Chapter 7

International Humanitarian Law and Human Rights Law

I. Introduction

This chapter follows a structure based on thematic issues and notions derived from HRL, IHL and the law on IDPs. While the primary task is to establish facts relating to the origins and course of the conflict, there are two main reasons for the choice of a framework that is not merely narrative and descriptive. First, the mandate of the mission refers to international law, IHL and HRL and accusations made in the context of the conflict, including war crimes. Also, given that the task required is to provide a legal assessment of those facts, the proposed structure prevents repetition between the section on facts and the one on legal analysis.

Taking the above remarks into account, this chapter proceeds first with a brief overview of the applicable international law. Next it seeks to present, thematically, the main facts relating to the armed conflict between Russia and Georgia and its aftermath, examining them from the points of view of IHL and HRL, within the scope as described earlier. For each of the thematic issues the main substantive rules applicable will be recalled, followed by an establishment of the facts and a conclusion discussing whether or not there has been a violation. Where some facts cannot be established – and consequently cannot be legally assessed – in a definite and conclusive fashion, alternatives will be described. For each thematic issue a distinction between the three areas (South Ossetia, Abkhazia and the rest of Georgia) will be made when necessary.

The Fact-Finding Mission would like to underline that its use of names, terms and expressions, particularly with regard to the conflict regions, should not be construed as implying any form of recognition or non-recognition or having any other political connotation whatsoever. A special note of caution seems necessary, too, as regards allegations of violation of International Humanitarian Law and Human Rights and also as regards allegations of war crimes and genocide. The EU Council of Ministers directed the Mission to investigate these allegations. At the same time, the Mission only started its work at the end of 2008. Consequently, it was necessary to base much of its fact-finding on investigations which had been carried out soon after the conflict by a number of regional organisations such as the OSCE and the Council of Europe, as well as respected international non-governmental organisations such as Human Rights Watch, Amnesty International, the International Crisis Group and others. The Mission also had several meetings with representatives of the International Committee of the Red Cross. Additionally, the Mission was able to collect first-hand evidence from witnesses and victims. It should be noted that the factual basis thus established may be considered as adequate for the purpose of fact-finding, but not for any

other purpose. This includes judicial proceedings such as the cases already pending before International Courts as well as any others.

II. Applicable international law

Two main sets of norms constitute the applicable legal framework: IHL and HRL. First, both branches of international law are applicable in times of armed conflict. Second, given that the current report covers a longer period than the duration of the armed conflict *per se*, human rights law is also directly relevant.

The special issue of displaced persons is governed both by specific rules of IHL and HRL and by different sets of guidelines or rules depending on whether they are classified as IDPs or refugees.

Finally, norms of public international law relating to state responsibility and international criminal law also constitute important parts of the applicable legal framework. Individual criminal responsibility is triggered in cases of war crimes, in particular where there have been grave breaches of the Geneva Conventions or Additional Protocol I.

A. International Humanitarian Law

International humanitarian law (IHL) regulates the conduct of hostilities and protects persons who do not or who no longer participate directly in hostilities, in order to limit the effects of warfare. Its primary aim is to ensure the protection of certain persons and objects. While the IHL norms applicable vary depending on the character of an armed conflict (whether it is regarded as an international or a non-international armed conflict), the humanitarian goal remains equally important in both types of conflict. This is exemplified by the increasing convergence between the rules of IHL applicable in an international armed conflict and those applicable in a non-international armed conflict.

IHL comprises both conventional law and customary law. Georgia and the Russian Federation are parties to the main IHL treaties, including the four Geneva Conventions of 1949 and the two additional protocols of 1977, together with the 1954 Convention for the Protection of Cultural Property in the Event of Armed Conflict. The Russian Federation is also a party to the 1907 Hague Convention (IV) respecting the Laws and Customs of War on Land.

Furthermore, it is well recognised that the rules contained in this latter instrument have become part of customary international humanitarian law.[1]

The IHL treaty law applicable to non-international armed conflict is far less developed than the body of norms applicable to international armed conflict. The former primarily includes Common Article 3 of the Geneva Conventions and Additional Protocol II. It is now well recognised, however, that the customary international humanitarian law applicable to internal armed conflicts goes beyond those provisions[2] and encompasses fundamental principles on the conduct of hostilities.

