jurisdiction in the special economic zone and the continental trail;
d) The air space over the territories stipulated in Paragraphs (a), (b) and (c) of this Clause."
The Law is available at: http://www.venice.coe.int/docs/2009/CDL(2009)004-e.asp

[36] Georgia, APPLICATION UNDER ARTICLE 33 OF THE EUROPEAN CONVENTION ON HUMAN RIGHTS AND RULES 46 AND 51 OF THE RULES OF COURT, *op. cit.*, p. 8.

[37] *Idem*. More generally, Georgia asserted: "after the ceasefire on 12 August 2008, the situation is properly understood as one of occupation, which, along with the human rights law, is also governed within IHL by the provisions pertaining to international armed conflicts. This is because objective evidence illustrates comprehensively that significant portions of Georgia remain occupied by forces of the Russian Federation and / or separatist forces acting as *de facto* organs of the Russian Federation" (p. 47).

[38] *Ibid*., pp. 8-9. For Zugdidi as an occupied territory, see also REQUEST FOR THE INDICATION OF PROVISIONAL MEASURES OF PROTECTION SUBMITTED BY THE GOVERNMENT OF THE REPUBLIC OF GEORGIA, para. 13, p. 7.

occupation of the territories adjacent to Abkhazia and South Ossetia.[39] It should be noted that Georgia referred to "occupation" and "effective control" by the Russian forces.[40]

The Russian Federation, on the contrary, holds that it does not at present, nor will it in the future, exercise effective control over South Ossetia or Abkhazia; and that it was not an occupying power.[41] It noted recently that "despite having crossed into the territory of Georgia in the course of the conflict, Russia was not an occupying power in terms of IHL." It further explained that "the presence of an armed force in the territory of another state is not always construed as occupation," relying on the ICJ ruling in the case between the Democratic Republic of Congo and Uganda and on the judgment of the ICTY in *Prosecutor* v. *Naletilic and Martinovic*.[42] According to the Russian Federation, "the determining factor in international law necessary to recognise a military presence as an occupation regime is whether the invading state has established effective control over the territory of the country in question and its population."[43] In its replies to the questionnaire submitted by the IIFFMCG, it presented a threefold argument to reject such control. First, "the Russian Armed Forces never replaced the lawful governments of Georgia or South Ossetia."[44] Second, "no regulatory acts

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[39] AMENDED REQUEST FOR THE INDICATION OF PROVISIONAL MEASURES OF PROTECTION SUBMITTED BY THE GOVERNMENT OF GEORGIA, Request to the ICJ, *op. cit.*, p. 5, para 13.

[40] Case concerning the Application of the International Convention on the Elimination of All Forms of Racial Discrimination (*Georgia* v. *Russian Federation*), Request for the indication of provisional measures, International Court of Justice, ICJ, 15 October 2008, para 33, p. 10.

[41] *Ibid*., p. 19, para. 74.

[42] Russia, Responses to Questions Posited by the IIFFMCG (Legal Aspects), *op. cit.*, p. 7: "Pursuant to Article 42 IV of the Hague Convention governing the laws and customs of land warfare, the crucial factor in qualifying military presence as occupation is whether the invading state has established effective control over the territory of the country in question and its civilian population. Criteria of such effective control have been determined, for example, in a case tried by the International War Crimes Tribunal in former Yugoslavia, *Prosecutor* v. *Naletilich and Martinovich* as well as another case tried by the International Court, *Congo* v. *Uganda*. The International War Crimes Tribunal deduced five main criteria of effective control in the aforementioned case. The two key criteria were as follows: the occupying power must establish temporary administration to govern the territory and issue within the bounds of this territory instructions deemed mandatory for the local population.
"Similarly to the War Crimes Tribunal, the International Court also addressed the issue of occupation in the case dealing with the military action taken by Uganda against Congo.
"If we follow the court's logic, the fact that the criteria pursuant to which the occupying force must establish a local administration is not met, and no regulatory acts have been issued by the occupying power, may serve as sufficient grounds to maintain that no occupation regime took place. It was exactly the approach taken by the International Court in the case *Congo* v. *Uganda* – the court recognised that a Ugandan occupation regime existed only in two areas of Congo, basing their opinion on the premise that the military of Uganda began to issue regulatory acts in these areas that were mandatory for the local population, and in so doing replaced the lawful government of Congo. In other areas of Congo the court recognised only Ugandan military presence."

[43] *Ibid*., p. 7.

[44] *Idem*, and p. 11. "The Russian Federation is not an occupying power and does not exercise effective control over the territory and/or population of South Ossetia. Maintaining law and order in South Ossetia and Abkhazia is an exclusive right vested with the governments of these countries" (p. 12). See also: *Public sitting held on Monday 8 September 2008, at 3 p.m., at the Peace Palace, Verbatim Record, in the case concerning*

mandatory for the local populations have been adopted by them."[45] Finally, "the number of Russian troops stationed in South Ossetia and Abkhazia (3,700 and 3,750 servicemen respectively) does not allow Russia in practice to establish effective control over these territories which total 12 500 sq. kilometers in size. To draw a parallel: effective control over a much smaller territory of Northern Cyprus 3 400 sq. kilometers) requires the presence of 30,000 Turkish troops. During the active phase of the military conflict the maximum size of the Russian contingent in South Ossetia and Abkhazia reached 12,000 personnel. However, all of these forces were engaged in a military operation and not in establishing effective control." It concluded that "based on the foregoing, there are no sufficient grounds for maintaining that the Russian side exercised effective control over the territory of South Ossetia or Georgia during the Georgian-South Ossetian conflict or that an occupation regime was established in the sense contemplated in IHL."[46]

As highlighted earlier, under IHL, the factual criteria or requirements for determining that control or authority has been established are not spelt out in the Hague Regulation or in Geneva Convention IV. The decisions of international courts have outlined some elements that can be used in clarifying this determination. In the ICTY case *Prosecutor* v. *Naletilic and Martinovic* quoted by Russia, the Trial Chamber refers to five "guidelines [to] provide some assistance," rather than criteria "to determine whether the authority of the occupying power has been actually established."[47] The following guidelines were listed by the ICTY based on some military manuals: "the occupying power must be in a position to substitute its own authority for that of the occupied authorities, which must have been rendered incapable of

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Application of the International Convention on the Elimination of All Forms of Racial Discrimination (*Georgia* v. *Russian Federation*), CR 2008/23, International Court of Justice, The Hague, 2008, para 14, p. 13: "Russian armed forces were present and are now present on the territories of Abkhazia and South Ossetia. However, this presence was not and is not occupation, as Georgia claims. Russian military forces and, therefore, Russia itself, did not and do not control either the territory of Abkhazia and South Ossetia, or the authorities or armed units of Abkhazia and South Ossetia. Russia has not exercised jurisdiction with respect to the territory or population of Abkhazia and South Ossetia. This allegation is absurd. This is no less true now, given that Abkhazia and South Ossetia are independent States, as recognized by Russia." The Russian Federation also stated: "First and foremost, Russia is *not* an occupying power in South Ossetia and Abkhazia. Both regions had an internationally recognized autonomous status and have enjoyed *de facto* independence already for a quite significant time. In particular, Russia has never - to paraphrase the text you applied in the *Congo* v. *Uganda* case (*Armed Activities on the Territory of the Congo (Democratic Republic of the Congo* v. *Uganda), Judgment,ICJ. Reports 2005*, para. 173) - Russia, let me repeat, Russia has never assumed the role of the existing authorities, that is the Abkhaz and South Ossetian authorities, recognized as such by Georgia itself. Besides, the Russian presence, apart from its participation in limited peace-keeping operations, has been restricted in time and stretches only for a few weeks" (p. 44, para 16). "Furthermore, local authorities have always retained their independence and continue to do so" (p. 44, para. 17).

[45] Russia, Responses to Questions Posited by the IIFFMCG (Legal Aspects), *op. cit.*, p. 7

[46] *Idem*.

[47] ICTY, *Prosecutor v. Naletilic and Martinovic*, para. 217.

functioning publicly; the enemy's forces have surrendered, been defeated or withdrawn; the occupying power has a sufficient force present, or the capacity to send troops within a reasonable time, to make the authority of the occupying power felt; a temporary administration has been established over the territory; the occupying power has issued and enforced directions to the civilian population."[48]

However, the reading of this case by the Russian Federation should be nuanced. Indeed after having explained the notion of control, the Trial Chamber quotes the Commentary on Geneva Convention IV "mak[ing] clear that the application of the law of occupation to the civilian population differs from its application under Article 42 of the Hague Regulations."[49] It goes on to state that: "the Chamber accepts this to mean that the application of the law of occupation as it affects 'individuals' as civilians protected under Geneva Convention IV does not require that the occupying power have actual authority. For the purposes of those individuals' rights, a state of occupation exists upon their falling into 'the hands of the occupying power.' Otherwise civilians would be left, during an intermediate period, with less protection than that attached to them once occupation is established".[50]

When assessing the factual situation in the light of the aforementioned remarks, one aspect must first be clarified. It has been asserted, to reject the argument of an occupation, that the presence of the Russian military forces was limited to certain strategic points and did not cover the whole territory in question.[51] Article 2 of Geneva Convention IV contemplates cases of both partial and total occupation of a territory. As confirmed by the ICTY, under IHL "there is no requirement that an entire territory be occupied, provided that the isolated areas in

[48] *Idem*.

[49] *Ibid*., para. 219.

[50] *Ibid*., paras 221-222. It is also worth noting that in the case Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v. Uganda) the ICJ stressed that "in the present case the Court will need to satisfy itself that the Ugandan armed forces in the DRC were not only stationed in particular locations but also that they had substituted their own authority for that of the Congolese Government" (para. 173). While the establishment of a local administration in certain parts of the territory, and the adoption of regulatory acts, were sufficient for the court to ascertain occupation (para. 175), this does not mean that those two elements become prerequisites for a state of occupation to be ascertained. The lack of such elements was decisive in the case before the court in the absence of any other evidence. Going beyond that interpretation would lead to turning elements of proof of an occupation into conditions for considering a territory to be occupied.

[51] Public sitting held on Monday 8 September 2008, at 3 p.m., at the Peace Palace, Verbatim Record, in the case concerning Application of the International Convention on the Elimination of All Forms of Racial Discrimination (Georgia v. Russian Federation), CR 2008/23, *op. cit.*, para 17, p. 44.

which the authority of the occupied power is still functioning 'are effectively cut off from the rest of the occupied territory".[52]

If, as asserted in the chapter of this report on the use of force, Russia's military intervention cannot be justified under international law, and if neither Abkhazia nor South Ossetia is a recognised independent state, IHL – and in particular the rules concerning the protection of the civilian population (mainly Geneva Convention IV) and occupation – was and may still be applicable. This applies to all the areas where Russian military actions had an impact on protected persons and goods. However, the extent of the control and authority exercised by Russian forces may differ from one geographical area to another. It was possibly looser in the territories of South Ossetia and Abkhazia administered by the *de facto* authorities. In the Kodori Valley, and in districts and villages in South Ossetia such as Akhalgori,[53] where before the conflict the Georgian forces and administration had exercised control, the substitution is more evident. In those cases, such as the buffer zones, the argument of an existing administrative authority different from the Georgian one cannot be admissible, nor can the argument according to which "Russia has frequently dissociated itself from, and even condemned, the Ossetian and Abkhaz authorities."[54] Regarding the insufficient number of troops invoked by the Russian Federation,[55] this must be linked to the fact that the determination is not about ascertaining the occupation of the whole territory of Georgia. Moreover, in the *Armed Activities on the Territory of the Congo (Democratic Republic of the Congo* v. *Uganda)* case, the arguments used by Uganda of a "small number of its troops in the territory" and their confinement to "designated strategic locations"[56] were not used by the Court to reject the qualification of occupation. Finally, given the fact that a state of occupation may exist without armed resistance, the question of the number of troops cannot in itself be legally relevant.

The main rules of the law applicable in a case of occupation state *inter alia* that the occupying power must take measures to restore and ensure, as far as possible, public order and safety;

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[52] ICTY, Prosecutor v. Naletilic and Martinovich, op. cit., para. 218.

[53] For a list see Georgia, APPLICATION UNDER ARTICLE 33 OF THE EUROPEAN CONVENTION ON HUMAN RIGHTS AND RULES 46 AND 51 OF THE RULES OF COURT, *op. cit.*, p. 7.

[54] Public sitting held on Monday 8 September 2008, at 3 p.m., at the Peace Palace, Verbatim Record, in the case concerning Application of the International Convention on the Elimination of All Forms of Racial Discrimination (*Georgia* v. *Russian Federation*), CR 2008/23, *op. cit.*, para. 17, p. 44.

[55] Russia, Responses to Questions Posited by the IIFFMCG (Legal Aspects), *op. cit.*, p. 8.

[56] *Armed Activities on the Territory of the Congo (Democratic Republic of the Congo* v. *Uganda)*, *op. cit.*, para. 170.

the taking of hostages is prohibited; reprisals against protected persons or their property are prohibited and the destruction or seizure of enemy property is prohibited, unless absolutely required by military necessity during the conduct of hostilities.

As outlined by the ICJ, such application does not preclude the applicability of human rights law. If this is explained by the general principle of the continued applicability of human rights in times of war, it is also closely linked to another issue under human rights law: the control or exercise of jurisdiction, which is critical for recognising the extra-territorial application of human rights law. In this regard, a number of cases where human rights law was deemed applicable to forces abroad were cases of occupation.

The significance of ascertaining who is, actually, on the ground, exercising authority is exemplified by one assertion put forward by the Russian Federation. Stressing the difference between "measures taken during the hostilities to protect the civilian population from threats posed by these hostilities and those taken outside the scope of hostilities to protect the civilian population from looting, pillaging, abuse, etc.," the Russian Federation first dismissed the application of the law of occupation under IHL. Secondly, it noted, however, that while "South Ossetia had and still has its own government and local authorities that exercise effective control in this country, maintain the rule of law and protect human rights, (...) the Russian military contingent called upon to carry out purely military tasks in the territory of South Ossetia, to the best of their abilities tried to maintain law and order and prevent any offences in the areas of their deployment including Georgia proper, where due to the flight of Georgian government authorities an apparent vacuum of police presence ensued."[57] It is therefore necessary to clarify the application of human rights law in the present context.

B. International Human Rights Law

First, human rights law (HRL) is relevant given the preliminary remarks on the time frame and scope of the report, which go beyond the time of the conflict itself and require an examination of acts committed in peacetime. Secondly, it is now well established that HRL continues to apply in time of armed conflict.[58] In this regard, the current case pending before the ICJ between Georgia and the Russian Federation, concerning the application of the International Convention on the Elimination of All Forms of Racial Discrimination in this

[57] Russia, Responses to Questions Posited by the IIFFMCG (Legal Aspects), *op. cit.*, pp. 7-8.

[58] See for example, *Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion, I.C.J. Reports 1996*, para. 25; *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion, ICJ Reports 2004*, para. 106.

context, has given rise to extensive discussion between the parties on three intertwined issues to do with the applicability of human rights law: in time of war, in cases of occupation and extraterritorially.

The obligations of states under human rights treaties include not only the obligation to refrain from interfering with the exercise and enjoyment of those rights, but also the positive obligation to take measures to protect their enjoyment. As stressed by the Human Rights Committee, the legal obligation under Article 2(1) of the ICCPR "to respect and to ensure to all individuals within its territory and subject to its jurisdiction the rights recognized in the present Covenant is both negative and positive in nature."[59]

While it has been argued that only states could be bound by these obligations, it is now recognised that non-state actors too have obligations under human rights law. The joint report on Lebanon and Israel by a group of four UN special rapporteurs stressed that "although a non-State actor cannot become a party to these human rights treaties, it remains subject to the demand of the international community, first expressed in the Universal Declaration of Human Rights, that every organ of society respect and promote human rights."[60] This is particularly significant in cases where a non-state actor exercises effective control over a territory.[61]

a) Applicable treaty law

Georgia and the Russian Federation are parties to the main universal human rights treaties, notably the International Covenant on Civil and Political Rights (ICCPR), the International Covenant on Economic, Social and Cultural Rights, the Convention Against Torture, the International Convention on the Elimination of All Forms of Racial Discrimination and the Convention on the Prevention and Punishment of the Crime of Genocide.

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[59] General Comment No. 31 [80], Nature of the General Legal Obligation Imposed on States Parties to the Covenant, CCPR/C/21/Rev.1/Add.13. (General Comments), 26 May 2004, paras 6-7.

[60] Report of the Special Rapporteur on extrajudicial, summary or arbitrary executions, Philip Alston; the Special Rapporteur on the right of everyone to the enjoyment of the highest attainable standard of physical and mental health, Paul Hunt; the Representative of the Secretary-General on the human rights of internally displaced persons, Walter Kälin; and the Special Rapporteur on adequate housing as a component of the right to an adequate standard of living, Miloon Kothari, UN Doc. A/HRC/2/7, 2 October 2006, para. 19, quoted by Andrew Clapham, "Human rights obligations of non-state actors in conflict situations," International Review of the Red Cross, No. 863, 2006. For a review of the practice in this regard, see Clapham, pp. 503.

[61] See for example the Report of the Special Rapporteur on extrajudicial, summary or arbitrary executions, Philip Alston; the Special Rapporteur on the right of everyone to the enjoyment of the highest attainable standard of physical and mental health, Paul Hunt; the Representative of the Secretary-General on the human rights of internally displaced persons, Walter Kälin; and the Special Rapporteur on adequate housing as a component of the right to an adequate standard of living, Miloon Kothari, UN Doc. A/HRC/2/7, para. 19.

In addition to universal human rights treaties, they are both parties to regional instruments that impose obligations on them: notably the European Convention for the Protection of Human Rights and Fundamental Freedoms (EConvHR), the Framework Convention for the Protection of National Minorities, and the human dimension commitments of the Organisation for Security and Co-operation in Europe (OSCE).

b) Extraterritorial application

The territorial scope of the application of human rights treaties is a key question to be answered, given that the Russian Federation operated outside the borders of its territory in the context of the conflict in Georgia. The second question – that of derogation from human rights treaties in times of emergency – should then be addressed.

Under Article 2(1) of ICCPR, "[e]ach State Party to the present Covenant undertakes to respect and to ensure to all individuals within its territory and subject to its jurisdiction" the rights recognised in that convention. Article 1 of the EConvHR uses more general wording by stating that "the High Contracting Parties shall secure to everyone within their jurisdiction the rights and freedoms defined in Section I of this Convention." These two provisions have been interpreted as meaning that the application is not limited to the state's territory *per se* but also extends to places under its effective control. The UN Human Rights Committee noted that "a State Party must respect and ensure the rights laid down in the Covenant to anyone within the power or effective control of that State Party, even if not situated within the territory of the State Party."[62] The European Court of Human Rights already relied on the criteria of effective control for determining the application of the EConvHR: "Bearing in mind the object and purpose of the Convention, the responsibility of a Contracting Party may also arise when, as a consequence of military action, whether lawful or unlawful, it exercises effective control of an area outside its national territory."[63] This extraterritorial application of the human rights treaties where a state exercises jurisdiction outside its territory was also confirmed by the ICJ.[64]

The question of what types of situation constitute effective control also arises, as it does for the determination of an occupied territory. They comprise prolonged occupations as well as

[62] General Comment No. 31 [80], Nature of the General Legal Obligation Imposed on States Parties to the Covenant, op. cit., para. 10.

[63] European Court of Human Rights, *Loizidou* v. *Turkey*, Application No. 15318/89 (18 December 1996), para. 62.

[64] Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion, ICJ Reports 2004, paras 111-113.

situations that lasted only a short period of time.[65] In this regard, the European Court of Human Rights, ruling in the case of *Ilascu* v. *Moldova and the Russian Federation*, provides an interesting guideline for the definition of effective control: "the military and political support" of Russia, "military, economic, financial and political support given by the Russian Federation" and "the participation of its military personnel in the fighting."[66]

While it appears that in the *Ilascu* case there was not a situation of occupation,[67] this did not prevent the Court from recognising that Russia was exercising effective control over the Moldovan Republic of Transnistria and that consequently persons on this territory came within its jurisdiction.[68] Both states – Georgia[69] and Russia[70] – referred to this case but presented a different reading. It should be stressed that the issue of whether the Russian Federation exercises effective control over certain parts of Georgia is currently pending before the European Court of Human Rights. In this regard Georgia argues, in the light of the findings in the *Ilascu* case, and the support given by the Russian Federation to Abkhazia and South Ossetia, that Russia does exercise the control required for the EConvHR to apply.[71] Reaching a definite conclusion on this question would be a delicate matter. By justifying the possible infringement of specific rights as a result of the actions of the Russian forces, the

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[65] See examples in Rule of Law in Armed Conflict project, RULAC, Paper, *Interaction between international humanitarian law and human rights in armed conflicts*, available at: http://www.adh-geneva.ch/RULAC/interaction_between_humanitarian_law_and_human_rights_in_armed_conflicts.php

[66] *Ilascu and Others* v. *Moldova and the Russian Federation*, App. No. 48787/99, judgment of 8 July 2004, paras 382 and 392.

[67] This is asserted by Georgia in its application: Georgia, APPLICATION UNDER ARTICLE 33 OF THE EUROPEAN CONVENTION ON HUMAN RIGHTS AND RULES 46 AND 51 OF THE RULES OF COURT, *op. cit.*, para. 149.

[68] *Ilascu and Others* v. *Moldova and the Russian Federation*, App. No. 48787/99, judgment of 8 July 2004, para. 392.

[69] Public sitting held on Monday 8 September 2008, at 10 p.m., at the Peace Palace, Verbatim Record, in the case concerning the Application of the International Convention on the Elimination of All Forms of Racial Discrimination (*Georgia* v. *Russian Federation*), CR 2008/22, International Court of Justice, The Hague, 2008, para 35. See also Georgia, APPLICATION UNDER ARTICLE 33 OF THE EUROPEAN CONVENTION ON HUMAN RIGHTS AND RULES 46 AND 51 OF THE RULES OF COURT, *op. cit.*, paras 149-152, and Public sitting held on Monday 8 September 2008, at 10 p.m., at the Peace Palace, Verbatim Record, in the case concerning Application of the International Convention on the Elimination of All Forms of Racial Discrimination (*Georgia* v. *Russian Federation*), CR 2008/25, International Court of Justice, The Hague, 2008, para 40, p. 20. The advocate for Georgia stated: "If Russian control was found to exist over the region called the "Moldavian Republic of Transnistra" without military occupation, can there be any doubt about Russian control over Abkhazia and South Ossetia *with* military occupation?"

[70] Public sitting held on Monday 8 September 2008, at 10 p.m., at the Peace Palace, Verbatim Record, in the case concerning Application of the International Convention on the Elimination of All Forms of Racial Discrimination (*Georgia* v. *Russian Federation*), CR 2008/27, International Court of Justice, The Hague, 2008, paras 13 ff.

[71] Georgia, APPLICATION UNDER ARTICLE 33 OF THE EUROPEAN CONVENTION ON HUMAN RIGHTS AND RULES 46 AND 51 OF THE RULES OF COURT, *op. cit.*, paras 155-159.

Russian Federation indirectly recognises that such rights were relevant in the context of its operation abroad.[72] This raises the question of derogations from human rights norms.

c) Derogations

International human rights treaties contain provisions that allow States parties to derogate temporarily from their obligations under those treaties. Article 4(1) of ICCPR lays down the conditions for such a derogation to be lawful.[73] As specified by the UN Human Rights Committee in its General Comment, "measures derogating from the provisions of the Covenant must be of an exceptional and temporary nature" and two fundamental conditions must be met for a State to invoke this derogation: first, there must be a situation that amounts to a public emergency that threatens the life of the nation, and secondly, the state of emergency must be proclaimed officially and in accordance with the constitutional and legal provisions that govern such a proclamation and the exercise of emergency powers.[74] This treaty body further notes that "even during an armed conflict measures derogating from the Covenant are allowed only if and to the extent that the situation constitutes a threat to the life of the nation."[75] Article 15(1) of EConvHR also envisages derogations under certain conditions and makes an explicit reference to a situation of war.[76]

Article 4 of the ICCPR explicitly lays down the provisions which are non-derogable and which must therefore be respected at all times. These include the right to life; the prohibition of torture and cruel, inhuman or degrading punishment; the prohibition of slavery, the slave trade and servitude; and freedom of thought, conscience and religion. Furthermore, measures derogating from the Covenant must not involve discrimination on the grounds of race, colour, sex, language, religion or social origin. The Human Rights Committee also spelt out the other "elements" of the Covenant that cannot be lawfully derogated from under Article 4, such as

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[72] Russia, Responses to Questions Posited by the IIFFMCG (Legal Aspects), *op. cit.*, p. 11.

[73] This article prescribes that "in time of a public emergency which threatens the life of the nation and the existence of which is officially proclaimed, the States Parties to the present Covenant may take measures derogating from their obligations under the present Covenant to the extent strictly required by the exigencies of the situation, provided that such measures are not inconsistent with their other obligations under international law and do not involve discrimination solely on the ground of race, colour, sex, language, religion or social origin."

[74] Human Rights Committee, *General Comment No. 29 (Art. 4)*, Doc. ONU CCPR/C/21/Rev.1/Add.11, 31 August 2001, para. 2.

[75] *Ibid*., para. 3.

[76] This paragraph reads as follows: "In time of war or other public emergency threatening the life of the nation any High Contracting Party may take measures derogating from its obligations under this Convention to the extent strictly required by the exigencies of the situation, provided that such measures are not inconsistent with its other obligations under international law."

the right of all persons deprived of their liberty to be treated with humanity and with respect for the inherent dignity of the human person; the prohibition against the taking of hostages, abduction and unacknowledged detention; certain elements of the rights of minorities to protection; the prohibition on deportation or the forcible transfer of population groups; and the prohibition against propaganda for war and against the advocacy of national, racial or religious hatred that would constitute incitement to discrimination, hostility or violence.[77]

The Russian Federation, while not explicitly referring to a case of derogation, has made the following statement: "If in selected cases the actions of Russian military personnel may be deemed as an infringement of specific human rights (for instance, restricting the freedom of movement), these actions were taken to protect the lives and health of the civilian population, maintain public safety, prevent and preclude any unlawful actions and protect citizens regardless of their nationality and/or ethnic background."[78]

As noted by the Commissioner for Human Rights of the Council of Europe,[79] according to Article 15(3) of the EConvHR, any High Contracting Party availing itself of this right of derogation must keep the Secretary-General of the Council of Europe fully informed of the measures it has taken and the reasons for them. On 10 August 2008, Georgia did inform the Secretary-General of the Council of Europe that, on 9 August 2008, the President of Georgia had invoked his right under Articles 73(1)(f) and 46(1) of the Constitution and declared state of war in the whole territory for fifteen days. The President's decision had been approved by the Georgian Parliament. In the same *note verbale* informing the Secretary-General of the state of war, it was specifically pointed out that no derogation had been made for any rights under the EConvHR. Subsequently, on 3 September 2008 the Permanent Representative of Georgia to the Council of Europe informed the Committee of Ministers that a state of emergency would replace martial law in the country, beginning on 4 September 2008. In this instance, Georgia made no statement concerning possible derogations.

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[77] *Ibid*., para. 13.

[78] Russia, Responses to Questions Posited by the IIFFMCG (Legal Aspects), *op. cit.*, p. 11.

[79] Thomas Hammarberg, Commissioner for Human Rights of the Council of Europe, HUMAN RIGHTS IN AREAS AFFECTED BY THE SOUTH OSSETIA CONFLICT, *Special Mission to Georgia and the Russian Federation*, 22-29 August 2008, CommDH(2008)22, 8 September 2008, para. 12.

d) Relationship with IHL

The main issue is the type of relationship between these two bodies of norms; the question is therefore not whether but rather how human rights law interacts with IHL.[80] Although this question goes far beyond the scope of the work of the IIFFMCG, it nevertheless bears important consequences for the applicable legal framework. The ICJ, when discussing the continued application of the right to life in time of war, stressed that the arbitrary character of the deprivation of a life should be assessed against the standards of IHL and not those of human rights. In this case, IHL acts as a *lex specialis* vis-à-vis human rights law.[81]

While this does not resolve practical issues of application, it does shed some light on the various scenarios one may encounter. Bearing in mind this relevance of human rights law in the context of the armed conflict, it is now necessary to outline briefly the relevant standards applicable to the protection of IDPs.

C. Legal Framework for IDPs

While the armed conflict between Russia and Georgia resulted in persons who could potentially be qualified as refugees crossing the border into Russia, the main issue concerns IDPs, whether those still displaced following the armed conflict in Abkhazia and South Ossetia in the 1990s or IDPs forced to leave because of the hostilities in 2008 and their aftermath. There appear to be conflicting views regarding the qualification of certain displaced persons in the context of the 2008 conflict in Georgia. Contention arises about the qualification of those who fled, as a result of the conflict, from Abkhazia and South Ossetia to the Georgian controlled territory: the authorities in South Ossetia and Abkhazia used the term "refugees,"[82], which implies the crossing of an international border, whereas the Georgian authorities qualify those persons as IDPs. Given that at the time of the conflict there was no

[80] LUBELL, N., "Challenges in applying human rights law to armed conflict," *International Review of the Red Cross*, No. 860, 2005, p. 738.

[81] In a more systematic way, the ICJ further elaborated the various types of relationship between these two bodies of law: "As regards the relationship between international humanitarian law and human rights law, […] some rights may be exclusively matters of international humanitarian law; others may be exclusively matters of human rights law; yet others may be matters of both these branches of international law. In order to answer the question put to it, the Court will have to take into consideration both these branches of international law, namely human rights law and, as lex specialis, international humanitarian law." *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, op. cit.*, para. 106. The ICJ confirmed this approach in the *Armed Activities on the Territory of the Congo (Democratic Republic of the Congo* v. *Uganda) case, op. cit.*, para. 119.

[82] This term was used for example in the context of meetings with the IIFFMCG.

internationally recognised border[83] separating South Ossetia or Abkhazia from the rest of Georgia proper, persons displaced between these two territories should be classified as IDPs in the same way as the ethnic Georgians living in the regions adjacent to the administrative border with South Ossetia who had to leave for Gori and Tbilisi.

Although IDPs are not protected through the legal regime of refugee law, they benefit of course from the legal protection of HRL and, in time of armed conflict, of IHL. In addition to substantive rules protecting them as human beings, these branches of law also contain norms concerning displacement itself and the right to return. In order to address the specific needs of persons forcibly displaced from their homes in their own countries by violent conflicts, gross violations of human rights and natural and human-made disasters, the United Nations Guiding Principles on Internal Displacement have been drafted.[84] While, unlike treaties, these principles are not binding, they are consistent with existing international law, some of them restating or deriving from existing legal obligations,[85] and they set standards in relation to IDPs. They constitute a normative framework for the internally displaced. In this regard, OSCE participating States, including Georgia and Russia, have recognised these principles as a "useful framework for the work of the OSCE and the endeavours of participating States in dealing with internal displacement."[86]

Having outlined the main elements of the applicable international law, it is now necessary to ascertain the facts, as described by the parties and in the light of the other documentary sources, in order to clarify the allegations of violations.

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[83] On this criterion see *Guiding Principles on Internal Displacement Annotations*, Walter Kälin, The American Society of International Law, The Brookings Institution – University of Bern Project on Internal Displacement, Studies in Transnational Legal Policy, No. 38, The American Society of International Law, Washington, DC, 2008, p. 2, available at: http://www.asil.org/pdfs/stlp.pdf

[84] For the purpose of these Guidelines, IDPs are "persons or groups of persons who have been forced or obliged to flee or to leave their homes or places of habitual residence, in particular as a result of or in order to avoid the effects of armed conflict, situations of generalized violence, violations of human rights or natural or human-made disasters, and who have not crossed an internationally recognized border." See *Guiding Principles on Internal Displacement*, Report of the Representative of the Secretary-General, Mr Francis M. Deng, submitted pursuant to Commission resolution 1997/39E/CN.4/1998/53/Add.2, Addendum, E/CN.4/1998/53/Add.2, 11 February 1998, COMMISSION ON HUMAN RIGHTS.

[85] See *Guiding Principles on Internal Displacement Annotations*, Walter Kälin, The American Society of International Law, The Brookings Institution – University of Bern Project on Internal Displacement, Studies in Transnational Legal Policy. No. 38, The American Society of International Law, Washington, DC, 2008, available at: http://www.asil.org/pdfs/stlp.pdf

[86] OSCE, 2 December 2003, Ministerial Council Maastricht, DECISION No. 4/03 on Tolerance and Non-discrimination, para. 13.

III. Main facts and related legal assessment

Particular attention must be paid to the numbers of casualties. First of all, most of the casualties were reported in the context of the hostilities in South Ossetia and in adjacent areas. Secondly, the discrepancies between the first reports of the number of civilians killed and wounded during the hostilities in South Ossetia, as announced by Russia and South Ossetia, and the latest figures provided by the parties, are striking.[87] This was singled out as an "issue" in the 2009 report by Human Rights Watch.[88] The circumstances in which people were killed do matter. For this reason, some lists of people killed, not specifying whether they were participating in the hostilities,[89] should be considered carefully.

Under IHL, the exact figure of casualties is not relevant in itself and does not entail legal implications. What matters is rather the nature of the victims and the circumstances in which such casualties occurred. Furthermore, the Mission does not have the capacity to make a definitive estimate in this regard. The number of casualties given by different sources varies, mostly depending on who is considered.[90] However, all parties to the conflict have a responsibility to establish reliable figures. This is particularly crucial as, at the time of writing this report, some people have still been left with conflicting reports about the death of their relatives and no information about the location of their bodies.

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[87] AI, Civilians in the Line of Fire – The Georgia-Russia Conflict, op. cit., p. 10.

[88] HRW, Up In Flames – Humanitarian Law Violations and Civilian Victims in the Conflict over South Ossetia, op. cit., p. 74. See also AI, Civilians in the Line of Fire – The Georgia-Russia Conflict, op. cit., p. 10.

[89] See for example, Deceased victims list, Public Investigation Commission in South Ossetia, available at: www.osetinfo.ru

[90] For example the Russian Federation in its replies to the questionnaire sent by the IIFFMCG stated that 162 civilian residents – nationals of South Ossetia – had died and 255 had suffered injuries of various degrees; 48 servicemen from the Russian Federation Armed Forces were killed including 10 who served in the Mixed Peacekeeping Forces Battalion, and 162 servicemen sustained various degrees of injuries [Russia, Responses to Questions Posited by the IIFFMCG (Humanitarian Aspects)], p. 2). The August 2009 Report by the Government of Georgia entitled "The aggression by the Russian Federation against Georgia" gives the following figures for "[w]ar casualties among civilian, military and media personnel": 412 persons died. "These have included 228 civilians; 170 military; 14 policemen. Meanwhile, 10 military and 14 policemen remain missing. One foreign and two Georgian journalists have died and four journalists have been wounded in the exercise of their professional functions, 1 747 citizens of Georgia have been wounded; among them 973 military, 547 civilians, and 227 policemen." Report by the Government of Georgia on the aggression by the Russian Federation against Georgia, August 2009, p. 40. Following his visit to the region, Luc Van den Brande, the chairperson of the Ad Hoc Committee established by PACE to study the situation in Russia and Georgia, stated on 29 September 2008 that "independent reports put the total number of deaths at between 300 and 400, including the military." See PACE, Ad Hoc Committee of the Bureau of the Assembly, "The situation on the ground in Russia and Georgia in the context of the war between those countries," Memorandum by Luc Van den Brande, chairperson of the Ad Hoc Committee of the Bureau of the Assembly, Doc. 11720, Addendum II, September 29, 2008.

As mentioned earlier, the primary task of the IIFFMCG is to establish facts. At the same time, it has also been commissioned to assess allegations of violations. The chronology and sequencing of facts as presented below are not to be construed as establishing any type of causal links between them.

A. Conduct of hostilities

IHL governs the conduct of hostilities by parties to a conflict through a set of general principles and more specific rules. The fundamental tenets of this body of norms consist of the immunity of the civilian population and its corollary, the principle of distinction, and the general principle that the right of the parties to the conflict to choose methods or means of warfare is not unlimited.

While the conventional rules of IHL on the conduct of hostilities were applicable mainly to international armed conflicts, the recent decisions of the international criminal tribunals, as well as the consolidation of the customary nature of IHL rules,[91] demonstrate the exponential development of the applicable customary law in non-international armed conflicts.[92]

IHL requires that the parties to a conflict distinguish at all times between combatants and civilians, as well as between military objectives and civilian objects, and that they direct their operations only against combatants and military objectives.[93] Civilians lose their immunity from attack when and only for such time as they are directly participating in hostilities.[94] In this regard, and as far as objects are concerned, IHL defines military objectives as objects which by their nature, location, purpose or use make an effective contribution to military action and whose partial or total destruction, capture or neutralisation, in the circumstances ruling at the time, offers a definite military advantage. Civilian objects are all objects that are not military objectives. Civilian objects, such as homes and schools, are protected against attack, unless and for such time as they are used for military purposes.

In application of this principle of distinction, IHL further prohibits indiscriminate attacks defined in three categories: those (a) which are not directed at a specific military objective; (b)

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[91] In the key study published by the ICRC in 2005 it appears that out of 161 customary rules identified, 159 are also applicable to non-international armed conflicts.

[92] On the convergence between the two regimes, see MOIR, L., *The Law of Internal Armed Conflict*, Cambridge, Cambridge University Press, 2002, p. 306.

[93] As to who qualifies as a "combatant", see Articles 4(A)(1)-(3) and (6) Geneva Conventions (GC) III and Articles 43-44 of the Additional Protocol I. "Civilians" are all those who do not qualify as combatants thus defined, cf. Article 50 of the Additional Protocol I.

[94] See for example Article 52(3) of the Additional Protocol I.

which employ a method or means of combat which cannot be directed at a specific military objective; or (c) which employ a method or means of combat the effects of which cannot be limited as required by international humanitarian law; and consequently which, in each such case, are of a nature to strike both military objectives and civilians or civilian objects without distinction.

Among the cases of indiscriminate attack are those attacks by bombardment by any method or means which treats as a single military objective a number of clearly separated and distinct military objectives located in a city, town, village or other area containing a similar concentration of civilians or civilian objects. Such attacks are prohibited.

Even when an attack is directed at a clear military objective, IHL also prohibits such an attack as being indiscriminate if it is expected to cause incidental loss of civilian life, injury to civilians, damage to civilian objects, or a combination thereof, which would be excessive in relation to the concrete and direct military advantage anticipated.

In addition to the obligations to direct attacks only against combatants and military objectives, and to respect the principle of proportionality in attack, the parties to the conflict must also take a series of precautions at the time of planning, ordering or leading an attack. These precautions in attack, codified in Article 57 of Protocol I, are grounded in the principle that military operations must be conducted with in constant vigilance in order to spare the civilian population, civilian persons and civilian objects. All possible practical precautions must be taken in order to avoid and, in any event, to reduce to a minimum human casualties in the civilian population, injuries to civilian persons and incidental damage to civilian objects. These precautions include doing everything feasible to verify that the objects of attack are military objectives and not civilians or civilian objects, and giving “effective advance warning” of attacks when circumstances permit.

Finally, IHL on the conduct of hostilities also contains principles and rules on weapons.

