

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 War 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 2008², and the bombardment of the upper Kodori Valley by Abkhaz forces started on 9 August³. 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.

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 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,

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

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/RES/1582 (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

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

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 1974⁵¹ 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;

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.

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 peacekeepers⁵⁹ 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

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 be 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 it 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

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

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.

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

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 statement⁸⁹ 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.

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

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

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 2008¹⁰⁵ 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.¹⁰⁶As 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.

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.

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

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

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 IFFMCG 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 used¹²⁸ and the fatalities and destructions of building resulting from it¹²⁹) 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.

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

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

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 peacekeepers."¹⁴⁹ "[T]he military action by Georgia began when they started to attack our peacekeepers 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/ur112subpirx.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.

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 IFFMCG 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.

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 casualties 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,

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 casualties 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 casualties. 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 posed 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-determination¹⁸⁰ renders inadmissible any type of foreign intervention, be it upon invitation of the previous “old” government or of the rebels. Any

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. Ranzhofer, 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

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.

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.

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. A/59/565), 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

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, Russia 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 IFFMCG 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.in.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

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.

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/Fortea (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 réservé* 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.

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 troop 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.

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 posed by the IIFMCG 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 IIFMCG 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 posed 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.