The question remains whether, when the cease-fire occurred on 12 August 2008, IHL ceased to apply in relation to the August 2008 conflict. While it could be said that it is fairly easy to determine when IHL starts to apply, it seems more difficult to identify the moment when its application ends, mainly owing to the different formulas used in conventional law. Geneva Convention IV, for example, speaks about the "general close of military operations" (Article 6(2)), whereas Additional Protocol II uses the expression "end of the armed conflict" (Article 2(2)). The International Criminal Tribunal for the former Yugoslavia (ICTY), in its decision of 2 October 1995 in the *Tadic* case, tried to clarify this point by indicating that: "International humanitarian law applies from the initiation of such armed conflicts and extends beyond the cessation of hostilities until a general conclusion of peace is reached; or, in the case of internal conflicts, a peaceful settlement is achieved." The ICTY thus rejected the factual criteria that signify the cessation of hostilities. This implies that a cease-fire – whether temporary or definitive – or even an armistice cannot be enough to suspend or to limit the application of IHL. Relevant conventional instruments stipulate that a number of provisions continue to apply until the emergence of a factual situation completely independent of the concluding of a peace treaty. Thus, to quote only some examples, the protection provided for people interned as a result of the conflict (in particular, prisoners of war and

[1] See also Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion, ICJ Reports 2004, p. 172, para. 89.

[2] Prosecutor v. Tadic, IT-94-1-AR72, Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, 2 October 1995, para. 118. See also J-M. HENCKAERTS, L. DOSWALD-BECK (eds), Customary International Humanitarian Law, Volumes I and II, Cambridge, ICRC, Cambridge University Press, 2005. Out of the 161 customary rules identified by the ICRC, 159 are applicable to non-international armed conflicts. HENCKAERTS, J-M., "Study on customary international humanitarian law: A contribution to the understanding and respect for the rule of law in armed conflict", in: International Review of the Red Cross, No. 857, 2005, p. 189.

civilian prisoners) applies until their final release and repatriation or their establishment in the country of their choice.[3]

a) IHL of international and non-international armed conflict

The hostilities between Georgia and the Russian Federation constitute an international armed conflict between two states as defined by Common Article 2 of the 1949 Geneva Conventions: "cases of declared war or of any other armed conflict which may arise between two or more of the High Contracting Parties, even if the state of war is not recognized by one of them." This was asserted by both the Russian Federation[4] and Georgia.[5] Consequently, IHL applicable to this category of armed conflict is relevant.

The hostilities between South Ossetia and Abkhazia on the one hand, and Georgia on the other, are governed by the IHL applicable to non-international armed conflict, since both are recognised internationally as being part of Georgia and, at the time of the 2008 conflicts, this was undisputed. The Russian Federation also reached this conclusion.[6] However Georgia seems to classify it overall as an international armed conflict: "in relation to the period from 7 to 12 August 2008, objective evidence shows that there was resort to armed force by the separatists, the Russian Federation and the Republic of Georgia. Therefore, it is beyond doubt that there was an international armed conflict in existence from 7 to 12 August 2008."[7] This could be the case if one considers that Russia exercises sufficient control over the Abkhaz/South Ossetian forces, as will be discussed later.

Given the organised and responsible command of South Ossetian and Abkhaz armed forces, as well as the territorial control exercised by the authorities, the criteria set out in Additional Protocol II for its application are met.[8] Common Article 3 of the Geneva Conventions and

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[3] This exception is based on Article 5 of Geneva Convention III, Article 6(4) of Geneva Convention IV and Articles 3(b) of Protocol I and 2(2) of Protocol II; it is also mentioned by the ICTY in the *Tadic* decision of 2 October 1995 (para. 69).

[4] Russia, Responses to Questions Posited by the IIFFMCG (Legal Aspects), p. 10.

[5] Georgia, APPLICATION UNDER ARTICLE 33 OF THE EUROPEAN CONVENTION ON HUMAN RIGHTS AND RULES 46 AND 51 OF THE RULES OF COURT, Application No. 38263/08, 6 February 2009, document submitted by Georgia to the IFFMCG, pp. 46-47.

[6] Russia, Responses to Questions Posited by the IIFFMCG (Legal Aspects), *op. cit.*, p. 10.

[7] Georgia, APPLICATION UNDER ARTICLE 33 OF THE EUROPEAN CONVENTION ON HUMAN RIGHTS AND RULES 46 AND 51 OF THE RULES OF COURT, Application No. 38263/08, 6 February 2009, document submitted by Georgia to the IFFMCG, pp. 46-47.