Accounts of destruction and casualties do not *per se* constitute sufficient elements to conclude that violations of IHL have occurred: the circumstances of the attacks are to be assessed.

While the hostilities broke out in South Ossetia on the night of 7/8 August 2009, artillery shelling had been reported by various sources during the previous days. As this shelling is one

of the main justifications invoked by Georgia for intervening in South Ossetia,[95] those events have particular significance.[96]

A large number of allegations of violations from all sides relate to the conduct of Georgian, South Ossetian and Russian forces in Tskhinvali and the surrounding villages, as well as in the adjacent zones and in Gori, both during the conflict and after. There are particular issues depending on the party concerned.

As the hostilities took place partly in an urban setting, notably Tskhinvali and Gori and the surrounding villages, an assessment of the facts relating to the conduct of hostilities is complicated. While IHL does not prohibit fighting in urban areas, the presence of many civilians places greater obligations on the warring parties to take steps to minimise the harm to civilians. Forces deployed in populated areas must avoid locating military objectives near densely populated areas, and endeavour to remove civilians from the vicinity of military objectives.[97]

Addressing questions such as the types of objective that have been targeted, the circumstances at the time of the attack and the exact cause of damage has proved to be very delicate. For example, many administrative buildings were attacked, as well as schools and apartment buildings. In the case of these objectives, a key fact to establish would be whether or not Ossetian combatants were present in the buildings at the time they were attacked. According to Human Rights Watch, witnesses and members of South Ossetian militias themsleves "made it clear that South Ossetian forces set up defensive positions or headquarters in civilian infrastructure."[98] There are also cases where the presence of such combatants was not substantiated.

Although it appears very difficult to reach definite factual and legal conclusions on each and every specific attack, a number of facts do seem to emerge from testimonies collected on the ground by NGOs and from the comparison between the military objectives and the types of weapons used.

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[95] Mamuka Kurashvili, commander of Georgian peacekeepers in the region stated that Georgia had "decided to restore constitutional order in the entire region," quoted by AI, *Civilians in the Line of Fire – The Georgia-Russia Conflict, op. cit.*, p. 9.

[96] See Chapter 5 "Military Events of 2008".

[97] Art. 58 Additional Protocol I.

[98] HRW, *Up In Flames – Humanitarian Law Violations and Civilian Victims in the Conflict over South Ossetia, op. cit.*, p. 50.

First, a review of the specific controversial targets attacked in the course of the conflict is necessary. However, as objects may have been damaged, or persons affected, without their having been the actual targets attacked, this section will also address the collateral loss of civilians and damage to civilian objects. Secondly, a more general assessment of the conduct of the parties to the conflict under IHL will then be necessary. While most of the allegations of war crimes concern South Ossetia, a few relate to the Kodori Valley and will also be examined.

a) Targets attacked

According to Russia, "In the course of the entire military operation units of the Russian Federation Armed Forces, acting exclusively with a view to repelling an armed attack, used tanks, APCs and small arms to fire upon clearly identified targets only, which enabled them to minimise civilian losses."[99]

Georgia stated that "Georgian forces attacked a) predetermined military targets, including a Russian military convoy moving south and b) targets identified during the hostilities."[100] It provided details only about the former type of targets.

In the light of these two statements, and given the damage caused to civilian buildings, facts concerning targets need to be carefully established. For example the Human Rights Assessment Mission of the OSCE observed, within Tskhinvali, "... damage to mostly civilian buildings, as well as to the base of the Russian peacekeepers deployed under the 1992 Sochi Agreement," including "apartment blocks and civilian neighbourhoods, schools, a home for the elderly, and a psychiatric hospital, all of which were visited by the mission, were among the civilian objects badly damaged by military forces."[101]

A distinction on the conduct of hostilities derived from IHL, the distinction between persons and objects, will be used to structure the analysis of the targets attacked.

(i) Alleged Attacks on Peacekeepers

Alleged attacks on peacekeepers occurred both prior to the conflict, fuelling the tension between the parties, and during it. Given the status of those persons and the particular

[99] Russia, Responses to Questions Posited by the IIFFMCG (Humanitarian Aspects), *op. cit.*, pp. 8-9.

[100] Georgia, Responses to Questions Posited by the IIFFMCG (Humanitarian Aspects, question 3), provided to the IIFFMCG on 5 June 2009, p. 1.

[101] *United Nations Inter-agency Humanitarian Assessment Mission to South Ossetia, op. cit.*, para. 5.9.

attention paid to those attacks in the allegations by Georgia and the Russian Federation, it is crucial to clarify what the facts are and to assess their potential legal implications.

Under IHL, the protection afforded to peacekeepers is closely linked to the general protection of civilians. As stated in the ICRC Customary Law Study, customary IHL prohibits "directing an attack against personnel and objects involved in a peacekeeping mission in accordance with the Charter of the United Nations, as long as they are entitled to the protection given to civilians and civilian objects under international humanitarian law."[102] The use of force for strictly self-defence purposes or for the defence, within their peacekeeping mandate, of civilians or civilian objects would not be qualified as participation in hostilities. In this context they could not be regarded as a lawful target as they are not pursuing any military action. It is important to stress that, in both international and non-international armed conflict, the Rome Statute of the ICC regards it as a war crime intentionally to direct attacks against peacekeepers and related installations "as long as they are entitled to the protection given to civilians or civilian objects under the international law of armed conflict."[103]

During the conflict, according to Russian peacekeepers, posts manned by Russian and/or Ossetian forces were attacked by Georgian forces.[104] The Russian Federation claims that the peacekeepers were deliberately killed. It argues that Georgia committed "violations of international norms governing the conduct of war, resulting primarily in casualties among the peacekeeping personnel."[105] When meeting with the IIFFMCG's experts in Moscow in July 2009, the representatives of the Investigative Committee of the General Prosecutor's Office of Russia indicated that 10 Russian peacekeepers had been killed.[106]

According to Amnesty International, "on 31 July, reports indicate that South Ossetian forces attacked and blew up a Georgian military vehicle carrying Georgian peacekeepers."[107]

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[102] Rule 33, in J-M. HENCKAERTS, L. DOSWALD-BECK (eds), *Customary International Humanitarian Law*, Volume I, *op. cit.*, p. 112.

[103] See Article 8(2)(b)(iii) and (e)(iii), which read as follows: "Intentionally directing attacks against personnel, installations, material, units or vehicles involved in a humanitarian assistance or peacekeeping mission in accordance with the Charter of the United Nations, as long as they are entitled to the protection given to civilians or civilian objects under the international law of armed conflict."

[104] See short chronology provided by the Russian Federation.

[105] Russia, Responses to Questions Posited by the IIFFMCG (Humanitarian Aspects), *op. cit.*, p. 2.

[106] Meeting with the representatives of the Investigative Committee of the General Prosecutor's Office of Russia, Moscow, 29 July 2009.

[107] AI, *Civilians in the Line of Fire – The Georgia-Russia Conflict, op. cit.*, p. 8.

Georgia also claimed that Georgian peacekeepers were attacked by South Ossetian irregular armed groups in the evening of the 7 August.[108]

According to HRW, the organisation's researchers "witnessed the extensive damage caused to the peacekeepers' posts by Georgian attacks" in Tskhinvali and near the village of Khetagurovo.[109] Amnesty International refers to information from the Russian authorities reporting that 10 Russian peacekeepers were killed and a further 30 injured in the course of the attack on two bases located in Verkhny Gorodok in Tskhinvali and another attack north of Tskhinvali.[110]

Georgia has claimed that on 7 August "at 22:30, the armed formations of the proxy regime guided by Russian peacekeepers fired at the Georgian-controlled villages of Prisi and Tamarsheni, from Tskhinvali and the mountain of Tliakana."[111] This action, if confirmed, could be seen as direct participation in hostilities. More generally, Georgian forces allege that South Ossetian forces were firing from the peacekeepers' posts that were attacked during the conflict or providing South Ossetia militiamen with the coordinates of Georgian positions, thereby turning the posts into lawful military objectives.[112]

HRW further noted that it was unable to corroborate any of the serious allegations of attacks on or by peacekeepers from Russia and Georgia.[113]

Nor was the IIFFMCG able to corroborate such claims, or the claim that Georgian forces had attacked Russian peacekeepers' bases, with information from sources other than the sides. Even if these claims were to be confirmed, the lack of more precise information would make the establishment of relevant facts and their legal assessment problematic, as the Mission would find itself with two contradictory assertions. When considering direct attacks against peacekeepers, the conclusion depends on whether or not, at the time of the attacks, the peacekeepers and peacekeeping installations had lost their protection. On the other hand,

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[108] See: Georgia, Replies to Question 3 of the Questionnaire on humanitarian issues, provided to the IIFFMCG on 5 June 2009, p. 2.

[109] HRW, *Up In Flames – Humanitarian Law Violations and Civilian Victims in the Conflict over South Ossetia*, *op. cit.*, p. 33.

[110] *Ibid*., p. 26.

[111] See: Georgia, Replies to Question 3 of the Questionnaire on humanitarian issues, provided to the IIFFMCG on 5 June 2009, p. 2.

[112] See Georgia, Replies to the Questionnaire on Military Issues, provided to the IIFFMCG.

[113] HRW, *Up In Flames – Humanitarian Law Violations and Civilian Victims in the Conflict over South Ossetia*, *op. cit.*, p. 33.

peacekeepers may have been killed or injured as a result of an indiscriminate attack, not specifically directed against them.[114]

The Mission was unable to establish whether, at the time of the alleged attacks on Russian peacekeepers' bases, the peacekeepers had lost their protection owing to their participation in the hostilities. The Mission is consequently unable to reach a definite legal conclusion on these facts.

(ii) Objects

1. Administrative buildings

In March 2009 the IIFFMCG was shown by the *de facto* South Ossetian authorities several administrative buildings, such as those of the Parliament and the *de facto* Ministry of Foreign Affairs, which they alleged had been hit by Georgian forces.[115] It witnessed the damage caused by these attacks. The HRAM also observed "first-hand the destruction caused to many civilian public buildings in Tskhinvali, including the university, a library, the 'parliament building' and other 'governmental offices' in the same complex. A police station and the 'presidential' administration were also damaged."[116] Human Rights Watch also referred to administrative buildings hit by the Georgian artillery, such as the Ossetian parliament building.[117]

The IIFFMCG would like to stress that, as for other types of targets, while it is extremely important to establish the amount of the damage and destruction, ascertaining the circumstances and purpose of a given attack also remains crucial. In this regard, as outlined by Human Rights Watch, the Georgian authorities later claimed that their military had targeted mostly administrative buildings in these areas because these buildings were harbouring Ossetian militias.[118] Similarly, in his testimony to the parliamentary commission

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[114] See Chapter 5 "Military Events of 2008".

[115] Under IHL, only those objects may be lawfully targeted which by their nature, location, purpose or use make an effective contribution to military action and whose partial or total destruction, capture or neutralisation, in the circumstances ruling at the time, offers a definite military advantage. In this regard, attacks on administrative buildings during the August 2008 conflict raise some questions as to whether such buildings can be lawfully targeted.

[116] OSCE, *Human Rights in the War-Affected Areas following the Conflict in Georgia*, *op. cit.*, p. 41.

[117] HRW, *Up In Flames – Humanitarian Law Violations and Civilian Victims in the Conflict over South Ossetia*, *op. cit.*, p. 50.

[118] *Ibid*., p. 41, quoting Zaza Gogava, Chief of the Staff of the Georgian Armed Forces, Stenographic Record of the Session of the Parliamentary ad hoc Commission on Military Aggression and Acts of Russia against the Territorial Integrity of Georgia, Session of October 28, 2008, http://www.parliament.ge/index.php?lang_id=ENG&sec_id=1329&info_id=21212

studying the August war, Zaza Gogava, Chief of Staff of the Georgian Armed Forces, said that "Georgian forces used precision targeting ground weapons only against several administrative buildings, where headquarters of militias were located; these strikes did not cause any destruction of civilian houses."[119] Although this has yet to be clearly established, such an argument would necessarily have legal implications under IHL.

Under certain conditions, the military use of a particular civilian object may turn this object into a military objective that can be lawfully targeted. On the other hand the attacker still needs to ensure the protection of the civilian population, for example by assessing whether the attack will not be disproportionate and by taking appropriate precautions. These elements will be discussed later from a broader perspective.

The Mission was unable to assess each specific attack on administrative and public buildings in Tskhinvali but notes that, although not in themselves lawful military objectives, such buildings may be turned into a legitimate target if used by combatants. This would, however, not relieve the attacker of certain obligations under IHL (e.g. precautions, proportionality).

2. Schools

Under IHL, schools are by nature civilian objects that are immune from attack. Several cases of damage caused to schools in the course of the hostilities call for specific attention.

Referring to the shelling of Tskhinvali by Georgian forces, Human Rights Watch noted that "the shells hit and often caused significant damage to multiple civilian objects, including the university, several schools and nursery schools, stores, and numerous apartment buildings and private houses, (...) some of these buildings were used as defence positions or other posts by South Ossetian forces (including volunteer militias), which rendered them legitimate military targets."[120] For example, witnesses told Human Rights Watch that militias had taken up positions in School No. 12 in the southern part of Tskhinvali, which was seriously damaged by Georgian fire.[121]

The attack on School No. 7 in Gori on 9 August also exemplifies the need to pay particular attention to the circumstances of an attack. According to Human Rights Watch, relying on one

[119] HRW, Up In Flames – Humanitarian Law Violations and Civilian Victims in the Conflict over South Ossetia, *op. cit.*, p. 50.

[120] *Ibid.*, p. 41.

[121] *Ibid.*, p. 50.

eyewitness: "Russian aircraft made several strikes on and near School No. 7 in Gori city. (…) [A]bout one hundred Georgian military reservists were in the yard of the school when it was attacked. (..) None of the reservists was injured. The reservists as combatants were a legitimate target, and it is possible that the school was deemed as being used for military purposes. In such circumstances, it would lose its status as a protected civilian object. In the attack, one strike hit an apartment building next to the school, killing at least five civilians and wounding at least 18, and another hit a second building adjacent to the school causing damage, but no civilian casualties. There were civilians also taking shelter in the school."[122] In this regard, following the overview of specific objects that were attacked or hit, in this section an assessment will later be undertaken to determine whether the principle of proportionality was respected and whether precautions had been taken to minimise the death of civilians and damage to civilian buildings.

The Mission has no information indicating that schools not used for military purposes were deliberately attacked.

3. Hospitals

Under IHL hospitals, apart from the protection they benefit from as civilian objects, enjoy special protective status.[123]

Damage caused to hospitals in the course of a conflict does not in itself amount to a direct attack against such an object. While it may be so if the hospitals have lost their protection because they have been "used to commit, outside their humanitarian duties, acts harmful to the enemy," damage can also be collateral, caused by an attack on a legitimate military target.

According to Human Rights Watch, one of the civilian objects hit by GRAD rockets in Tskhinvali when the Georgian forces attacked was the South Ossetian Central Republican Hospital (Tskhinvali hospital), the only medical facility in the city that was assisting the

[122] *Ibid*., p. 94.

[123] Article 19 of Geneva Convention IV holds that: "The protection to which civilian hospitals are entitled shall not cease unless they are used to commit, outside their humanitarian duties, acts harmful to the enemy. Protection may, however, cease only after due warning has been given, naming, in all appropriate cases, a reasonable time limit, and after such warning has remained unheeded. The fact that sick or wounded members of the armed forces are nursed in these hospitals, or the presence of small arms and ammunition taken from such combatants and not yet handed to the proper service, shall not be considered to be acts harmful to the enemy," Articles 12 and 13 of Protocol I and Article 11 of Protocol II are also relevant.

wounded, both civilians and combatants, in the first days of the fighting.[124] According to this organisation, the rocket severely damaged treatment rooms on the second and third floors.[125]

Testimonies gathered by Human Rights Watch refer to heavy bombing and shelling of Kekhvi, an ethnic Georgian village north of Kurta in South Ossetia, between 7 and 9 August.[126] One of the residents stated that "on 9 August massive bombing started and the village administration and hospital buildings were destroyed."[127]

Human Rights Watch also documented the attack at around 2 a.m. on 13 August by a Russian military helicopter, which fired a rocket towards a group of hospital staff members who were on a break in the hospital yard. The rocket killed Giorgi Abramishvili, an emergency-room physician. Human Rights Watch reported that its researchers saw that the roof of the hospital building was clearly marked with a red cross.[128] This attack contradicts the claim by the Russian Federation that its forces fired "upon clearly identified targets only" during the conflict and that "all kill fire was monitored."[129]

While the damage caused to hospitals by GRAD rockets or artillery shelling resulted from the use of inaccurate means of warfare, the helicopter fire at the hospital in Gori seems to indicate a deliberate targeting of this protected object. This may amount to a war crime.

4. Vehicles

Under IHL, civilian vehicles are immune from attack owing to their civilian character. In the context of the August 2008 conflict, two circumstances may explain the damage caused to civilian vehicles and may have legal implications for whether such damage could amount to a violation of IHL: either a legitimate military target was in the vicinity of the vehicle when it was damaged, or armed militia fighters were in the vehicle when it was attacked. In this latter case, a militia fighter is a legitimate military target if he or she participates directly in hostilities. This is significant as in the course of the conflict many persons reported that South Ossetian militia fighters stole cars and used them for different purposes.[130] For example, in

[124] HRW, Up In Flames – Humanitarian Law Violations and Civilian Victims in the Conflict over South Ossetia, *op. cit.*, p. 42.

[125] *Idem*.

[126] *Ibid.*, p. 91.

[127] *Idem*.

[128] *Ibid.*, p. 95.

[129] Russia, Responses to Questions Posited by the IIFFMCG (Humanitarian Aspects), *op. cit.*, p. 8.

[130] See, inter alia, customary Rules 7-10, in J-M. HENCKAERTS, L. DOSWALD-BECK (eds), Customary International Humanitarian Law, Volume I, *op. cit.*, pp. 25-36.

June 2009 the IIFFMCG expert interviewed two inhabitants of Koshka who had witnessed South Ossetian military men stealing cars. A total of 14 vehicles were taken.

Testimonies collected by Human Rights Watch refer to attacks by Georgian forces on civilians fleeing the conflict zone, mainly on the Dzara road. The Georgian authorities stated in a letter to this organisation that their forces "fired on armor and other military equipment travelling from the Roki Tunnel along the Dzara Road, not at civilian vehicles."[131] A witness told Human Rights Watch that Ossetian forces had an artillery storage facility and firing position on a hill about one kilometre from the Dzara road. While both Russian forces and Ossetian military equipment constitute legitimate targets, accounts of vehicles being hit by Georgian weaponry raise questions about either the civilian nature of those vehicles or inaccurate targeting or collateral damage or deliberate attacks. According to the Georgian government, the movement of civilian transport vehicles was stopped during the combat. From information it collected, however, Human Rights Watch has suggested that "many cars were driven by South Ossetian militiamen who were trying to get their families, neighbours and friends out of the conflict zone."[132]

In its 2009 Report, Human Rights Watch stressed that it was not able to verify independently the claim that cluster bombs were used by Georgian forces in their attacks on the Dzara road, as recounted by one witness. It concluded that such allegations needed to be further investigated.[133]

There are also cases of aerial attacks on civilian convoys fleeing South Ossetia near Eredvi, more than likely carried out by Russian forces according to Human Rights Watch which interviewed residents who had fled. As stressed by this organisation, there appeared to be no Ossetian or Russian military positions in that area that would have been targeted by the Georgian army.[134]

An attack reported in interviews to Human Rights Watch took place on a taxi on 12 August in Tedotsminda, with two persons killed when Russian forces fired on the vehicle.[135] Another

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[131] HRW, Up In Flames – Humanitarian Law Violations and Civilian Victims in the Conflict over South Ossetia, *op. cit.*, p. 56.

[132] *Idem*.

[133] *Idem*.

[134] *Ibid*., pp. 115-116.

[135] *Ibid*., p. 117.

testimony gathered by an NGO recounts another similar incident on the main road heading north from this town to the crossroads near Sakasheti.[136]

The Mission was unable to reach a definite conclusion as to whether the attacks on vehicles by Georgian forces were contrary to IHL. Only deliberate Georgian attacks on civilian vehicles would amount to a war crime.
Similarly, circumstances surrounding the attacks on civilian convoys fleeing the area of conflict, possibly by Russian planes, are difficult to ascertain. If confirmed, such attacks would amount to a war crime.

5. Houses and residential buildings

By their nature, houses and residential buildings are civilian objects that, under IHL, cannot be attacked unless they are used for military purposes.

It is necessary to stress that although hostilities occurred in the Kodori Valley, few houses were damaged. The extent of the destruction gave rise to conflicting accounts.

During an interview with an elderly woman from Ajara conducted by one of the Mission's experts on 7 March 2009,[137] the respondent indicated that she had stayed on with her husband and sister after her family had left the village, and was evacuated by the ICRC in October 2008. She stressed that she had seen lots of houses being bombed in Ajara. The HRAM also reported information that a number of residents of the Kodori Valley lost homes and property as a result of the conflict: a villager from Chkhalta told the HRAM that his house and some of his neighbours' houses were damaged in the bombing. A woman from Sakheni reported that her house was damaged by bombs, as did a man from Gentsvishi. Another man's house was damaged when a bomb dropped in his yard, 20 metres from his house. In Ajara a woman

[136] A woman from Pkhvenisi was trying to go back to her village with her husband and a neighbour. She told the NGO staff:
"So we left from Igoeti after midnight on 12th, my husband, our neighbour and I, in order to go back. We went first to Gori, and then through Variani, heading home. No cars on the road in the dark.
"Then we came to the turn of the road by Sakasheti. We made a stop there, Something fell down in the front of the car, by my husband. There was an explosion. I remember my husband saying, I can't feel my legs.
"When I woke up, I was outside the car, in the shade of a tree. I saw my husband a few meters away from me, moaning. I tried to reach him but couldn't, as I could not use my legs. I later learned I had a bullet wound in my right leg, above the ankle which went through without touching the bone. A Georgian hostage with the Russian soldiers afterwards told me that our car had been fired upon first, and forced to stop.
"After 40 days my family told me that my husband was dead. I later learned that his body stayed behind the tree for four days before the representatives of the Georgian patriarchy took the body and buried it in Tbilisi.
"There were similar incidents in Khviti and Shindisi. Two women were killed in an attack on the car they were sitting in in Shindisi."
Interview by the NGO on 23 October 2008. The incident referred to in Shindisi has been identified as the one HRW documented with regard to the taxi.

[137] Interview conducted on 7 March 2009, with a Georgian interpreter, in Tbilisi.

reported that four or five houses were destroyed by bombs. On 9 August, "the Abkhaz *de facto* Deputy Ministry of Defence declared that aerial strikes were carried out on the military infrastructure in the upper Kodori Valley".[138] During a meeting with the IIFFMCG in March 2009, the *de facto* Deputy Minister for Defence stressed that only one civilian house had been destroyed and that there had been no major fighting in the valley, with only four soldiers wounded. According to the Georgian authorities, "in addition to South Ossetia, Russian forces have opened a second front in Abkhazia, attacking and destroying Georgian villages in the Kodori Gorge (...)."[139] The Abkhaz government in exile, however, indicated to the IIFFMCG that to their knowledge only three houses had been destroyed.[140] The IIFFMCG experts who travelled to the Kodori Valley on 30 May 2009 did not witness damage to houses.

Most of the damage to houses and residential buildings occurred in the context of the conflict in South Ossetia and along the Tskhinvali/Gori axis. The August 2008 conflict involved hostilities in cities and villages. Besides villages in the "buffer zones" and those located in South Ossetia, the two main cities affected by the hostilities were Tskhinvali and Gori.[141]

The Georgian authorities stated that "the Georgian military command minimised the list of targets for artillery and ground troops in the city of Tskhinvali and in the vicinity of populated villages. The list of predetermined targets included only places of heavy concentration of the

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[138] Report of the Secretary-General on the situation in Abkhazia, Georgia, 3 October 2008, S/2008/631, p. 8, para. 45. See also: Meeting with the Abkhaz *de facto* Minister for Defence, 4 March 2009, Sukhumi.

[139] REQUEST FOR THE INDICATION OF PROVISIONAL MEASURES OF PROTECTION SUBMITTED BY THE GOVERNMENT OF THE REPUBLIC OF GEORGIA, 13 August 2008, p. 6 para. 12. See also: Public sitting held on Monday 8 September 2008, at 10 a.m., at the Peace Palace, Verbatim Record, in the case concerning Application of the International Convention on the Elimination of All Forms of Racial Discrimination (Georgia v. Russian Federation), CR 2008/22, International Court of Justice, The Hague, 2008, p. 41, para. 9. Georgia also stated that "Beginning on August 8 at 09:45, Russian aviation bombed a series of civilian and military targets across Georgia, outside the zone of conflict in South Ossetia, damaging infrastructure and causing significant civilian casualties. These targets include but are not limited to: Kodori Gorge, Abkhazia region." See "Timeline of Russian Aggression in Georgia; Ethnic Cleansing of Georgians Resulting from Russian Invasion and Occupation since August 8, 2008; and Violations of IHL and IHRL in course of an International Armed Conflict: torture, inhuman and degrading treatment, hostage taking," document submitted by the Government of Georgia in 2009, pp. 10-11.

[140] Meeting on 4 June 2009.

[141] According to Human Rights Watch:
"In Tskhinvali, the most affected areas were the city's south, southeast, southwest, and central parts. Georgian authorities later claimed that their military was targeting mostly administrative buildings in these areas. The shells hit and often caused significant damage to multiple civilian objects, including the university, several schools and nursery schools, stores, and numerous apartment buildings and private houses. Such objects are presumed to be civilian objects and as such are protected from targeting under international law; but as described below, at least some of these buildings were used as defense positions or other posts by South Ossetian forces (including volunteer militias), which rendered them legitimate military targets," HRW, *Up In Flames – Humanitarian Law Violations and Civilian Victims in the Conflict over South Ossetia, op. cit.*, p. 41.

enemy's manpower and assets."[142] While this may be true with regard to the "list of predetermined targets" mentioned earlier, it does not rule out the possibility that the "targets identified during the hostilities" may have included houses and homes used by the South Ossetian forces.

The HRAM "confirmed first-hand that seven houses in the village of Nogkau were totally or partially destroyed by bombs and tank fire and that homes in the mostly ethnic Ossetian village of Khetagurovo were damaged by small-arms and artillery fire."[143] As stressed above, this damage is in itself not sufficient to constitute a violation of IHL.

It is worth noting that, in the case of Khetagurovo, Human Rights Watch "was able to establish that the positions of Ossetian militias were in close proximity to the civilian homes hit by the Georgian artillery," as claimed by the Georgian forces that said they came under heavy fire from Khetagurovo.[144]

Similarly, "another witness, a 50-year-old kindergarten teacher who showed Human Rights Watch the fragments of GRAD rockets that hit her kindergarten building on Isak Kharebov Street, also said that volunteer militias had been 'hiding' in the building". Several members of the Ossetian militia interviewed by Human Rights Watch confirmed that many school and nursery-school buildings were used as gathering points and defence positions by the militias.[145]

During the ground offensive, extensive damage was caused by Georgian tanks and infantry-fighting vehicles firing into the basements of buildings.[146]

In no way, however, does this mean that the presence of South Ossetian combatants in houses or residential buildings would release the attacker from his obligations under the principle of proportionality, or from the obligation to take precautionary measures as required by IHL.

The attacks by Russian forces in South Ossetia and deeper on the territory of Georgia proper involved aerial, artillery and tank strikes and caused civilian casualties and damage to houses and apartments. According to Human Rights Watch, "villagers from Tamarasheni (in South

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[142] Georgia, Responses to Questions Posited by the IIFFMCG (Humanitarian Aspects, Question 3), provided to the IIFFMCG on 5 June 2009, p. 1

[143] OSCE, *Human Rights in the War-Affected Areas following the Conflict in Georgia*, *op. cit.*, p. 41.

[144] HRW, *Up In Flames – Humanitarian Law Violations and Civilian Victims in the Conflict over South Ossetia*, *op. cit.*, p. 51.

[145] *Idem*.

[146] *Ibid*., p. 58.

Ossetia) described how Russian tanks fired on villagers' homes" and "witnesses told Human Rights Watch that there were no Georgian military personnel in their houses at the time that the tank fire took place."[147] This will be analysed in detail as part of our general assessment of allegations of indiscriminate attacks and failure to take precautionary measures.

While damage to civilian houses and buildings caused by Georgian and Russian forces does not in itself constitute a violation of IHL, the damage caused by artillery, aerial and tank attacks raises serious concern, especially with regard to the principle of proportionality and the obligation to take precautions as required by IHL.

6. Cultural objects, monuments, museums and churches

The basic principle is to be found in Article 4 of the 1954 Convention for the Protection of Cultural Property in the Event of Armed Conflict, applicable in both international and non-international armed conflict. It states that, as long as cultural property is civilian, under IHL it may not be the object of attack. Customary law provides that "Each party to the conflict must respect cultural property: a) Special care must be taken in military operations to avoid damage to buildings dedicated to religion, art, science, education or charitable purposes and historic monuments unless they are military objectives; b) Property of great importance to the cultural heritage of every people must not be the object of attack unless imperatively required by military necessity."[148]

Reports on the conflict in Georgia contain very few allegations of damage caused to cultural monuments, museums or churches. While not systematically put forward, such claims as have been made come from both Georgia and the Russian Federation. According to the latter, "a random examination of historic and cultural monuments conducted on 15-18 August 2008 showed that a number of unique objects had been lost as a result of large-scale heavy-artillery shelling of South Ossetian communities by the Georgian forces. Furthermore, instances of vandalism and the deliberate destruction of cultural monuments and ethnic Ossetian burial sites were attributed to the Georgian military as well."[149] Noting that the information provided is subject to verification, Georgia gives the following description of damage to cultural monuments, churches and museums "based on reports from the local population and museum staff, and data compiled by the Ministry of Culture, Monument Protection and Sport of Georgia." Georgia asserts that "a number of monuments have been damaged by bombings,

[147] *Ibid*., p. 114.

[148] Rule 38, in J-M. HENCKAERTS, L. DOSWALD-BECK (eds), *Customary International Humanitarian Law*, Volume I, *op. cit.*, p. 127.

[149] Russia, Responses to Questions Posited by the IIFFMCG (Humanitarian Aspects), *op. cit.*, p. 3.

shelling, looting and arson carried out by Russian forces and Ossetian militias operating in their wake." It stressed that "a precise survey of the damage is not yet available [as] the expert group mandated by the government cannot gain access to the zones controlled by Russian forces." It also indicates that the list[150] is provisional and that the high density of monuments in the Shida Kartli region makes it likely that many more churches or monuments have been damaged as well.[151]

There seems to be uncertainty as to the exact damage to cultural monuments caused as a result of the conflict. According to the Human Rights Assessment Mission of the OSCE, an NGO reported that the destruction in Disevi included cultural monuments dating from the14th century and earlier.[152] During an interview conducted by an NGO and made available to the IIFFMCG, a villager from Dvani, a village on the administrative border, declared that "the church was hit, and some houses were destroyed (...). It was artillery fire. The Russians should have known there were no military targets there."[153] There are no further details about the circumstances of the attack.

The most significant damage confirmed concerns the Bishop's Palace in Nikozi (10th/11th centuries). This is included in the list provided by Georgia of monuments that were allegedly damaged. It is described by the Georgian authorities as "one of the most important examples from the late medieval period, [and it] was heavily damaged following aerial bombardment on

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[150] Georgia gave the following list:
"Archangel church (19th century): The newly restored church in the village of Kheiti was damaged following shelling on 12th of August.
"Ikorta church (12th century): One of the most interesting examples of Georgian Christian architecture and home to three Georgian heroes' graves. The church was damaged following shelling on the 9th and 10th of August.
"Ivane Machabeli museum: The museum in the village of Tamarasheni just north of Tskhinvali was heavily bombed and destroyed.
"Giorgi Machabeli Palace (18th century): The Palace in the village of Kurta, situated between Tskhinvali and Djava, was leveled by bulldozer following its looting on 13-14th of August.
"Bishop's Palace in Nikozi (10th/11th centuries): This recently restored palace, one of the most important examples from the late medieval period, was heavily damaged following aerial bombardment on 9th August and a subsequent fire.
"Wooden Church of St George in Sveri (19th century): The church, one of the few surviving examples of sacred wooden architecture, was burned to the ground.
"Kemerti St George Church (9th-10th centuries): The church was bombed on 10th of August.
"Ksani Gorge Museum Reserve (Eristavi Palace) in Akhalgori district: Currently occupied by South Ossetia militias; looting is feared."
See: Document submitted by Georgia, "Russian Invasion of Georgia – Facts & Figures," 8 September 2008, p. 14.

[151] Document submitted by Georgia, "Russian Invasion of Georgia – Facts & Figures," 8 September 2008, p. 30.

[152] OSCE, *Human Rights in the War-Affected Areas following the Conflict in Georgia*, *op. cit.*, p. 52.

[153] Interviews conducted by an NGO on 11 September 2008, which does not want to be quoted.

9th August and a subsequent fire."[154] This is confirmed by the Council of Europe Assessment Mission on the Situation of the Cultural Heritage in the Conflict Zone in Georgia. This mission visited Georgia in October 2008 and assessed the damage inflicted on the cultural heritage and, by extension, buildings, in the August 2008 conflict zone in Georgia, and more specifically in the former so-called "buffer zone" to the north of Gori. The Technical Assessment Report refers to "the 10th-century Bishop's Palace which, together with a group of domestic buildings to the south, was badly damaged by bomb blast." It further indicates that "the religious community members were in the buildings at the time of the blast."[155] There is a need to collect further information on the circumstances of the attack.

Generally, more information is needed in order to assess both the extent of the damage and the facts relating to the circumstances of the military operations. This is critical as the special protection given to cultural property ceases only in cases of imperative military necessity.

b) Indiscriminate attacks including disproportionate attacks

Some of the most serious allegations by all sides in the August 2008 conflict relate to indiscriminate attacks and the deliberate targeting of civilians. The Russian Federation argues that Georgia committed "violations of international norms governing the conduct of war, resulting in dramatic humanitarian consequences and, primarily, casualties, among the civilian population, and the destruction of residential quarters and civilian facilities."[156] Georgia claims that: "Throughout the armed conflict, the Russian Federation, in conjunction with proxy militants under their control, conducted indiscriminate and disproportionate attacks."[157] Allegations in this regard focus *inter alia* on the use of certain types of weapons having indiscriminate effects. Russia reported the "large-scale and indiscriminate use of heavy weapons and military equipment by the Georgian side against the civilian population of Ossetia on the night of 7 to 8 August"[158] including the "shelling of residential areas and

[154] Document submitted by Georgia, "Russian Invasion of Georgia – Facts & Figures," 8 September 2008, p. 30.

[155] Council of Europe, Directorate-General IV: education, culture and heritage, youth and sport, *Assessment Mission on the situation of the cultural heritage in the conflict zone in Georgia*, Technical Assessment Report, Report prepared by: Mr David Johnson, 20 October 2008, Reference: AT(2008)386, p. 9. See also: *Council of Europe Post-Conflict Immediate Actions for the Social and Economic Revitalisation of Communities and Cultural Environment in the Municipality of Gori (Georgia)*, General Reference Document, Directorate-General IV: education, culture and heritage, youth and sport, 18 February 2009, Reference: AT(2008)450rev, p. 11.

[156] Russia, Responses to Questions Posited by the IIFFMCG (Humanitarian Aspects), *op. cit.*, p. 1.

[157] See: Georgia, Replies to Question 5 of the Questionnaire on Humanitarian Issues, provided to the IIFFMCG on 5 June 2009, p. 4. See also p. 1.

[158] Russia, Responses to Questions Posited by the IIFFMCG (Humanitarian Aspects), *op. cit.*, p. 1. See also p. 2.

infrastructure facilities"[159] and the use of "multiple launch rocket systems that cause massive civilian casualties when used in populated areas and inflict large-scale damage to vital civilian facilities."[160] Georgia claims that "the Russian Federation has failed to meet this duty by indiscriminately bombing and shelling areas which were not legitimate military targets, and by utilizing means of warfare, such as landmines and cluster bombs, in a manner which failed to distinguish between civilians and combatants."[161]

The IIFFMCG deems it necessary first to address the issue of the types of weapons used and the ways in which they were used before proceeding with a general assessment of the question of indiscriminate attacks.

(i) The types of weapons used and the ways in which they were used

IHL governing the use of weapons is articulated in general principles prohibiting the use of means or methods of warfare that provoke superfluous injury or unnecessary suffering[162] or indiscriminate effects,[163] and specific rules banning or limiting the use of particular weapons. None of the weapons used in the context of this conflict is covered by a specific ban, whether be it conventional or customary. Nevertheless, while none of the weapons used during the August 2008 conflict could be regarded as unlawful *per se* under the general principles of IHL, the way in which these weapons were used raises serious concern in terms of legality. This is significant considering that the weapons in question were used mostly in populated areas. The two types of controversial weapon are the GRAD rockets and cluster bombs.

As rightly stated by Georgia, "at the time of the international armed conflict between Russia and Georgia in August 2008, Georgia was not party to any of the international legal instruments expressly prohibiting the use of GRAD Multiple Rocket Launching systems or cluster munitions in international armed conflict; neither was there any rule of customary

[159] *Ibid*., p. 2.

[160] *Ibid*., p. 4.

[161] Georgia, Responses to Questions Posited by the IIFFMCG (Humanitarian Aspects, Question 5), provided to the IIFFMCG on 5 June 2009, p. 1.

[162] Article 35(2) of Additional Protocol I of 1977 states that "It is prohibited to employ weapons, projectiles and material and methods of warfare of a nature to cause superfluous injury or unnecessary suffering."

[163] Under Article 51(4) of Additional Protocol I of 1977, indiscriminate attacks include "(b) those which employ a method or means of combat which cannot be directed at a specific military objective; or (c) those which employ a method or means of combat the effects of which cannot be limited as required by this Protocol; and consequently, in each such case, are of a nature to strike military objectives and civilians or civilian objects without distinction."

international law, applicable to Georgia, prohibiting the above."[164] This also holds true for Russia.

Where GRAD rockets are concerned, Georgia, as reported by HRW, stated that such rockets were used only on "Verkhny Gorodok district of Tskhinvali, where [separatist] artillery was deployed," while the city centre was hit with "modern, precision targeting weapons."[165] Georgia reiterated this position in its replies to the questionnaire sent by the IIFFMCG: "The Armed Forces of Georgia used GRAD rockets only against clear military objectives and not in populated areas."[166] Georgia stressed that "the types of weapons used, including GRAD Multiple Rocket Launching Systems [MLRS] or cluster munitions, had been used in full compliance with the applicable rules of international humanitarian law, in particular the principles of distinction and proportionality."[167]

These statements on the use of GRAD rockets, however, contradict the information gathered by the IIFFMCG. According to many reports and accounts from witnesses present in Tskhinvali on the night of 7 August 2008,[168] Georgian artillery started a massive area bombardment of the town. Shortly before midnight the centre of Tskhinvali came under heavy fire and shelling. OSCE observers assessed that this bombardment originated from MLRS GRAD systems and artillery pieces which were observed stationed North of Gori in the Karaleti area just outside the zone of conflict on 7 August at 3 p.m.[169] Narratives of the first hours following the offensive indicate intense shelling with incoming rounds exploded at intervals of 15 to 20 seconds. Within 50 minutes (8 August, 0.35 a.m.) the OSCE observers counted more than 100 explosions of heavy rounds in the town, approximately half of them in the immediate vicinity of the OSCE field office which was located in a residential area. The OSCE compound was hit several times, and damaged.