[8] Article 1 of Additional Protocol II defines the applicability with regard to "all armed conflicts (…) which take place in the territory of a High Contracting Party between its armed forces and dissident armed forces or other organized armed groups which, under responsible command, exercise such control over a part of its territory as to enable them to carry out sustained and concerted military operations and to implement this Protocol."

Additional Protocol II both apply in the current situation, in addition to relevant customary law.

b) IHL of international armed conflict because of Russia's control over Abkhaz/South Ossetian forces

An armed conflict between a State and an armed group may be qualified as international if this group, under certain conditions, is under the control of another State, i.e., a second State. Georgia and the Russian Federation hold opposing views on whether the latter exercised control over the Abkhaz and Ossetian forces. Given the difficulty of reaching a definite factual conclusion, and in view of the current state of the law, the current legal arguments and positions are outlined.

For the purpose of classifying an armed conflict, in the *Tadic Case* the Appeals Chamber of the ICTY discussed the criteria for control by a State over an individual or a group of individuals. It held that "the requirement of international law for the attribution to States of acts performed by private individuals is that the State exercises control over the individuals" and that "the *degree of control* may, however, vary according to the factual circumstances of each case."[9] First the ICTY considered that the "test" of "effective control" applied by the International Court of Justice (ICJ) in the *Nicaragua Case*,[10] to determine whether an individual may be held to have acted as a *de facto* organ of a State, was persuasive in only two cases:

"the case of a private individual who is engaged by a State to perform some specific illegal acts in the territory of another State. In such a case, it would be necessary to show that the State issued specific instructions concerning the commission of the breach in order to prove – if only by necessary implication – that the individual acted as a de facto State agent (...)"; or

"when an unorganised group of individuals commits acts contrary to international law. For these acts to be attributed to the State it would seem necessary to prove not only that the State exercised some measure of authority over those individuals but also that it issued specific instructions to them concerning the performance of the acts at issue."[11]

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[9] ICTY, *Prosecutor* v. *Tadic*, IT-94-1-AR72, the Judgement of the Appeals Chamber, 15 July 1999, para. 117.

[10] The test was whether the individual had specifically "directed or enforced" the perpetration of particular acts.

[11] ICTY, *Prosecutor* v. *Tadic*, IT-94-1-AR72, the Judgement of the Appeals Chamber, 15 July 1999, para. 118. The Appeals Chamber gives "for instance, kidnapping a State official, murdering a dignitary or a high-ranking State official, blowing up a power station or, especially in times of war, carrying out acts of sabotage" as examples of such acts.

Georgia and the Russian Federation have two completely opposing views on the question of control. While Georgia claims that the Russian Federation acted through the separatist South Ossetian and Abkhaz forces under its direction and control,[12] the Russian Federation has stated that "the conduct of the South Ossetian and Abkhaz authorities is not conducted by organs of the Russian Federation."[13] It must be stressed that the terms used before the ICJ seem to frame the discussion within the context of the rules of attribution under international law on state responsibility for wrongful acts. The Russian Federation reaffirmed its stance by stating: "Russia exercises no degree of control (effective or actual) over South Ossetian military personnel, civilians or the territory of this Republic."[14]

The composition of the Abkhaz and South Ossetian forces remains unclear. Human Rights Watch described the South Ossetian forces as "consisting of several elements – South Ossetian Ministry of Defence and Emergencies, South Ossetian Ministry of Internal Affairs, South Ossetian Committee for State Security, volunteers, and Ossetian peacekeeping forces" – who also participated in the fighting.[15] Various testimonies contain accounts of foreign volunteers such as Chechens operating in the territory of South Ossetia.[16] The presence of 300 volunteers from the Russian Federation was mentioned by the representatives of the Georgian Ministry of Internal Affairs when meeting with the IIFFMCG experts in June 2009. *De facto* authorities from South Ossetia confirmed to the IIFFMCG in June that volunteers had fought with South Ossetian military forces. The regular armed forces of the *de facto* South Ossetian authorities unquestionably constitute "an organised and hierarchically structured group", while the Abkhaz army is described as being made up of "regular" forces and a "well-trained reservist component" with "a command hierarchy."[17] On the other hand, the situation may be different for isolated armed groups or individuals who acted on their own during the hostilities. In the former case, "overall control" would need to be established in order to render the armed conflict between Georgia and the Abkhaz and South Ossetian armed forces international.

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[12] Case concerning Application of the International Convention on the Elimination of All Forms of Racial Discrimination (*Georgia* v. *Russian Federation*), Request for the indication of provisional measures, International Court of Justice, ICJ, 15 October 2008, p. 2, para. 3.