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[164] Georgia, Response to Questions Posited by the IIFFMCG (Humanitarian Aspects), provided to the IIFFMCG on 5 June 2009, p. 1.

[165] HRW, *Up In Flames – Humanitarian Law Violations and Civilian Victims in the Conflict over South Ossetia*, *op. cit.*, p. 50.

[166] Georgia, Responses to Questions Posited by the IIFFMCG (Humanitarian Aspects), provided to the IIFFMCG on 5 June 2009, p. 1. See also: Meeting of the IIFFMCG with the Ministry of Defence of Georgia on 4 June 2009.

[167] *Idem*.

[168] See Chapter 5 "Military Events of 2008".

[169] OSCE Mission to Georgia, Spot Report Update No. 1 (11:00 Tbilisi time) dtd 8 August 2008; confirmed by OSCE Military Monitoring Officers and other staff personnel in talks on 16/17 October 2008. See also OSCE Mission to Georgia, Spot Report. Update on the situation in the zone of the Georgian-Ossetian conflict, dtd 7 August 2008.

Investigations and interviews carried out by HRW and Amnesty International seem to confirm these facts. Human Rights Watch concluded that Georgian forces fired GRAD rockets using, among other weapons, BM-21 "GRAD," a multiple rocket launcher system capable of firing 40 rockets in 20 seconds, self-propelled artillery, mortars, and Howitzer cannons.[170] According to Amnesty International, "the entry of Georgian ground forces into these villages, and into Tskhinvali itself, was preceded by several hours of shelling and rocket attacks as well as limited aerial bombardment. Much of the destruction in Tskhinvali was caused by GRADLAR MLRS (GRAD) launched rockets, which are known to be difficult to direct with any great precision."[171] Shelling, including with Howitzer cannons and self-propelled artillery, caused damage, death and injury, in particular in Tskhinvali, even though some of the population had been evacuated.[172] Amnesty International representatives observed extensive damage to civilian property within a radius of 100-150 m from these points, particularly in the south and south-west of the town, highlighting the inappropriateness of the use of GRAD missiles for targeting these locations.[173]

The Fact-Finding Mission concludes that during the offensive on Tskhinvali the shelling in general, and the use of GRAD MLRS as an area weapon in particular, amount to indiscriminate attacks by Georgian forces, owing to the characteristics of the weaponry and its use in a populated area. Furthermore, the Georgian forces failed to comply with the obligation to take all feasible precautions in the choice of means and methods of warfare with a view to avoiding, and in any event to minimising, incidental loss of civilian life, injury to civilians and damage to civilian objects.

The other highly debated weapons used in the course of the conflict are the cluster munitions. While the use of cluster bombs in order to stop the advance of the Russian forces was acknowledged by the Georgian authorities, Moscow did not officially authorise such use by its own forces.

According to Amnesty International, the Georgian authorities stressed that cluster munitions were deployed only against Russian armaments and military equipment in the vicinity of the Roki tunnel in the early hours of 8 August and only by Georgian ground forces. The Georgian

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[170] HRW, *Up In Flames – Humanitarian Law Violations and Civilian Victims in the Conflict over South Ossetia, op. cit.*, p. 50.

[171] AI, Civilians in the Line of Fire – The Georgia-Russia Conflict, *op. cit.*, p. 24.

[172] HRW, *Up In Flames – Humanitarian Law Violations and Civilian Victims in the Conflict over South Ossetia, op. cit.*, pp. 41

[173] AI, Civilians in the Line of Fire – The Georgia-Russia Conflict, *op. cit.*, p. 26.

authorities informed Amnesty International that such cluster munitions were also used on 8 August to attack Russian and Ossetian forces on the Dzara bypass road.[174] Amnesty International noted that "the Georgian authorities maintain that there were no civilians on the Dzara road at the time of the Georgian cluster bombing as the movement of all kinds of civilian transport vehicles was stopped during combat operations in the area, and this was confirmed by Georgian forward observers." Amnesty International stressed that it was not "able to establish whether there were definitely civilians in the areas targeted by Georgian cluster bombs along the Dzara road at the precise time of their deployment." However, it noted that "it is clear that several thousand civilians were fleeing their homes both towards central Georgia and to North Ossetia during the course of 8 August and that the Dzara road was an obvious avenue of flight for South Ossetians heading north."[175]

Georgia explained the military necessity for using cluster bombs in the following terms:

"Cluster munitions, specifically the GRADLAR160 missile system and the MK4 LAR160 type missiles with M-85 cluster bombs, have been used exclusively against heavily armored vehicles and equipment moving into the territory of Georgia. The use of the aforementioned was based on a thorough analysis of the military necessity and the military advantage it could give to the Georgian army in the given situation. The pressing military necessity was to halt the advance of Russian military personnel and equipment into Georgian territory. The attack was directed specifically at military personnel and objects and the use of the GRADLAR160 missile system and the MK4 LAR160 type missiles with M-85 cluster bombs impeded the advance of the Russian Army into Georgian territory for several hours, thus giving the Georgian Army, which in numbers was several times less than the advancing Russian troops, a military advantage which created the opportunity to facilitate the safe evacuation of civilians from the theatre of war."[176]

As for the presence of clusters that hit nine villages in the Gori District, HRW noted that "several factors suggest that Georgian forces did not target these villages, but rather that the submunitions landed on these villages owing to a massive failure of the weapons system."[177]

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[174] AI, Civilians in the Line of Fire – The Georgia-Russia Conflict, *op. cit.*, p. 33.

[175] *Idem*.

[176] Georgia, Responses to the Questions Posited by the IIFFMCG (Humanitarian Aspects, Question 4), provided to the IIFFMCG on 5 June 2009, p. 1.

[177] HRW, *Up In Flames – Humanitarian Law Violations and Civilian Victims in the Conflict over South Ossetia*, *op. cit.*, p. 66.

HRW documented a number of civilian casualties as a consequence of these incidents, either when cluster munitions landed, or from unexploded duds.[178]

Russia informed the IIFFMCG that "the Chief Military Prosecutor's Office jointly with the Prosecutor-General's Office of the South Ossetian Republic (SOR) identified instances where in the course of the military operation Georgian armed forces used cluster munitions and 500-kg air-delivered bombs against the civilian population." The Russian Federation stated that "this is prohibited by the Convention on Prohibitions or Restrictions on the Use of Certain Conventional Weapons Which May Be Deemed to Be Excessively Injurious or to Have Indiscriminate Effects dated 10 October 1980."[179]

There are two separate questions arising from the above claim. The first concerns whether Georgia deliberately targeted the civilian population, which is prohibited whatever type of weapon is used; the second question is whether the use of these two weapons (mainly cluster munitions), either *per se* or because of how they have been used by Georgia, contravenes the 1980 Conventional Weapons Convention. There seems to be no evidence of such a direct attack against civilians by Georgian forces. With regard to the question of legality vis-à-vis the 1980 Convention, it is crucial to stress that not only is this treaty merely a framework convention that does not consider specific weapons, but none of its related protocols addresses the legality of the weapons in question here.

Concerning the alleged use of cluster bombs by Russia, this state reiterated its position in its replies to the IIFFMCG questionnaire: "Cluster munitions, though available to the strike units of the Russian Federation Air Force and designed to inflict casualties on the enemy and destroy military equipment in open spaces, have never been used."[180] This contradicts evidence, collected by Human Rights Watch, which asserted that cluster munitions were used, *inter alia*, in the village of Variani, killing three people; in Ruisi; and in the main square of Gori city, killing six people.[181]

The death of a Dutch journalist in the course of the 12 August cluster munitions strike on Gori's main square strengthens this claim that Russia did use cluster munitions. This is

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[178] *Ibid*., pp. 66-67.

[179] Russia, Responses to Questions Posited by the IIFFMCG (Humanitarian Aspects), *op. cit.*, p. 4.

[180] Russia, Responses to Questions Posited by the IIFFMCG (Humanitarian Aspects), *op. cit.*, p. 10. See also p. 9.

[181] HRW, *Up In Flames – Humanitarian Law Violations and Civilian Victims in the Conflict over South Ossetia*, *op. cit.*, pp. 105-113.

significant as not only HRW but also the commission of inquiry set up by the Dutch Ministry of Foreign Affairs concluded that this journalist had been killed as a result of the use of such weapons by the Russian side.[182]

Information also collected by Amnesty International seems to rule out any doubt about the use of cluster munitions by Russia in populated areas.[183] This is confirmed by the recent report by HRW which investigated the use of cluster bombs by Georgia and Russia during the August 2008 conflict.[184]

The use by Georgia of certain weapons including GRAD MRLS during the offensive against Tskhinvali and other villages in South Ossetia did not comply with the prohibition of indiscriminate attacks and the obligation to take precautions with regard to the choice of means and methods of warfare.

The use of artillery and cluster munitions by Russian forces in populated areas also led to indiscriminate attacks and the violation of rules on precautions.

(ii) Indiscriminate attacks by Russia and Georgia

While Amnesty International noted that Russian aerial bombardments appear to have been quite localised and that most of the bombing would appear to have targeted Georgian military positions outside built-up areas, it noted, however, that villages and towns were hit, even though the damage would appear to be limited to stretches of streets and isolated houses here

[182] Human Rights Watch noted: "on August 29 the Dutch Ministry of Foreign Affairs dispatched an investigative commission consisting of military and diplomatic experts to Gori to investigate Storimans's death. (…) Based on visual characteristics, the serial numbers found on the missile pieces and the nature of the strike, the commission concluded that Russian forces had hit the square with an Iskander SS-26 missile carrying cluster munitions. The information gathered by Human Rights Watch researchers on the ground supports the Dutch investigation's conclusions. The Russian Ministry of Defense has denied that it used the missile system Iskander in South Ossetia, though this would not preclude that it had been used against a target in another part of Georgia, such as Gori. Presented with the findings of the Dutch investigative commission, the Russian authorities asserted that there was not enough evidence to conclude that Storimans had been killed as a result of the use of weapons by the Russian side." See HRW, *Up In Flames – Humanitarian Law Violations and Civilian Victims in the Conflict over South Ossetia, op. cit.*, pp. 112-113. See also for the report of the Dutch Commission: "Report of the Storimans investigative mission," October 20, 2008, http://www.minbuza.nl/binaries/enpdf/scannen0001.pdf

[183] "Although Russia continues to deny the use of cluster bombs, Amnesty International delegates heard numerous independent eye-witness accounts suggesting their use in Kvemo Kviti, Trdznisi, Tqviavi, Pkhvenisi, Kekhvi, Ruisi and Akhaldaba, mostly on 8 August, but also in the following days. Material evidence of the use of both AO 2.5 RTM cluster munitions (dropped from planes in RBK 500 bombs) and Uragan fired M210 bomblets have been found around several villages just north of Gori. These areas were still populated by many civilians, many of whom were on the roads trying to flee the conflict. It has also been alleged that the bomb attack on the central square of Gori on 12 August was conducted using cluster munitions," AI, *Civilians in the Line of Fire – The Georgia-Russia Conflict, op. cit.*, pp. 33-34.

[184] HRW, *A Dying Practice: Use of Cluster Munitions by Russia and Georgia in August 2008*, April 2009, available at: http://www.hrw.org/en/reports/2009/04/14/dying-practice-0.

and there in the villages affected.[185] The IIFFMCG witnessed the nature of this damage in Tkviavi in June 2009. Amnesty International also suggested that in this regard the Russian bombing was different from the Georgian assault on Tskhinvali.[186] It nevertheless pointed out that its "delegates also heard a number of accounts in which civilians and civilian objects were struck by aerial and missile attacks in the apparent absence of nearby military targets." It expressed concern "that civilians and civilian objects may have been directly attacked in violation of Article 51(3) of Protocol I to the Geneva Conventions, or that they were hit in the course of indiscriminate attacks in violation of Article 51(4)."[187]

HRW, which conducted a more in-depth analysis of the bombardment of places and other incidents, reached a firmer conclusion, stating that:

"Russian forces attacked areas in undisputed Georgian territory and South Ossetia with aerial, artillery, and tank fire strikes, some of which were indiscriminate, killing and injuring civilians. All Russian strikes using cluster munitions were indiscriminate."[188]

Many cases investigated by HRW raise serious concerns under IHL. Discussing the circumstances and methods of the attacks, this organisation made the following assessment:

"Russian forces attacked Georgian military targets in Gori city and in ethnic Georgian villages in both South Ossetia and undisputed Georgian territory, often causing civilian casualties and damage to civilian objects such as houses or apartment blocks. The proximity of these targets to civilian objects varied. In several cases, the military targets were within meters of civilians and civilian homes, and the attacks against them resulted in significant civilian casualties. In other cases the apparent military targets were located as far as a kilometer away from civilian objects, and yet civilian casualties also resulted. In attacking any of these targets the Russian forces had an obligation to strictly observe the principle of proportionality, and to do everything feasible to assess whether the expected civilian damage from the attack would likely be excessive in relation to the direct and concrete military advantage to be gained. In many cases the attacks appear to have violated the principle of proportionality."

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[185] AI, *Civilians in the Line of Fire – The Georgia-Russia Conflict, op. cit.*, p. 29.

[186] *Idem.*

[187] *Idem*.

[188] HRW, *Up In Flames – Humanitarian Law Violations and Civilian Victims in the Conflict over South Ossetia, op. cit.*, p. 87.

HRW also documented cases in which villagers from Tamarasheni described how Russian tanks had fired on villagers' homes. Witnesses told Human Rights Watch that there were no Georgian military personnel in their houses at the time when the tank fire took place. HRW also referred to "one witness [who] described an incident in which tanks methodically moved through the streets, firing on numerous houses in a row, suggesting that the fire was not directed at specific military targets and that such attacks were indiscriminate."[189]

Georgian attacks, both during the shelling of Tskhinvali and during the ground offensive, raise serious concerns. In the former, according to HRW, "at the very least the Georgian military effectively treated a number of clearly separate and distinct military objectives as a single military objective in an area that contained a concentration of civilians and civilian objects,"[190] amounting under IHL to indiscriminate attacks. In some cases where Georgian forces did target military objectives, HRW pointed out that "evidence suggests that (…) the attacks may have been disproportionate because they could have been expected to cause loss of civilian life or destruction of civilian property that was excessive compared to the anticipated military gain."[191]

As for the ground offensive, according to HRW it is very difficult to reach a definitive conclusion in terms of legality under IHL owing to the presence of Ossetian combatants throughout Tskhinvali and in some villages. The organisation noted that "numerous witnesses confirmed to Human Rights Watch that virtually all able-bodied males joined the volunteer militias, often after moving their families to safety in North Ossetia."[192] HRW however "believes that, particularly during the attempt to take Tskhinvali, on a number of occasions Georgian troops acted with disregard for the protection of civilians by launching attacks where militias were positioned that may have caused predictably excessive civilian loss compared to the anticipated military gain."[193]

In several cases, Georgia and Russia conducted attacks that were indiscriminate and consequently violated IHL.

[189] *Ibid*., p. 114.

[190] *Ibid*., p. 89.

[191] *Idem*.

[192] *Ibid*., p. 57.

[193] *Idem*.

c) Precautionary measures in attacks

Obligations regarding precautions in attack on the part of the attacker are key to ensuring that other rules of IHL on the conduct of hostilities are respected. Article 57 of Additional Protocol I spells out the general obligation that "in the conduct of military operations, constant care shall be taken to spare the civilian population, civilians and civilian objects" in this regard, as well as more specific precautionary measures to be taken, such as to:

"(i) do everything feasible to verify that the objectives to be attacked are neither civilians nor civilian objects and are not subject to special protection but are military objectives;

(ii) take all feasible precautions in the choice of means and methods of attack with a view to avoiding, and in any event to minimizing, incidental loss of civilian life, injury to civilians and damage to civilian objects;

(iii) refrain from deciding to launch any attack which may be expected to cause incidental loss of civilian life, injury to civilians, damage to civilian objects, or a combination thereof, which would be excessive in relation to the concrete and direct military advantage anticipated;" as well as:

"(c) effective advance warning shall be given of attacks which may affect the civilian population, unless circumstances do not permit."[194]

These obligations played a very important role given that hostilities took place in populated areas and, at least with regard to Ossetian militia fighters, involved very mobile forces.

The offensive on Tskhinvali by Georgian forces raises serious concerns in the light of these obligations on warring parties to take all possible steps to minimise harm to civilians and not to attack civilian objects.[195]

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[194] Such obligations are of a customary nature and are applicable in both international and non-international armed conflict. See Rules 15-21, in J-M. HENCKAERTS, L. DOSWALD-BECK (eds), *Customary International Humanitarian Law*, Volume I, *op. cit.*, pp. 51-67.

[195] In its replies to the Questionnaire sent by the IIFFMCG, Georgia indicated that:
"Georgian military command minimised list of targets for artillery and ground troops in the city of Tskhinvali and vicinity of populated villages. The list of predetermined targets included only places of heavy concentration of the enemy's manpower and assets. Georgian military command did not use any MRLS system inside populated areas. Finally, the command was informed both by open sources and intelligence of massive evacuation of civilians from proxy-controlled territories, including from the city of Tskhinvali."
Georgia, Responses to Questions Posited by the IIFFMCG (Humaneterian Aspects), Question 3, provided to the IIFFMCG on 5 June 2009, p. 1.

While the identification of legitimate military targets and the efforts made by the Georgian forces to minimise those located in the city or near populated areas seem to meet the requirements of IHL, some issues remain: one concerns the choice of artillery for conducting the attacks; another concerns the list of targets "identified during the hostilities," for example during the ground offensive. Most important are the issue of the intelligence used to select targets and the question of the presence of the civilian population in Tskhinvali at the time of the offensive. Amnesty International expressed concern "that the Georgian forces may have selected targets in areas with large numbers of civilians on the basis of outdated and imprecise intelligence and failed to take necessary measures to verify that their information was accurate before launching their attacks."[196] It further noted that "at the time of the initial shelling of Tskhinvali, Georgian forces were positioned several kilometres from Tskhinvali, at a distance from which it would have been difficult to establish the precise location of the Ossetian positions firing on them. Nor, as Ossetian forces were lightly armed and mobile, could there have been any guarantee that positions from which munitions had been fired in preceding days were still occupied on the night of 7 August."[197] It also expressed concern about whether precautions were actually taken in relation to the choice of means and methods and issuing a warning to the civilians.[198]

This latter point, regarding the giving of effective advance warning, is closely linked to the controversial question of the number of inhabitants remaining at the time of the offensive. Different figures were being given, even among the South Ossetian authorities.[199] During a meeting at the Ministry of Defence of Georgia on 4 June 2009, the IIFFMCG was told that, according to the information available to the military command at the time, "most of the population was evacuated by the 5th of August." Anatoly Barankevich, the National Security Council Secretary of South Ossetia, referring to the plan for the evacuation of civilians, declared that "on August 8 we have completely cleared the city."[200]

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[196] AI, *Civilians in the Line of Fire – The Georgia-Russia Conflict, op. cit.*, p. 27. In the same vein, HRW noted that "It is also not clear to Human Rights Watch to what extent the Georgian command had the necessary intelligence to establish the exact location of the South Ossetian forces at any given moment, in part because the forces were very mobile." HRW, *Up In Flames – Humanitarian Law Violations and Civilian Victims in the Conflict over South Ossetia, op. cit.*, p. 51.

[197] *Idem.*

[198] *Idem*.

[199] AI, *Civilians in the Line of Fire – The Georgia-Russia Conflict, op. cit.*, p. 27.

[200] Georgia, Responses to Questions Posited by the IIFFMCG (Humaneterian Aspects), Question 3, provided to the IIFFMCG on 5 June 2009, p. 2.

These statements contradict the testimony of the Georgian army chief of staff, Zaza Gogava, to a parliamentary commission examining the conduct of the war, namely, that the Georgian military command was clearly aware of the presence of civilians in Tskhinvali and other areas subjected to artillery strikes.[201] A Georgian soldier – interviewed by HRW – who entered Tskhinvali on the morning of 8 August said that they could see civilians in a basement. There is thus no doubt that many people were still in Tskhinvali on the night of 7 August. Consequently, the question is about the type of precautionary measures that were taken by the Georgian military command to minimise the harm to civilians, both during the shelling and afterwards, in the course of the ground operation.

During the meeting between representatives of the Ministry of Defence of Georgia and the IIFFMCG in June 2009, the Mission's experts were told that the Georgian forces had used smoke grenades to warn the population before artillery shelling. This seems to fall short of giving effective advance warning under IHL. In its replies to the questionnaire, Georgia indicated that "moreover, at 15:00 on 8 August, the Georgian authorities declared a three-hour unilateral cease-fire to allow the remaining civilians to leave the conflict area in the southern direction from Tskhinvali towards Ergneti."[202] This appears to be not enough in the light of the IHL obligation to take all feasible measures. When the offensive on Tskhinvali was carried out, at night, no general advance warning was given to the remaining population.

It should be mentioned that the presence of South Ossetian fighters, mostly in buildings in whose basements civilians were sheltering, and the fact that they even shot at Georgian soldiers from these very basements, complicates the conduct of warfare on the part of the attacker. This does not, however, release the Georgian forces from their obligations. In this regard, one of the most worrying examples of the lack of precautionary measures taken by the Georgian forces is their use of tanks and infantry fighting vehicles to fire at those buildings while knowing that there were civilians inside. HRW has documented cases where tanks fired at close range into the basements of buildings.[203]

Russia described as follows the precautions its forces took in the course of the conflict:

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[201] See "Chief of Staff Testifies before War Commission," Civil Georgia, http://www.civil.ge/eng/article.php?id=19851.

[202] See: Georgia, Replies to Question 3 of the Questionnaire on Humanitarian Issues, provided to the IIFFMCG on 5 June 2009, p. 2.

[203] HRW, *Up In Flames – Humanitarian Law Violations and Civilian Victims in the Conflict over South Ossetia*, *op. cit.*, p. 58.

"In the course of the entire military operation units of the Russian Federation Armed Forces, acting exclusively with a view to repelling an armed attack, used tanks, APCs and small arms to fire upon clearly identified targets only, which enabled them to minimise civilian losses. These units targeted multiple launch rocket systems as well as artillery and mortar batteries, personnel and firepower of the opposing force in its staging areas. The actual overall effect was as expected. Artillery fire and air strikes inflicted significant damage, undermined morale and brought considerable psychological pressure to bear upon the opposing forces. During the active phase of the operation the Russian command undertook a number of effective measures aimed at minimising the damage for the civilian population and to the property of local citizens. Artillery fire and air strikes were planned and carried out in areas situated at a considerable distance from local communities against clearly identified targets only. Key artillery fire missions were completed against well-observed targets – in the process, commanders of combined arms units adjusted artillery fire through spotters and artillery reconnaissance units. Local communities and civilian facilities were not fired upon. All fire would cease once Georgian units withdrew from their positions. The Russian air component acting in support of the army units on the ground delivered a number of strikes against pockets of Georgian forces, firing emplacements and columns of military equipment en route. The Russian air component did not fly any missions in areas adjacent to or bordering on residential communities. All kill fire was monitored. As a result of these measures civilian casualties were minimised."[204]

While the above description shows efforts to minimise civilian casualties and damage to civilian objects, it also presents the Russian forces as having systematically proceeded with the appropriate precautions. The evidenced use in populated areas by Russia of cluster munitions, a weapon which, by virtue of its wide area coverage and its unexploded duds, demonstrates that the obligation to take all feasible precautions in the choice of means of warfare was not systematically respected. Furthermore, as documented by HRW, "with regard to many aerial and artillery attacks, Russian forces failed to observe the obligations to do everything feasible to verify that the objects to be attacked were military objectives (and not civilians or civilian objects) and to take all feasible precautions to minimise harm to civilians."[205]

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[204] Russia, Responses to Questions Posited by the IIFFMCG (Humanitarian Aspects), *op. cit.*, p. 8.

[205] HRW, *Up In Flames – Humanitarian Law Violations and Civilian Victims in the Conflict over South Ossetia*, *op. cit.*, p. 87.

In the light of the extensive damage and relatively large number of civilian casualties of the conflict in and around South Ossetia, the conduct of the Abkhaz forces during the hostilities looks considerably better, although the Abkhaz forces reportedly also inflicted some damage to civilian property both in the upper Kodori Valley and the Zugdidi district.

During the offensive on Tskhinvali and other villages in South Ossetia, Georgian forces failed to take the precautions required under IHL.
In several cases the Russian forces also failed to comply with their obligations under IHL with regard to precautions before attacks.

d) Passive precautions and human shields

Under IHL, the defender too is bound by obligations to minimise civilian casualties and damage to civilian objects such as houses. Article 58 of Additional Protocol I of 1977 sets out the obligations with regard to precautions against the effects of attacks: "the Parties to the conflict shall, to the maximum extent feasible: (a) endeavour to remove the civilian population, individual civilians and civilian objects under their control from the vicinity of military objectives; (b) avoid locating military objectives within or near densely populated areas; (c) take the other necessary precautions to protect the civilian population, individual civilians and civilian objects under their control against the dangers resulting from military operations." This is a rule of customary law applicable in both types of conflict.[206] IHL also prohibits the use of human shields.[207]

Of very serious concern for the IIFFMCG are the numerous testimonies, some by South Ossetian combatants themselves, that they used houses and residential basements in Tskhinvali from which to fire at Georgian ground troops, putting at risk the lives of civilians who were sheltering in the basements of the same buildings. HRW also raised this issue.[208]

This is a clear violation of the obligation to avoid locating military objectives within or near densely populated areas. It probably did not constitute a violation of the prohibition against

[206] ICRC Study, Rules 22-24, pp. 68.

[207] *Ibid*, Rule 97, p. 337, and article 51(7) Protocol I.

[208] For example, witnesses told Human Rights Watch that militias had taken up positions in School No. 12 in the southern part of Tskhinvali, which was seriously damaged by the Georgian fire.
"Another witness said South Ossetian fighters were co-mingled with civilians in the basement of Tskhinvali School No. 6, which drew Georgian tank fire. No civilian casualties resulted.
Yet another witness, a 50-year-old kindergarten teacher who showed Human Rights Watch the fragments of GRAD rockets that hit her kindergarten building on Isak Kharebov Street, also said that volunteer militias had been 'hiding' in the building. Several members of the Ossetian militia interviewed by Human Rights Watch confirmed that many of the school and nursery school buildings were used as gathering points and defence positions by the militias," HRW, pp. 50-51.

using human shields, however, as this rule requires the specific intent to prevent attacks by deliberately collocating military objectives and civilians.[209]

South Ossetian forces reportedly violated IHL by firing from houses and residential buildings and using them as defensive positions, putting the civilian population at risk.

B. Treatment of persons and property in areas under changing control

Given that, although the conflict lasted no more than five days, insecurity continued and serious violations of HRL occurred even weeks after the cease-fire, both IHL and HRL are relevant and offer complementary protection of persons and property. Under IHL, this protection is partly ensured through the recognition of fundamental guarantees.[210]

During the conflict and after the cease-fire, there was a campaign of deliberate violence against civilians: houses were torched and villages looted and pillaged. Most of these acts were carried out in South Ossetia and in the undisputed territory of Georgia, mainly in the areas adjacent to the administrative border with South Ossetia.

These acts occurred even weeks after the cease-fire and the end of the hostilities. Such violations raise the critical question of the general lack of protection in areas under changing control, such as Georgian-administered villages in South Ossetia or the so-called "buffer zone". As highlighted by interviews conducted by Human Rights Watch, most of the acts of violence against civilians, pillage and looting were committed by Ossetian forces.[211] Information gathered from eyewitnesses also indicates the presence of Russian forces while these violations were taking place, and sometimes the participation of Russian forces in these acts. While most of the violations were committed against ethnic Georgians, ethnic Ossetians were also not immune from looters.[212]

According to Human Rights Watch:

"South Ossetian forces include South Ossetian Ministry of Defence and Emergencies servicemen, riot police (known by the Russian acronym OMON), and several police companies, working under the South Ossetian Ministry of Internal Affairs, and servicemen of

[209] See J-M. HENCKAERTS, L. DOSWALD-BECK (eds), *Customary International Humanitarian Law*, Volume I, *op. cit.*, p. 340.

[210] See Article 75 of the Additional Protocol I of 1977.

[211] HRW, *Up In Flames – Humanitarian Law Violations and Civilian Victims in the Conflict over South Ossetia*, *op. cit.*, p. 61.

[212] *Ibid*., p. 143.

the South Ossetian State Committee for Security (KGB). Many interviewees told Human Rights Watch that most able-bodied men in South Ossetia took up arms to protect their homes. As South Ossetia has no regular army its residents tend to refer to the members of South Ossetian forces as militias (opolchentsy) unless they can be distinctly identified as policemen or servicemen of the Ministry of Defence and Emergencies. Credible sources also spoke about numerous men from North Ossetia and several other parts of Russia who fought in the conflict in support of South Ossetia and who were involved in the crimes against civilians that followed."

"In some cases, it is difficult to establish the exact identity and status of the Ossetian perpetrators because witnesses' common description of their clothing (camouflage uniform, often with a white armband) could apply to the South Ossetian Ministry of Defence and Emergencies, South Ossetian Ministry of Internal Affairs, volunteer fighters, or even common criminal looters. Several factors, however, indicate that in many cases the perpetrators belonged to South Ossetian forces operating in close cooperation with Russian forces. The perpetrators often arrived in villages together with or shortly after Russian forces had passed through them; the perpetrators sometimes arrived on military vehicles; and the perpetrators seem to have freely passed through checkpoints manned by Russian or South Ossetian forces."

"Witnesses sometimes also referred to the perpetrators as Chechens and Cossacks; whether this was an accurate identification is not clear, although there were media reports of Chechens and Cossacks participating in the conflict."[213]

Two closely linked questions arise at this point: that of identifying the perpetrators of these violations and that of the exact role played by the Russian forces in the violations. Answering these questions will have key legal implications, as it requires us to distinguish between those who committed these acts of violence and those who did not act to prevent them or stop them.

While it appears difficult to conclude that Russian forces systematically participated in or tolerated the conduct of South Ossetian forces, there do seem to be credible and converging reports establishing that in many cases Russian forces did not act to prevent or stop South Ossetian forces. Human Rights Watch refers to three types of situation: passive bystanders, active participation and the transport of militias. Some testimonies also mention the positive involvement of Russian troops in stopping militias from looting or preventing them from

[213] *Ibid*., p. 128.

looting and burning houses. HRW refers also to checkpoints and roadblocks set up on 13 August which effectively stopped the looting and torching campaign but which were inexplicably removed after just a week. Interviews conducted in March 2009 by the IIFFMCG's expert also produced different accounts ranging from active intervention to stop violations, to passive observation, and even involvement.

Lastly, it is important to stress from the outset that patterns of violence differed depending on the area concerned. The most extensive destruction and brutal violence seem to have taken place in South Ossetia, with certain characteristics that appear to be different from what happened in the buffer zone. This difference in pattern was explicitly recognised by representatives from the Georgian Ministry of Internal Affairs when meeting with IIFFMCG experts on 4 June 2009. There is, finally, no comparison possible between the situations in these two former areas and the effects of the hostilities in Abkhazia, which were very limited.

a) Summary executions

The right to life is the most fundamental of human rights. Several rules of IHL[214] and HRL[215] prohibit murder, which is a war crime under IHL.

There are several testimonies of alleged extrajudicial killings or summary executions by Ossetian forces during the torching of villages. To date, however, only a few have come from direct eyewitnesses. Others are from indirect sources: either information reported by elderly people who stayed on in affected villages to persons who left, or general information that people heard. While this does not mean that we question the potential existence of such acts when reported by indirect sources, there is a need to double-check such information carefully. "Human Rights Watch received uncorroborated reports of at least two extrajudicial killings of ethnic Georgians in South Ossetia that took place amidst the pillage."[216] Amnesty International documented "unlawful killings, beatings, threats, arson and looting perpetrated by armed groups associated with the South Ossetian side."[217] The HRAM of the OSCE noted

[214] Common Article 3 of the Geneva Conventions prohibits "violence to life and person, in particular murder of all kinds with respect to the persons taking no active part in the hostilities, including members of armed forces who have laid down their arms and those placed 'hors de combat' by sickness, wounds, detention, or any other cause."

[215] ICCPR Article 6, EConvHR Article 2.1.

[216] *Ibid*., pp. 142-143.

[217] AI, *Civilians in the Line of Fire – The Georgia-Russia Conflict, op. cit.*, p. 39.

that "some of the key conflict-related human rights violations identified by the HRAM in interviews with displaced persons include killings of civilians."[218]

In interviews conducted by NGOs and provided to the IIFFMCG, a number of IDPs reported that residents who stayed in villages gave accounts of several persons being killed by Russian forces in Pkhvenisi or by Ossetian militias in Disevi. A 56-year-old woman who fled Disevi reported the same information given by Human Rights Watch: she described the burning of Disevi and said that she witnessed Ossetian militias burn the house of 70-year-old Elguja Okhropiridze and shoot him dead.[219]

In Dvani, a person interviewed by an NGO that provided information to the IIFFMCG described the following: "two guys were killed in our village (by Ossetians), Ervandi Bezhanishvili and Vasil Mekarishvili. I think Ervandi was killed (shot) trying to run away, while Vasil was shot when he refused to kiss the Russian flag. People in the village told me this."

According to the HRAM of the OSCE, "displaced persons witnessed killings of unarmed civilians by incoming military forces in Gori and in the villages of Megvrekisi, Tirdznisi, Ergneti, and Karaleti." The HRAM gave the following accounts: "In Ergneti, for example, a villager described to the HRAM how he saw a group of ten 'Ossetians' in Russian uniforms hit an 80-year-old man in the back and then shoot him. The victim, according to the villager, crawled into a building, said 'I've been shot,' and then fell down and died. In Karaleti, a villager reported, a car with four 'Ossetians' dressed in military uniforms entered the village and shot and killed one of his neighbors with an automatic weapon."[220]

Another testimony suggests that the general insecurity and sometimes vengeful types of attacks also affected Ossetians. A resident from Disevi who returned to his village in September 2008 told the following to an NGO interviewing him:

"At my third visit to the village Ossetians were particularly aggressive. Their aggression was caused by murder of Oleg, the Ossetian person whom we saw in white 'Niva' at our first visit. Ossetians found him dead at the village public school. Oleg had very good relation with the

[218] OSCE, HUMAN RIGHTS IN THE WAR-AFFECTED AREAS FOLLOWING THE CONFLICT IN GEORGIA, *op. cit.*, p. 18.

[219] HRW, *Up In Flames – Humanitarian Law Violations and Civilian Victims in the Conflict over South Ossetia, op. cit.*, p. 143.

[220] OSCE, Human Rights in the War-Affected Areas Following the Conflict in Georgia, *op. cit*., p. 23.

residents of our village and I suppose he had controversy with other Ossetians for that reason. Consequently, certain Ossetian killed him for having protected Georgians."[221]

According to Human Rights Watch: "during and in the immediate aftermath of the war, at least 14 people were deliberately killed by Ossetian militias in territory controlled by Russian forces. Human Rights Watch documented six deliberate killings in Georgian settlements controlled by Russian forces, and received credible allegations of another six cases. Human Rights Watch also heard allegations of two such killings in South Ossetia."[222] All these reports coming from different sources should be checked carefully as some may refer to the same cases.

While the exact number of summary executions has not been established, and some facts remain uncertain, the Mission nevertheless believes that there is credible evidence of cases of summary executions carried out by South Ossetian forces.

b) Rape and sexual and gender-based violence

Under IHL, the prohibition against rape and other forms of sexual violence, which is a norm of customary law,[223] derives from numerous provisions of treaty law applicable both in non-international armed conflicts and in international armed conflicts. For example Common Article 3 of the Geneva Conventions prohibits "violence to life and persons" including cruel treatment and torture, and "outrages upon personal dignity". Article 75 of Additional Protocol I of 1977 prohibits "at any time and in any place whatsoever, whether committed by civilian or by military agents (…) violence to the life, health, or physical or mental well-being of persons" and "outrages upon personal dignity, in particular humiliating and degrading treatment, enforced prostitution and any form of indecent assault."[224] Article 4 of Additional Protocol II of 1977 specifically adds "rape" to this list. Under the Rome Statute of the ICC, "committing rape (...) or any other form of sexual violence," in addition to constituting a grave breach of the Geneva Conventions or a serious violation of Common Article 3, constitutes a war crime in both international and non-international armed conflict.[225] Under

[221] Interview conducted on 15 December 2008.

[222] HRW, *Up In Flames – Humanitarian Law Violations and Civilian Victims in the Conflict over South Ossetia, op. cit.,* p. 154.

[223] See Rule 93, in J-M. HENCKAERTS, L. DOSWALD-BECK (eds), Customary International Humanitarian Law, Volume I, *op. cit.*, p. 323.

[224] See Article 75 para. 2 a) and b) respectively.

[225] Article 8(2)(b) xxii and (e)vi.

HRL, sexual violence is prohibited through the prohibition of torture and cruel, inhuman or degrading treatment.

In the context of the August 2008 armed conflict and its aftermath, there are a number of accounts of sexual and gender-based violence (SGBV), including rape. However, given the very sensitive nature of such crimes, they are usually under-reported – even more so in Georgia, as highlighted by many NGOs and international organisations. For example, victims of rape during the 1990s conflicts are only now beginning to report what happened then.

Human Rights Watch received numerous reports of the rape of ethnic Georgian women during the August 2008 war. It stressed that "due to the sensitive nature of the crime, rape is frequently under-reported, and it is particularly difficult to document cases during conflict."[226] The HRAM also acknowledged that it had not gathered comprehensive information on SGBV. As outlined by that Mission: "Although the issue of SGBV was raised in interviews with individuals, it did not feature prominently, which may well be because the subject is still considered largely taboo in much of Georgia and victims may face a very real threat of ostracism. In addition, many of the interviews were carried out in circumstances – such as the lack of privacy – which were not conducive to discussing this issue."[227]

The extent of the SGBV in the context of the conflict or in certain areas following the hostilities has still to be fully ascertained. To date, however, SGBV does not seem to have been widespread. An NGO reported to the HRAM that it had not found evidence that rape occurred frequently during the conflict, but that there had been some instances.[228] Similarly, the Office of the Prosecutor-General of Georgia told the HRAM that while there was no evidence of systematic rape during the conflict, there had been at least four or five rapes related to the conflict.[229]

Human Rights Watch "was able to document two cases of rape in undisputed areas of Georgia under Russian control."[230] Testimonies gathered by NGOs do not give direct information from victims of potential SGBV. One case was reported in Prizi, in the Gori region. Persons detained in SIZO ("Investigative Isolator" or detention facility) in Tskhinvali referred to a

[226] HRW, *Up In Flames – Humanitarian Law Violations and Civilian Victims in the Conflict over South Ossetia, op. cit.*, p. 59.

[227] OSCE, Human Rights in the War-Affected Areas following the Conflict in Georgia, op. cit., p. 19.

[228] *Ibid*., p. 25.

[229] *Ibid*., p. 37.

[230] HRW, *Up In Flames – Humanitarian Law Violations and Civilian Victims in the Conflict over South Ossetia, op. cit.*, p. 59.

woman approximately 22 years old who was "regularly taken outside the cell for interrogation, away for an hour or two, and when she came back she seemed upset and wouldn't talk to anyone". In Meghvrekisi there is also an account of one 14-year-old girl who was raped. In particular, NGO staff interviewed by the HRAM reported that they had evidence of a case in which a woman who was hiding in a church in Gori was gang-raped; a woman who was held in custody in Tskhinvali was taken out by guards and repeatedly raped; a girl kidnapped in Gori was raped; and the NGO's doctors had found physical evidence indicative of rape on a Georgian male soldier.[231] According to the Office of the Prosecutor-General of Georgia, cases of rape included a girl who was taken from a minibus near Akhalsopeli (Shida Kartli) and raped several times, and a woman who was kept in detention alone in a house and was reportedly raped by four persons.[232]

A woman interviewed in March 2009 by the IIFFMCG expert in a settlement near Gori, and who is tasked by the UN with collecting information on alleged violations of human rights, confirmed both the reality of rapes during the conflict and the difficulty of documenting such crimes. The *Rapid Needs Assessment of Internally Displaced Women as a Result of the August 2008 Events in Georgia* carried out by the Institute for Policy Studies with financial and technical support from the United Nations Development Fund for Women (UNIFEM) provides an overview of the SGBV in relation to the conflict and its aftermath, following interviews of 1 144 persons and based on a methodology designed to take into account the sensitive nature of this violence by using indirect questions.[233] This study notes that "due to stigma attached to sexual abuse it is likely that in general many women simply do not admit that they have been exposed to any physical or verbal abuse."[234] The survey revealed that 6.3% of respondents reported having information about sexual violence against women; out of these 70 respondents, 21.4% said they had information about cases of rape, 32.8% – group rape, 14.3% – attempted rape, and 31 % did not specify kind of abuse.[235]

The IIFFMCG concludes that although the SGBV in the context of the conflict and its aftermath does not appear to have been systematic or widespread, it is fundamental to address it both in terms of practical responses and in terms of accountability.

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[231] OSCE, Human Rights in the War-Affected Areas following the Conflict in Georgia, *op. cit.*, p. 25.

[232] *Ibid.*, p. 37.

[233] Human Rights Assessment Mission of the Office for Democratic Institutions and Human Rights, OSCE, Human Rights in the War-Affected Areas following the Conflict in Georgia, 27 November 2008, p. 8.

[234] *Ibid*., p. 7.

[235] *Ibid*., p. 8.

The Mission believes that although sexual and gender based violence in the context of the conflict and its aftermath does not appear to have been systematic or widespread, it is fundamental to address it both in terms of practical responses and in terms of accountability.

c) Ill-treatment and torture

The prohibition of torture, cruel or inhuman treatment and outrages upon personal dignity, in particular humiliating and degrading treatment, is contained in both IHL and HRL.

Numerous cases of ill-treatment have been reported by various sources in the course of the conflict and its aftermath. While such acts were committed against persons detained, there were also extensive beatings and threats against civilians mainly of Georgian ethnicity who remained in villages either in South Ossetia or in the undisputed territory of Georgia. These acts were committed mainly by South Ossetian forces, as reported by the victims interviewed. Though limited in scope and in quantity, the interviews of inhabitants from Achabeti, Tamarasheni, Disevi, Eredvi and Kekvi conducted by the Mission's expert in March confirmed existing information. Additional interviews were conducted by the IIFFMCG expert in June 2009, especially in villages close to the administrative border with South Ossetia such as Koshka. Two inhabitants of this village had been severely beaten by South Ossetians when they entered the territory of Georgia proper.

There were numerous cases of civilians having been beaten. In Tirdznisi, for example, in an interview with an NGO a man owning a bakery told how Ossetian militias had entered the village on 12 August and beaten his brother and his neighbour. His brother had had his ribs and arm broken.[236]

Many of the civilians who were ill-treated in South Ossetia were elderly people who could not flee in the early days of the conflict. An 80-year-old woman from Eredvi explained to the IIFFMCG expert how Ossetian and Russian military men came into her house in September. While they were surprised to find her in the house, they asked her for money. Then they put a phone wire around her neck and threw her on the ground and dragged her outside.

A Tbilisi-based NGO specialising in assistance to victims of torture told the HRAM that they have identified 50 torture cases related to the conflict for long-term follow-up.[237] While Human Rights Watch documented far fewer cases, they all occurred in the context of detention.

[236] Interviews conducted on 11 December 2008.

[237] OSCE, Human Rights in the War-Affected Areas following the Conflict in Georgia, *op. cit.*, p. 24.

The Mission believes that there are confirmed cases of ill-treatment and torture committed by South Ossetian forces.

d) Detention of combatants

Under IHL, rules regarding detention and related status are different depending on the type of conflict, i.e. whether it is international or non-international in character. In the former case, combatants benefit from the status of prisoner of war under certain conditions.

With respect to persons detained by Georgian forces, according to the Georgian authorities 32 persons were detained because of their participation in hostilities. According to Human Rights Watch the authorities did not display evidence that they were all combatants.[238] A few Ossetian civilians were also detained. One possible case of enforced disappearance is recounted in the 2009 HRW Report,[239] although the Georgian authorities deny that the person who is allegedly missing is in their custody. According to information given by an NGO to the HRAM of the OSCE, "14 Ossetians, including two teenagers, were detained by Georgian police following the Russian withdrawal from the 'buffer zone' and were held incommunicado."[240]

Georgia provided additional information on persons it detained: "Russian military personnel held as POWs: five; – Members of separatist illegal armed formations: thirty-two; – Apparent mercenary: one (Russian citizen)." Georgia indicated that:

"All Georgian-held prisoners were exchanged for the 159 Georgian civilians and 39 POWs held under Russian authority. The ICRC was afforded unimpeded access to Georgian detention facilities and visited three of the five POWs – the other two were taken prisoner late in the war. The ICRC visited facilities maintained by the Ministries of Defence and Justice on a number of occasions, inspecting the conditions in which not only the POWs were detained, but also those of the detained members of separatist illegal armed formations.

"Those detained in the context of the conflict were placed separately from other prisoners."[241]

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238 HRW, *Up In Flames – Humanitarian Law Violations and Civilian Victims in the Conflict over South Ossetia, op. cit.*, p. 79.

239 *Ibid*., p. 85.

240 OSCE, Human Rights in the War-Affected Areas following the Conflict in Georgia, *op. cit.*, p. 25.

241 Georgia, Responses to Questions Posited by the IIFFMCG (Humaneterian Aspects), Question 3, provided to the IIFFMCG on 5 June 2009, pp. 2-3.

According to the Russian Federation, "during the operation Russian and South Ossetian military units detained 85 Georgian nationals" and "Taking into consideration the fact that some Georgian servicemen deserted from their units, disposed of their weapons and military uniform, destroyed their identity papers, changed into civilian clothing, etc., it proved impossible to ascertain the exact number of military personnel among those detained."[242] The Russian Ministry of Foreign Affairs added the following in its replies to the questionnaire sent by the IIFFMCG:

"Throughout the entire period during which Russia's armed forces took part in the military operation in South Ossetia and Abkhazia between 8 and 12 August 2008, the Russian military forces detained Georgian military personnel only (as of 12.08.2008 no other Georgian military were detained). Since Russia took part in an armed conflict that was international in nature, these detainees were treated as combatants in accordance with IHL. Therefore, once detained they received the status of prisoners of war. To the best of our knowledge after the conflict ended and the prisoners of war were cleared of any potential military crimes, on 19 August all of them were handed over to the Georgian side in the presence of ICRC delegates with the Council of Europe Commissioner for Human Rights T. Hammarberg acting as a mediator. The Russian side treated these prisoners of war in accordance with the requirements set out in IHL. They were never subjected to torture."[243]

In its replies to the IIFFMCG questionnaire Georgia indicated, on the contrary, that "as many as 30 soldiers who were detained during and after the conflict experienced torture and ill-treatment, including being beaten with rifles, burned with cigarettes and cigarette lighters, and subjected to electric shocks."[244]

In the case of the detention of Georgian military servicemen by South Ossetian forces, however, direct eyewitnesses reported that Russian forces were present in the place of detention. Some of those Georgian combatants were captured by South Ossetian militias. Some were transferred first to Ossetian police and then handed over to Russian forces. Human

[242] Russia, Responses to Questions Posited by the IIFFMCG (Humanitarian Aspects), *op. cit.*, pp. 12-13.

[243] Russia, Responses to Questions Posited by the IIFFMCG (Legal Aspects), *op. cit.*, p. 11.

[244] Georgia, Responses to Questions Posited by the IIFFMCG (Humanitarian Aspects, Question 6), provided to the IIFFMCG on 5 June 2009, p. 1.

Rights Watch documented cases of ill treatment and torture and three executions of Georgian soldiers in the presence of Russian forces.[245]

The Mission believes that there are confirmed cases of ill-treatment and torture against combatants detained. Such acts seem to have been committed mainly by South Ossetian forces, in some cases possibly with Russian soldiers present.

e) Detention of civilians, arbitrary arrests, abduction and taking of hostages

There are also many cases where civilians of Georgian ethnicity have been deprived of their liberty. Such cases include the arrest and detention of civilians in inappropriate conditions by Ossetian forces, some being kidnapped and released against payment of a ransom. Many civilians also described their arrest as being taken hostage to be used in exchanges later.

Two elderly women from Achabeti village were brought by South Ossetian forces to Tskhinvali on 11 August and were detained together with more than 40 people, most of them also elderly, in the basement of what they identified as the FSB building in Tskhinvali. They were all kept together for three days in the same small room, where they had to take turns to lie down on a few wooden beds, and with very little bread or water. They were then kept in the yard for five days and had to clean the streets. Many civilians detained had to burry corpses.

Two men from Achabeti and Tskhinvali respectively described how they were beaten while detained in SIZO.[246]

During the meeting the IIFFMCG experts had on 5 June 2009 with representatives of the *de facto* Ministry of Defence and Ministry of Interior of South Ossetia, these authorities actually acknowledged that civilians had been present in the Ministry of Interior building, but they indicated that they had been taken there in the context of safety measures to protect them from the effects of the hostilities. Not only is this in complete contradiction with numerous

[245] HRW, *Up In Flames – Humanitarian Law Violations and Civilian Victims in the Conflict over South Ossetia, op. cit.,* pp. 185.

[246] The first said: "There were about 80 people there, and every day there came more. I stayed there for 18 days, during which time I was beaten, including with rifle butts, kicked and humiliated. I had bruises and wounds on my face and hands. They beat me in the kidneys. [He had visible damage on finger, broken nail, which we photographed] There were only seven cells in the SIZO, very little room and some people slept in the corridor."
The second declared: "We were taken to the SIZO, where the other hostages were. At the most, there were 170 people there – mostly older people, but also women and children – in a space which measured perhaps 10 by 10 meters. It was so crowded we could hardly stand, we slept in shifts. We got some bread and cereals, and tea without sugar. A doctor came and looked at my leg. The doctor and his colleague were attentive and gave me good treatment during the 18 days I stayed there."

testimonies from persons detained there but, even if it were so, it would be impossible to explain why, if such measures were taken for protection purposes, those persons were not released until 27 of August, two weeks after the hostilities had ended, and why they had to clean the streets and bury dead bodies.[247]

The HRAM heard many reports of the kidnapping of villagers who were then held for ransom. For example, a family of four was kidnapped in Gogeti; the wife and two children were released and asked to bring money in exchange for the husband.[248]

It seems that there have been numerous cases of illegal detention of civilians, arbitrary arrests, abduction and taking of hostages, mostly committed by South Ossetian forces and other South Ossetian armed groups.

f) Pillage and looting

IHL prohibits pillage both in time of international armed conflict and in time of armed conflict of a non-international character. In treaty law, for example, pillage is prohibited according to Article 33 of Geneva Convention IV of 1939 and Article 4(2) of Additional Protocol II of 1977. This is also a rule of international customary law.[249] Under the Rome Statute, pillage is a war crime in both types of conflict.[250]

The conflict in Georgia and its aftermath have been characterised by a campaign of large-scale pillage and looting against ethnic Georgian villages in South Ossetia and in the so-called buffer zones. While this was mainly committed by Ossetian military and militias, including Ossetian civilians, there are many eyewitness reports of looting by Russian forces. Most importantly, numerous testimonies refer to Russian soldiers being present while armed

[247] Human Rights Watch "also received reports of Georgians who were abducted by Ossetians and not handed over to the police. Lia B., 76, tearfully told Human Rights Watch on September 10 how she witnessed two Ossetian men abduct her 17-year-old granddaughter, Natia B., on August 13 in the middle of the day." A 70-year-old woman from Prisi had to go back to her village from Gori with her 17-year-old granddaughter because there was no available place for them to stay in Gori. She explained what happened mid-August 2008:
"We walked for nine hours. When we were walking though the village of Kidznisi, an old broken Zhiguli car, maybe stolen, stopped in front of us. Two young blond Ossetians in paramilitary uniform (with white stripes at the arm) got out of the car, took my granddaughter and kidnapped her", Interview conducted on 9 September 2008".

[248] OSCE, Human Rights in the War-Affected Areas following the Conflict in Georgia, *op. cit.*, p. 39.

[249] See Rule 52, in J-M. HENCKAERTS, L. DOSWALD-BECK (eds), Customary International Humanitarian Law, Volume I, *op. cit.*, p. 182.

[250] In international armed conflict (Article 8, 2, b, xvi) and in non-international armed conflict (Article 8, 2, e, v), "pillaging a town or place, even when taken by assault," is a war crime.

Ossetians were looting. Some pillage started immediately after the withdrawal of the Georgian forces.

HRW documented – and sometimes directly witnessed – systematic looting in Tamarasheni, Zemo Achabeti, Kvemo Achabeti, Kurta, Tkviavi, Tirdznisi, Dvani, Koshka, Megrekisi, Nikozi, Karaleti, Knolevi, Avlevi, Tseronisi, and Kekhvi.[251] The HRAM of the OSCE also reported a number of cases of looting and pillage.[252] By way of example, the HRAM told of a woman in Kekhvi who saw her house being looted by a group of "Ossetians" wearing military uniforms with white arm bands. The men also stole her car and loaded it with furniture from a neighbour's house before driving away. As she fled the village, she saw "Ossetian" soldiers who were being protected by Russian forces and were pillaging shops and other houses.[253]

It is critical to stress that in the aftermath of the conflict the looting and pillage intensified both in South Ossetia and in the buffer zone in Dvani, Megvrekisi and Tkviavi.[254]

Moreover, Ossetian villagers also participated in looting in September, demonstrating a lack of protection and policing by the Ossetian and Russian forces. Many testimonies refer to Russian forces being present whilst Ossetian militias were looting.

Far from being a few isolated cases, in certain villages the pillage seems to have been organised, with looters first using trucks to take the furniture and then coming to steal the windows and doors of houses.[255]

Human Rights Watch also pointed out that "in some communities where Ossetians lived side-by-side with Georgians, or in mixed marriages, the Ossetians were also targeted for looting, harassment, and accusations of collaboration," such as in Zonkar, a tiny Tskhinvali-administered hamlet in the Patara Liakhvi valley surrounded by ethnic Georgian villages.[256]

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[251] HRW, *Up In Flames – Humanitarian Law Violations and Civilian Victims in the Conflict over South Ossetia*, 22 January 2009, pp. 130-142 and 164-169.

[252] Human Rights Assessment Mission of the Office for Democratic Institutions and Human Rights, OSCE, Human Rights in the War-Affected Areas following the Conflict in Georgia, 27 November 2008, p. 44.

[253] *Idem*.

[254] Amnesty International noted that: "Extensive looting of Georgian-administered villages appears to have taken place over the two weeks following the cessation of hostilities. Eye-witness accounts of some villages dating from the 13-14 August refer only to limited looting, yet when Amnesty International representatives visited these same villages almost two weeks later on the 26 August, they observed first hand that looting and pillaging was still going on", AI, Civilians in the Line of Fire – The Georgia-Russia Conflict, op. cit., p. 41.

[255] Interview of IDPs from South Ossetia by the IIFFMCG expert in March 2009.

[256] HRW, *Up In Flames – Humanitarian Law Violations and Civilian Victims in the Conflict over South Ossetia*, *op. cit*., pp. 143-144.

Amnesty International expressed particular concern at the "many reports of Russian forces looking on while South Ossetian forces, militia groups and armed individuals looted and destroyed Georgian villages and threatened and abused the residents remaining there."[257] It described the following situation:

"In the village of Eredvi on 26 August Amnesty International representatives witnessed ongoing looting and pillaging, including by armed men. As the looting was going on, Russian military equipment continued to pass through Eredvi (due west of Tskhinvali) and Russian checkpoints controlled the entry and exit to the village; Amnesty International observed that only ordinary cars, rather than trucks or other large vehicles, were searched, and not in all cases."[258]

There is consequently extensive evidence of a widespread campaign of looting and pillage by Ossetian forces, as well as unidentified armed Ossetians and sometimes civilians, during the conflict but mostly after the cease-fire. While the Russian forces do not seem to have played an important part in this campaign, they did little to stop it.

NGOs present in Georgia reported information from some of the IDPs they interviewed on looting by Abkhaz forces in the Kodori Valley and villages in the former "security zone" as identified under the 1994 Moscow agreement, notably villages near the administrative border, such as Anaklia. For example a villager from Ganmukhuri reported looting and robbing by Abkhaz soldiers.[259] While UN officials in Zugdidi stated that there was no report of human rights violations during the conflict in the Kodori Valley, they noted conflicting accounts of the looting of the Svan property and livestock.[260] An elderly woman from Ajara stated during the interview that Russian Forces[261] took her cattle and her furniture. On the other hand, there are reports through information collected by NGOs that Russian forces appear to have exercised a certain amount of restraint and discipline on the Abkhaz forces to prevent misconduct. The Abkhaz *de facto* Deputy Minister for Defence, when asked about alleged looting, stressed that Abkhaz soldiers had been instructed not to damage property, and he pointed out that although it was not possible to look after every single house and that he could not rule out some acts by reservists motivated by revenge, in his view these were minor,

[257] AI, Civilians in the Line of Fire – The Georgia-Russia Conflict, *op. cit.*, p. 32.

[258] *Ibid*., p. 43.

[259] Interviewed by an NGO on 10 September 2008.

[260] Meeting with UNOMIG officials, March 2009, Zugdidi.

[261] This contradicts the version given by the Abkhaz *de facto* Ministry of Defence who claimed that no Russian forces were involved in the fighting.

isolated incidents.[262] He indicated that he saw only one house burning when he visited the area on 15 August.

The HRAM however also indicated reports of looting in the Kodori Gorge: "One villager reported that his house had survived without damage, but when he returned he found that his television, radio and curtains had been stolen. A woman from Ptishi said that she returned to find her house looted, as did several of her neighbours. The houses were not burned, however. Even the UNOMIG base in Ajara was emptied of all movable assets and was occupied by Abkhaz personnel. As a result of the conflict, many villagers also lost cattle, which for many is essential for their livelihood. A woman from Ptishi reported that some cattle were killed by bombs. A man from Gentsvishi said that he had not been able to locate his cattle since his return. An international humanitarian organisation also confirmed that villagers' cattle had disappeared.[263] Thus although some looting may have taken place in the Kodori Valley, it seems to have happened in isolated incidents, unlike the patterns identified in South Ossetia and in the adjacent buffer zone.

During and, in particular, after the conflict a systematic and widespread campaign of looting took place in South Ossetia and in the buffer zone against mostly ethnic Georgian houses and properties. Ossetian forces, unidentified armed Ossetians, and even Ossetian civilians participated in this campaign, with reports of Russian forces also being involved.
The Russian forces failed to prevent these acts and, most importantly, did not stop the looting and pillage after the ceasefire, even in cases where they witnessed it directly.
The Abkhaz forces did not embark on such pillage; there are, however, reports of a few instances of looting and destruction.

g) Destruction of property

While IHL provides that parties to an international armed conflict may seize military equipment belonging to an adversary as war booty,[264] in both international and non-international armed conflict it prohibits the destruction or seizure of the property of an adversary, unless required by imperative military necessity.[265] Article 33 of Geneva Convention IV states that "Reprisals against protected persons and their property are prohibited." Under Article 147 of this convention, "extensive destruction and appropriation of

[262] Meeting with the Abkhaz *de facto* Minister for Defence, 4 March 2009, Sukhumi.

[263] Human Rights Assessment Mission of the Office for Democratic Institutions and Human Rights, OSCE, Human Rights in the War-Affected Areas following the Conflict in Georgia, 27 November 2008, p. 61.

[264] See Rule 49, in J-M. HENCKAERTS, L. DOSWALD-BECK (eds), Customary International Humanitarian Law, Volume I, *op. cit*., p. 173.

[265] *Ibid*, Rule 50, p. 175.

property, not justified by military necessity and carried out unlawfully and wantonly" is a grave breach. The ICC Rome Statute also qualifies these acts as war crimes in non-international armed conflict.[266] This prohibition should also be read in conjunction with the prohibition under IHL against collective punishment.

It is critical to stress that in the context of the August 2008 conflict, as in other armed conflicts, the destruction of property is closely linked to the need for IDPs to leave their houses. In this regard, as underlined above, the UN Guiding Principles on Internal Displacement restates the above prohibitions, reflecting existing IHL and HRL, within the framework of the rights of displaced persons.[267]

When considering the destruction of civilian property in the context of the conflict in South Ossetia and its aftermath, a key distinction must be made between on the one hand destruction as a result of shelling, artillery strikes, aerial bombardment or tanks firing, which might constitute a violation of IHL but does not systematically do so, and destruction as a result of deliberate acts of torching and burning. As noted by the HRAM, some destruction resulted from the hostilities proper, whether during the offensive by Georgian forces against Tskhinvali and other villages in South Ossetia, or during Russian aerial bombardments and artillery shelling.[268] Here it is necessary to refer to the section on indiscriminate attacks, above.

This type of destruction is in no way less serious. But it must be stressed from the outset that the extensive damage caused through burning, with some villages almost completely burned down, raises grave concern as to the motives behind such acts. The practice of burning reached such a level and scale that it is possible to state that it characterised the violence of the conflict in South Ossetia. This large-scale campaign of burning targeted ethnic Georgian villages in South Ossetia and, to a lesser extent, the areas adjacent to the administrative border.

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[266] Article 8, 2, xii, of the Rome Statute.

[267] "1. No one shall be arbitrarily deprived of property and possessions.
"2. The property and possessions of internally displaced persons shall in all circumstances be protected, in particular, against the following acts: (a) Pillage; (b) Direct or indiscriminate attacks or other acts of violence; (c) Being used to shield military operations or objectives; (d) Being made the object of reprisal; and (e) Being destroyed or appropriated as a form of collective punishment.
"3. Property and possessions left behind by internally displaced persons should be protected against destruction and arbitrary and illegal appropriation, occupation or use," See Principle 21.

[268] Human Rights Assessment Mission of the Office for Democratic Institutions and Human Rights, OSCE, Human Rights in the War-Affected Areas following the Conflict in Georgia, 27 November 2008, pp. 41.

In this regard it is also paramount to stress that a number of testimonies seem to suggest a pattern of deliberate destruction and torching in the ethnic Georgian villages in South Ossetia that was different in scale and motives from what happened in the buffer zone.

Regarding the burning and torching of entire villages in South Ossetia, the explanation given by Russia and the *de facto* South Ossetian authorities failed to convince the IIFFMCG.

According to the Russian Federation, "one of the reasons accounting for the fires and destruction in Georgian villages was the deliberate policy of arson perpetrated by the retreating Georgian Armed Forces. As a result a number of ordnances detonated including armour-piercing rocket-launcher rounds that had been placed and stored in advance in residential homes in a number of Georgian villages (Kekhvi, Tamarasheni, Kheita, Kurta, Eredvi, Avnevi, etc.) to arm Georgian paramilitary self-defence units."[269] Explanations given by South Ossetia also point the finger at Georgians: the representative of one of the two South Ossetian organisations accompanying the IIFFMCG during its visit to South Ossetia in March claimed that the houses were burned by Georgians. These claims, however, are not supported by any information available through interviews of IDPs or of villagers who remained during the hostilities and after. Moreover, according to HRW, the majority of the witnesses it interviewed did not complain about violations against them by the Georgian forces, in the context of the ground offensive.[270]

The South Ossetia *de facto* Prosecutor-General told the HRAM that the Georgian forces had been using these villages as military positions.[271] This latter explanation could in no way account for the extensive and systematic torching of entire villages witnessed by the IIFFMCG. All the information gathered from a variety of sources points to South Ossetian forces and militias as being the perpetrators, with dozens of testimonies in this regard. Interviews of inhabitants from ethnic Georgian villages as direct eyewitnesses, by Georgian NGOs, Human Rights Watch[272] and Amnesty International, as well as information collected by the IIFFMCG itself, substantiate this pattern.

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[269] Russia, Responses to Questions Posited by the IIFFMCG (Humanitarian Aspects), *op. cit*., p. 10.

[270] HRW, *Up In Flames – Humanitarian Law Violations and Civilian Victims in the Conflict over South Ossetia*, *op. cit*., p. 61.

[271] Human Rights Assessment Mission of the Office for Democratic Institutions and Human Rights, OSCE, Human Rights in the War-Affected Areas following the Conflict in Georgia, 27 November 2008, p. 42.

[272] HRW, *Up In Flames – Humanitarian Law Violations and Civilian Victims in the Conflict over South Ossetia*, *op. cit*., pp. 130.

After the cease-fire this campaign did not stop, but actually intensified. Regarding the extent of the damage caused, it is clear from both eyewitness reports and satellite images that many houses were burned in the last two weeks of August and in September.[273]

This was also confirmed by IDPs interviewed by the IIFFMCG expert and other organisations. Furthermore, although to date unverifiable, one person interviewed by the Mission's expert claimed that some burned houses were later destroyed to conceal the fact that they had been torched. This may be related to confirmed reports of burned houses having been "bulldozed" in September.[274]

The IIFFMCG also wishes to note that this campaign of burning houses in South Ossetia was accompanied by violent practices such as preventing people from extinguishing fires under threat of being killed[275] or forcing people to watch their own house burning.[276]

The IIFFMCG concludes that – as also stated by the HRAM and by HRW – after the bombing, South Ossetians in uniform as well as Ossetian civilians who followed the Russian forces' advance undertook a systematic campaign of arson against homes and other civilian buildings in villages populated predominantly by ethnic Georgians. Interviews by the IIFFMCG expert confirmed that with few exceptions Russian forces did not participate directly in the destruction of villages, aside from a brief period in mid-August, but nor did they intervene to stop it.

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[273] For example Amnesty International noted:
"Satellite imagery obtained for Amnesty International has confirmed extensive destruction in various settlements that occurred after the ceasefire.
"Looting and arson attacks appear to have been concentrated on Georgian-majority villages north and east of Tskhinvali, associated prior to the conflict with the Tbilisi-backed alternative administration headed by Dmitri Sanakoev. In particular, the villages of Kekhvi, Kurta, Kvemo Achabeti, Zemo Achabeti, Tamarasheni, Ergneti, Kemerti, Berula and Eredvi sustained heavy damage. (…) The destruction of houses and property in some Georgian-majority settlements in South Ossetia took place in the aftermath of hostilities and not as a direct result of them. Satellite images obtained for Amnesty International by the American Association for the Advancement of Science reveal no damage to the village of Tamarasheni, for example, on 10 August. Satellite photos from the 19 August, however, already reveal extensive destruction, with 152 damaged buildings in Tamarasheni. By the time that Amnesty International delegates were able to visit these villages at the end of August, they were virtually deserted and only a very few buildings were still intact," AI, Civilians in the Line of Fire – The Georgia-Russia Conflict, op. cit., pp. 40-41. See also Human Rights Watch (HRW), Georgia: Satellite Images Show Destruction, Ethnic Attacks, available at: http://www.hrw.org/en/news/2008/08/27/georgia-satellite-images-show-destruction-ethnic-attacks

[274] HRW, *Up In Flames – Humanitarian Law Violations and Civilian Victims in the Conflict over South Ossetia*, *op. cit*., p. 131. See also Human Rights Assessment Mission of the Office for Democratic Institutions and Human Rights, OSCE, Human Rights in the War-Affected Areas following the Conflict in Georgia, 27 November 2008, p. 43.

[275] See for example Human Rights Assessment Mission of the Office for Democratic Institutions and Human Rights, OSCE, Human Rights in the War-Affected Areas following the Conflict in Georgia, 27 November 2008, p. 24.

[276] Interview of IDPs by an expert of the IIFFMCG.

With regard to the destruction of property in the buffer zone, it is first necessary to state that both types of destruction (as a result of hostilities, and from deliberate torching) were documented in this area. The IIFFMCG expert, travelling in June 2009 on the road from Karaleti to Koshka, saw several houses that had been destroyed by Russian aerial bombardment and artillery shelling. While these forms of destruction do not in themselves amount to a violation of IHL, some instances, discussed earlier, do constitute indiscriminate attacks. As for the burning of houses, the members of the OSCE HRAM counted approximately 140 recently burned homes during their travels in the "buffer zone," none of which showed traces of combat activity.[277]

Without questioning the reality of the destruction by torching of houses in the buffer zone, the IIFFMCG wishes to observe that, at least for the villages its expert visited in June 2009 and in the light of the interviews it conducted, the patterns of destruction through arson appear to be slightly different than in South Ossetia. First, the scale of the destruction is less vast. In Karaleti, inhabitants indicated that 25 houses had been burned.[278] The motive for torching deserves particular attention. While it is true that revenge and private motives are also relevant in explaining the torching of ethnic Georgian villages in South Ossetia, the destruction of only selected houses in the village indicates a more targeted form of violence in the places the IIFFMCG visited. Information gathered by the IIFFMCG expert appears to suggest that lists of houses to be burned down were pre-established. Some inhabitants felt that the destruction was prompted by the fact that the owner had a relative in the police who had allegedly been involved in acts committed against ethnic Ossetians. An elderly woman living with her family on the outskirts of Karaleti explained that the house in front of hers had been burned down by a group of Ossetians because the owner had bought cattle that had previously been stolen from ethnic Ossetians. Similar accounts of the selective torching of houses were collected by the IIFFMCG expert in Tkviavi.

Another explanation for this more selective violence could be that many mixed families with Ossetian relatives live in the buffer zone. When acknowledging the different pattern of violence in the buffer zone, the representatives of the Ministry of Internal Affairs the IIFFMCG met with offered this as a justification for it.[279]

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[277] Human Rights Assessment Mission of the Office for Democratic Institutions and Human Rights, OSCE, Human Rights in the War-Affected Areas following the Conflict in Georgia, 27 November 2008, p. 27.

[278] Interviews conducted on 3 June 2009.

[279] Meeting on 4 June 2009.

While these considerations cannot be generalised, they need to be taken into account when reflecting on the patterns of violence during the conflict, especially with regard to property rights. This aspect of individualised revenge is critical and should not be overshadowed by more general patterns. For a comprehensive post-conflict solution to be meaningful, this aspect should be addressed in order to defuse tension and deal with the different types of violence effectively.

South Ossetians in uniform, and Ossetian civilians who followed the Russian forces' advance, undertook a systematic campaign of arson against homes and other civilian buildings in villages populated predominantly by ethnic Georgians, including in the so-called buffer zones.
With few exceptions, Russian forces did not participate directly in the destruction of villages, aside from a brief period in mid-August, but neither did they intervene to stop it.

h) Maintenance of law and order

Under the IHL on military occupation the occupying power, once it has authority over a territory, has an obligation to take all the measures in its power to restore, and ensure, as far as possible, public order and safety.[280] Ensuring safety includes protecting individuals from reprisals and revenge. There is also an obligation to respect private property.[281]

Even where the law on occupation is not applicable, under HRL states have an obligation to protect persons under their jurisdiction and prevent violations against them.

In the context of the conflict in Georgia the issue of the maintenance of law and order, and consequently that of the authorities responsible for such maintenance, is critical for several reasons. First, control over certain areas changed during the period of the conflict and its aftermath: in South Ossetia, in villages or districts that had previously been administered by the Georgian authorities, and also in the buffer zones and in Abkhazia, in the Kodori Valley. But it is also relevant for those parts of South Ossetia and Abkhazia where the *de facto* authorities had been exercising control before the outbreak of the conflict. Secondly, the presence of Russian forces on those territories raises the issue of their responsibilities, whether under the law of occupation or under human rights law. Thirdly, numerous, if not

[280] Article 43 of Convention (IV) respecting the Laws and Customs of War on Land and its annex: Regulations concerning the Laws and Customs of War on Land. The Hague, 18 October 1907.

[281] Article 46 of Convention (IV) respecting the Laws and Customs of War on Land and its annex: Regulations concerning the Laws and Customs of War on Land. The Hague, 18 October 1907. According to Article 87(1) of Additional Protocol I, "the High Contracting Parties and the Parties to the conflict shall require military commanders, with respect to members of the armed forces under their command and other persons under their control, to prevent and, where necessary, to suppress and to report to competent authorities breaches of the [1949] Conventions and of this Protocol."

most, violations occurred after the conflict, at a time when the main question was actually one of policing and maintaining order to prevent or stop such violations. Apart from the question of identifying who had responsibility for maintaining public order and ensuring security, there has clearly been, with some exceptions, a vacuum in this regard.

One of the most worrying areas was the buffer zone. The Representative of the Secretary-General on the human rights of internally displaced persons reported that "during his visit to the so-called buffer zone, he witnessed evidence of widespread looting of property and listened to villagers reporting incidents of harassment and violent threats committed by armed elements, in tandem with a failure by Russian forces to respond and carry out their duty to protect, particularly in the northernmost area adjacent to the *de facto* border with the Tskhinvali region/South Ossetia. Villagers explained their permanent fear of attack by what they described as armed bandits coming from the Tskhinvali region/South Ossetia, and their repeated but unsuccessful requests to the Russian forces for protection. Villagers insisted that there were no problems between neighbours within the same villages, irrespective of their ethnic origins, but that the perpetrators were coming from outside the villages, i.e. the Tskhinvali region/South Ossetia."[282] In September 2008 the Council of Europe Commissioner for Human Rights also noted that "in the northern part – i.e. the area adjacent to the administrative border of South Ossetia – there are still reports of looting, torching and threats, and far fewer people have been able to return."[283] Following his special mission to Georgia and the Russian Federation on 22-29 August 2008, the Council of Europe Commissioner for Human Rights stressed the "right to protection against lawlessness and inter-community violence." He noted that he had "received a great number of reports of physical assault, robbery, kidnapping for ransom, looting and torching of houses as well as personal harassment by South Ossetian militia or other armed men in the Georgian villages in South Ossetia and in the 'buffer zone'."[284] He further stated that he "was alarmed over the rampant criminality in the 'buffer zone'."[285]

While denying the status of occupying power, the Russian Federation acknowledged that it had tried to exercise police powers on the ground. With regard to "measures taken outside the

[282] Report of the Representative of the Secretary-General on the human rights of internally displaced persons, Walter Kälin, A/HRC/10/13/Add.2, 13 February 2009, para. 44.

[283] SPECIAL MISSION TO GEORGIA INCLUDING SOUTH OSSETIA SUMMARY OF FINDINGS, *op. cit.*, p. 3.

[284] HUMAN RIGHTS IN AREAS AFFECTED BY THE SOUTH OSSETIA CONFLICT, Special Mission to Georgia and Russian Federation, *op. cit.*, para. 87, p. 16.

[285] *Ibid*., para. 88, p. 16.

scope of hostilities to protect the civilian population from looting, pillaging, abuse etc.," it describes the situation as follows. In terms of "a police function":[286]

"South Ossetia had and still has its own government and local authorities which exercise effective control in this country, maintain the rule of law and protect human rights. At the same time, the Russian military contingent called upon to carry out purely military tasks in the territory of South Ossetia, to the best of their abilities tried to maintain law and order and prevent any offences in the areas of their deployment, including Georgia proper, where owing to the flight of Georgian government authorities an apparent vacuum of police presence ensued. The Russian military force could not substitute for the government of South Ossetia. The Russian military have never been granted the jurisdiction to maintain the rule of law, not to mention that their sheer numbers are insufficient for that task. Nevertheless, the Russian troops apprehended more than 250 persons on suspicion of looting and other crimes. All of them have been handed over to the authorities of South Ossetia for further investigation and criminal prosecution."[287]

This argument of relying on the South Ossetian *de facto* authorities to maintain public order and prevent violations of human rights is flawed, however. In the first place, these authorities failed to ensure the protection or safety of persons living on the territory they controlled, as demonstrated above. This is additionally proven by the fact that even Ossetians did not enjoy protection. One of the two remaining residents of Zonkar, a tiny Tskhinvali-administered hamlet in the Patara Liakhvi valley surrounded by ethnic Georgian villages, told Human Rights Watch how men dressed in Ossetian peacekeeper uniforms looted her house and tried to set fire to it. She said that although she reported the incident to the police, no officials from the South Ossetia prosecutor's office came to her house to investigate.[288] Even more worrying, however, is the fact that Ossetian forces were themselves among the main perpetrators of violations of human rights.

Furthermore, the position adopted by the Russian Federation is not admissible in the buffer zone, where the South Ossetian *de facto* authorities were not exercising control.

Another aspect of the Russian argumentation calls for further analysis. Russia claims that although it was not an occupying power, "the Russian military contingent called upon to carry

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[286] Russia, Responses to Questions Posited by the IIFFMCG (Legal Aspects), *op. cit.*, p. 6.

[287] *Ibid*., pp. 7-8.

[288] HRW, Up In Flames – Humanitarian Law Violations and Civilian Victims in the Conflict over South Ossetia, *op. cit*., p. 144.

out purely military tasks in the territory of South Ossetia, to the best of their abilities tried to maintain law and order and prevent any offences in the areas of their deployment including Georgia proper, where owing to the flight of Georgian government authorities an apparent vacuum of police presence ensued." First, it recognises the absence of policing by Georgian authorities. Second and most importantly it clearly states that effectively the Russian forces, to a certain extent, were trying to maintain order and safety. Russia elaborated further on the actions it carried out in this regard:

"From day one of the operation, the Russian military command undertook exhaustive measures to prevent pillaging, looting and acts of lawlessness with respect to the local Georgian population. All personnel serving in units that took part in the operation was familiarised with the Directive issued by the General Staff of the Russian Armed Forces and the order given by the Army Commander-in-Chief 'to maintain public safety and ensure the security and protection of citizens residing in the territory of the South Ossetian Republic'.

"Russian troops, jointly with South Ossetian law-enforcement and military units, provided round-the-clock protection of the homes and land allotments that remained undamaged in Georgian villages, at the same time ensuring the safety and security of South Ossetian residents regardless of their ethnic background."[289]

First of all, this contradicts the information according to which "in October an official from the Council of Europe who requested anonymity told Human Rights Watch that a senior member of the Russian military in the region said that the military was given no mandate for the protection of civilians."[290]

In general, these elements demonstrate that to a certain degree, Russian forces were in a position to ensure public order and safety in the territories they were stationed in, and claim to have undertaken measures in this regard. This contrasts strikingly with what happened on the ground, where there was a serious lack of action by the Russian troops to prevent violations and protect ethnic Georgians.