[13] *Ibid*, p. 19, para. 75.

[14] Russia, Responses to Questions Posited by the IIFFMCG (Legal Aspects), *op. cit.*, p. 11.

[15] HRW, *Up In Flames – Humanitarian Law Violations and Civilian Victims in the Conflict over South Ossetia*, *op. cit.*, p. 5.

[16] This was confirmed through an interview conducted in March 2009 by a Mission's expert. Some interviewees clearly identified Chechens and Uzbeks among the military forces that looted and set fire to their houses.

[17] *De facto* Abkhaz authorities, Replies to questions on legal issues related to the events of last August, submitted to the IIFFMCG in April 2009, pp. 3-4.

When the Appeals Chamber of the ICTY turned to the *de jure* and factual relationship between the Russian Federation and the Abkhaz and South Ossetian forces, the elements it considered shed some light on the nature and degree of this control. For example the fact that "the controlling State is *not the territorial State* where the armed clashes occur or where at any rate the armed units perform their acts" has to be taken into account, and it calls for "more extensive and compelling evidence."[18] The Appeals Chamber specified that the control has to go beyond "merely coordinating political and military activities" and "beyond mere coordination or cooperation between allies."[19] It analysed the forms of assistance provided, and the command structure in place.[20]

The statements made by the Russian Federation and the *de facto* Abkhaz authorities reject any allegation of overall control. The Russian Federation has declared that "prior to the conflict in August one could only speak of cooperation between the Russian peacekeeping contingent and South Ossetian and Abkhaz military units wherever peacekeeping forces may be present within parameters commonly accepted in similar situations in other countries. These relations were governed by the mandate of the peacekeeping force."[21] While strong economic, cultural and social ties exist between the Russian Federation and the authorities of Abkhazia,[22] those authorities have stated that, in the course of the operation in the Kodori Valley, "the Abkhaz army, while remaining in contact with Russian forces acting from Abkhaz territory, operated independently."[23] Further aspects of the assistance and the military structure and command linking the Russian Federation and those entities would need to be substantiated in order to establish such control. According to Georgia, "the Abkhaz and South Ossetian military formations did not independently control, direct or implement the military operations during either the armed conflict or the occupation periods. Rather, these military formations acted as

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[18] ICTY, *Prosecutor* v. *Tadic*, IT-94-1-AR72, the Judgement of the Appeals Chamber, 15 July 1999, para. 138.

[19] *Ibid*., para. 152.

[20] The ICTY Appeals Chamber ruled as follows: "Over and above the extensive financial, logistical and other assistance and support which were acknowledged to have been provided by the VJ to the VRS, it was also uncontested by the Trial Chamber that as a creation of the FRY/VJ, the structures and ranks of the VJ and VRS were identical, and also that the FRY/VJ directed and supervised the activities and operations of the VRS. As a result, the VRS reflected the strategies and tactics devised by the FRY/JNA/VJ" (para. 151). The Trial Chamber found that the various forms of assistance provided to the armed forces of the *Republika Srpska* by the Government of the FRY were "crucial" to the pursuit of their activities and that "those forces were almost completely dependent on the supplies of the VJ for carrying out offensive operations" (para. 155). See ICTY, *Prosecutor* v. *Tadic*, IT-94-1-AR72, the Judgement of the Appeals Chamber, 15 July 1999.

[21] Russia, Responses to Questions Posited by the IIFFMCG (Legal Aspects), *op. cit.*, p. 5.

[22] See, for example, Abkhaz authorities, Replies to questions on legal issues related to the events of last August, submitted to the IIFFMCG in April 2009, p. 2.

[23] *Ibid*., p. 4.

agents or *de facto* organs of the Respondent State and as such constituted a simple continuation of the Russian Federation's armed forces."[24]

In factual terms, one may have to draw a distinction with regard to the nature of the relationship between Russia and South Ossetia on the one hand, and between Russia and Abkhazia on the other. In the former, ties seem to be stronger. During the meeting between the IIFFMCG experts and the representatives of the Ministry of Internal Affairs of Georgia, the representatives stressed the political and economic links between Russia and South Ossetia. They also claimed that Russia exercises control over South Ossetia through various channels ranging from financial help to the presence of Russian officials in key military positions in the South Ossetian forces.[25]