One of the main measures taken by Russian troops was to set up roadblocks and checkpoints. Regarding South Ossetia, Human Rights Watch noted that "roadblocks set up by Russian

[289] Russia, Responses to Questions Posited by the IIFFMCG (Humanitarian Aspects), *op. cit.*, p. 11.

[290] HRW, Up In Flames – Humanitarian Law Violations and Civilian Victims in the Conflict over South Ossetia, *op. cit.*, p. 124.

forces on August 13 effectively stopped the looting and torching campaign by Ossetian forces, but the roadblocks were inexplicably removed after just a week."[291]

As reported by HRW, two residents of Tkviavi, a village 12 kilometres south of Tskhinvali that was particularly hard hit by looters from South Ossetia, said that the looting had decreased when the Russian forces maintained a checkpoint in the village, although the marauders kept coming during the night. Furthermore, several Tkviavi villagers told Human Rights Watch that they believed that more frequent patrolling by the Russian forces or Georgian police would have improved security in the area. A witness told Human Rights Watch that looters "seemed to be afraid to encounter the Russians, and were hiding from them," suggesting, according to HRW, that had Russian forces taken more preventive measures to stop violence against civilians these measures would have been effective.[292]

In this regard, other measures by the Russian troops consisted of patrolling and informing the inhabitants and giving the villagers phone numbers so they could contact the Russian military authorities if they witnessed any kind of violation. Regarding these measures, an habitant of Tkviavi, the former mayor of the village, told the IIFFMCG expert on 3 June that while having offered to help, the Russian military authorities did not do much concretely to stop the looting.

At this stage it is critical to note that the measures such as checkpoints introduced by the Russian forces were meant to prevent violations by South Ossetian militias, and consequently ensure respect of IHL. Oddly, one result of the checkpoints was actually to prevent the Georgian police from maintaining law and order in those areas,[293] and in some cases to stop villagers attempting to return home from Gori to villages in the "buffer zone," while Russia continued to invoke the lawlessness.[294]

On the other hand, testimonies gathered by the IIFFMCG and by HRW[295]also report Russian ground forces trying to protect the civilian population from Ossetian forces, militia members, or criminal elements.

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[291] *Ibid*., p. 9.

[292] *Ibid*., p. 126.

[293] *Ibid*., p. 126.

[294] UNHCR, "Situation north of Gori is deteriorating," Emergency Operation in Georgia Update, 27 August 2008, http://www.unhcr.org/news/NEWS/48b55da74.pdf.

[295] HRW, *Up In Flames – Humanitarian Law Violations and Civilian Victims in the Conflict over South Ossetia, op. cit*., p. 125.

Nevertheless, from all the testimonies collected, it appears that the Russian authorities did not take the necessary measures to prevent or stop the widespread campaign of looting, burning and other serious violations committed after the ceasefire.[296]

Referring to the situation at the end of August, the Council of Europe Commissioner for Human Rights also stressed that "the Russian forces have the duty under international humanitarian law to maintain law and order in the zone they control," and he "raised his serious concerns about the security of the civilians with all sides." He noted that the Russian head of the peacekeeping presence in the buffer zone and other high-level Russian officials "acknowledged that policing and maintaining law and order were major challenges. According to them, the area had been infiltrated by marauders, criminal gangs and militia, who were committing serious crimes."[297]

In September 2008, as a way to address this failure to maintain law and order properly, Human Rights Watch called for the EU to provide the monitoring mission scheduled to move into areas near South Ossetia with a policing mandate to protect the civilians.[298]

The Russian authorities and the South Ossetian authorities failed overwhelmingly to take measures to maintain law and order and ensure the protection of the civilian population as required under IHL and HRL.

C. Missing and dead persons

Article 33(1) of Additional Protocol I sets out the obligation on each party to a conflict to search for persons reported missing. Although Additional Protocol II contains no provisions with regard to missing persons, the general obligation to account for them and to transmit

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[296] As underlined by Amnesty International, distinguishing between South Ossetia and the buffer zone: "As the occupying force, the Russian army had a duty to ensure the protection of civilians and civilian property in areas under their control. Whilst this may have been difficult in practice in the early days of the conflict, when Russian forces were still engaging the Georgian army, the looting and destruction of property owned by ethnic Georgians, and the threatening of remaining Georgians in South Ossetia and the surrounding "buffer zone," continued on a large scale for several weeks after the formal cessation of hostilities. It is clear that the Russian authorities singularly failed in their duty to prevent reprisals and serious human rights abuses being carried out by South Ossetian forces and militia units. In the "buffer zones," Russia was bound by its obligations as an occupying power as codified in the Fourth Geneva Convention. This means that it was primarily responsible for the security and welfare of Georgian civilians in those areas. In South Ossetia, while it may not formally have been the occupying power, it was nevertheless bound by its obligations under human rights law to respect and protect the rights of all those under its effective control", AI, Civilians in the Line of Fire – The Georgia-Russia Conflict, *op. cit*., p. 32.

[297] HUMAN RIGHTS IN AREAS AFFECTED BY The SOUTH OSSETIA CONFLICT, Special Mission to Georgia and Russian Federation, *op. cit*., para. 89, p. 16

[298] Human Rights Watch, "*Georgia: EU Mission Needs to Protect Civilians – In Security Vacuum, Frequent Attacks and Pervasive Fear*," 15 September 2008, http://www.hrw.org/en/news/2008/09/15/georgia-eu-mission-needs-protect-civilians

information has been recognised as applicable in both international and non-international armed conflict. The ICRC Customary Law Study identified the rule according to which "Each party to the conflict must take all feasible measures to account for persons reported missing as a result of armed conflict and must provide their family members with any information it has on their fate."[299]

As with missing persons, families are entitled to be informed if their relatives are dead. The two main obligations – to search for the dead and to protect them against pillage and ill-treatment – are restated in Geneva Conventions I, II and IV (1949). Article 8(2) of Additional Protocol II also states the duty to search for the dead and to prevent ill-treatment. Complying with these obligations is a prerequisite for the respect of subsequent obligations requiring the return of remains and decent burial.[300]

The issue of missing persons is an ongoing one which by definition cannot be limited to the August conflict. It also relates therefore to the conflict in Abkhazia and South Ossetia at the beginning of the 1990s. The Abkhaz *de facto* authorities stated, for example:

"After the war of 1992-1993 a special commission on missing persons was created. A similar commission was set up by the Georgian authorities. Both sides cooperated proactively in trying to identify such instances. Specialists were invited to identify the bodies of those killed. During the initial stages the cooperation was relatively efficient; however, gradually the intensity of the commission's work subsided. As of today both Abkhazia and the Georgian side have identified a significant number of missing persons, however, it seems unlikely that they will ever be found. The Abkhaz side believes that these people are most likely dead."[301]

While to date there is no exact figure for the number of persons reported missing as a result of the August conflict, the ICRC stated the following:

"People seeking missing relatives continue to contact the ICRC in Tskhinvali, Gori, Tbilisi and Moscow. Today, 37 families are still without news of their loved ones. The ICRC follows up each individual case of people who went missing during the conflict and its aftermath with the relevant authorities and on a confidential basis. In addition, an ICRC forensic expert in

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[299] See Rule 117, in J-M. HENCKAERTS, L. DOSWALD-BECK (eds), Customary International Humanitarian Law, Volume I, *op. cit*., p. 421.

[300] *Ibid*., see Rules 111-116, pp. 406-420.

[301] Abkhaz authorities, Responses to Questions Posited by the IIFFMCG (Legal aspects), submitted to the IIFFMCG in April 2009, p. 9.

Tbilisi is on hand to help authorities identify mortal remains. There are still over 1,900 people missing as a result of previous conflicts in the region."[302]

In June 2009, in its replies to the IIFFMCG questionnaire, Georgia, referring to the statistics to hand, gave the following information about Georgians missing: "19 civilians are missing as a result of the armed conflict between Georgia and Russia. The families of these persons have been mediated by the MoIA and brought to the National Bureau of Court Expertise to undertake DNA analysis with the aim of identifying the corpses of their missing relatives. As a result, 2 missing persons were identified."[303] Georgia also indicated that "3 police officers are still missing" and "10 military persons are still missing."[304]

The Russian Federation reported that "to clarify the fate of missing persons as well as those who perished in the territory of South Ossetia as a result of terrorist attacks organised by Georgian intelligence services, the Inquiry Committee appointed by the Russian Federation Prosecutor-General's Office submitted a request for legal assistance to the Office of the Prosecutor-General of the South Ossetian Republic."[305] While this initiative is commendable, it should be recalled that existing reports mention persons unaccounted for as a result of acts committed by the South Ossetians forces and that such an initiative should concern all persons reported missing.

There are accounts by IDPs to whom the fate of their relatives is still unknown at the time of writing this Report, or who have received unconfirmed reports that they are dead without having been able to have their body returned. Despite having interviewed only some persons affected by the conflict, the IIFFMCG expert heard two such testimonies from ethnic Georgians: a woman from Achabeti whose husband's body was identified by his brother but never given back to her; and another woman from Achabeti who has had no news of her brother.

Another case highlighted by Human Rights Watch gives grounds for particular concern. Researchers from this organisation were told by an Ossetian taxi-driver that his friend, a resident of Kvemo Achabeti, and the friend's wife were shot dead by unknown persons at

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[302] ICRC, "*Western/Central Georgia and South Ossetia: helping the most vulnerable,*" Operational update, 20-03-2009, available at: http://www.icrc.org/Web/eng/siteeng0.nsf/html/georgia-update-200309

[303] Georgia, Responses to Questions Posited by the IIFFMCG (Humanitarian Aspects, Questioni 8), provided to the IIFFMCG on 5 June 2009, p. 2.

[304] *Idem*.

[305] Russia, Responses to Questions Posited by the IIFFMCG (Humanitarian Aspects), *op. cit*., pp. 13 and 14.

some point between August 13 and 16, and the researchers went with him to photograph the grave. They found, however, that the grave appeared to have been dug up, and the bodies were missing."[306]

There were also commendable acts to be noted. According to the HRAM of the OSCE "a villager from Kurta told how she heard that Russian soldiers sometimes helped people to get back to the village to look for missing persons."[307]

The issue of persons missing as a result of the conflict, together with unsettled allegations of arbitrary detention and the prevention of hostage-taking, are still ongoing at the time of writing this Report and give rise to conflicting views between all sides.[308] These issues thus remain sources of concern for the Fact-Finding Mission.

Bearing in mind the suffering of families faced with the loss of a relative or uncertainty about his or her fate, it should be stressed that all parties to the conflict must fulfil their obligations under IHL with regard to missing and dead persons. It is worth recalling the importance of cooperation between all the parties, including through the establishment of joint mechanisms to address these questions.

D. Forced displacement

The issue of displacement in the context of the 2008 armed conflict and its aftermath is manifold, notably because it is constituted of different patterns. A complicating factor in terms of the protection of displaced persons is that, as outlined by the United Nations Inter-agency Humanitarian Assessment Mission to South Ossetia, "many people have lived as internally displaced persons in South Ossetia, or from South Ossetia elsewhere, since the first conflict of 1991-92."[309]

As stated earlier, displacement is not limited to the period of the conflict itself, given the continuing violence and insecurity that lasted for weeks after the cease-fire of 12 August. In this regard, the United Nations Inter-agency Humanitarian Assessment Mission to South Ossetia, following its visit in September 2008, noted that "the protection of civilians emerged

[306] HRW, *Up In Flames – Humanitarian Law Violations and Civilian Victims in the Conflict over South Ossetia, op. cit*., p. 143 and Footnote No. 396.

[307] Human Rights Assessment Mission of the Office for Democratic Institutions and Human Rights, OSCE, Human Rights in the War-Affected Areas following the Conflict in Georgia, 27 November 2008, p. 49.

[308] See Amnesty International, *Civilians in the aftermath of war: The Georgia-Russia Conflict one year on*, August 2009, p. 21.

[309] United Nations Inter-agency Humanitarian Assessment Mission to South Ossetia, 16-20 September 2008, Mission Report, para. 5.1.

as the most urgent humanitarian concern."[310] There are still some displacements of population in the Akhalgori district at the time of the writing of this Report.

Displacements were of course not limited to persons fleeing the territory of South Ossetia. But since most of the hostilities and damage occurred in South Ossetia, the displacement of population in and around that territory was more extensive. It should then be determined to what extent this was due to causes other than the hostilities *per se*. Similarly, the question of the return of internally displaced persons from ethnic Georgian villages in South Ossetia seems to be raised in different terms than for those who left the so-called buffer zone. Amnesty International states: "Prospects for return may be seen as sharply distinguished between areas falling within the 1990 boundaries of the South Ossetian autonomous region and areas beyond, falling in the so-called 'buffer zones'. Return to the former, above all to those areas formerly associated with the Tbilisi-backed Dmitri Sanakoev administration, is extremely unlikely. Villages in those areas were subjected to a high level of destruction and pillaging."[311]

The UN Guiding Principles on Internal Displacement apply to all phases of displacement – providing protection against arbitrary displacement, offering a basis for protection and assistance during displacement, and setting forth guarantees for safe return, resettlement and reintegration.[312] Consequently, assessing displacement in the context of the conflict in Georgia entails looking at five main issues: first, bearing important legal consequences is the question of the reasons for the displacement and the prohibition on arbitrary displacement; second, as the displacement of persons is closely linked to allegations of ethnic cleansing, this issue will be addressed; third, the treatment of displaced persons; fourth, the right to return; and finally, the issue of property rights and compensation for IDPs, especially as, owing to pillage, destruction and torching, many of these people have no prospect of returning in the near future.

It is necessary, however – as a preliminary question and to have an overview of the situation – to look at the scale of the displacement. At the same time, it is not the aim of IIFFMCG to reach definite conclusion or to discuss figures. Walter Kälin, the Representative of the Secretary-General on the human rights of internally displaced persons, noted that "precise

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[310] United Nations Inter-agency Humanitarian Assessment Mission to South Ossetia, 16-20 September 2008, Mission Report, para. 5.1.

[311] AI, Civilians in the Line of Fire – The Georgia-Russia Conflict, *op. cit.*, p. 51.

[312] See Guiding Principles on Internal Displacement, *op. cit.*, para. 9.

data on current displacement patterns remain difficult to establish."[313] There are also conflicting versions of the number of IDPs who have already returned.

a) Figures

According to the February 2009 report on the human rights of internally displaced persons written by the Representative of the Secretary-General following his visit in October 2008, "as a result of the hostilities in northern Georgia that escalated on 7/8 August 2008, some 133 000 persons became displaced within Georgia."[314] Walter Kälin stressed that "currently, displacement in Georgia can be divided into the three categories described below:

"(a) Approximately (according to the Civil Registry Agency) 107 026 persons fled the area adjacent to the Tskhinvali region/South Ossetia. IDPs from the Tskhinvali region/South Ossetia are estimated as of November 2008 as 19 111, from the upper Kodori Valley as 1 821, and those displaced from Akhalgori as 5 173. According to the Office of the United Nations Resident/Humanitarian Coordinator, an estimated 75 000 persons displaced from Gori and surrounding areas returned soon after the end of hostilities in August and September, while an estimated 24 596 of the persons who fled the so-called buffer zone have been able to return home in the Shida Kartli region following the withdrawal of Russian troops between 7 October and 10 November 2008.[315] The main needs of the latter category relate to the challenge of recovery after return including safety (including humanitarian demining) and the re-establishment of law and order. The reconstruction and repair of destroyed or looted houses; humanitarian assistance with food and firewood; and the re-establishment of basic services such as education and health, as well as the re-establishment of economic activities, are important concerns;

"(b) According to government estimates, some 37 605 IDPs will not return in the foreseeable future. This figure includes the 19 111 IDPs from the Tskhinvali region/South Ossetia and the 1 821 IDPs from the upper Kodori Valley, as well as those IDPs who will spend the winter in displacement, namely 11 500 who cannot return to the area adjacent to the Tskhinvali region/South Ossetia for reasons such as security or the destruction of property, and some 5

[313] Report of the Representative of the Secretary-General on the human rights of internally displaced persons, Walter Kälin, A/HRC/10/13/Add.2, 13 February 2009, para. 11.

[314] *Idem*, para. 9.

[315] Office of the United Nations Resident/Humanitarian Coordinator, Situation Report No. 35 on the situation in Georgia, 6-13 November 2008.

173 IDPs from Akhalgori.[316] *The Government estimates that some 21 000 displaced persons will be accommodated in durable housing by the end of the year;*

"(c) Approximately 220 000 internally displaced persons from the territories of Abkhazia and the Tskhinvali region/South Ossetia have been living in protracted displacement for more than a decade following the conflicts in the aftermath of the independence of the former Soviet Republic of Georgia in 1991, as described in the Representative's previous report."[317, 318]

In his latest report on human rights issues following the August 2008 armed conflict, issued on 15 May 2009, the Commissioner for Human Rights of the Council of Europe indicated that "according to the information available, a total number of approximately 138,000 people were displaced in Georgia."[319]

According to the information from international organisations gathered by the Human Rights Assessment Mission (HRAM) of the OSCE's Office for Democratic Institutions and Human Rights, "since the new South Ossetian *de facto* administration has taken over in the Akhalgori area, many people have left the region" and "more than 5 100 individuals had left Akhalgori by the end of October."[320] In June 2009 the IIFFMCG experts met with the administration in Akhalgori which provided the following figures: before the 2008 August conflict there were approximately 9 000 inhabitants, 2 388 of them ethnic Ossetians and the rest Georgian; on 1 December 2008 there were 6 900 persons and on 1 March 2009, 5 074. According to information gathered during the visit, at least two Georgian families left Akhalgori while the IIFFMCG was there in the afternoon of 5 June. Considering that, according to the South Ossetian authorities, approximately 2 400 Georgians still live there, there is a clear indication that Georgians are continuing to leave the region, contrary to claims by the administration in Akhalgori that they are "slowly returning".

316 *Ibid.*

317 E/CN.4/2006/71/Add.7, paras 6-9.

318 Report of the Representative of the Secretary-General on the human rights of internally displaced persons, Walter Kälin, A/HRC/10/13/Add.2, *op. cit.*, para. 11, with footnotes included.

319 Commissioner for Human Rights of the Council of Europe, Report on human rights issues following the August 2008 armed conflict, 15 May 2009, CommDH(2009)22, para. 9.

320 Human Rights Assessment Mission of the Office for Democratic Institutions and Human Rights, OSCE, Human Rights in the War-Affected Areas following the Conflict in Georgia, 27 November 2008, p. 50.

b) The prohibition of arbitrary or forcible displacement and the reasons for displacement in the context of the 2008 armed conflict and its aftermath

(i) Applicable law

The international legal norms relevant for addressing the various issues relating to displacement derive from IHL (for displacement in time of armed conflict), HRL (for displacement following the end of hostilities) and the UN Guiding Principles on Internal Displacement, which aim to provide a set of common standards based on the two former branches of international law.

Provisions of IHL[321] and HRL[322] explicitly or implicitly point to a general prohibition against arbitrary or forcible displacement, with only restricted circumstances in which displacement is permissible. For example, Article 17 of Protocol II states that "the displacement of the civilian population shall not be ordered for reasons related to the conflict unless the security of the civilians involved or imperative military reasons so demand." Under HRL, as recalled by Walter Kälin, the Representative of the Secretary-General on the Human Rights of Internally Displaced Persons, "the key norm is Article 12 of ICCPR [which] guarantees not only the right to liberty of movement but also the freedom to choose one's residence, which includes the right to remain there (paragraph 1)."[323] This provision further stipulates that this right "shall not be subject to any restrictions except those which are provided by law, are necessary to protect national security, public order (*ordre public*), public health or morals or the rights and freedoms of others, and are consistent with the other rights recognized in the present Covenant (paragraph 3)." This prohibition against arbitrary displacement is restated in the UN Guiding Principles under Principle 6(1): "Every human being shall have the right to be protected against being arbitrarily displaced from his or her home or place of habitual residence." The quality of arbitrariness refers to displacements that do not meet the requirements of IHL and HRL. Consequently, evacuations of civilians to ensure their security against the effects of hostilities or "a displacement designed to prevent the population from being exposed to grave danger cannot be expressly prohibited."[324]

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[321] Articles 49 and 147 of Geneva Convention IV, Articles 51(7), 78(1) and 85(4) of Protocol I, Articles 4(3)(e) and 17 of Protocol II.

[322] Article 12 of the Universal Declaration of Human Rights, Articles 12(1) and 17 of the ICCPR, and Article 8 of the EConvHR.

[323] Guiding Principles on Internal Displacement Annotations, *op. cit.*, p. 28.

[324] ICRC Commentary to Article 17 of Additional Protocol II, p. 1472.

Unless the security of the civilians involved or imperative military reasons so demand, the deportation of the civilian population from an occupied territory and the forced movement of civilians in internal armed conflicts amount to war crimes, according to Articles 8(2)(b)(viii) and (e)(viii) of the Rome Statute and Article 85(4)(a) of Protocol II.

In the light of this general prohibition and its exceptions, it is necessary to analyse the displacement patterns of the approximately 138,000 persons displaced in the context of the August 2008 armed conflict. It appears critical to determine the main reasons for the displacement of those persons, and the sequencing of and reasons for their displacement should be nuanced.

(ii) Patterns of and reasons for the displacements

First, without prejudging the causes of or motives for this displacement, it is critical to note that, in fact, ethnic considerations were involved. As stressed by Amnesty International, "the direction of flight divided largely, though not exclusively, along ethnic lines, with Ossetians having fled northwards to the Russian Federation and ethnic Georgians having fled southwards into other regions of Georgia."[325] According to Russia, in its replies to the IIFFMCG questionnaire, the massive exodus of the population from Georgia to the territory of the Russian Federation primarily involved groups of Ossetians, Abkhaz, Russians, Armenians, Azeris and other ethnic minorities residing in Georgia.[326]

The Russian Federation insisted that "one of the most dramatic consequences of the Georgian military operation against South Ossetia was the massive exodus of local population to the territory of the Russian Federation in search of refuge."[327] Georgia claims on the contrary that more than 130,000 civilians have fled as a result of the campaign of expulsion of ethnic Georgians and raids against Georgian villages by Russian forces in conjunction with irregular proxy armed groups.[328] While these statements account for the general consequences of the hostilities, none of them seems to reflect the various factual causes of the displacement of people taking into account the time, i.e. whether prior to the conflict, during the conflict of in its aftermath. In this regard, there is also a need to distinguish between geographical areas.

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[325] AI, Civilians in the Line of Fire – The Georgia-Russia Conflict, *op. cit.*, p. 48.

[326] Russia, Responses to Questions Posited by the IIFFMCG (Humanitarian Aspects), *op. cit.*, p. 5.

[327] *Ibid.*, p. 3.

[328] Georgia, Responses to Questions Posited by the IIFFMCG (Humanitarian Issues, Question2), provided to the IIFFMCG on 5 June 2009, p. 1.

In the course of the oral pleadings before the ICJ it was submitted that "before the recent attacks on Georgian villages in the Kodori Valley, there was a community of 3 000 Georgians in that area of Upper Abkhazia, to the north of Gali district."[329] According to Georgia, its Department of Statistics estimated that there were 1 900 inhabitants in Ajara municipality (upper Kodori Valley) as of 1 January 2008. The Civil Registry Agency had registered 1 218 IDPs from this municipality on 8 September 2008.[330] Georgia argued that these displacements from the upper Kodori Valley were the result of attacks on and the destruction of Georgian villages, which had forcibly displaced their entire population.[331] Similarly, Amnesty International, though referring to a different figure, noted that some 2 500 people had been displaced from that valley, as a result of military hostilities between Georgian and Abkhaz forces in the area.[332] When considering the displacement of inhabitants from the valley, it is necessary to stress that most of the civilians and military personnel left the region before the hostilities began.[333]

In South Ossetia, the pattern of displacement appears to be more complex. The first period to consider is that prior to the outbreak of the conflict. It is worth noting that testimonies recount that many South Ossetians left the Tskhinvali region at the end of July 2008. Evacuations were also carried out by the *de facto* authorities of South Ossetia. According to the Georgian authorities, "the evacuation of civilians from the Tskhinvali region to the Russian Federation began on 2nd of August 2008."[334] They also state: "At 12:23, the proxy regime announced the evacuation of civilian population from Tskhinvali and from the separatist-controlled villages of the region. The evacuation continued through 6 August 2008. This fact is further confirmed by the statement of Anatoly Barankevich, then National Security Council Secretary of the

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[329] Public sitting held on Monday 8 September 2008, at 10 a.m., at the Peace Palace, Verbatim Record, in the case concerning Application of the International Convention on the Elimination of All Forms of Racial Discrimination (Georgia v. Russian Federation), CR 2008/22, International Court of Justice, The Hague, 2008, p. 41, para. 9.

[330] See: Document submitted by Georgia, "Russian Invasion of Georgia – Facts & Figures," 8 September 2008, p. 14.

[331] REQUEST FOR THE INDICATION OF PROVISIONAL MEASURES OF PROTECTION SUBMITTED BY THE GOVERNMENT OF THE REPUBLIC OF GEORGIA, 13 August 2008, p. 6 para. 12. See also: Public sitting held on Monday 8 September 2008, at 10 a.m., at the Peace Palace, Verbatim Record, in the case concerning Application of the International Convention on the Elimination of All Forms of Racial Discrimination (Georgia v. Russian Federation), CR 2008/22, International Court of Justice, The Hague, 2008, para. 14, p. 57.

[332] AI, Civilians in the Line of Fire – The Georgia-Russia Conflict, *op. cit.*, p. 9.

[333] Report of the Secretary-General on the situation in Abkhazia, Georgia, 3 October 2008, S/2008/631, p. 8, para. 45.

[334] Georgia, Responses to Questions Posited by the IIFFMCG (Humanitarian Aspects, Question 3), provided to the IIFFMCG on 5 June 2009, p. 2.

proxy regime."[335] This is confirmed by a construction worker from Karaleti who, with three other Georgians, arrived in Java on 23 July 2008 to work. This man indicated that on 6 August Eduard Kokoity ordered women and children out and that he, together with his colleagues, saw them passing on the road while they were working.[336] The Russian Federation also indicated that its "Armed Forces helped to organise the evacuation of civilians from the conflict zone"[337] and that "more than 25 thousand people were evacuated from the conflict area including more than 7 thousand children."[338] Such evacuations do not constitute violations of HRL or IHL as they were carried out in order to ensure the security of the persons concerned.

According to the Russian Federation, "as for the predominantly ethnic Georgians who fled from South Ossetia towards Georgia, a significant number of such persons left their homes before the military operation. This fact has been recognised in particular in the report presented by the Council of Europe Commissioner for Human Rights T. Hammarberg. Our assumption is that the primary reason that drove ethnic Georgians to flee both prior to 8 August 2008 and in the following days was the initial information pointing to the fact that the Georgian side was gearing up for a military operation and then the military operation that unfolded around their places of residence. This process was not caused by any premeditated actions directed against ethnic Georgians *per se*."[339] This seems to contradict various testimonies according to which, days prior to the outbreak of the conflict, ethnic Georgians left because of the shelling against ethnic Georgian villages in South Ossetia, such as in Prisi and Tamarasheni. Although less well documented, the intermittent shelling of those villages before the conflict is substantiated by various testimonies.[340] Three persons from Achabeti, a village north of Tskhinvali, interviewed by one of the Mission's experts in Tbilisi on 7 March, indicated that the village was shelled from ethnic Ossetian villages uphill, but they were not able to see clearly who was firing. Shelling and artillery were heard in Achabeti, on 4, 5 and 6 August. These interviewees, as well as others (interviewed by NGOs) who left their village on

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[335] According to this statement: "Since August 1 conditions on border have started to become heated, at the beginning there were simple bombardments, then there appeared the first victims. Then Prime Minister Iury Ionovich Morozov has decided to evacuate people, thanks to him hundreds of lives have been rescued: both children, and women, and old men. Approximately 35 thousand persons were taken out from there (…). On August 8 we have completely cleared the city." See *Idem*.

[336] Testimony gathered by an NGO and forwarded to the IIFFMCG, p. 4.

[337] Russia, Responses to Questions Posited by the IIFFMCG (Humanitarian Aspects), *op. cit.*, p. 9.

[338] Russia, Responses to Questions Posited by the IIFFMCG (Legal Aspects), *op. cit.*, p. 8.

[339] Russia, Responses to Questions Posited by the IIFFMCG (Humanitarian Aspects), *op. cit.*, p. 7.

[340] HRW, *Up In Flames – Humanitarian Law Violations and Civilian Victims in the Conflict over South Ossetia*, *op. cit.*, p. 90.

7 August,[341] declared that inhabitants started to leave because of the growing insecurity and tension.

When the conflict broke out, displacements increased. The Commissioner for Human Rights of the Council of Europe stated that he "met a great number of displaced persons, who had left their homes due to hostilities (...), they all said they felt that they had been forced to leave."[342] The United Nations Inter-agency Humanitarian Assessment Mission to South Ossetia noted with concern that there were "multiple and credible accounts by civilian victims of the widespread targeting of civilians, both ethnic Ossetian and ethnic Georgian, during the immediate armed confrontation and its aftermath" and that this had caused the widespread displacement of civilians in the capital, Tskhinvali, and surrounding villages in the Didi Liakhvi and Frone valleys.[343] Following his visit to Georgia from 1 to 4 October 2008, Walter Kälin noted that after he had spoken "to persons displaced in August from areas adjacent to the Tskhinvali region/South Ossetia, most of them fled, primarily in order to avoid the dangers of war and general insecurity."[344] This was also the general impression the Mission's expert had after interviewing several people who had left ethnic Georgian villages in South Ossetia.

It is worth noting that Georgians living on the main axis between Gori and Tskhinvali in the buffer zone did not flee before the hostilities reached this zone. Instead, they were taken by surprise when Russian troops and South Ossetian forces crossed the administrative border and advanced southwards in the direction of Gori. Interviews conducted by an IIFFMCG expert in June 2009 with inhabitants who had returned to their homes in the villages of Koshka, Tkviavi and Karaleti illustrate this fact.

While it is not always possible to identify the exact reason for displacement in the context of armed conflict, it appears critical here to distinguish the general motive of fleeing the conflict zone to avoid the dangers of war from more specific actions deliberately carried out to force a displacement. In this regard, looting and the burning of houses and property were the reasons for the displacement of ethnic Georgians living in villages around Tskhinvali. This is

[341] Testimonies from inhabitants of Tamarasheni, Disevi and Kurta.

[342] Thomas Hammarberg, Commissioner for Human Rights of the Council of Europe, HUMAN RIGHTS IN AREAS AFFECTED BY The SOUTH OSSETIA CONFLICT, Special Mission to Georgia and Russian Federation, 22-29 August 2008, CommDH(2008)22, 8 September 2008, para 31.

[343] United Nations Inter-agency Humanitarian Assessment Mission to South Ossetia, *op. cit.*, para. 5.7.

[344] Report of the Representative of the Secretary-General on the human rights of internally displaced persons, Walter Kälin, A/HRC/10/13/Add.2, 13 February 2009, para. 10.

particularly significant for people who had decided to stay in those villages despite the hostilities, but who were forced to leave. A villager from Kemerti had to leave after he saw his house being looted and then set on fire.[345] The IIFFMCG expert also interviewed inhabitants from Achabeti and Eredvi who told similar stories and who left because their property was either looted or burned or both.[346] According to the HRAM: "A man from Eredvi described to the HRAM how 'Ossetians' forced his wife's elderly parents out of their house and then burned it down before their eyes. Several other displaced persons from the same village provided nearly identical accounts of their own experiences and of the near total destruction of the village. The perpetrators in Eredvi, according to all accounts, were Ossetians wearing white arm bands. Many witnesses described how the fires were often started by putting a flammable red substance on the beds and then setting it ablaze. (...) The HRAM visited Eredvi and confirmed extensive damage to the village."[347] Other testimonies from people who stayed in their villages, such as in Nuli or Kurta,[348] seem to indicate a pattern of intimidation, beating, threats, looting and the destruction and burning of houses by Ossetian military or paramilitary forces, in order to force the remaining people to leave ethnic Georgian villages.

According to Georgia's Ministry of Foreign Affairs, the total population in some 21 majority-ethnic-Georgian villages in these areas – i.e., those under the Government of Georgia's control prior to August 2008 – comprised 14,500 persons, of whom some 13,260 had been registered as IDPs in Georgia by 8 September.[349] The United Nations Inter-agency Humanitarian Assessment Mission to South Ossetia visited at least six of these villages in the conflict zone in and around the capital, and noted that they appeared to be empty of all population.[350] Two visits carried out by IIFFMCG experts in March and June confirmed that Georgian villages to the north of Tskhinvali, from Tamarasheni to Kekhvi, are still completely empty.

The causes for displacement are more striking when we consider the period after 12 August when, as the EU-brokered peace deal was being discussed, hostilities virtually ceased. Of

[345] Testimony from NGO interviews.

[346] Interviews conducted in March 2009.

[347] Human Rights Assessment Mission of the Office for Democratic Institutions and Human Rights, OSCE, Human Rights in the War-Affected Areas following the Conflict in Georgia, 27 November 2008, p. 42.

[348] Testimonies from interviews by NGOs, pp. 7 and 13.

[349] United Nations Inter-agency Humanitarian Assessment Mission to South Ossetia, *op. cit.*, para. 5.7.

[350] *Idem*.

particular concern is what happened in the so called "buffer zone." As outlined by the United Nations Inter-agency Humanitarian Assessment Mission to South Ossetia, "according to reports received from UN and NGO colleagues with access to the buffer zone outside the administrative boundaries of South Ossetia, a pattern of intimidation leading to displacement, and of destruction of properties, continues in certain targeted villages in that zone."[351] The Assessment Mission also referred to "reports from reliable humanitarian partners detailing continued cases of looting, intimidation, and forced displacement."[352]

It must be underlined that despite the existence, in addition to this pattern, of other reasons for displacement, such as a warning to leave by the Georgian police or by the residents' relatives or neighbours, we cannot dismiss the fact that there are numerous accounts of acts deliberately committed to force displacements.

The situation in the Akhalgori district shows that displacement was not caused merely by general direct hostilities. Indeed there were no hostilities in this district – an area in the east of South Ossetia, populated mostly by ethnic Georgians and under Georgian administration before the war. The Georgian authorities stated that "to date, remaining ethnic Georgians in Akhalgori live in constant fear; their rights and freedoms are limited; they are forced to accept Russian or so-called Ossetian passports and to cut links with the rest of Georgia."[353] According to the HRAM, "Georgians are leaving Akhalgori because of the strong presence of Russian and Ossetian forces and [because they] believe that fighting may break out."[354] As noted by Human Rights Watch, "residents of Akhalgori district face threats and harassment by militias and anxiety about a possible closure of the district's administrative border with the rest of Georgia. Both factors have caused great numbers of people to leave their homes for undisputed Georgian territory."[355] This climate of insecurity was confirmed through interviews by the IIFFMCG expert in March 2009 with several persons from this district who fled and who are currently living in Tserovani settlements.

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[351] United Nations Inter-agency Humanitarian Assessment Mission to South Ossetia, *op. cit.*, para. 5.8.

[352] *Ibid*., para. 4.2.

[353] Georgia, Response to Questions Posited by the IIFFMCG (Humanitarian Aspects, Question 2) provide to the IIFFMCG on 5 June 2009, p. 3.

[354] Human Rights Assessment Mission of the Office for Democratic Institutions and Human Rights, OSCE, Human Rights in the War-Affected Areas following the Conflict in Georgia, 27 November 2008, p. 50.

[355] HRW, *Up In Flames – Humanitarian Law Violations and Civilian Victims in the Conflict over South Ossetia*, *op. cit*., p. 87. See also pp. 147.

There were several reasons for the displacement of approximately 135,000 persons in the context of the 2008 August conflict and its aftermath.
While the need to avoid the danger of hostilities and the general climate of insecurity account for most of the displacements, numerous documented cases of violations of IHL and HRL committed in order to force the displacement of ethnic Georgians in South Ossetia lead us to conclude that the prohibition against arbitrary or forced displacement has been violated.

c) Allegations of ethnic cleansing against Georgians

While Georgia did not make allegations of genocide, it claimed that the crime of ethnic cleansing had been committed by South Ossetian and Russian forces. It submitted that "ethnic Georgians were subjected to ethnically motivated crimes committed either directly by Russian armed forces or through their tacit consent by South Ossetian militias (on the territories falling under Russian control)."[356]

More specifically, one of the advocates representing Georgia before the ICJ in the CERD case stated that it is "Georgia's case that there is in fact, and has long been, 'discrimination based on ethnicity in the policy of voluntary return of refugees and other displaced persons', that this policy is associated with ethnic cleansing in relevant areas of Georgia, that the process of ethnic cleansing continues and that to at least a significant degree it is attributable to the Russian Federation."[357]

Such a claim has to be seen in the context of the importance attributed by both sides to the ethnic dimension of the August conflict, and the link with previous allegations of ethnic cleansing regarding "the conflicts of 1991-1994, 1998 [and] 2004" made by Georgia,[358] which complicate the assessment of the claim. Georgia reiterated, for example, that "Ethnic Georgians and other ethnic minorities have been ethnically cleansed from Abkhazia and the Tskhinvali region/South Ossetia as a result of the war in 1992-1993 in Abkhazia and in 1991-

[356] Georgia, Responses to Questions Posited by the IIFFMCG (Humanitarian Aspects, Question 1), provided to the IIFFMCG on 5 June 2009, p.1

[357] Public sitting held on Monday 8 September 2008, at 4.30 p.m., at the Peace Palace, Verbatim Record, in the case concerning Application of the International Convention on the Elimination of All Forms of Racial Discrimination (Georgia v. Russian Federation), CR 2008/25, International Court of Justice, The Hague, 2008, para. 9, p. 12.

[358] Case concerning Application of the International Convention on the Elimination of All Forms of Racial Discrimination (Georgia v. Russian Federation), Request for the indication of provisional measures, International Court of Justice, ICJ, 15 October 2008, p. 6.

1992 in the Tskhinvali region/South Ossetia."[359] It should also be stressed that such a conclusion, and the use of the expression "ethnic cleansing," have implications – politically and even emotionally, for all sides – that go far beyond the present legal assessment.

The assessment of this claim is complicated by the fact that ethnic cleansing is not a term defined in international treaty law. Taking stock of the various attempts to define "ethnic cleansing", Professor William Schabbas noted: "while there is no generally recognized text defining ethnic cleansing, [such attempts] concur that it is aimed at displacing a population in order to change the ethnic composition of a given territory, and generally to render the territory ethnically homogeneous or 'pure'..."[360] The link to a territory appears critical in these attempts at a definition. The Security Council Commission of Experts on violations of IHL during the war in the former Yugoslavia stated that "'ethnic cleansing' means rendering an area ethnically homogeneous by using force or intimidation to remove persons of given groups from the area."[361]

Ethnic cleansing does not equate to genocide. This has been acknowledged by Georgia.[362]

In the 2007 Genocide case the ICJ differentiated between the two. When considering the specific intent of genocide, the Court had to elaborate on the relationship between this crime and what is known as "ethnic cleansing." After having noted that "the term 'ethnic cleansing' has frequently been employed to refer to the events in Bosnia and Herzegovina," it considered "what legal significance the expression may have."[363]

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[359] Georgia, Responses to Questions Posited by the IIFFMCG (Humanitarian Aspects, Question 2), provided to the IIFFMCG on 5 June 2009, p.1.

[360] Schabbas, W., *op. cit.*, p. 199.

[361] "Interim Report of the Commission of Experts Established Pursuant to Security Council resolution 780 (1992),", UN Doc. S/35374 (1993), para 55.

[362] In its replies to the IIFFMCG Questionnaire, Georgia stated:
"Neither the intent, as a matter of policy, to render an area "ethnically homogeneous," nor the operations that may be carried out to implement such policy, can as such be designated as genocide: the intent that characterizes genocide is 'to destroy, in whole or in part' a particular group, and deportation or displacement of the members of a group, even if effected by force, is not necessarily equivalent to destruction of that group, nor is such destruction an automatic consequence of the displacement."
It does not mean that ethnic cleansing can not constitute genocide, if it reaches the specific intent of the crime – destruction of the group in comparison with the intent of the removal of the group from a region," Georgia, Replies to Question 1 of the Questionnaire on humanitarian issues, provided to the IIFFMCG on 5 June 2009, p. 3.

[363] The Court noted:
"It is in practice used, by reference to a specific region or area, to mean 'rendering an area ethnically homogeneous by using force or intimidation to remove persons of given groups from the area' (S/35374 (1993), para. 55, Interim Report of the United Nations Commission of Experts). It does not appear in the Genocide Convention (…). It can only be a form of genocide within the meaning of the Convention, if it corresponds to or falls within one of the categories of acts prohibited by Article II of the Convention. Neither

Georgia claims "that the expulsion of ethnic Georgians from certain regions of Georgia, through the acts committed and steps taken by the Russian Federation along with South Ossetian proxy militants, is equal to the act of ethnic cleansing." It "considers 'ethnic cleansing' an extreme form of racial discrimination under Article 1 of the Convention on the Elimination of All Forms of Racial Discrimination."[364]

This allegation has been echoed by various organisations. In its Resolution 1633 (2008) on "The consequences of the war between Georgia and Russia," the Parliamentary Assembly of the Council of Europe stated that it was "especially concerned about credible reports of acts of ethnic cleansing committed in ethnic Georgian villages in South Ossetia and the 'buffer zone' by irregular militia and gangs which the Russian troops failed to stop." It further "stresse[d] in this respect that such acts were mostly committed after the signing of the cease-fire agreement on 12 August 2008, and [were] continuing" at the date of the adoption of the resolution.[365] The rapporteurs of the Committee on the Honouring of Obligations and Commitments by Member States of the Council of Europe (Monitoring Committee) who visited Georgia and Russia at the end of September detailed the basis for this qualification:

"The systematic nature of the looting and destruction of property in South Ossetia, together with indications from the de facto leadership in Tskhinvali that ethnic Georgian IDPs are not welcome to return, even if they take on the citizenship of the self-proclaimed state as demanded by the de facto authorities, is a clear indication that ethnic cleansing is taking place in South Ossetia. This is confirmed by reports from international humanitarian and relief organisations, as well as human rights organisations and the diplomatic community in Georgia, who have reported systematic acts of ethnic cleansing of Georgian villages in South Ossetia by South Ossetian irregular troops and gangs. Reports have been received that, in

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the intent, as a matter of policy, to render an area "ethnically homogeneous," nor the operations that may be carried out to implement such policy, can as such be designated as genocide: the intent that characterizes genocide is "to destroy, in whole or in part" a particular group, and deportation or displacement of the members of a group, even if effected by force, is not necessarily equivalent to destruction of that group, nor is such destruction an automatic consequence of the displacement. (…) In other words, whether a particular operation described as "ethnic cleansing" amounts to genocide depends on the presence or absence of acts listed in Article II of the Genocide Convention, and of the intent to destroy the group as such. In fact, in the context of the Convention, the term "ethnic cleansing" has no legal significance of its own. That said, it is clear that acts of "ethnic cleansing" may occur in parallel to acts prohibited by Article II of the Convention, and may be significant as indicative of the presence of a specific intent (dolus specialis) inspiring those acts," ICJ, Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro), *op. cit.*, para. 190.

[364] Georgia, Replies to Questions Posited by theIIFFMCG (Humanitarian aspects, Question 1), provided to the IIFFMCG on 5 June 2009, p. 3.

[365] Parliamentary Assembly of the Council of Europe, Resolution 1633, adopted on 2 October 2008, para. 13.

some cases, complete villages have been bulldozed and razed. This pattern also seemed to be confirmed by the visit of the PACE delegation to the region, which saw that the Georgian village of Ksuisi in South Ossetia had been completely looted and virtually destroyed."[366]

Human Rights Watch also concluded that ethnic cleansing took place in Georgia.[367]

Several elements all lead to the conclusion that ethnic cleansing was carried out during and, most importantly, after the August 2008 conflict. When considering the territory at stake and its ethnic composition, it must be stressed that South Ossetia was populated by ethnic Georgians in certain areas and villages. The UN Guiding Principles on Internal Displacement, in Principle 6(2), give examples of situations in which displacement would be arbitrary: "when it is based on (…) 'ethnic cleansing' or similar practices aimed at or resulting in alteration of the ethnic, religious or racial composition of the affected population." As well as through displacement, ethnic cleansing can be achieved through other acts such as the threat of attacks against the civilian population and the wanton destruction of property.[368]

Many ethnic Georgian villages in South Ossetia were and still are completely empty of people. Furthermore, a number of testimonies report destruction and torching done explicitly to force people to leave and prevent them from returning. This is significant when one considers that while most of the population of those villages left at the outbreak of the hostilities, this violence was directed against the few inhabitants who had stayed on. In this regard, during its latest visit to the area north of Tskhinvali, on the road linking Tamarasheni, Achabeti, Kurta and Kekhvi, the IIFFMCG experts witnessed that all of these ethnic villages had been burned down and were completely uninhabited.

While no definition of ethnic cleansing exists, and there is consequently no requirement of a particular scale in the material acts, it is critical to note that the extensive damage and the acts committed against the remaining ethnic Georgian inhabitants can in no way be regarded as isolated incidents. At the same time, it is difficult to regard them as systematic. This is closely linked to another issue.

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366 Committee on the Honouring of Obligations and Commitments by Member States of the Council of Europe (Monitoring Committee), Report, The consequences of the war between Georgia and Russia, Doc. 11724, 1 October 2008, Co-rapporteurs Luc van den BRANDE and Mátyás EÖRSI, para. 41, available at: http://assembly.coe.int/Main.asp?link=/Documents/WorkingDocs/Doc08/EDOC11724.htm

367 HRW, *Up In Flames – Humanitarian Law Violations and Civilian Victims in the Conflict over South Ossetia*, *op. cit.* p. 131.

368 See on this issue, 'Interim Report of the Commission of Experts Established Pursuant to Security Council resolution 780 (1992)', *op. cit.*, para. 56.

Although there is no legal requirement for any particular mental element to be present in ethnic cleansing, this qualification does seem to require an aim of "changing the ethnic composition of a given territory" or "generally rendering the territory ethnically homogeneous." Acts committed during and after the conflict show clearly that violence is being targeted against one particular ethnic group, i.e., ethnic Georgians.

In this regard it is necessary to acknowledge that the causes of displacement are numerous and that some acts, while apparently committed solely on ethnic grounds, may also be motivated by revenge for acts committed during the 1990s conflicts. During the latest visit by the IIFFMCG, in June, one of its experts interviewed a South Ossetian inhabitant of Tskhinvali who explicitly stated that ethnic Georgian villages from Kekhvi to Tamarasheni had been destroyed as revenge for what their inhabitants had done to South Ossetia in 1991-1992 and after. But this person also added that other ethnic Georgian villages had not been destroyed because they had always had good relationships with South Ossetians.[369]

On the other hand, ethnic cleansing does not necessarily mean that a whole territory must be homogeneous – it also relates to the aim of changing the ethnic composition of a territory.

Several elements suggest that there was ethnic cleansing in South Ossetia against Georgians living there.

Given the scale and the type of acts of violence such as forced displacement, pillage and the destruction of homes and property committed in South Ossetia, the question of whether they could amount to a crime against humanity arises. Under the Rome Statute, a crime against humanity is defined as particular acts including the "forcible transfer of population" and "persecution against any identifiable group or collectivity on political, racial, national, ethnic, cultural, religious, gender or other grounds", "when committed as part of a widespread or systematic attack directed against any civilian population, with knowledge of the attack."[370] While the discriminatory intent is not a common element of the crime against of humanity,

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[369] In this regard, in Georgian-populated villages that were under the control of the *de facto* South Ossetian authorities until the conflict, Amnesty International observed a very different situation from that in ethnic Georgian villages administered by the Georgian authorities:
"On 26 August, representatives of the organisation visited the villages of Nedalti and Akhalsheni in the Znaur district, to the west of Tskhinvali, which saw much less fighting. Akhalsheni has the only Georgian-language school operational in South Ossetian-controlled territory. Amnesty International representatives met representatives of the Georgian community of Akhalsheni, who said that while most of the village's population had left for Georgia on the eve of the conflict, not one house had been damaged or looted nor had there been any casualties in the village," AI, p. 44.

[370] See Article 7 of the Rome Statute of the International Criminal Court.

and is required only for the acts of persecution,[371] most of the acts identified were carried out against a particular group – ethnic Georgian inhabitants of South Ossetia. The key criterion for any of those acts to be classified as crime against humanity is that it was demonstrably committed as part of a widespread or systematic attack directed against a civilian population. To the extent that such an element is present, these acts could be classified as crime against humanity.

Several elements suggest the conclusion that ethnic cleansing was carried out against ethnic Georgians in South Ossetia both during and after the August 2008 conflict.

d) Treatment of displaced persons

As civilians, IDPs benefit from the general protection of IHL and, when the law of armed conflict ceases to apply, protection under HRL. Alleged violations in this regard will be addressed later. It is, however, very important to highlight the vulnerability of IDPs in the context of displacement. Numerous testimonies of ill treatment, beating, kidnapping and arbitrary arrest and detention in the course of their displacement during the conflict and its aftermath have been reported. The set of rules protecting IDPs is compiled in the UN Guiding Principles on Internal Displacement.[372]

Responses from the parties to the conflict on the issue of displaced persons and their treatment must be addressed in the light of the fact that before the outbreak of the conflict many people had been living as internally displaced persons in South Ossetia, and people from South Ossetia and Abkhazia had been displaced elsewhere, since the first conflict of 1991-92.[373]

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[371] See for example Larry May, *Crimes Against Humanity: A Normative Account*, New York, Cambridge University Press, 2005, p. 125, and Patricia M. Wald, "*Genocide and Crimes Against Humanity*," Washington University Global Studies Law Review, 2007, Vol. 6, p. 629.

[372] Principle 10 re-states that "every human being has the inherent right to life which shall be protected by law. No one shall be arbitrarily deprived of his or her life" and that "attacks or other acts of violence against internally displaced persons who do not or no longer participate in hostilities are prohibited in all circumstances." Principle 11 re-states that "every human being has the right to dignity and physical, mental and moral integrity." Principle 12 inter alia restates that: "Every human being has the right to liberty and security of person. No one shall be subjected to arbitrary arrest or detention. Internally displaced persons shall be protected from discriminatory arrest and detention as a result of their displacement. In no case shall internally displaced persons be taken hostage."

[373] In November 2008, the HRAM of the Office for Democratic Institutions and Human Rights of the OSCE noted that: "The Government of Georgia has made efforts under difficult circumstances to meet the needs of a large, new population of displaced persons. Despite these efforts, as well as those of international and national humanitarian organisations, many displaced persons are still living in very difficult conditions and have not yet been provided with adequate assistance or shelter as winter approaches. The de facto authorities in South Ossetia have provided some assistance for war-affected persons in territories under their control, but others continue to face arduous conditions and depend on international assistance," Human Rights Assessment Mission of the Office for Democratic Institutions and Human Rights, OSCE, Human Rights in the War-Affected Areas following the Conflict in Georgia, 27 November 2008, p. 6.

The Representative of the Secretary-General on the human rights of internally displaced persons noted that "the immediate humanitarian response from the Government to the rapid displacement resulting from the escalation of the conflict on 7/8 August is generally considered to have been speedy and adequate."[374] He was also nevertheless informed "that in the initial stages of the emergency, the coordination of the Government response was unclear and changed several times, revealing a lack of preparedness at the level of the competent authorities." The UN Representative noted that "this observation is shared by the Council of Europe Commissioner on Human Rights who considered, following his August visit, that neither the authorities nor the international community had done enough to provide the displaced with adequate living conditions, which had, however, improved in the course of September."[375] Walter Kälin welcomed "the fact that in contrast to earlier responses to displacement, in the aftermath of the August conflict the Government endorsed a policy of full support to local integration of IDPs from the Tskhinvali region/South Ossetia and Abkhazia and quickly adopted implementation measures, in particular in the area of housing", such as in Tserovani.[376]

e) The right to return, and obstacles

(i) Right to return under international law

According to the UN Guiding Principles on Internal Displacement, the competent authorities have the primary duty and responsibility to establish the conditions, and also to provide the means, to make three possible solutions available to IDPs: return to their former homes; local integration; and resettlement in another part of the country.[377]

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[374] Report of the Representative of the Secretary-General on the human rights of internally displaced persons, *op. cit.*, para. 16.

[375] *Idem*. Following its Special Follow-Up Mission to the Areas Affected by the South Ossetia Conflict, in November 2008, the Commissioner for Human Rights expressed "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." See 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 (12-14 November 2008, Tbilisi, Tskhinvali and Gori), Thomas Hammarberg Commissioner for Human Rights of the Council of Europe, CommDH(2008)37, 16 December 2008.

[376] Report of the Representative of the Secretary-General on the human rights of internally displaced persons, *op. cit.*, para. 18.

[377] Principle 28(1) states: "Competent authorities have the primary duty and responsibility to establish conditions, as well as provide the means, which allow internally displaced persons to return voluntarily, in safety and with dignity, to their homes or places of habitual residence, or to resettle voluntarily in another part of the country. Such authorities shall endeavour to facilitate the reintegration of returned or resettled internally displaced persons."

While HRL focuses primarily on the right of return from another country, there is an obligation on the governments concerned to do everything possible to protect the right to return within countries too.[378] This is also a rule under conventional and customary IHL, whereby "displaced persons have a right to voluntarily return in safety to their homes or places of habitual residence as soon as the reasons for their displacement cease to exist."[379] As underlined in Principle 6(3) of the UN Guiding Principles, "displacement shall last no longer than required by the circumstances." This right is strengthened by the IDPs' freedom of movement and right to choose their place of residence.

Guarantees relating to decisions to return are fundamental. Such decisions must be voluntary, meaning that they are made without coercion and based on an informed choice, and return must take place in conditions of safety and dignity, which would allow the returnees to live without threats to their security and under economic, social and political conditions compatible with the requirements of human dignity.

(ii) Impediments to the full exercise of the right to return

The return of IDPs is one the most pressing concerns and one of the most complex issues in the context of the August 2008 conflict, as well as in a broader perspective with regard to IDPs from the conflicts in the 1990s.[380] From the outset, two points must be stressed: first, there is a desperate expectation on the part of IDPs to return to their homes and places of residence. This was underlined by all IDPs interviewed by the IIFFMCG's expert in March 2009 as well as in other interviews conducted by international organisations and NGOs.[381] At the same time, all IDPs stressed that their return would be possible only if their security was guaranteed. The second point to be highlighted: under no circumstances should the current question of the status of South Ossetia and Abkhazia be used to hamper or impede the right of IDPs to return. This has also been clearly stated by the Commissioner for Human Rights of the Council of Europe.[382]

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[378] Thomas Hammarberg, Commissioner for Human Rights of the Council of Europe, HUMAN RIGHTS IN AREAS AFFECTED BY The SOUTH OSSETIA CONFLICT, 8 September 2008, *op. cit*., para. 32.

[379] See Rules 132 in J-M. HENCKAERTS, L. DOSWALD-BECK (eds), Customary International Humanitarian Law, Volume I, *op. cit*., p. 468.

[380] See for example, among the five reports issued by the High Commissioner of the CoE, SPECIAL MISSION TO GEORGIA INCLUDING SOUTH OSSETIA SUMMARY OF FINDINGS, *op. cit*., p. 2.

[381] For example, *ibid*., para. 31.

[382] *Ibid*., para. 32.

As noted above, according to government estimates in November 2008, 37,605 or so IDPs will not return in the foreseeable future, including 19,111 IDPs from the Tskhinvali region/South Ossetia, 1,821 IDPs from the upper Kodori Valley, and those IDPs who have spent the winter in displacement, namely 11,500 who cannot return to the area adjacent to the Tskhinvali region/South Ossetia and some 5,173 IDPs from Akhalgori.[383] According to United Nations estimates, there will be some 30,000 long-term displaced persons as a result of the conflict.[384]

While the winter and weather conditions might have explained why only few families returned to their homes in the upper Kodori Valley, the IIFFMCG visited the Kodori Valley in June and witnessed that most of the IDPs had not yet returned. According to different sources, between 150 and 200 persons have returned.[385]

The most difficult issue appears to be the return of persons displaced from South Ossetia. As stressed by the Commissioner for Human Rights of the Council of Europe in September, "the right to return should encompass the whole area of conflict, not only the 'buffer zone', but also South Ossetia itself."[386] In this regard there seem to be differences among the population returning to this region. The Russian Federation stated that "by late September more than 25 thousand people had returned from the territory of Russia to South Ossetia,"[387] whereas ethnic Georgians are not able to return.[388]

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[383] Report of the Representative of the Secretary-General on the human rights of internally displaced persons, *op. cit*., p. 2

[384] United Nations, Georgia Crisis Flash Appeal, October 2008, p. 15.

[385] Meetings of the IIFFMCG with the *de facto* Minister for Foreign Affairs of Abkhazia on 29 May 2009 and with the "Abkhaz government in exile" on 4 June 2009.

[386] SPECIAL MISSION TO GEORGIA INCLUDING SOUTH OSSETIA SUMMARY OF FINDINGS, *op. cit*, para. 35.

[387] Russia, Responses to Questions Posited by the IIFFMCG (Legal Aspects), *op. cit.*, p. 8. According to the Office for Democratic Institutions and Human Rights of the OSCE, "the vast majority of the more than 30,000 persons who found refuge in Russia during the conflict have returned to their homes in South Ossetia." See OSCE, Human Rights in the War-Affected Areas following the Conflict in Georgia, *op. cit.*, pp. 6-7.

[388] The Commissioner for Human Rights of the Council of Europe in his latest report of 15 May 2009 confirmed that:
"According to recent estimates from the Georgian Government and UNHCR, over 30,000 persons still remain displaced. Around 18,000 individuals have been offered durable housing solutions by the Georgian Government and almost 4,000 opted for financial compensation. Approximately 12,500 still reside in collective centres or temporary private accommodation. As for the people who fled to the Russian Federation, most of them have returned to South Ossetia, except for some 1,200 who have chosen to remain in the Russian Federation. Most of the people displaced by the August 2008 conflict have been able to return to their homes in the areas adjacent to South Ossetia, and most of those who fled to the Russian Federation have been able to return. However, most ethnic Georgians who have fled South Ossetia have not been in a

The obstacles hampering the return of displaced persons are numerous. In September 2008 the United Nations Inter-agency Humanitarian Assessment Mission to South Ossetia stated *inter alia* that "a lack of the rule of law, violation of property rights, limited livelihood prospects, and broader political developments affecting reconciliation, render this a complex undertaking."[389]

According to Georgia, "many of the ethnic Georgians who fled their villages in the Tskhinvali region/South Ossetia during the conflict and its immediate aftermath have not been able to return." It referred *inter alia* to declarations made by the *de facto* South Ossetian authorities making people's return conditional on their acceptance of South Ossetian passports and renunciation of Georgian passports, and mentioned testimonies from persons who had been stopped at Russian/Ossetian checkpoints reported by the HRAM of the OSCE.[390]

The IIFFMCG has come to the conclusion that security and the destruction of property are currently the two main obstacles. These have also been highlighted by the Georgian authorities.[391] Similarly, the Russian Federation has noted that "as for their return to communities located to the North and North-East of Tskhinvali, this process has been physically hampered by the fact that a significant number of homes were destroyed during the military operation as well as by the remaining security risks."[392] According to the Office for Democratic Institutions and Human Rights of the OSCE, "although many of the more than 130,000 persons displaced by the [August 2008] conflict have returned to their former places of residence, mainly in the 'buffer zone', over 20,000 persons, overwhelmingly ethnic Georgians, have been prevented from returning to their former places of residence in South Ossetia due to fear of insecurity, damage to their homes, or restrictions placed on their return,

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position to return," Report on human rights issues following the August 2008 armed conflict, 15 May 2009, para 10.

389 United Nations Inter-agency Humanitarian Assessment Mission to South Ossetia, op. cit., para. 4.2. The Russian Federation also identified the following:
"[D]ue to the fact that the Russian Federation severed diplomatic ties with Georgia, since 29 August 2008 the process of voluntary repatriation of Georgian nationals to their home country has become significantly more complicated since many of these people have no proof of identity. Other key factors that hamper the efforts to ensure organised repatriation of displaced persons include the remaining ethnic tensions and the situation in the 'buffer zones,' which continues to teeter on the brink of conflict due to the build-up of Georgian military forces. These factors may potentially create new sources of tension along [the] South Ossetian and Abkhaz borders.," Responses to Question, *op. cit*., p. 6.

390 Georgia, Responses to Questions by the IIFFMCG (Humanitarian Aspects, Question 2), provided to the IIFFMCG on 5 June 2009, pp. 2-3.

391 Report of the Representative of the Secretary-General on the human rights of internally displaced persons, *op. cit*., p. 2.

392 Russia, Responses to Questions Posited by the IIFFMCG (Humanitarian Aspects), *op. cit*., p. 7.

while many who fled from the Kodori region of Abkhazia fear to return because of uncertainties about the security situation."[393]

When considering the extensive destruction and burning of houses carried out after the cease-fire of 12 August, and after most of the ethnic Georgians had left the villages, there are many indications that this destruction was committed deliberately in order to prevent IDPs from returning. In this regard, destruction as an obstacle to the right of return cannot be seen as a mere consequence of the hostilities. As Human Rights Watch have underlined, their researchers came to the conclusion that this destruction of ethnic Georgian villages around Tskhinvali – most of it after mid-August – was done "with the express purpose of forcing those who remained to leave and ensuring that no former residents would return."[394]

In March 2009 the IIFFMCG was able to travel on the road between Tskhinvali and the village of Kurta where it witnessed extensive damage, with almost all the houses burned down or otherwise destroyed. Travelling along the same road in June, the IIFFMCG saw that all the ethnic Georgian villages were still completely empty.

As highlighted above, the IIFFMCG is also concerned at the fact that looting, destruction and torching occurred after the cease-fire. The United Nations Inter-agency Humanitarian Assessment Mission to South Ossetia stated that "the UNOSAT images of the villages north of Tskhinvali taken on 19 August appear now to be only a partial reflection of the current extent of property damage there." In the village of Avnevi in the Frone valley, to the west of Tskhinvali, the Mission members observed "smoke rising from one ruin on 18 September, making it unlikely that it had been burned during the August conflict."[395] There are also testimonies according to which some destruction and torching were being done deliberately to prevent displaced persons from returning. On 30 September 2008, during its mission, the Committee on Legal Affairs and Human Rights of the Council of Europe echoed the information provided by the Human Rights Watch investigators: "They have personally observed the looting and burning of the houses of ethnic Georgians (...) They have also asked several looters and arsonists, who were acting in complete openness, for the reasons for their

[393] OSCE, Human Rights in the War-Affected Areas following the Conflict in Georgia, *op. cit.*, pp. 6-7.

[394] HRW, *Up In Flames – Humanitarian Law Violations and Civilian Victims in the Conflict over South Ossetia, op. cit.*, p. 131.

[395] *Idem*.

actions. The answer they received was that they wanted to make sure that the Georgian inhabitants had no houses they could return to."[396]

With regard to the measures undertaken to make the return of displaced persons possible, the Office for Democratic Institutions and Human Rights of the OSCE stressed that it is clear that the *de facto* authorities in South Ossetia and Abkhazia, including Russian military authorities, have not taken steps to ensure that displaced persons can return voluntarily to their former places of residence in safety and dignity, in line with the obligations on these authorities under international standards.[397]

Of particular concern is the practice by the *de facto* authorities in South Ossetia and Abkhazia of imposing certain conditions on those wishing to return. One of these is the requirement to become a citizen of Abkhazia or South Ossetia. This condition was described to the Commissioner for Human Rights of the Council of Europe by the *de facto* authorities in Tskhinvali.[398] The HRAM referred to declarations by the authorities in South Ossetia explicitly stating this condition.[399] Testimony from IDPs being prevented from returning seems to suggest that these declarations have produced an effect on the ground.[400]

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396 Parliamentary Assembly of the Council of Europe (PACE), Committee on Legal Affairs and Human Rights, "The consequences of the war between Georgia and Russia," Opinion by rapporteur Christos Pourgourides, Doc. 11732 rev, 1 October 2008, para. 14, available at:http://assembly.coe.int/Main.asp?link=/Documents/WorkingDocs/Doc08/EDOC11732.htm, para.34.

397 OSCE, Human Rights in the War-Affected Areas following the Conflict in Georgia, *op. cit.*, p. 6.

398 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, *op. cit*., p. 1.

399 The HRAM report states:
"Mr Kokoity (the leader of the separatist forces) reportedly made a statement in mid-September that Georgian "refugees" holding South Ossetian citizenship can freely return to their former places of residence. Displaced Georgians will be allowed to come back if they are ready to renounce Georgian citizenship and acquire South Ossetian citizenship.
"Other *de facto* South Ossetian officials have expressed similar views. The *de facto* Minister for the Interior, for example, told the HRAM that he has found records of 4,000 ethnic Georgians living in South Ossetia who had been issued weapons since 2006 and that if these people tried to return they would be prosecuted. Others, he said, would only be allowed to return if they renounced their Georgian citizenship. The Deputy Chairperson of the *de facto* Council of Ministers (the *de facto* Deputy Prime Minister) told the HRAM: 'If a Georgian who decides to remain in South Ossetia does not meet our expectations, they will be expelled… I don't want Georgians to return to the northern villages of Tamarasheni and others, and they won't be able to.'" See Human Rights Assessment Mission of the Office for Democratic Institutions and Human Rights, OSCE, Human Rights in the War-Affected Areas following the Conflict in Georgia, 27 November 2008, p. 48.

400 According to the HRAM:
"A displaced person from the village of Disevi, for example, told the HRAM that she tried to return to Disevi but was prevented from doing so by Russian soldiers. Another concurred in a separate interview that 'it is impossible to get through the Russian-Ossetian check points' and that it was not safe to return to tend the fields.
"A displaced couple from Vanati told the HRAM they have not been able to return to their house because police stop people from entering that area. A villager who tried to return to Ksuisi village said he was turned

While the Abkhaz *de facto* Minister for Foreign Affairs has declared that "there were no Abkhaz obstacles to the return of refugees in the Kodori Valley,"[401] based on information from UNOMIG the UN Secretary-General has noted that the "Abkhaz *de facto* authorities announced that all the local population, estimated in 2002 at up to 2,000, could return if the displaced persons obtained Abkhaz 'passports' and gave up their Georgian citizenship."[402] This alleged link between return and the issuance of an Abkhaz passport raises broader questions regarding acts and situations that are not limited to the August conflict.

According to the HRAM, "some displaced persons appear to have been pressured by the Georgian authorities to return to their former places of residence in the areas adjacent to South Ossetia before conditions were in place to guarantee their security or an adequate standard of living, in contravention of OSCE commitments and other international standards."[403]

The IIFFMCG concludes that serious obstacles have prevented IDPs from returning to their homes in South Ossetia, and that for them to return no conditions other than those recognised by international standards should be imposed on them. Furthermore, the *de facto* South Ossetian and Abkhaz authorities, together with Russia, should take all appropriate steps to ensure that IDPs can return to their homes. Georgia must also respect the principle that a decision to return must be free from coercion. Finally, all sides should act in order to ensure that the right of return is fully implemented. This is critical with regard to the consequences of the August 2008 conflict, but also as a general measure to ensure a lasting solution to this conflict. Working to ensure the realisation of this right to return should give each side some leverage in negotiations and provide a basis for cooperation.

The authorities in Abkhazia and South Ossetia, together with Russia, should take all appropriate measures to ensure that IDPs are able to return to their homes. No conditions for exercising this right, other than those laid down by international standards, shall be imposed on IDPs. Georgia shall respect the principle of return as a free, individual decision by displaced persons.
Ensuring the realisation of the right to return is one of the basic prerequisites for achieving a lasting solution to the conflict.

back at a checkpoint after being told he should apply for a Russian passport and citizenship if he wanted to return to the village. Other villagers reported they were afraid to go back to their villages after their experiences there," *ibid*., pp. 48-49.

401 Meeting with the Abkhaz *de facto* Minister for Foreign Affairs, 3 March 2009, Sukhumi.

402 Report of the Secretary-General on the situation in Abkhazia, Georgia, pursuant to Security Council resolution 1839 (2008), 3 February 2009, S/2009/69, p. 8, para. 41.

403 OSCE, Human Rights in the War-Affected Areas following the Conflict in Georgia, *op. cit*., p. 7.

f) Protection of property rights

Under IHL the property rights of displaced persons must be respected. This rule is considered to be a norm of customary law.[404] The protection of the right to property, subject to restrictions imposed by law in the public interest, is also guaranteed in Article 1 of the First Protocol to the EConvHR. The UN Guiding Principles on Internal Displacement state that "No one shall be arbitrarily deprived of property and possessions" and that "[t]he property and possessions of internally displaced persons shall in all circumstances be protected."[405] Moreover Principle 29(2) holds that the "competent authorities have the duty and responsibility to assist returned and/or resettled internally displaced persons to recover, to the extent possible, their property and possessions which they left behind or were dispossessed of upon their displacement" and that "when recovery of such property and possessions is not possible, competent authorities shall provide or assist these persons in obtaining appropriate compensation or another form of just reparation."

The protection of property rights constitutes a critical issue: first, it entails ensuring that the property of displaced persons remains untouched until they can effectively return to their homes; secondly, it concerns property that has already been destroyed. It is therefore a prerequisite for a lasting peace in the region, as it also includes the issue of compensation.

According to the Russian Federation, the "property rights of displaced persons in the territory of South Ossetia are protected by the South Ossetian law enforcement authorities. Russian organisations cooperating with South Ossetia have been instructed not to engage in any transactions involving real estate of dubious legal standing."[406] Russia has also stated that "Russian troops, jointly with South Ossetian law enforcement and military units, provided round-the-clock protection of homes and land allotments that remained undamaged in Georgian villages, at the same time ensuring the safety and security of South Ossetian residents regardless of their ethnic background."[407]

On the contrary, many reports indicate the absence of proper measures to protect houses. The Office for Democratic Institutions and Human Rights of the OSCE indicated that the issue of

[404] See Rule 133 in J-M. HENCKAERTS, L. DOSWALD-BECK (eds), Customary International Humanitarian Law, Volume I, *op. cit*., p. 472.

[405] See Principle 21.

[406] Russia, Responses to Questions Posited by the IIFFMCG (Humanitarian Aspects), *op. cit*., p. 7.

[407] Russia, Responses to Questions Posited by the IIFFMCG (Humanitarian Aspects), *op. cit*., p. 11.

compensation for homes and other property lost during the conflict remains unresolved.[408] It stressed that "the most disturbing aspect of property loss was the apparently widespread, deliberate burning of houses by those whom villagers described as 'Ossetians'."[409] Furthermore, north of Tskhinvali, when HRW researchers returned in September certain villages had been almost fully destroyed, while in Kekhvi the debris of some houses along the road appeared to have been bulldozed.[410]

The Commissioner for Human Rights of the Council of Europe recalled that those who are unable to return to their homes, because they are occupied or have been destroyed, are entitled to restitution or compensation.[411] Both governments have to respect the ICJ order on provisional measures of 15 October 2008, to "do all in their power (…) to ensure, without distinction as to national or ethnic origin, the protection of the property of displaced persons and of refugees."[412]

A 2009 report commissioned by the Council of Europe on the destruction of cultural monuments indicated that "owners of buildings damaged or destroyed in the villages in the so-called former 'Buffer Zone' are being consulted by the Governor's services in order to know if they either prefer to receive subventions for repairing their houses or an amount of money to rebuild elsewhere. This measure aims at offering to all those affected by the conflict the possibility of being properly accommodated before the winter."[413]

In June, Georgia indicated that "the Law on Restitution was adopted on December 29, 2006. The aim of the law is to provide property restitution, adequate immovable property in place or compensation of the material (property) damage to the victims who suffered damage as a

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[408] OSCE, Human Rights in the War-Affected Areas following the Conflict in Georgia, *op. cit.*, p. 7.

[409] *Ibid*., p. 27.

[410] HRW, *Up In Flames – Humanitarian Law Violations and Civilian Victims in the Conflict over South Ossetia, op. cit.,* p. 131.

[411] Thomas Hammarberg, Commissioner for Human Rights of the Council of Europe, Special Mission to Georgia and Russian Federation, *op. cit.*, para. 38.

[412] Case concerning Application of the International Convention on the Elimination of All Forms of Racial Discrimination (Georgia v. Russian Federation), Request for the indication of provisional measures, International Court of Justice, ICJ, 15 October 2008, p. 41.

[413] Council of Europe, Directorate-General IV: education, culture and heritage, youth and sport, Assessment Mission on the situation of the cultural heritage in the conflict zone in Georgia, Technical Assessment Report, report prepared by: Mr David Johnson, 20 October 2008, Reference: AT(2008)386, p. 6.

result of a conflict in the Former Autonomous District of South Ossetia. Currently, steps are being taken for the implementation of the Law on Restitution."[414]

The issue of property rights in connection with the conflicts in the 1990s is still unsettled.

At the time of writing this Report there also seem to be issues with regard to property rights in the Akhalgori district. When meeting with the IIFFMCG on June 2009, the head of the administration suggested that the land which had been privatised by the Georgian government before the August 2008 conflict would now be nationalised. Furthermore, the head of the administration also referred to houses that had been taken from Ossetians by Georgians in 1991 and would now need to be given back to the Ossetians. Such issues raise serious concerns and, if not properly addressed, in accordance with international standards, will certainly fuel more tensions between the communities in the region.

The IIFMCG considers that property rights of IDPs is an issue which indeed dates back to the conflict in the 1990s and goes far beyond the effects of the August hostilities. It requires a common effort from all stakeholders to ensure that it is included in a global restorative justice initiative together with the right to return.

The IIFFMCG found that, in relation to the August 2008 conflict, there is a critical difference between the situation of property rights in Abkhazia and in South Ossetia. While only a very limited number of houses have been damaged in the course of the operations in Abkhazia, the situation in South Ossetia is dramatically different. Not only did the *de facto* South Ossetian authorities and Russian forces not take steps to protect the property of IDPs, but Ossetian forces actively participated in the looting and burning of houses. These violations also took place after the cease-fire.

Comprehensive programmes of compensation or another form of reparation should be designed to address the violation of IDPs' property rights. Such measures, however, cannot be a substitute for the right to return, and should be considered together with it.

[414] Georgia, Responses to Questions Posited by the IIFFMCG (Humanitarian aspects, Question 2), provided to the IIFFMCG on 5 June 2009, p. 5.

The protection of the property rights of IDPs is a longstanding issue, with still unsettled disputes over property rights dating back to the conflicts in the 1990s.
In South Ossetia there has been a serious failure on the part of the authorities and the Russian forces to protect the property rights of IDPs during – and, especially, after – the August 2008 conflict. Furthermore, South Ossetian forces did participate in the looting, destruction and burning of houses during and after the conflict.
Comprehensive reparation programmes should be designed and implemented. They should be seen as a complement to the exercise of the right to return of IDPs, and not a substitute for this right.

E. Respect for human rights, discrimination against minorities

While the conflict in Georgia cannot be seen as being solely related to ethnic and minority issues, this consideration does remain critical. Furthermore, the questions of discrimination against and respect for the human rights of minorities go far beyond the conflict itself. The HRAM of the OSCE stated:

"The August conflict had clear minority implications. Ethnic Ossetians and Abkhaz are minority communities within Georgia, while as of the writing of this report ethnic Georgians are, in fact, minority communities in both South Ossetia and Abkhazia. The conflict unfolded to a significant degree along ethnic lines. In general, therefore, the human rights concerns resulting from the conflict are compounded by their implications as minority issues. In addition, a number of specific issues of discrimination and failure to protect the rights of persons belonging to minority communities have arisen or worsened in the aftermath of the conflict, especially with regard to the southern Gali district of Abkhazia."[415]

As noted by HRAM, existing human rights and minorities issues worsened following the August 2008 conflict. There is therefore a need to provide a brief overview of the situation with respect to human rights and discrimination against minorities before the conflict. An analysis of how the situation evolved in the aftermath of the conflict will then be conducted. While it goes far beyond the mandate of this Mission to look at the overall human rights situation, the purpose is to address the main issues in as much as they amount to discrimination and fuel resentment between communities. In this regard, dealing with such issues appears to be a prerequisite for reaching a lasting solution to the conflict and ensuring a true and comprehensive reconciliation between communities.

[415] Human Rights Assessment Mission of the Office for Democratic Institutions and Human Rights, OSCE, Human Rights in the War-Affected Areas following the Conflict in Georgia, 27 November 2008, *op. cit.*, p. 18.

a) Overview of human rights and discrimination against minorities before the August 2008 conflict

First it is necessary to outline the relationship between the conflicts in the 1990s and some human rights issues. As stressed in 2005 by the UN Committee on the Elimination of Racial Discrimination, "the conflicts in South Ossetia and Abkhazia have resulted in discrimination against people of different ethnic origins, including a large number of internally displaced persons and refugees."[416]

Second, it is critical to be mindful of both the polarisation and the politicised way of dealing with human rights and humanitarian issues as a result of past conflicts, especially in the context of violations of IHL and HRL. These two aspects are particularly acute for Abkhazia.[417] As one researcher on Abkhazia rightly put it:

"The serious mass violations of human rights in this period – with ethnically motivated murders, civilians among them – extremely aggravated the 'enemy image' and mutual intolerance. In practically all the issues connected with this problem, be they the numbers of returnees, their legal status, the acquisition of passports, their security or even their access to education in their mother tongue, there are wide differences between the views of the conflicting sides."[418]

Third, existing human rights issues, mainly in the Gali district, worsened as a result of the conflict and its various consequences, while new issues also arose, for example in the Akhalgori district.

Fourth, the authorities in Abkhazia and South Ossetia are bound by human rights obligations. As recalled by the OSCE High Commissioner on National Minorities following his visit to Georgia in November 2005, "international norms and standards require that any authority

[416] Concluding Observations of the Committee on the Elimination of Racial Discrimination, Georgia, 15 August 2005, CERD/C/GEO/CO/3, 27/03/2007, para. 5.