At this point it is appropriate to underline that although the classification of an armed conflict as international or non-international is important in terms of the responsibilities of the various parties involved, when it comes to the effective protection by IHL of the persons and objects affected by the conflict it does not make much difference. Indeed, it is generally recognised that the same IHL customary law rules generally apply to all types of armed conflicts.

c) IHL of military occupation

Under IHL, the law of military occupation primarily includes the 1907 Hague Regulations concerning the Laws and Customs of War on Land and Geneva Convention IV relative to the Protection of Civilian Persons in Time of War, as well as some provisions of Additional Protocol I. As Geneva Convention IV does not provide a definition of what constitutes an occupation, it is necessary to rely on the Hague Regulations. A territory is considered "occupied" when it is under the control or authority of the forces of the opposing State, without the consent of the government concerned. More specifically, according to Sassòli and Bouvier, "the rules of IHL on occupied territories apply whenever a territory comes, during an armed conflict, under the control of the enemy of the power previously controlling that territory, as well as in every case of belligerent occupation, even when it does not encounter armed resistance and there is therefore no armed conflict."[26] In the former case, pursuant to Article 42 of these Regulations, a "territory is considered occupied when it is actually placed

[24] Georgia, APPLICATION UNDER ARTICLE 33 OF THE EUROPEAN CONVENTION ON HUMAN RIGHTS AND RULES 46 AND 51 OF THE RULES OF COURT, *op. cit.*, para. 160.

[25] IIFFMCG Meeting with Representatives of the Ministry of Internal Affairs of Georgia, 4 June 2009.

[26] SASSÒLI, M. and BOUVIER, A., *How Does Law Protect In War*, 2nd Edition, Vol. I, Geneva, ICRC, 2006, p. 187.

under the authority of the hostile army. The occupation extends only to the territory where such authority has been established and can be exercised."[27] For the second situation, Geneva Convention IV provides that "the Convention shall also apply to all cases of partial or total occupation of the territory of a High Contracting Party, even if the said occupation meets with no armed resistance."[28]

As stressed by the ICJ in the case of the *Armed Activities on the Territory of the Congo (Democratic Republic of the Congo* v. *Uganda)*, "to reach a conclusion as to whether a State, the military forces of which are present on the territory of another State as a result of an intervention, is an "occupying Power" in the meaning of the term as understood in the *jus in bello*, the Court must examine whether there is sufficient evidence to demonstrate that the said authority was in fact established and exercised by the intervening State in the areas in question."[29] Ascertaining the existence of a state of occupation is a determination based on facts.[30] The critical question is the degree and extent of the control or authority required in order to conclude that a territory is occupied.

Two perceptions exist in this regard, which are not mutually exclusive but rather constitute two stages in the application of the law on occupation. These two stages reflect growing control by the occupying power. This means that, for a part of the law of occupation to apply, it is not necessary for the military forces of a given State to administer a territory fully.

The Commentary on the Geneva Conventions states the following with respect to Article 2(2) of Geneva Convention IV: "the word 'occupation' has a wider meaning than it has in Article 42 of the Regulations annexed to the Fourth Hague Convention of 1907. So far as individuals are concerned, the application of the Fourth Geneva Convention does not depend upon the existence of a state of occupation within the meaning of the Article 42 referred to above. The relations between the civilian population of a territory and troops advancing into that territory, whether fighting or not, are governed by the present Convention. There is no intermediate period between what might be termed the invasion phase and the inauguration of a stable

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[27] See Article 42 of the Regulations concerning the Laws and Customs of War on Land and Geneva Convention IV relative to the Protection of Civilian Persons in Time of War. See also *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion, ICJ Reports 2004*, p. 167, para. 78 and p. 172, para. 89: "a territory is considered to be occupied when it is actually placed under the authority of the hostile army, and the occupation extends only to the territory where such authority has been established and can be exercised."

[28] Art. 2 of 1949 Geneva Convention IV.

[29] *Armed Activities on the Territory of the Congo (Democratic Republic of the Congo* v. *Uganda), Judgment, 19 December 2005, ICJ Report 2005*, para. 173.

[30] ICTY, *Prosecutor v. Mladen Naletilic, aka "Tuta"*, para. 172.

regime of occupation. Even a patrol which penetrates into enemy territory without any intention of staying there must respect the Conventions in its dealings with the civilians it meets."[31] While this stage does not of course entail a full application of the law of occupation under Geneva Convention IV, the mere fact that some degree of authority is exercised on the civilian population triggers the relevant conventional provisions of the law of occupation on the treatment of persons. In a further stage, the full application of the law on occupation comes into play, when a stronger degree of control is exercised. This is reflected in a number of military manuals which require it to be established that "a party to a conflict is in a position to exercise the level of authority over enemy territory necessary to enable it to discharge *all* the obligations imposed by the law of occupation."[32] The new United Kingdom military manual calls for a twofold test: "[f]irst, that the former government has been rendered incapable of publicly exercising its authority in that area; and, secondly, that the occupying power is in a position to substitute its own authority for that of the former government."[33]

The determination must be made on a case-by-case basis. This is particularly relevant when considering the present issue of whether, during the conflict in Georgia, territories were occupied by the Russian Federation and, if so, which territories, taking into account the facts and the period of time. Georgia claims that a number of different areas were occupied by Russia both during and after the conflict. For the purpose of determining the existence of a state of occupation for each of those places, it is worth briefly listing them as presented by Georgia, as the conclusion may differ depending on the territory concerned and the time.

First, in its Request for the indication of provisional measures of protection submitted to the ICJ on 12 August 2008 Georgia asserted that the territories of South Ossetia and Abkhazia, including the upper Kodori Valley, were occupied by Russian forces.[34] On 23 October, the Parliament of Georgia adopted a law declaring Abkhazia and South Ossetia "occupied territories" and the Russian Federation a "military occupier."[35] This claim was reiterated in

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[31] Commentary on the Geneva Conventions of 12 August 1949, Jean Pictet (ed.), Geneva, p. 60.

[32] Daniel Thürer, ICRC statement, "Current challenges to the law of occupation," November 2005, available at http://www.icrc.org/web/eng/siteeng0.nsf/html/occupation-statement-211105

[33] *The Manual of the Law of Armed Conflict*, United Kingdom Ministry of Defence, Oxford, Oxford University Press, 2004, para. 11.3, p. 275.

[34] AMENDED REQUEST FOR THE INDICATION OF PROVISIONAL MEASURES OF PROTECTION SUBMITTED BY THE GOVERNMENT OF GEORGIA, Request to the International Court of Justice, p. 5, para. 13.

[35] See the "Law on Occupied Territories of Georgia," adopted on 23 October 2008. Clause 2 of this law reads as follows:
"For the purpose of this Law "the occupied territories and territorial waters" (hereinafter "The Occupied Territories") shall mean:

Georgia's application to the ECHR against Russia on 6 February 2009.[36] In describing the "current occupation" Georgia also stated: "the western part of the former 'buffer zone' (the village of Perevi in the Sachkhere District) remains under Russian occupation."[37] In addition to those territories that are still occupied by Russian forces at the time of writing this report, according to Georgia the following territories were occupied in the aftermath of the conflict: "In Eastern Georgia South of the conflict zone Russian forces occupied most parts of the Gori District, including the City of Gori; South-west of the conflict zone Russian forces occupied part of the Kareli District; West of the conflict zone Russian forces occupied part of the Sachkhere District; in Western Georgia they occupied the cities of Zugdidi, Senaki and Poti. Following the Russian withdrawal from the City of Gori on 22 August 2008, Russian forces still occupied the northern part of the Gori District right up to the southern administrative boundary of South Ossetia. This territory constituted part of the 'buffer zone' that was created by Russian Forces around the territory of South Ossetia and absorbed territories that used to be under the control of the Georgian central Government. Russian forces withdrew from this buffer zone, except in upper Kodori Valley, the Akhalgori district and the village of Perevi (in the Sachkhere District), on 8 October 2008."[38] More generally, Georgia alleged the

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a) Territory of the Autonomous Republic of Abkhazia;
b) Tskhinvali region (territory of the former Autonomous Republic of South Ossetia);
c) Waters in the Black Sea: territorial inland waters and sea waters of Georgia, their floor and resources, located in the aquatic territory of the Black Sea, along the state border with the Russian Federation, to the South of the Psou River, up to the administrative border at the estuary of the Engury River, to which the sovereign right of Georgia is extended; also the sea zones: the neighbouring zone, the special economic zone and the continental trail where, in compliance with the legislation of Georgia and international law, namely the UN Convention on Maritime Law (1982), Georgia has fiscal, sanitary, emigration and customs rights in the neighbouring zone and the sovereign right and jurisdiction in the special economic zone and the continental trail;
d) The air space over the territories stipulated in Paragraphs (a), (b) and (c) of this Clause."
The Law is available at: http://www.venice.coe.int/docs/2009/CDL(2009)004-e.asp

[36] Georgia, APPLICATION UNDER ARTICLE 33 OF THE EUROPEAN CONVENTION ON HUMAN RIGHTS AND RULES 46 AND 51 OF THE RULES OF COURT, *op. cit.*, p. 8.