[417] See Shalva Pichkhadze, "*Settlement of the Georgian-Abkhaz conflict: The Problem of Displaced Persons*," in: Georgian and Abkhaz Perspectives on Human Security and Development in Conflict-Affected Areas: A Policy Research Initiative, CITpax, May 2009, p. 61; for the polarisation issue, see Natella Akaba, "*Problems of reintegration of returnees to the Gal District of Abkhazia through the perspective of the human rights*," in: Georgian and Abkhaz Perspectives on Human Security and Development in Conflict-Affected Areas: A Policy Research Initiative, *op. cit*., p. 48.

[418] *Idem.*

controlling territory and people, even if not recognised by the international community, must respect the human rights, including minority rights, of everyone."[419]

To mention just one situation in which past issues are still relevant, one could take the Gali district in Abkhazia: the property rights of displaced persons, the language of education, freedom of movement and access to essential services and employment opportunities were already some of the key human rights issues prior to the August 2008 conflict. This was stressed *inter alia* by the UN High Commissioner for Human Rights following her visit to Georgia in February 2008.[420]

In his latest report on the human rights issues following the August 2008 armed conflict, dated May 2009, the Council of Europe Commissioner for Human Rights referred to his previous visit to this region in February 2007, when he examined a number of questions resulting from the earlier conflict in the 1990s. According to him "these are still relevant today" and "the main issues include further returns and security of returnees, freedom of movement, issues related to passports and identity documents, and education in the Georgian language in the Gali district."[421] In October 2007 the UN Secretary-General had noted that "the Human Rights Office in Abkhazia, Georgia, continued to follow closely the issues that have an impact on the life of residents in the Gali district. It monitored conscription practices in the district, as well as the situation related to the freedom of movement of local residents and the issue of language of instruction, which remained a concern to the local population and those willing to return."[422] In January 2008 he stressed that the language of instruction in schools in the Gali district also remained of concern.[423] Already in 2006 the OSCE High Commissioner on National Minorities had "appealed to the Abkhaz leadership to show flexibility regarding teaching in the mother-tongue, specifically teaching students in the

[419] Statement by Rolf Ekéus, the OSCE High Commissioner on National Minorities, to the 616th Plenary Meeting of the OSCE Permanent Council, Vienna, Austria 29 June 2006, p. 3, available at: http://www.osce.org/documents/hcnm/2006/06/19959_en.pdf.

[420] In this regard, Louise Arbour encouraged "the Abkhaz leadership to continue working towards sustainable rights-based solutions for internally displaced people, including protection of property rights. She also stressed the importance for education to be provided in relevant mother tongues, and for all local residents to be able to exercise their right to freedom of movement, including access to essential services and employment opportunities." See UN Press Release, UN High Commissioner for Human Rights, "*Georgia makes progress but human rights concerns remain*," 28 February 2008, available at: http://www.unhchr.ch/huricane/huricane.nsf/view01/EF7E5E7D706BF6E1C12573FD007B237F?opendocument

[421] Report on human rights issues following the August 2008 armed conflict, by Thomas Hammarberg, Commissioner for Human Rights of the Council of Europe (Visit: Tbilisi, Sukhumi and Gali, 8 to 12 February 2009), CommDH(2009)22, 15 May 2009, para. 51.

[422] Report of the Secretary-General on the situation in Abkhazia, Georgia, S/2007/588, 3 October 2007, para. 15.

[423] Report of the Secretary-General on the situation in Abkhazia, Georgia, S/2008/38, 23 January 2008, para. 24.

Georgian language in the Gali district, and to ensure that this matter is resolved in full accordance with international norms."[424] With regard to the so-called Abkhaz "passport," this issue was referred to by the UN Secretary-General in April 2008, when he noted that "UNOMIG continued to follow [Abkhaz] plans to issue Abkhaz 'passports' to Gali district residents." In his view, "while the *de facto* heads of administration and heads of villages have been instructed about the process, the issuing procedures are still unclear," and "the concern of the Mission is that Gali district residents should not be forced to renounce their nationality, which would be at variance with international human rights norms."[425]

In South Ossetia the consequences of the 1991-1992 conflict for human rights were still acute years after the cease-fire. As stressed in 2005 by the International Crisis Group, for example, there were still issues of displaced persons who were due to regain property or be compensated for their losses.[426]

While to address the human rights situation following the August 2008 conflict would take a report in itself, two regions of particular concern will be addressed here: the Gali district in Abkhazia and the Akhalgori region in South Ossetia. The IIFFMCG welcomes the finding of the OSCE report of February 2009 entitled "The Situation of Ossetians in Georgia Outside the Former Autonomous District of South Ossetia – after the war with Russia in August 2008," that "contrary to initial concerns shared by human rights and humanitarian actors, the August 2008 war did not lead to a change of the situation of ethnic Ossetians in Georgian-controlled territory or to their long-term displacement in any significant numbers."[427]

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[424] Statement by Rolf Ekéus, the OSCE High Commissioner on National Minorities, *op. cit*., p. 3.

[425] Report of the Secretary-General on the situation in Abkhazia, Georgia, S/2008/219, 2 April 2008, para. 26.

[426] International Crisis Group, "Georgia-South Ossetia: Refugee Return the Path to Peace," Europe Briefing No. 38, 19 April 2005, available at: http://www.crisisgroup.org/home/index.cfm?l=1&id=3380.

[427] The Reports states: "Contrary to initial concerns shared by human rights and humanitarian actors, the August 2008 war did not lead to a change of the situation of ethnic Ossetians in Georgian controlled territory or to their long-term displacement in any significant numbers. The population of ethnically mixed villages in the adjacent areas to the administrative boundary line of the former Autonomous District of South Ossetia has not raised any concerns over discrimination. On the contrary, firsthand reports testify to mutual support among neighbours of different ethnic background during wartime. Ethnic Ossetians to whom UNHCR had talked in collective centres had not raised concerns over discrimination either. The Representative of the UN Secretary-General on the Human Rights of IDPs, who visited Georgia in October 2008, met with persons of Ossetian ethnic origin among IDPs, usually from mixed marriages, and could not identify concerns related to their ethnic origin. Inhabitants of the areas adjacent to the former Autonomous District of South Ossetia had insisted that there were no inter-ethnic problems between Georgians and Ossetians, because they often lived in mixed marriages". See OSCE, Report on The Situation of Ossetians in Georgia Outside the Former Autonomous District of South Ossetia; pp. 4-5, extracts from the Replies to Question 7, provided by Georgia, p. 1.

There is a clear need to address the current human rights/discrimination issues following the August 2008 conflict in conjunction with the previously existing human rights concerns, many of them related to the conflict in the 1990s. It is critical to adopt a comprehensive approach in order for the settlement of those issues to be part of a lasting solution.

a) Grounds

(i) Ethnic origin

Ethnic considerations with regard to the August 2008 conflict in Georgia and its aftermath concern the ethnic Georgians, the South Ossetians and the Abkhaz. Discussing the question of ethnicity and its nuances goes far beyond the scope of this Report. Nevertheless, it is important to stress that in Abkhazia, in the Gali Distric for example, ethnic Georgians are in fact Mingrelians, a sub-ethnic group of the Georgian people.

The question of ethnicity is, however, closely intertwined with the issue of citizenship acquired through new passports.

(ii) The question of the issuance of passports

Although this phenomenon first referred to the issuance by the Russian Federation of Russian passports to Abhkaz and South Ossetians,[428] it also relates to the acquisition by Georgians of Abkhaz or South Ossetian passports.

"Passportisation" was described as the process whereby the Russian Federation conferred Russian nationality on South Ossetians and Abkhaz, *inter alia* to allow them to travel internationally.[429] The *de facto* Ministry of Foreign Affairs of Abkhazia stated:

"So in actual fact only Russia came to our assistance, agreeing to provide the people of Abkhazia with international-type Russian passports. From that moment on Abkhaz were able to travel outside the Republic and take advantage of the rights and freedoms afforded to them under international laws and standards."[430]

As outlined by Human Rights Watch, "by the end of 2007, according to the South Ossetian authorities, some 97 per cent of residents of South Ossetia had obtained Russian passports. As

[428] AI, *Civilians in the Line of Fire – The Georgia-Russia Conflict, op. cit.*, p. 7.

[429] *Idem*. See also HRW, *Up In Flames – Humanitarian Law Violations and Civilian Victims in the Conflict over South Ossetia, op. cit.*, p. 18.

[430] Abkhaz authorities, Responses to Questions Posited by the IIFFMCG (Legal Aspects), submitted to the IIFFMCG in April 2009, p. 3.

Russia imposed a visa regime with Georgia in 2000, Russian passports allowed Ossetians and Abkhaz to cross freely into Russia and entitled them to Russian pensions and other social benefits."[431]

Following the conflict, the acquisition of Russian citizenship became even more politicised, with claims by Georgia in the case of the Akhalgori district that "the separatist authorities are making territorial claims supported by the Russian Federation and actively disseminating Russian passports to the remaining residents."[432]

The question of passports now also concerns the acquisition of Abkhaz or South Ossetian passports by ethnic Georgians. For Abkhazia, for example, according to the UN Secretary-General, "the issuance of Abkhaz 'passports' in the Gali district started formally at the end of March"; "[i]t appears that during the following two months the issuance was put on hold," and "[i]n June the *de facto* authorities in the Gali district restarted the process, with limited results, owing to the reluctance of Gali district residents to state in the application forms that they renounce their Georgian citizenship."[433] In April 2009 the Abkhaz *de facto* Ministry of Foreign Affairs stated that "according to the Passport and Visa Service of the Abkhaz Ministry of the Interior, 2,108 Gali district residents applied for citizenship and 583 passports have already been issued."[434]

The question of Abkhaz and South Ossetian "passports" is a highly sensitive and politicised one. While they are more internal identity papers than passports in the international meaning of the term, the related issues surrounding the procedures and conditions in which they are issued, as well as the concrete consequences of not having such a document, give rise to many debates and disputes. This is mainly due to the fact that the documents are discussed in the context of the unsettled status of these two break-away regions.

Beyond the specific question of passports, the key objective is that people living in the region of Gali or in South Ossetia are provided with the same basic rights, regardless of their ethnic background or citizenship. The question of a passport becomes a human rights issue insofar as

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[431] HRW, *Up In Flames – Humanitarian Law Violations and Civilian Victims in the Conflict over South Ossetia*, *op. cit*., p. 18.

[432] Amended request for the indication of provisional measures of protection submitted by the Government of Georgia, Request to the ICJ, *op. cit.*, p. 2.

[433] Report of the Secretary-General on the situation in Abkhazia, Georgia, 23 July 2008, S/2008/480, p. 6, para. 30.

[434] Abkhaz authorities, Replies to questions on legal issues related to the events of last August, submitted to the IIFFMCG in April 2009, p. 10.

either people are coerced, directly or indirectly, into giving up their current citizenship or they are discriminated against on this basis.

c) Rights concerned and alleged discrimination

The Gali District is identified by Georgia as "the only remaining territory where ethnic Georgians continue to live in Abkhazia, with a Georgian population of approximately 42,000 persons."[435] According to Georgia, "immediately prior to the August 8 Russian aggression, this population faced increasing intimidation and pressure to adopt Russian citizenship."[436] In September 2008 Tbilisi also stressed that these "ethnic Georgians [lived] in constant fear of violent attacks and expulsions"[437] and that they were being "forced out of their homes by a campaign of harassment and persecution."[438] The Georgian authorities referred more specifically to "the continuing discriminatory treatment of ethnic Georgians in the Gali District of Abkhazia, including but not limited to pillage, hostage-taking, beatings and intimidation, denial of the freedom of movement, denial of their right to education in their mother tongue, pressure to obtain Russian citizenship and/or Russian passports, and threats of punitive taxes and expulsion for maintaining Georgian citizenship."[439]

One of the most practical consequences of the conflict seems to be the limitation of freedom of movement in both the Gali District[440] and Akhalgori.[441] This is a critical issue with far-reaching disruptive effects on the lives of the people living there, as many residents have close links with outside areas and are reliant in many ways on having the freedom to move across the administrative boundary.

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[435] Public sitting held on Monday 8 September 2008, at 10 a.m., at the Peace Palace, Verbatim Record, in the case concerning Application of the International Convention on the Elimination of All Forms of Racial Discrimination (Georgia v. Russian Federation), CR 2008/22, International Court of Justice, The Hague, 2008, p. 9, para. 41.

[436] Amended request for the indication of provisional measures of protection submitted by the Government of Georgia, 13 August 2008, p. 7, para. 17.

[437] Public sitting held on Monday 8 September 2008, at 10 a.m., at the Peace Palace, Verbatim Record, in the case concerning Application of the International Convention on the Elimination of All Forms of Racial Discrimination (Georgia v. Russian Federation), CR 2008/22, International Court of Justice, The Hague, 2008, p. 18, para. 10.

[438] *Idem*.

[439] Case concerning Application of the International Convention on the Elimination of All Forms of Racial Discrimination (Georgia v. Russian Federation), Request for the indication of provisional measures, International Court of Justice, ICJ, 15 October 2008, p. 6.

[440] Human Rights Assessment Mission of the Office for Democratic Institutions and Human Rights, OSCE, Human Rights in the War-Affected Areas following the Conflict in Georgia, 27 November 2008, p. 57 and p. 63.

[441] *Ibid.*, p. 33 and p. 50.

This issue of the increasing restrictions on freedom of movement in the Gali District following the conflict was underlined by the Council of Europe Commissioner for Human Rights:

"The people living in that district have been relying – for various reasons, including commercial purposes, commuting for employment, family ties, medical care or social needs, education, security concerns, etc. – on freedom of movement across the Inguri river to the Zugdidi area. Prior to the summer of 2008, such movement was essentially unrestricted. Since the summer of 2008, new restrictions have been imposed on movement across the administrative border, which has rendered the population in Gali more isolated than before. The restrictions on movement have reportedly led to cases of bribery at crossing points."[442]

The IIFFMCG supports the statement by the Commissioner on "a need to find a solution which will reconcile appropriate security measures with the legitimate interest of local populations to enjoy free movement across the Inguri river."[443]

The freedom of movement also includes the right to return for displaced persons, notably the return of ethnic Georgian IDPs. For example, a villager who was trying to return to Ksuisi village in South Ossetia said he was turned back at a checkpoint after being told he should apply for a Russian passport and citizenship if he wanted to return to the village.[444] This practice also concerns Abkhaz and South Ossetian citizenship as a condition for ethnic Georgians to return to their place of residence. As highlighted above, this condition was described to the Commissioner for Human Rights of the Council of Europe by the *de facto* authorities in Tskhinvali.[445] While the Abkhaz *de facto* Minister for Foreign Affairs declared that "there were no Abkhaz obstacles to the return of refugees in the Kodori Valley,"[446] the UN Secretary-General noted that the "Abkhaz *de facto* authorities announced that all the local population, estimated in 2002 at up to 2,000, could return if the displaced persons obtained Abkhaz 'passports' and gave up their Georgian citizenship."[447]

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[442] Report on human rights issues following the August 2008 armed conflict, 15 May 2009, *op. cit*., paras 55 ff.

[443] *Ibid*., p. 58.

[444] Human Rights Assessment Mission of the Office for Democratic Institutions and Human Rights, OSCE, Human Rights in the War-Affected Areas following the Conflict in Georgia, 27 November 2008, pp. 48-49.

[445] 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, *op. cit*., p. 1.

[446] Meeting with the Abkhaz *de facto* Minister for Foreign Affairs, 3 March 2009, Sukhumi.

[447] Report of the Secretary-General on the situation in Abkhazia, Georgia pursuant to Security Council resolution 1839 (2008), 3 February 2009, S/2009/69, p. 8, para. 41.

A similar question arises in the case of Akhalgori. Human Rights Watch stated:

"The new head of the Akhalgori district administration, Anatoly Margiev, told Human Rights Watch that the border was not likely to close, though not all of his staff shared this view. Margiev also told Human Rights Watch that as of January 2009 the administration would start processing South Ossetian passports for all residents of Akhalgori, 'in order [for them] to be able to move freely in North and South Ossetia. Following that, they will be also given Russian citizenship'."[448]

More generally, as mentioned earlier, the issue of passports raises several questions. First are the coercive nature of the acquisition of passports and the related question of renouncing Georgian citizenship. This issue is particularly salient in the case of the Gali district.

According to the HRAM of the OSCE, "moves by the *de facto* authorities to encourage residents of Gali to give up their Georgian citizenship appear coercive and discriminatory and are further exacerbating the situation of the Georgian community in the district."[449] This seems to apply as regards both Abkhaz passports and Russian ones. The Committee on the Honouring of Obligations and Commitments by Member States of the Council of Europe referred to "ethnic Georgians in the Gali District of Abkhazia [who] are reportedly also beginning to be put under pressure to accept Abkhaz passports."[450] According to Georgia, "reports received from residents of Gali – which is now isolated from the rest of Georgia due to the closure of the administrative border at the Enguri Bridge – suggest that they are being harassed, attacked, and threatened of expulsion if they do not accept Russian passports."[451]

The *de facto* Abkhaz authorities rejected these allegations and stated:

"Despite the fact that the refugees who returned to the Gali district felt a certain political pressure (parenthetically, this political pressure continues to this day) and expressed uncertainty with respect to applying for Abkhaz citizenship and passports, Abkhaz authorities have done everything within their power to regain the trust of its people. Currently, the returnees have the right to obtain the Abkhaz nationality and passports without any pressure

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[448] HRW, *Up In Flames – Humanitarian Law Violations and Civilian Victims in the Conflict over South Ossetia*, *op. cit*., p. 150.

[449] Human Rights Assessment Mission of the Office for Democratic Institutions and Human Rights, OSCE, Human Rights in the War-Affected Areas following the Conflict in Georgia, 27 November 2008, pp. 7-8.

[450] Committee on the Honouring of Obligations and Commitments by Member States of the Council of Europe (Monitoring Committee), The implementation of Resolution 1633 (2008) on the consequences of the war between Georgia and Russia, Report, *op. cit.*, para. 60.

[451] Document submitted by Georgia, "Russian Invasion of Georgia – Facts & Figures," 8 September 2008, p. 4.

or coercion – this is a free choice of every citizen of Abkhazia and every person who considers him or herself to be a resident of this country."[452]

The Secretary-General of the United Nations noted that "the Human Rights Office continued to monitor developments concerning the issuance of Abkhaz passports in the Gali district."[453] There seem to be different degrees of pressure. Whether or not this amounts to coercion is questionable. According to the HRAM of the OSCE "there are now growing pressures on residents of the Gali district to obtain Abkhaz passports, which may be significant enough to constitute coercion."[454] In March 2009 UNOMIG informed the IIFFMCG that while renouncing one's Georgian nationality was not an explicit condition when filing a request for obtaining an Abkhaz passport,[455] in practice, applications without a declaration of renunciation were systematically rejected, and all 18 applications without such declarations had been refused. UNOMIG noted that although ethnic Georgians are not forced to take an Abkhaz passport, in practice there is a certain amount of pressure to do so, given that such passports are required in order to access certain services.[456] Whatever type of pressure is used, credible reports indicate an absence of free choice. This appears to be reaching a point where, as stressed by an NGO to the HRAM, "conditions are being created that will make it impossible for many of the residents of Gali to live normally without an Abkhaz passport."[457]

While the *de facto* authorities in Sukhumi reaffirmed, at a meeting with the IIFFMCG in June 2009, that the process of giving Abkhaz passports to Georgians residing in Gali is carried out exclusively on a voluntary basis, the above information on direct or indirect coercion is cause for serious concern. The IIFFMCG strongly states that the process of obtaining a passport and, most importantly, the renouncing of one's nationality, must not involve coercion, be it direct or indirect.

The second issue with regard to passports is the consequence for ethnic Georgians of not having one. According to information received by the HRAM of the OSCE, an Abkhaz

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[452] Abkhaz authorities, Responses to Questions Posited by the IIFFMCG (Legal Aspects), submitted to the IIFFMCG in April 2009, p. 10.

[453] Report of the Secretary-General on the situation in Abkhazia, Georgia, pursuant to Security Council resolution 1839 (2008), 3 February 2009, S/2009/69, p. 5, para. 25.

[454] Human Rights Assessment Mission of the Office for Democratic Institutions and Human Rights, OSCE, Human Rights in the War-Affected Areas following the Conflict in Georgia, 27 November 2008, p. 68.

[455] The OSCE however noted that "Reportedly, the application form for an Abkhaz passport includes a statement that 'I voluntarily renounce my Georgian citizenship'." *Ibid*., p. 69.

[456] Meeting with UNOMIG officials, March 2009, Gali.

[457] Human Rights Assessment Mission of the Office for Democratic Institutions and Human Rights, OSCE, Human Rights in the War-Affected Areas following the Conflict in Georgia, 27 November 2008, p. 68.

passport is required for all employees of the local administration, including doctors and teachers; a passport is also needed to transact business and for other legal activities.[458] The HRAM also stressed that "Abkhaz law permits dual citizenship with Russia, but not with Georgia, a provision that many consider discriminatory."[459]

As underlined by the authorities in Sukhumi, at a meeting with the IIFFMCG, the alternative option for people who do not wish to obtain an Abkhaz passport is to obtain a residence permit. However, as stressed by the Council of Europe Commissioner for Human Rights, "the information as to the rights and entitlements applying to holders of residence permits is somewhat unclear."[460]

While the question of passports is a very complex and highly controversial one, the IIFFMCG believes that the main objective must be to ensure in practice that this issue does not deprive ethnic Georgians of their rights.

Another much-debated issue in the Gali district is education in the Georgian language for the population of this area. The UN Secretary-General noted that "the Human Rights Office continued to monitor developments concerning the language of instruction, reporting that the number of academic hours allocated to studying the Georgian language was reduced for the 2008-2009 school year."[461]

The Abkhaz *de facto* authorities stated that "the Gali district has 21 schools, 11 of which are Georgian schools." They also stressed that "there has been no interruption of teaching in Georgian, a fact confirmed by international observers." According to Article 6 of the Constitution of the Republic of Abkhazia: "The State guarantees all ethnic groups that inhabit Abkhazia the right to freely use their native language."[462]

However, as pointed out by the Council of Europe Commissioner for Human Rights in May 2009, "there have been many assertions about a deterioration of the situation following the

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458 *Idem*.

459 *Ibid*., p. 69.

460 Report on human rights issues following the August 2008 armed conflict, 15 May 2009, *op. cit*., para. 59.

461 Report of the Secretary-General on the situation in Abkhazia, Georgia pursuant to Security Council Resolution 1839 (2008), 3 February 2009, S/2009/69, p. 5, para. 25.

462 Abkhaz authorities, Responses to Questions Posited by the IIFFMCG (Legal Aspects), submitted to the IIFFMCG in April 2009, p. 6.

August 2008 conflict"[463] concerning the language of education for ethnic Georgians. In this regard the OSCE High Commissioner on National Minorities "underlined that measures to reinforce the role of one language and culture should not be pursued at the expense of other languages and cultures."[464]

Serious concern is expressed about the situation of ethnic Georgians in the Gali disctrict (Abkhazia) and the Akhalgori district and the effective protection of their rights. The de facto authorities in Abkhazia and South Ossetia must ensure that the rights of these persons are protected. The issue of the status of Abkhazia and South Ossetia can under no circumstances be allowed to result in discrimination or the infringement of their rights.

F. Investigation into and prosecution of violations of IHL and human rights law

Under IHL, States have an obligation to investigate war crimes allegedly committed by their nationals and members of their armed forces, as well as other persons falling under their jurisdiction.[465] The obligation to investigate and prosecute applies in both international and non-international armed conflict.[466]

A number of human rights treaties include a clear obligation on States to prosecute persons suspected of having committed serious violations of human rights. Notably, the International Covenant on Civil and Political Rights (ICCPR) and the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment impose a general obligation on all States Parties to provide an effective remedy against violations of the rights and freedoms contained in these two core human rights treaties. This also includes a duty to investigate and punish those responsible.[467]

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[463] Report on human rights issues following the August 2008 armed conflict, 15 May 2009, *op. cit.*, para. 68.

[464] Press release, Statement by the OSCE High Commissioner on National Minorities following his visit to Georgia (14-20 September 2008), The Hague, 23 September 2008.

[465] See for example Article 146 of Geneva Convention IV.

[466] According to Rule of 158 of the ICRC Study on Customary International Law: "States must investigate war crimes allegedly committed by their nationals or armed forces, or on their territory, and, if appropriate, prosecute the suspects. They must also investigate other war crimes over which they have jurisdiction and, if appropriate, prosecute the suspects." See J-M. HENCKAERTS, L. DOSWALD-BECK (eds), Customary International Humanitarian Law, Volume I, *op. cit*, p. 607.

[467] Principle 4 of the Basic Principles and Guidelines on the Right to a Remedy and Reparation For Victims of Gross Violations of Human Rights and Serious Violations of International Humanitarian Law adopted by the UN General Assembly in December 2005, states: "In cases of gross violations of international human rights law and serious violations of international humanitarian law constituting crimes under international law, States have the duty to investigate and, if there is sufficient evidence, the duty to submit to prosecution the person allegedly responsible for the violations and, if found guilty, the duty to punish her or him."

These obligations to investigate and prosecute call for accountability on the part of of all the sides that committed violations of IHL and HRL, whether they be Russians, Georgians, South Ossetians or Abkhaz.

Furthermore, it is not enough under international law merely to conduct an investigation into war crimes and violations of HRL. Such an investigation must be effective, prompt, thorough, independent and impartial, and must be followed by prosecution if violations are established.[468]

This obligation to investigate and prosecute must be read in the light of documented cases of violations of IHL and HRL committed during and after the August 2008 conflict. It must also be recalled that this obligation applies primarily to violations committed by a State's own forces or persons under its control, and must not be limited to investigating the violations committed by the other parties to the conflict.

First it is crucial to note the contrast between the efforts undertaken by the Russian Federation to investigate, with a view to prosecution, crimes allegedly committed by Georgian forces and the absence to date of prosecutions of Russian citizens, including soldiers. In its Monitoring Committee Report, the Council of Europe Parliamentary Assembly pointed out:

"The Investigative Committee of the General Prosecutor's Office of Russia launched an investigation into genocide committed by Georgian troops against Russian citizens (ethnic Ossetians) in South Ossetia. In addition, it opened an investigation into crimes committed by Georgia against the Russian military. It would seem that there is no intention to investigate possible violations of human rights and humanitarian law committed by Russian forces and forces under the control of the de facto South Ossetian authorities. Indeed, the special Investigative Committee reportedly closed its investigations on the ground in South Ossetia in mid-September, at a time when credible reports indicated that looting, pillaging, as well as

[468] Principle 19 of the Updated Set of Principles for the Protection and Promotion of Human Rights Through Action to Combat Impunity endorsed by the Commission on Human Rights in 2005 refers to the States' "…obligation to undertake prompt, thorough, independent and impartial investigations of violations of human rights and international humanitarian law and take appropriate measures in respect of the perpetrators, particularly in the area of criminal justice, by ensuring that those responsible for serious crimes under international law are prosecuted, tried and duly punished."

acts of ethnic cleansing were taking place on a daily basis in the areas under Russian control, including in the so-called 'buffer zone'".[469]

In its replies to the questionnaire sent by the IIFFMCG, the Russian Ministry of Defence first stated that "during the peace enforcement operation against Georgia no instances have been identified where norms of International Humanitarian Law or Human Rights were violated by military personnel of the Russian Federation Armed Forces."[470] In responses to additional questions asked by the IIFFMCG, the Russian Federation was less categorical but still noted that "to the best of its knowledge, Russian military personnel never committed any violations of International Humanitarian Law." "As for the potential violations of human rights committed by Russian servicemen," it pointed out *inter alia* that "victims of such violations have specific legal options to obtain reparations for such violations." It further indicated that they could begin by filing lawsuits with the Russian courts, but that it was not aware of any such cases.[471]

When meeting with the IIFFMCG's experts in Moscow in July 2009, the representatives of the Investigative Committee of the General Prosecutor's Office of Russia indicated that the Committee's mandate was only to investigate violations committed against Russian nationals.[472] They also informed the IIFFMCG that investigations into crimes against other persons was the responsibility of the South Ossetian authorities, and that to their knowledge approximately 80 cases were currently being investigated by these authorities. Given the large number of inhabitants of South Ossetia having Russian nationality, the former argument is only partly relevant. Furthermore, coordination procedures must be set up in order for the Russian Investigative Committee to exchange information with the relevant South Ossetian authorities if it comes across evidence of violations against persons that are not covered by its activities. Most importantly, owing to the limited mandate of the Investigative Committee, there is a need to ensure that other investigative bodies from Russia carry out comprehensive investigations.

In its replies to the questionnaire, Georgia noted the following:

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[469] The implementation of Resolution 1633 (2008) on the consequences of the war between Georgia and Russia, op. cit., para. 50, available at:http://assembly.coe.int/Main.asp?link=/Documents/WorkingDocs/Doc09/EDOC11800.htm

[470] Russia, Responses to Questions Posited by the IIFFMCG (Humanitarian Aspects), *op. cit.*, p. 16.

[471] Russia, Responses to Questions Posited by the IIFFMCG (Legal Aspects), *op. cit.*, pp. 11-12.

[472] Meeting with the representatives of the Investigative Committee of the General Prosecutor's Office of Russia, Moscow, 29 July 2009.

"The investigation was launched concerning the violations committed in the course of the Russian-Georgian war in August 2008. Namely, on 9 August 2008, a couple of days after the Russian invasion of Georgia, the Office of the Prosecutor launched an investigation including under Article 411 (deliberate violation of humanitarian law provisions during internal and international armed conflicts) and Article 413 (other violations of international humanitarian law, including looting, illegal acquisition and destruction of civilian property) of the Criminal Code of Georgia. On August 11, another criminal case was opened on the facts of looting as provided by Article 413 of the Criminal Code of Georgia. These investigations have been merged. It is important to note that the investigation is not against anyone, but is launched on the facts and intends to shed light on the overall situation. Every person whose culpability is revealed in the course of the investigation will be subject to relevant legal proceedings. No charges have yet been made due to the difficulties to gather sufficient evidence. Initial statements from prisoners of war, civilian hostages have been taken, forensic examinations have been conducted, and seizure and inspection of affected areas under Georgian control has been implemented. However, lack of access to the affected areas in the Tskhinvali region/South Ossetia is a substantial impediment for a results-oriented efficient investigation."[473]

In no way can the current issue regarding the status of South Ossetia be allowed to prevent investigations or diminish the accountability of those responsible for IHL or HRL violations during and, most importantly, after the conflict in South Ossetia and in the buffer zone, be they from the regular forces, volunteers or other individuals. While there is a role for the *de facto* authorities to play in this regard, Russia also has a responsibility as it has forces in South Ossetia. Moreover, given the documented cases of violations committed by volunteers from Russia who may currently be on Russian territory, the obligation to investigate and prosecute these, in addition to the violations committed by its own forces, is directly applicable to Russia.

This obligation to investigate and prosecute goes beyond a mere requirement in law. It is critical for the sake of initiating a meaningful and comprehensive reconciliation process following the conflict, and for a lasting peace.

In the light of the grave violations of IHL and HRL committed during the conflict and in the weeks after the cease-fire, Russia and Georgia should undertake or continue prompt,

[473] Georgia, Responses to Questions Posited by the IIFFMCG (Humanitarian Issues, Questions 9 and 10), provided to the IIFFMCG on 5 June 2009, p. 2.

thorough, independent and impartial investigations into these violations, and should prosecute their perpetrators. This is also an obligation incumbent on the authorities in South Ossetia. The fight against impunity is one of the prerequisites for a true and lasting solution to the conflict.

G. Reparation

There is a general obligation under IHL for a state responsible for violations of international humanitarian law to make full reparation for the loss or injury caused.[474]

The United Nations Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law set out in more detail the rights of victims to restitution, compensation and rehabilitation.

It is worth noting that the Russian Federation stated that "residents of South Ossetia who suffered as a result of the hostilities received compensation paid out of the Federal budget. Several types of such compensation were envisaged: 1) all civilian victims residing in South Ossetia received a one-time payment in the amount of 1 000 roubles; 2) separate payments were earmarked for retirees; 3) finally, residents who had lost their property during the hostilities were paid up to 50 thousand roubles."[475]

This raises serious concerns as it would mean that no such reparations were paid to persons who suffered as a result of the hostilities on the territory of Georgia proper or in Abkhazia. Furthermore, it is crucial that such compensation should also be allocated to ethnic Georgians for the reconstruction of their homes in South Ossetia.

The Russian and Georgian governments should provide compensation for civilian damage and destruction caused by violations of international humanitarian law for which they are respectively responsible. Compensation is also vital in the light of the extensive destruction of property by South Ossetian forces and other armed individuals.

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[474] See for example Article 91 of Additional Protocol I of 1977 and Rule 150 of the ICRC Study on International Customary Humanitarian Law, in J-M. HENCKAERTS, L. DOSWALD-BECK (eds), Customary International Humanitarian Law, Volume I, *op. cit.*, p. 537.

[475] Russia, Responses to Questions Posited by the IIFFMCG (Legal Aspects), *op. cit.*, p. 12.

Accountability and reparation for violations of IHL and HRL are vital for a just and lasting peace. In the short term, this is also crucial in order to enable individuals who lost their property to rebuild their lives.

IV Allegations of genocide

Although the allegations of ethnic cleansing, made by Georgia against the Russian Federation and South Ossetia in relation to the armed conflict between Russia and Georgia and its aftermath, could be addressed together with those of genocide, as they are two clearly distinct concepts it is preferable to review the former separately. Furthermore, as ethnic cleansing is linked mainly to the displacement of persons, it will be discussed later under that heading.

Allegations of genocide were made during the conflict in Georgia and after the cease-fire. Owing to both the seriousness of the term "genocide" for public opinion and in the collective consciousness, and its very specific legal definition and corresponding consequences in international law, it is extremely important to assess these allegations carefully. The expression "crime of crimes," used by the ICTR, illustrates the highly unique nature of genocide.[476] There is consequently a need not only to establish facts and ascertain the law, but – more than for any other allegations – to aim at avoiding any post-conflict tension that could result from persisting resentment among communities over accusations of genocide. The gravity of this crime is translated into the very strict conditions required under international law for acts to be qualified as such.[477] As allegations were made by the Russian Federation and by the *de facto* South Ossetian authorities, the available evidence produced should be analysed against the backdrop of this legal definition. Georgia did not make such claims. In the context of their replies to the questionnaire sent by the IIFFMCG, the Georgian authorities stressed that Georgia "does not concede that the crime of the genocide has been committed by either party to the conflict during and/or in the aftermath of the 2008 hostilities."[478]

[476] Prosecutor v. Kambanda (Case No. ICTR-97-23-S) Judgment and Sentence, 4 September 1998, para. 16.

[477] William Schabbas rightly stresses: "Why is genocide so stigmatized? In my view, this is precisely due to the rigorousness of the definition and its clear focus on crimes aimed at the eradication of ethnic minorities or, to use the Convention terminology, 'national, racial, ethnical and religious'." In Genocide in international law: the crime of crimes, Cambridge University Press, 2000, p. 9.

[478] Georgia, Responses to Questions Posited by the IIFFMCG, (Humanitarian Aspects), provided to the IIFFMCG on 5 June 2009, p. 1.

Allegations of genocide were made by the Russian Federation against the Georgian forces. A number of political declarations by Russian authorities in the early days of the conflict explicitly accused Georgia of genocide.[479] These accusations have to be linked to the number of victims given by the Russian authorities at the time, who claimed 2,000 people had been killed. The declarations were accompanied by measures to investigate into alleged genocide.[480] The Deputy Chairman of the Committee announced that his office was opening "a genocide probe based on reports of actions committed by Georgian troops aimed at murdering Russian citizens – ethnic Ossetians – living in South Ossetia."[481] As reported by the Committee on the Honouring of Obligations and Commitments by Member States of the Council of Europe, "on 23 December 2008, the Head of the Investigation Commission of the General Prosecutor's Office of Russia announced that the Commission had finalised its investigations into the deaths of 162 South Ossetian civilians – a considerably lower number of deaths of civilians than originally announced by the Russian authorities – and of 48 members of the Russian military troops during the war, and that it had collected sufficient evidence to bring charges against Georgia of genocide against South Ossetians."[482]

Georgia was also accused of genocide by the *de facto* South Ossetian authorities and non-governmental organisations from South Ossetia. An adviser to the *de facto* President of South Ossetia stated that over 300 lawsuits had been sent to the International Criminal Court, seeking to bring the Georgian authorities to justice for "genocide" committed in the August 8-

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[479] For instance, the President of the Russian Federation, Dmitry Medvedev, stated on 10 August 2008 that "the actions of the Georgian side cannot be called anything other than genocide" in "SKP RF Opened a Criminal Investigation into the Killings of Russian Citizens in South Ossetia," Kommersant Online, August 14, 2008, http://www.kommersant.ru/doc.aspx?DocsID=1011523&ThemesID=301, quoted by HRW, Up In Flames – Humanitarian Law Violations and Civilian Victims in the Conflict over South Ossetia, *op. cit.*, p. 70.
The Prime Minister, Valdimir Putin, declared the same day: "I believe there were elements of genocide" in "Putin accuses Georgia of genocide," Russia Today, 10 August 2008, available at http://www.russiatoday.com/news/news/28744

[480] President Medvedev asked the Investigative Committee of the Russian Federation Prosecutor's Office to document the evidence of crimes committed by Georgian forces in South Ossetia in order to create a "necessary basis for the criminal prosecution of individuals responsible for these crimes" in "SKP RF Opened a Criminal Investigation into the Killings of Russian Citizens in South Ossetia," Kommersant Online, August 14, 2008, http://www.kommersant.ru/doc.aspx?DocsID=1011523&ThemesID=301, quoted by HRW, Up In Flames – Humanitarian Law Violations and Civilian Victims in the Conflict over South Ossetia, *op. cit.*, p. 70.

[481] Igor Komissarov, Deputy Chairman of the Investigative Committee of the General Prosecutor's Office. Reported by RIA Novosti, 14 August 2008, quoted by AI, 2008, p. 56. See also Committee on the Honouring of Obligations and Commitments by Member States of the Council of Europe (Monitoring Committee), The implementation of Resolution 1633 (2008) on the consequences of the war between Georgia and Russia, Report, Doc. 11800, 26 January 2009, Co-rapporteurs Luc van den BRANDE and Mátyás EÖRSI, para. 50.

[482] *Idem*. para. 50.

12 attack.[483] As noted by Human Rights Watch, such accusations were also "widely publicised by the Public Commission for Investigating War Crimes in South Ossetia, a group of Russian and South Ossetian public activists working with the prosecutor's office of the *de facto* South Ossetian authorities."[484] The commission was created on 12 August 2008 and issued a report aimed at documenting the case of genocide against South Ossetians. The head of the Public Committee declared that "now the world community has got access to photo and video and other documents which prove that Georgian soldiers in South Ossetia were actually committing genocide against its people."[485] Representatives of two NGOs whom the IIFFMCG met in Tskhinvali in March 2009 made the same accusations of genocide.