[37] *Idem*. More generally, Georgia asserted: "after the ceasefire on 12 August 2008, the situation is properly understood as one of occupation, which, along with the human rights law, is also governed within IHL by the provisions pertaining to international armed conflicts. This is because objective evidence illustrates comprehensively that significant portions of Georgia remain occupied by forces of the Russian Federation and / or separatist forces acting as *de facto* organs of the Russian Federation" (p. 47).

[38] *Ibid*., pp. 8-9. For Zugdidi as an occupied territory, see also REQUEST FOR THE INDICATION OF PROVISIONAL MEASURES OF PROTECTION SUBMITTED BY THE GOVERNMENT OF THE REPUBLIC OF GEORGIA, para. 13, p. 7.

occupation of the territories adjacent to Abkhazia and South Ossetia.[39] It should be noted that Georgia referred to "occupation" and "effective control" by the Russian forces.[40]

The Russian Federation, on the contrary, holds that it does not at present, nor will it in the future, exercise effective control over South Ossetia or Abkhazia; and that it was not an occupying power.[41] It noted recently that "despite having crossed into the territory of Georgia in the course of the conflict, Russia was not an occupying power in terms of IHL." It further explained that "the presence of an armed force in the territory of another state is not always construed as occupation," relying on the ICJ ruling in the case between the Democratic Republic of Congo and Uganda and on the judgment of the ICTY in *Prosecutor* v. *Naletilic and Martinovic*.[42] According to the Russian Federation, "the determining factor in international law necessary to recognise a military presence as an occupation regime is whether the invading state has established effective control over the territory of the country in question and its population."[43] In its replies to the questionnaire submitted by the IIFFMCG, it presented a threefold argument to reject such control. First, "the Russian Armed Forces never replaced the lawful governments of Georgia or South Ossetia."[44] Second, "no regulatory acts

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[39] AMENDED REQUEST FOR THE INDICATION OF PROVISIONAL MEASURES OF PROTECTION SUBMITTED BY THE GOVERNMENT OF GEORGIA, Request to the ICJ, *op. cit.*, p. 5, para 13.

[40] Case concerning the Application of the International Convention on the Elimination of All Forms of Racial Discrimination (*Georgia* v. *Russian Federation*), Request for the indication of provisional measures, International Court of Justice, ICJ, 15 October 2008, para 33, p. 10.

[41] *Ibid*., p. 19, para. 74.

[42] Russia, Responses to Questions Posited by the IIFFMCG (Legal Aspects), *op. cit.*, p. 7: "Pursuant to Article 42 IV of the Hague Convention governing the laws and customs of land warfare, the crucial factor in qualifying military presence as occupation is whether the invading state has established effective control over the territory of the country in question and its civilian population. Criteria of such effective control have been determined, for example, in a case tried by the International War Crimes Tribunal in former Yugoslavia, *Prosecutor* v. *Naletilich and Martinovich* as well as another case tried by the International Court, *Congo* v. *Uganda*. The International War Crimes Tribunal deduced five main criteria of effective control in the aforementioned case. The two key criteria were as follows: the occupying power must establish temporary administration to govern the territory and issue within the bounds of this territory instructions deemed mandatory for the local population.
"Similarly to the War Crimes Tribunal, the International Court also addressed the issue of occupation in the case dealing with the military action taken by Uganda against Congo.
"If we follow the court's logic, the fact that the criteria pursuant to which the occupying force must establish a local administration is not met, and no regulatory acts have been issued by the occupying power, may serve as sufficient grounds to maintain that no occupation regime took place. It was exactly the approach taken by the International Court in the case *Congo* v. *Uganda* – the court recognised that a Ugandan occupation regime existed only in two areas of Congo, basing their opinion on the premise that the military of Uganda began to issue regulatory acts in these areas that were mandatory for the local population, and in so doing replaced the lawful government of Congo. In other areas of Congo the court recognised only Ugandan military presence."

[43] *Ibid*., p. 7.