Allegations of genocide were also made by the *de facto* Abkhaz authorities, who stated that "documented proof of genocide perpetrated by the Georgian government against ethnic Abkhaz is still to be presented before the highest international judicial institutions."[486]

In its replies to the IIFFMCG questionnaire, Georgia submitted "that no crime of Genocide has been committed by the Georgian side, as neither acts meeting the gravity of the said crime nor the facts commonly known to support this allegation took place or were substantiated."[487] Georgia also noted that "unlike the SKP [Investigative Committee of the Prosecution Service of the Russian Federation], even international humanitarian organisations were not given access to the territory before August 19-20, 2008" and that "as such, during the first stages of evidence-gathering, the SKP was the sole fact-finding institution present on the ground."[488] It contested the "reliability of the information" allegedly gathered by the SKP and denounced the "exaggerated claims made by the Russian authorities." It stressed that "the SKP has not given any legal explanation as to how the acts allegedly committed by Georgian soldiers amounted to genocide by Georgia."[489] Georgia further noted that "the number of dead (civilian) persons officially declared by the Russian authorities poses question marks as to

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[483] RIA Novosti, "South Ossetians sue Georgia for genocide," 1 September 2008, http://en.rian.ru/world/20080901/116453506.html

[484] HRW, *Up In Flames – Humanitarian Law Violations and Civilian Victims in the Conflict over South Ossetia*, *op. cit.*, p. 72.

[485] Public Committee for Investigation of War Crimes in South Ossetia, South Ossetia – Chronicle of Contract Murder, available at: http://www.ossetia-war.com/book

[486] *De facto* Abkhaz authorities, Replies to questions on legal issues related to the events of last August, submitted to the IIFFMCG in April 2009, p. 10.

[487] Georgia, Responses to Questions Posited by the IIFFMCG (Humanitarian Aspects), provided to the IIFFMCG on 5 June 2009, p. 1.

[488] *Ibid*. pp. 1-2.

[489] *Ibid*., p. 2.

whether the list includes only civilians or also representatives of South Ossetia militias, who during the combat operation represented legitimate military targets."[490]

The 1948 Genocide Convention defines genocide as "any of the following acts committed with intent to destroy, in whole or in part, a national, ethnical, racial or religious group, as such: (a) Killing members of the group; (b) Causing serious bodily or mental harm to members of the group; (c) Deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part; (d) Imposing measures intended to prevent births within the group; (e) Forcibly transferring children of the group to another group."[491] The acts listed in Article 2 must be carried out with intent to destroy the group as such, in whole or in part.[492] The words "as such" emphasise that intent to destroy the protected group.[493] This "specific intent" is the key to qualifying a series of acts as genocide and distinguishing them from other crimes. The term "in part" in the context of the intent "to destroy a protected group" implies a certain scale, as clarified by international case-law. It requires the intention to destroy "a considerable number of individuals"[494] or "a substantial part" of a group.[495] Finally, intent must also be distinguished from motive. The Commission of Inquiry on Darfur, defining the motive as "the particular reason that may induce a person to engage in criminal conduct," stressed that "from the viewpoint of criminal law, what matters

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[490] *Idem*.

[491] See article 2 of the Convention on the Prevention and Punishment of the Crime of Genocide of 9 December 1948.

[492] Report of the International Commission of Inquiry on Darfur to the United Nations Secretary-General, 25 January 2005, p. 124, para. 490. The commission further elaborates these two elements:
"The objective element is twofold. The first, relating to the prohibited conduct, is as follows: (i) the offence must take the form of (a) killing, or (b) causing serious bodily or mental harm, or (c) inflicting on a group conditions of life calculated to bring about its physical destruction; or (d) imposing measures intended to prevent birth within the group, or (e) forcibly transferring children of the group to another group. The second objective element relates to the targeted group, which must be a 'national, ethnical, racial or religious group.' Genocide can be charged when the prohibited conduct referred to above is taken against one of these groups or members of such a group.
"Also the subjective element or mens rea is twofold: (a) the criminal intent required for the underlying offence (killing, causing serious bodily or mental harm, etc.) and, (b) "the intent to destroy, in whole or in part" the group as such. This second intent is an aggravated criminal intention or dolus specialis: it implies that the perpetrator consciously desired the prohibited acts he committed to result in the destruction, in whole or in part, of the group as such, and knew that his acts would destroy, in whole or in part, the group as such" (paras 490-491).

[493] ICJ, Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro), Judgment of 26 February 2007, I.C.J. 2007 Reports, para. 187. See also: Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion, I.C.J. Reports 1996, para. 26.

[494] See Kayishema and Ruzindana (ICTR, Trial Chamber, 21 May 1999), at § 97, quoted by International Commission of Inquiry on Darfur, *op. cit.*, para. 492.

[495] See Jelisi (ICTY Trial Chamber, 14 December 1999, at para. 82), Bagilishema (ICTR, Trial Chamber, 7 June 2001,, at § 64) and Semanza (ICTR, Trial Chamber, 15 May 2003, at para. 316, quoted by International Commission of Inquiry on Darfur, *op. cit*., para. 492.

is not the motive, but rather whether or not there exists the requisite special intent to destroy a group."[496]

Given the specificity of such a requirement, the question of whether there is proof of this genocidal intent is consequently critical.[497] In practice, however, clearly establishing the proof of such an intent, by means of facts, may be a very difficult task. The International Commission of Inquiry on Darfur, relying on established jurisprudence from international *ad hoc* criminal tribunals, made the following assessment:

"Whenever direct evidence of genocidal intent is lacking, as is mostly the case, this intent can be inferred from many acts and manifestations or factual circumstances. In Jelisi the Appeals Chamber noted that 'as to proof of specific intent, it may, in the absence of direct explicit evidence, be inferred from a number of facts and circumstances, such as the general context, the perpetration of other culpable acts systematically directed against the same group, the scale of atrocities committed, the systematic targeting of victims on account of their membership of a particular group, or the repetition of destructive and discriminatory acts' (§ 47)."[498]

The term "genocide," whether in the context of a judicial or fact-finding process or in a more political context, must still be used in a careful assessment based on the existing legal

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[496] International Commission of Inquiry on Darfur, op. cit., para 493: "For instance, in the case of genocide a person intending to murder a set of persons belonging to a protected group, with the specific intent of destroying the group (in whole or in part), may be motivated, for example, by the desire to appropriate the goods belonging to that group or set of persons, or by the urge to take revenge for prior attacks by members of that groups, or by the desire to please his superiors who despise that group".

[497] This holds true beyond the issue of whether the type of standards of proof must be different when considering state responsibility or when assessing of international individual criminal responsibility for genocide. With respect to ICJ ruling in the Genocide Convention case, this question raised significant discussion. An author criticized the fact that "behind the formula of 'fully conclusive evidence', when dealing with Articles II and III of the Genocide Convention the Court adopted for all practical purposes a typical criminal law 'beyond any reasonable doubt' standard of proof. See Andrea Gattini, "Evidentiary Issues in the ICJ's Genocide Judgment," Int Criminal Justice 2007, Vol. 5, pp. 889-904. See also: Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro), Judgment of 26 February 2007, I.C.J. 2007 Reports, para 189. In case such intent is not established, the qualification of genocide cannot be ascertained. In the case of Darfur, the Commission of inquiry "concluded that the Government of the Sudan has not pursued a policy of genocide. Arguably, two elements of genocide might be deduced from the gross violations of human rights perpetrated by Government forces and the militias under their control. These two elements are, first, the actus reus consisting of killing, or causing serious bodily or mental harm, or deliberately inflicting conditions of life likely to bring about physical destruction; and, second, on the basis of a subjective standard, the existence of a protected group being targeted by the authors of criminal conduct. However, the crucial element of genocidal intent appears to be missing, at least as far as the central Government authorities are concerned. Generally speaking the policy of attacking, killing and forcibly displacing members of some tribes does not evince a specific intent to annihilate, in whole or in part, a group distinguished on racial, ethnic, national or religious grounds." International Commission of Inquiry on Darfur, *op. cit.*, p. 4.

[498] International Commission of Inquiry on Darfur, *op. cit.*, para. 502.

definition and on facts. In the light of this brief overview of the legal definition of genocide, the allegations made in the context of the conflict in Georgia were unsupported by clear factual evidence, both at the time they were made and at the time of writing this Report.

In its replies to the question asked by the IIFFMCG with respect to allegations of genocide, the Russian Federation first noted the following:

"References made by the Russian side to acts of genocide perpetrated against the Ossetian people by the Georgian side in August 2008 should be viewed in the context of the preliminary information that was received during the first hours of the conflict and prior to it. As far as we can judge, there were indeed reasons to believe that the actions undertaken by the Georgians were aimed at exterminating fully or partially the Ossetian ethnic group as such (large-scale and indiscriminate use of heavy weapons and military equipment by the Georgian side against the civilian population of Ossetia on the night of 7 to 8 August, a proactive 'anti-Ossetian' policy conducted by the Georgian government)."[499]

This statement contrasts strikingly with the legal conditions and the type of evidence required under international law in order to qualify certain acts as genocide. While the facts may be no less serious even where the term is not used, declarations that do use the term "genocide" must rely on a careful and timely analysis of facts. Such a cautious approach seems to be favoured by the Russian Federation itself in its replies to the IIFFMCG when it further states that "the Inquiry Committee appointed by the Russian Federation Prosecutor-General's Office is about to finalise its investigation" and that "once all of the available pieces of evidence are analysed a decision will be taken with respect to a specific legal determination as well as whether it would be expedient to submit the materials of this criminal case to a court of law."[500]

The question remains whether, one year after the conflict, the available evidence supports the allegations of genocide. Although the Russian Federation made the aforementioned nuanced statements, it also reaffirmed that "at the same time it should also be noted that crimes committed by Georgian paramilitary forces in the territory of South Ossetia were mentioned in numerous transcripts detailing testimonies of victims and witnesses and shown on photographic materials" and that "the foregoing materials contain detailed information proving in essence that there were instances of genocide against ethnic Ossetians and military

[499] Russia, Responses to Questions Posited by the IIFFMCG (Humanitarian Aspects), p. 1.

[500] *Idem.*

crimes were perpetrated by the Georgian side."[501] When meeting with the IIFFMCG's experts in Moscow in July 2009, the representatives of the Investigative Committee of the General Prosecutor's Office of Russia reiterated the conclusion that in their view, based on the same elements contained in the Russian replies to the IIFFMCG's questionnaire, genocide has been committed against ethnic South Ossetians.[502]

Georgia, on the contrary, claimed that "according to publicly available evidence (witness statements), not only genocidal intent but even discriminatory intent was missing among Georgian soldiers during the ground operations."[503]

As described the alleged facts identified by the Russian Federation do not establish the "specific intent" required for acts to be qualified as genocide. Here are the main reasons that prevent the IIFFMCG from reaching the same conclusion as Russia in the light of the facts presented.

These facts, taken separately or together, do not substantiate the specific intent. First, the destruction of buildings predominantly used by South Ossetia may have been the result of combat. Second, the indiscriminate use of artillery systems, if proved, would actually not be

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[501] *Ibid*, p. 2. The replies provided by the Russian Federation further refer inter alia to the following alleged facts documented and established by the Inquiry Committee appointed by the Russian Federation Prosecutor General's Office:
Figures of victims (with "162 civilian residents – nationals of South Ossetia [who] were murdered and 255 suffered various degrees of injuries");
accounts of destruction with for example "655 residential buildings destroyed and torched by state-of-the-art weapons systems used by Georgia against Tskhinvali and other communities in South Ossetia, 2139 residential buildings and facilities used predominantly by ethnic Ossetians were partially destroyed";
"records of inspections conducted on locations, transcripts detailing testimonies of witnesses and victims as well as information made available by the General Staff of the Russian Federation Armed Forces backed by documents and electronic media captured during the peace enforcement operation in Georgia (detailed aerial photographs of local terrain and tactical maps, military staff plans, orders and other documents)" that showed according to Russia that "the [General] Staff of the Georgian Armed Forces had developed plans to invade the territory of South Ossetia and Abkhazia well in advance; [i]n particular, these documents envisaged that villages populated predominantly by ethnic Ossetians were to be destroyed";
"indiscriminate artillery systems were to be used during the offensive, including multiple launch rocket systems that cause massive civilian casualties when used in populated areas and inflict large-scale damage to vital civilian facilities";
"instances where in the course of the military operation Georgian armed forces used cluster munitions and 500 kg air-delivered bombs against the civilian population"; "more than 36 thousand ethnic Ossetians left the territory of South Ossetia between 7 and 16 August 2008"; "an Action Plan designed to block and poison water supplies to Tskhinvali and adjacent communities during the military operation [that] has recently been annexed to the materials of the criminal case currently under review by the Inquiry Committee" (pp. 2-5).
The Russian Federation concluded that "the foregoing facts give us reasons to believe that the Georgian side had a deliberate plan to destroy Ossetians as an ethnic group" (p. 5).

[502] Meeting with the representatives of the Investigative Committee of the General Prosecutor's Office of Russia, Moscow, 29 July 2009.

[503] Georgia, Responses to Questions Posited by the IIFFMCG (Humanitarian Aspects), provided to the IIFFMCG on 5 June 2009, p. 3.

an element demonstrating a specific intention but would rather show the absence of such intent, precisely because they are used in an indiscriminate manner, which could make it difficult or impossible to target a particular group. Third, the nature or type of a weapon is not sufficient to indicate a specific intent to destroy a protected group.[504] Fourth, as stressed by the ICJ, a bombardment in itself is not sufficient to prove the specific intent.[505] Nor does the report issued by the Public Committee for the Investigation of War Crimes in South Ossetia, and identified as proving the genocide against South Ossetians, contain evidence of this specific intent.[506]

More generally, various sources contested the allegations of genocide, questioning whether the available evidence was sufficient to support them. The Rapporteur of the Committee on Legal Affairs and Human Rights of the Parliamentary Assembly of the Council of Europe noted that "the facts do not seem to support the genocide allegations against Georgia: the number of Ossetian (civilian) victims of the Georgian assault ('thousands' according to early numbers cited by the Russian authorities relying on 'provisional data') seem to be much exaggerated; now it appears that most Ossetian victims (whose number is also much lower now) were combatants. Individual atrocities such as those described in certain Russian media and submissions to the Committee of Ministers would be serious crimes in their own right, but not attempted genocide."[507] Human Rights Watch questioned the reliability of the investigation conducted by the Investigative Committee of the Russian Federation Prosecutor's Office.[508]

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[504] As underlined by the ICJ in its Nuclear Weapons Advisory Opinion: "in the view of the Court, it would only be possible to arrive at such a conclusion after having taken due account of the circumstances specific to each case." Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion, I.C.J. Reports 1996. para. 26.

[505] Legality of Use of Force (Serbia and Montenegro v. Belgium), Request for the Indication of Provisional Measures, Order, 2 June 1999, para. 40.

[506] Public Committee for Investigation of War Crimes in South Ossetia, South Ossetia – Chronicle of Contract Murder, http://www.ossetia-war.com/book

[507] Parliamentary Assembly of the Council of Europe (PACE), Committee on Legal Affairs and Human Rights, "The consequences of the war between Georgia and Russia," Opinion by rapporteur Christos Pourgourides, Doc. 11732 rev, 1 October 2008, para. 14, available at: http://assembly.coe.int/Main.asp?link=/Documents/WorkingDocs/Doc08/EDOC11732.htm. See also PACE, Political Affairs Committee, "The consequences of the war between Georgia and Russia," Opinion by the rapporteur Mr Lindblad, Doc. 11731, 1 October 2008, para. 17, available at: http://assembly.coe.int/Main.asp?link=/Documents/WorkingDocs/Doc08/EDOC11731.htm

[508] This organisation referred to two cases where atrocities where reported by the investigators to have been committed in Tsinagari and in Khetagurovo, but were then attributed by the Russian authorities to two other villages, respectively Dmenisi and Sarabuki. A number of inhabitants of those villages were interviewed by HRW but said they never heard about such facts. HRW stated that such elements "raise serious concerns about the accuracy and thoroughness of the investigation." *Up In Flames – Humanitarian Law Violations and Civilian Victims in the Conflict over South Ossetia, op. cit.*, pp. 71-72.

In view of the above, the IIFFMCG expresses serious doubts about the allegations of genocide made against the Georgian authorities. While this could not be construed as interfering with a pending determination still under review before judicial or investigative bodies, such as the ICC Prosecutor's Office,[509] or within the Investigative Committee of the Russian Federation Prosecutor's Office, it is the Mission's opinion that such allegations were made too prematurely and lacked certain elements required under international law. Given the nature and gravity of such a crime, there is an imperative need for all sides to conduct informative and educational initiatives to counteract the negative impact of such accusations among the population. This is particularly significant when considering that some violations of IHL and HRL during the conflict and its aftermath were motivated by referring to "thousands of civilian casualties in South Ossetia," as reported by Russian federal TV channels."[510]

In the light of the above, the Mission believes that to the best of its knowledge the allegations of genocide in the context of the armed conflict between Russia and Georgia and its aftermath are not founded in law nor substantiated by factual evidence.

The Mission suggests that measures should be taken to ensure that unfounded allegations of genocide do not further fuel tensions or revengeful acts. Educational and informative initiatives in this respect should be envisaged.

V. Main findings and observations under IHL and HRL

a) Main Findings

Two general findings should be stressed before spelling out in detail the conclusions of this Chapter, as both are central to any measure aimed at addressing the situation:

First, two categories of conduct seem to emerge from the research, each on a different scale. On the one hand were acts perpetrated within the framework of the hostilities, such as violations of the law on the conduct of hostilities and, in a small number of cases, summary executions. Of course such acts can still be qualified as violations of IHL. At the same time there were also acts on a much larger scale, such as the burning and looting of villages, which

[509] "ICC Prosecutor Confirms Situation in Georgia under Analysis," International Criminal Court press release, August 20, 2008, available at: http://www.icc-cpi.int/press/pressreleases/413.html

[510] HRW stressed that "some of the local residents interviewed by Human Rights Watch justified the torching and looting of the ethnic Georgian enclave villages by referring to 'thousands of civilian casualties in South Ossetia,' as reported by Russian federal TV channels." See HRW, *Up In Flames – Humanitarian Law Violations and Civilian Victims in the Conflict over South Ossetia, op. cit.*, p. 74.

were committed during the conflict but, most importantly, also continued for weeks after the cease-fire.

Secondly, it is critical to realise and take into account the influence of and role played in the August 2008 conflict by the legacies of past abuses (whether from the 1990s conflicts or later incidents), both in fuelling allegations of violations and as motives – notably revenge – that help explain substantiated violations. This factor is crucial if measures conducive to a lasting peace are to be introduced.

While the first main finding is highly sensitive and would carry heavy implications in terms of the predictable reactions of the parties, it is crucial to be aware of this difference and to take it into account when considering lessons learned and prospects for the future.

Moreover this difference could also have an impact on the formulation of lessons learned, which the IIFFMCG would like to draft. Indeed, while certain violations call for accountability and compensation/reparation measures, others require more detailed, tailored measures, especially as violations are still occurring at the time of writing the Report.

Here are the main findings under IHL and HRL:

- Allegations of genocide against Ossetians are not substantiated by evidence.
- There is serious and concurring evidence to indicate that ethnic cleansing has been committed against ethnic Georgians in South Ossetia, through forced displacement and the destruction of property.
- Violations of IHL and HRL were committed by Georgia, Russia and South Ossetia. Very few examples of violations by Abkhaz forces were documented during the conflict or in its aftermath.
- While the August 2008 conflict lasted only five days, numerous violations of IHL were committed during this period by Georgia, Russia and South Ossetia.
- Very serious violations of IHL and HRL were committed by South Ossetian forces, armed groups and individuals after the cease-fire.
- Violations mainly concern IHL on the conduct of hostilities, treatment of persons and property and forced displacement.

- More specifically, violations include indiscriminate attacks and a lack of precautions by Georgia and Russia; a widespread campaign of looting and burning of ethnic Georgian villages by South Ossetia, as well as ill treatment, beating, hostage-taking and arbitrary arrests; and the failure by Russia to prevent or stop violations by South Ossetian forces and armed groups and individuals, after the cease-fire, in the buffer zone and in South Ossetia.

- The situation of the ethnic Georgians in the Gali District following the conflict and still at the time of writing this Report gives cause for serious concern under HRL.

- The situation of the ethnic Georgians in the Akhalgori region also raises serious concerns, as many continue to leave this region at the time of writing.

- Issues relating to insecurity and the destruction of property are key obstacles to the return of displaced persons, in particular the return of ethnic Georgians to South Ossetia.

- Dangers posed by explosive remnants of war, notably unexploded munitions from cluster bombs, also need to be addressed.

- Measures still need to be taken by all sides to ensure accountability and reparation for all violations.

Regarding areas of concern, the situation of IDPs should be highlighted. As stressed by the Representative of the Secretary-General on the Human Rights of Internally Displaced Persons, three elements must be in place for successful return operations, which will also lead to a stabilisation of the situation: "(i) ensuring safety for the life and limb of returnees, (ii) returning property to the displaced and reconstructing their houses, and (iii) creating an environment that sustains return and reintegration, that is, which allows life under adequate conditions, including income-generating opportunities, non-discrimination and possibilities for political participation."[511]

[511] Walter Kälin, Representative of the Secretary-General on the Human Rights of Internally Displaced Persons, "*Legal aspects of the return of internally displaced persons and refugees to Abkhazia, Georgia*," 29 November 2007.

b) Lessons Learned

Six main lessons learned can be outlined:

- The conduct of hostilities in populated areas requires particular precautions in order to minimise civilian losses and damage to civilian property. The use of artillery or cluster bombs does not allow IHL to be respected in such areas

- Georgia and Russia should sign the Convention on Cluster Munitions of 30 May 2008.

- Given the link between the violations committed in past conflicts and during the August 2008 conflict:

first, there is a need for education and information measures to dismiss unfounded allegations of genocide against Ossetians which could fuel more tension between the communities;

second, there is a vital need for accountability and reparation measures in relation to the August 2008 conflict in order to address violations committed and defuse further resentment among the communities;

finally, comprehensive transitional justice approaches should be envisaged, both to cover the August 2008 conflict and its links to past conflicts and to address the legacy of past abuses, in order to build a lasting peace and allow victims from all sides to express their needs and views. In this regard, the IIFFMCG should embrace and back the proposals outlined by the International Center for Transitional Justice in its recent report entitled *Transitional Justice and Georgia's Conflicts: Breaking the Silence*.[512]

- Measures to ensure the protection of the rights of minorities should be taken by all sides to defuse tension and avoid fuelling new resentments.

- Issues of property rights, in relation to this conflict and also to past conflicts, should be addressed.

- The issue of the status of South Ossetia and Abkhazia remains as salient as ever. This is not only a political and diplomatic question but also a legal and practical one. In this regard the "Law on Occupied Territories of Georgia" adopted by the Georgian Parliament on 23 October 2008 raises certain issues that need to be dealt with by the Georgian

[512] Magdalena Frichova, *Transitional Justice and Georgia's Conflicts: Breaking the Silence*, International Center for Transitional Justice, May 2009, available at: www.ictj.org/.../ICTJFrichova_GEO_BreakingtheSilence_pa2009.pdf

authorities, as recommended by the European Commission for Democracy through Law (Venice Commission) in its Opinion of March 2009.[513] When meeting with the IIFFMCG in June 2009, representatives of the Ministry of Foreign Affairs of Georgia indicated that the Parliament intended to look at the recommendations of the Venice Commission at the end of summer 2009, to improve the Law.

c) Further preventive measures and recommendations

The authorities of Abkhazia and South Ossetia are encouraged to commit themselves formally to respecting and ensuring the implementation of the Geneva Conventions and their Additional Protocols.

Additionally or alternatively, the parties should endeavour to sign special agreements on specific humanitarian issues (such as protected zones, or displaced persons), or on bringing into force in their relationship the entirety of the Geneva Conventions and Protocols, as for example envisaged in Article 3(2) of the Geneva Conventions.

Once the relevant international instruments have been acceded to, the principles and rules they embody must be incorporated into domestic law and practice. This first means thinking about and adapting the appropriate domestic regulations, recommendations, procedures and practical actions. Such measures have already been adopted in the region, but they may not be fully satisfactory and should in any case be re-examined in the light of the lessons learned from the August 2008 conflict. Here are some specific practical measures whose adoption is highly recommended:

All the authorities concerned should, already in peacetime, plan the location of military establishments in areas as remote as possible from civilian population concentrations and civilian buildings, in particular hospitals, schools and cultural sites.

As envisaged in particular by the Geneva Conventions and Protocols, the authorities are invited to mark relevant establishments and transports with the specific protection signs/emblems (i.e. in particular: the red cross for medical installations; a shield, pointed below, per saltire blue and white, for cultural goods; and three bright orange circles on the same axis for works and installations containing dangerous forces).

[513] European Commission for Democracy through Law (Venice Commission) Opinion on the Law on Occupied Territories of Georgia, Adopted by the Venice Commission at its 78th Plenary Session (Venice, 13-14 March 2009), CDL-AD(2009)015, Strasbourg, 17 March 2009, Opinion No. 516 / 2009.

It is also extremely useful to identify – already in peacetime – a service, which may be the local Red Cross Society, entrusted in particular with the tasks of collecting, registering and transmitting information about missing, displaced and dead persons, separated family members and prisoners.

For IHL to be respected in time of armed conflict, the principles need to be familiar to everybody and the more specific rules known to those who will have to implement them in practice. This of course also goes for human rights standards and rules. We know that efforts to achieve this are being made in Russia and Georgia. They should indeed be continued and strengthened. Similar steps should be taken in Abkhazia and South Ossetia. Basic knowledge should be the concern of everybody. However, more advanced dissemination, education and training should target particular sectors of the population, such as civil servants, journalists and the younger generations through secondary-school and university programmes. But, obviously, the most important target population are the arms-bearers (i.e. armed and police forces, militias, etc.). They must be properly instructed, and IHL requirements must be incorporated into their "rules of engagement." Cooperation and support programmes for dissemination, education and training in IHL and HRL with NGOs, international organisations or third States, such as those already initiated by the ICRC or the OSCE, are highly recommended.

The Fact-Finding Mission supports the following recommendations made by some representatives of the relevant UN agencies and regional and nongovernmental organisations, as essential elements conducive to a lasting peace in the region:

- The Commissioner for Human Rights of the Council of Europe has "call[ed] upon all concerned parties to allow free and unhindered access for international organisations to all the conflict-affected areas (including those which were indirectly affected), from all directions, at all times, so that the population can be provided with all the necessary humanitarian assistance and human rights support and the work of confidence-building can proceed."[514]

- The Human Rights Assessment Mission of the Office for Democratic Institutions and Human Rights of the OSCE has recommended that all parties to the conflict "respect fully, within their respective jurisdictions, all OSCE human rights commitments and other

[514] Commissioner for Human Rights of the Council of Europe, Report on human rights issues following the August 2008 armed conflict, 15 May 2009, CommDH(2009)22, para. 75.

international human rights obligations. Special attention should be devoted to ensuring that conditions are created for members of minority communities to enjoy all their human rights and freedoms."[515]

- The Representative of the UN Secretary-General on the human rights of internally displaced persons has "call[ed] on all parties to take all necessary steps to ensure persons displaced by the recent and past conflicts are able to enjoy their right to return voluntarily to their former homes in safety and dignity, and to guarantee recovery of their property and possessions. Where such recovery is not possible, they should obtain appropriate compensation or another form of just reparation."[516]

- The International Center for Transitional Justice has noted that "fifteen years of abortive efforts at conflict resolution indicate that political settlements in the region could be difficult to achieve without addressing demands for justice and the need for reconciliation."[517]

- The Human Rights Assessment Mission of the Office for Democratic Institutions and Human Rights of the OSCE has recommended that all parties to the conflict "undertake a thorough and genuine investigation of allegations of, and prosecute, human rights violations and other unlawful acts committed during the conflict by persons under their jurisdiction or control. Any individuals believed to have been involved in human rights violations or other serious crimes should be held to account and prosecuted in accordance with the law. The parties should co-operate in exchanging information and evidence for such prosecutions. In addition to holding individuals accountable, there should be full public disclosure of the facts surrounding human rights violations during the conflict." [518]

- The Human Rights Assessment Mission of the Office for Democratic Institutions and Human Rights of the OSCE has also noted that "bearing in mind the obligation to provide remedies for human rights violations contained in the ECHR and other international human rights conventions, and following the United Nations Basic Principles and

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[515] Human Rights Assessment Mission of the Office for Democratic Institutions and Human Rights, OSCE, Human Rights in the War-Affected Areas following the Conflict in Georgia, 27 November 2008, p. 77.

[516] Report of the Representative of the Secretary-General on the human rights of internally displaced persons, Walter Kälin, A/HRC/10/13/Add.2, 13 February 2009, para. 59.

[517] Magdalena Frichova, Transitional Justice and Georgia's Conflicts: Breaking the Silence, International Center for Transitional Justice, May 2009, p. 39, available at: www.ictj.org/.../ICTJFrichova_GEO_BreakingtheSilence_pa2009.pdf

[518] Human Rights Assessment Mission of the Office for Democratic Institutions and Human Rights, OSCE, Human Rights in the War-Affected Areas following the Conflict in Georgia, 27 November 2008, p. 76.

Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law, the parties should 'establish national programmes for reparation and other assistance to victims in the event that the parties liable for the harm suffered are unable or unwilling to meet their obligations.' Reparations should include the restitution of victims to their situation before the violation, compensation for economic damage suffered, and rehabilitation including medical and psychological care. Any compensation programme should take gender considerations into account to ensure that women heads of households and other female victims have equal access to restitution, compensation and rehabilitation." [519]

- The International Crisis Group noted that both investigation and prosecution "serve multiple purposes, not the least of which is to correct misinformation on the scale and nature of atrocities, when appropriate, so as to reduce the likelihood of revenge violence and to promote longer-term reconciliation."[520]

- "The Commissioner for Human Rights of the Council of Europe has also taken note of the decision, reached by the parties at the Geneva talks on 17 February 2009, to establish a joint incident prevention mechanism. The aim of the mechanism is to promote stability and security by providing a timely and adequate response to security incidents and/or criminal activities, ensuring the security of vital installations and infrastructure, as well as ensuring the effective delivery of humanitarian aid. Under the agreement, the security forces of all parties to the conflict and international monitors (UN, EU and OSCE) are to meet at least every week, or more often if needed, and may agree to conduct joint visits. The Commissioner considers that this mechanism has the potential to contribute to improving security in the conflict-affected areas, and calls upon all of the actors to implement it in practice and in good faith."[521]

Many of these measures entail cooperation between all the parties; dealing with such issues in a transparent and equal manner, with concrete solutions, may lay the foundations for dialogue and understanding.

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[519] *Idem*.

[520] International Crisis Group, RUSSIA VS GEORGIA: THE FALLOUT, Europe Report No.195 – 22 August 2008, p. 29.

[521] Commissioner for Human Rights of the Council of Europe, Report on human rights issues following the August 2008 armed conflict, 15 May 2009, CommDH(2009)22, para. 36.

VI Cases before International Courts

The August 2008 conflict gave rise to a number of complaints, both individual and interstate, which have been lodged with the available courts.

It is crucial to consider the findings of the IIFFMCG against this background. Given the cases pending, the report of the IIFFMCG, if made public, will be used extensively by all parties and by the relevant courts. So, in addition to providing victims and parties with a balanced analysis of the August 2008 conflict and its aftermath, it is also advisable for the Report to be made public in order to provide information in the context of judicial proceedings.

The first case in relation to the August 2008 conflict regards the proceedings instituted by Georgia before the European Court of Human Rights on 11 August 2008 alleging that the Russian Federation was violating the European Convention on Human Rights. On 6 February 2009, in accordance with Article 33 of the European Convention on Human Rights, Georgia lodged an inter-state application against the Russian Federation with the European Court of Human Rights.

There are also a number of applications from individuals that have been or are to be filed with the European Court of Human Rights. On 14 January 2009, for example, the Court announced that it had examined seven applications against Georgia, and that it had received a total of more than 3 300 cases from South Ossetians and Russians "with a similar factual background."[522] Several Georgian nongovernmental organizations are also providing assistance to ethnic Georgians in bringing cases to the Court.

Another interstate complaint relating to the August 2008 conflict has been lodged by Georgia against the Russian Federation in the International Court of Justice (ICJ). On 12 August 2008 Georgia instituted proceedings against the Russian Federation, and on 14 August it submitted a request to the ICJ for the indication of provisional measures. This case is based on the International Convention on the Elimination of All Forms of Racial Discrimination (ICERD). On 15 October 2008 the ICJ issued an order on provisional measures calling on Russia and Georgia to observe their legal obligations under the ICERD to prevent "irreparable prejudice"

[522] European Court of Human Rights, "Seven applications against Georgia Concerning Hostilities in South Ossetia", Press release by the Registrar, 14 January 2009, available at: http://cmiskp.echr.coe.int/tkp197/view.asp?item=1&portal=hbkm&action=html&highlight=&sessionid=18135459&skin=hudoc-pr-en

to the rights of persons before the court could rule on the merits of the case.[523] This case is currently pending before the Court.

While there are currently no cases pending before the International Criminal Court, on 20 August 2008 the ICC Prosecutor confirmed that the situation in Georgia is under analysis by his Office.[524]

[523] Case Concerning Application of the International Convention on the Elimination of All Forms of Racial Discrimination (Georgia v. Russian Federation), International Court of Justice, General List 140, Request for the Indication of Provisional Measures, October 15, 2008.

[524] ICC Press Release, "ICC Prosecutor confirms situation in Georgia under analysis," ICC-OTP-20080820-PR346, 20 August 2008. http://www2.icc-cpi.int/menus/icc/press%20and%20media/press%20releases/press%20releases%20(2008)/icc%20prosecutor%20confirms%20situation%20in%20georgia%20under%20analysis?lan=en-GB

Chapter 8

Back to Diplomacy

On 12 August, the Russian Government reported to the European Union High Representative for Common Foreign and Security Policy, Javier Solana, that "the aim of Russia's operation to force the Georgian side to peace had been achieved and it had been decided to conclude the operation".[1] Later that day President Medvedev met with President Sarkozy, who presented a ceasefire plan on behalf of the EU after telephone consultations with President Bush, German Chancellor Angela Merkel and other European leaders. President Medvedev reportedly backed some elements of the plan. French Foreign Minister Kouchner then flew to Tbilisi to present the proposals to the Georgian side. Presidents Medvedev and Saakashvili consulted by phone and reportedly agreed to a six-point peace plan. It called for all parties to the conflict to accept the following conditions :

- to refrain from the use of force;
- to end hostilities definitively;
- to provide free access for humanitarian aid;
- Georgian military forces will have to withdraw to their usual bases;
- Russian military forces will have to withdraw to the lines held prior to the outbreak of hostilities. Pending an international mechanism, Russian peacekeeping forces will implement additional security measures;
- opening of international talks on the security and stability arrangements in Abkhazia and South Ossetia.[2]

As long as international mechanisms were not put into place, Russian peacekeepers patrolled in a large so-called buffer zone outside South Ossetia. The plan did not

[1] ITAR-TASS, August 12, 2008.

[2] The English translation of the six-point plan is to be found in Press Release, Extraordinary Meeting General Affairs and External Relations, Brussels 13 August 2008, Council of the European Union.

specifically state that international peacekeepers would be deployed within South Ossetia.[3]

South Ossetia and Abkhazia agreed to and signed this ceasefire plan on 14 August 2008. The same day Georgia initiated the legal procedure for the cancellation of its membership within the CIS, finally taking a step which had been discussed for years. On 22 August, several Western media reported sizeable but not complete Russian military withdrawal from "Georgia proper". Diverging interpretations of the *status quo ante bellum* called for a follow-on ceasefire agreement.

A diplomatic event called the six- point peace plan into even greater question. On 25 August, Russia's Federation Council and the State Duma recommended that the President recognise the independence of Abkhazia and South Ossetia. Even at this point some Russian and Western experts did not believe that the Kremlin would follow this recommendation. However, in an announcement on 26 August, President Medvedev announced Russia's official recognition of the independence of both regions, and he called on other countries to follow this diplomatic step. On 5 September, Nicaragua recognised the independence of Abkhazia and South Ossetia. Within Russian-dominated regional formats like the Collective Security Treaty Organisation (CSTO) no government followed suit . At a late August 2008 summit of the Shanghai Cooperation Organisation (SCO) the communiqué appeared to reflect disapproval of recognition of the breakaway regions. After the armed conflict, Russian President Medvedev formulated a doctrine of privileged zones of interest.

On 8 September, President Sarkozy and President Medvedev signed a follow-on ceasefire agreement setting out the provisions of the six point plan in detail. It provided for measures on the withdrawal of armed forces and for international monitoring mechanisms. It also referred to the continuation of the activities of the international observers of UNOMIG and OSCE Mission to Georgia. This should happen within their existing mandates and would be subject to further adjustments by respectively the UN Security Council and the OSCE Permanent Council. International observers, including at least 200 from the EU, would have to be deployed in the areas adjacent to South Ossetia and Abkhazia. Thus the EU became a guarantor of the

[3] Jim Nichol: *Russia-Georgia Conflict in August 2008: Context and Implications for U.S. Interests*, Congressional Research Service Report, March 3, 2009, pp. 7-12.

principle of the non-use of force. The agreement also referred to the holding of international discussions, as provided for in the six point plan, to begin in Geneva on 15 October 2008.[4]

Russian troops withdrew from Poti and Senaki on 13 September and pulled back by 9 October from so-called buffer zones in accordance with the follow-on ceasefire plan. However, only one day after this plan was agreed upon, the Russian Defence Minister asserted that several thousand Russian troops would remain in Abkhazia and South Ossetia. Additionally, Russian checkpoints remained in some areas like the Akhalgori district in the eastern part of South Ossetia, which had been administered by Georgia before the August 2008 armed conflict. Thus Russia did not follow the call to pull back its troops to the pre-war level.

Moreover the Kremlin's recognition of the independence of Abkhazia and South Ossetia on the basis of the Kosovo precedent formula has an impact on international conflict resolution efforts. The newly-created Monitoring Mission in Georgia (EUMM) defined its area of action as "throughout Georgia" or "the whole of Georgia", but did not obtain free access to South Ossetia and Abkhazia. It soon became clear that Russia and its protégés in Sukhumi and Tskhinvali did not grant access to international observers to both regions. This limitation had serious consequences for a mission like the EUMM. Without access to both regions it could not fulfil its task to monitor the post-war stabilisation process in Georgia and the implementation of the ceasefire accords. Limited in this way in its area of action to the "adjacent regions" around Abkhazia and South Ossetia, the EUMM would be contributing to the safeguarding of *de facto* borders not recognised by Europe and the rest of the world, with the exception of Russia and Nicaragua. Thus the post-war stabilisation process in Georgia was based on a rather uncertain foundation.

The international discussions on Georgia began at the United Nations in Geneva with a first meeting on 15 October 2008, with the full involvement of the European Union, the United Nations and the OSCE.

[4] See *"President Nicolas Sarkozy travelled to Moscow and Tbilisi (September 8, 2008)"*, Ministère des Affaires Etrangères, http://pastel.diplomatie.gouv.fr/en/article_imprim.php3?id_article=11846 (accessed on 5 August 2009)