[44] *Idem*, and p. 11. "The Russian Federation is not an occupying power and does not exercise effective control over the territory and/or population of South Ossetia. Maintaining law and order in South Ossetia and Abkhazia is an exclusive right vested with the governments of these countries" (p. 12). See also: *Public sitting held on Monday 8 September 2008, at 3 p.m., at the Peace Palace, Verbatim Record, in the case concerning*

mandatory for the local populations have been adopted by them."[45] Finally, "the number of Russian troops stationed in South Ossetia and Abkhazia (3,700 and 3,750 servicemen respectively) does not allow Russia in practice to establish effective control over these territories which total 12 500 sq. kilometers in size. To draw a parallel: effective control over a much smaller territory of Northern Cyprus 3 400 sq. kilometers) requires the presence of 30,000 Turkish troops. During the active phase of the military conflict the maximum size of the Russian contingent in South Ossetia and Abkhazia reached 12,000 personnel. However, all of these forces were engaged in a military operation and not in establishing effective control." It concluded that "based on the foregoing, there are no sufficient grounds for maintaining that the Russian side exercised effective control over the territory of South Ossetia or Georgia during the Georgian-South Ossetian conflict or that an occupation regime was established in the sense contemplated in IHL."[46]

As highlighted earlier, under IHL, the factual criteria or requirements for determining that control or authority has been established are not spelt out in the Hague Regulation or in Geneva Convention IV. The decisions of international courts have outlined some elements that can be used in clarifying this determination. In the ICTY case *Prosecutor* v. *Naletilic and Martinovic* quoted by Russia, the Trial Chamber refers to five "guidelines [to] provide some assistance," rather than criteria "to determine whether the authority of the occupying power has been actually established."[47] The following guidelines were listed by the ICTY based on some military manuals: "the occupying power must be in a position to substitute its own authority for that of the occupied authorities, which must have been rendered incapable of

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Application of the International Convention on the Elimination of All Forms of Racial Discrimination (*Georgia* v. *Russian Federation*), CR 2008/23, International Court of Justice, The Hague, 2008, para 14, p. 13: "Russian armed forces were present and are now present on the territories of Abkhazia and South Ossetia. However, this presence was not and is not occupation, as Georgia claims. Russian military forces and, therefore, Russia itself, did not and do not control either the territory of Abkhazia and South Ossetia, or the authorities or armed units of Abkhazia and South Ossetia. Russia has not exercised jurisdiction with respect to the territory or population of Abkhazia and South Ossetia. This allegation is absurd. This is no less true now, given that Abkhazia and South Ossetia are independent States, as recognized by Russia." The Russian Federation also stated: "First and foremost, Russia is *not* an occupying power in South Ossetia and Abkhazia. Both regions had an internationally recognized autonomous status and have enjoyed *de facto* independence already for a quite significant time. In particular, Russia has never - to paraphrase the text you applied in the *Congo* v. *Uganda* case (*Armed Activities on the Territory of the Congo (Democratic Republic of the Congo* v. *Uganda), Judgment,ICJ. Reports 2005*, para. 173) - Russia, let me repeat, Russia has never assumed the role of the existing authorities, that is the Abkhaz and South Ossetian authorities, recognized as such by Georgia itself. Besides, the Russian presence, apart from its participation in limited peace-keeping operations, has been restricted in time and stretches only for a few weeks" (p. 44, para 16). "Furthermore, local authorities have always retained their independence and continue to do so" (p. 44, para. 17).

[45] Russia, Responses to Questions Posited by the IIFFMCG (Legal Aspects), *op. cit.*, p. 7

[46] *Idem*.

[47] ICTY, *Prosecutor v. Naletilic and Martinovic*, para. 217.

functioning publicly; the enemy's forces have surrendered, been defeated or withdrawn; the occupying power has a sufficient force present, or the capacity to send troops within a reasonable time, to make the authority of the occupying power felt; a temporary administration has been established over the territory; the occupying power has issued and enforced directions to the civilian population."[48]

However, the reading of this case by the Russian Federation should be nuanced. Indeed after having explained the notion of control, the Trial Chamber quotes the Commentary on Geneva Convention IV "mak[ing] clear that the application of the law of occupation to the civilian population differs from its application under Article 42 of the Hague Regulations."[49] It goes on to state that: "the Chamber accepts this to mean that the application of the law of occupation as it affects 'individuals' as civilians protected under Geneva Convention IV does not require that the occupying power have actual authority. For the purposes of those individuals' rights, a state of occupation exists upon their falling into 'the hands of the occupying power.' Otherwise civilians would be left, during an intermediate period, with less protection than that attached to them once occupation is established".[50]

When assessing the factual situation in the light of the aforementioned remarks, one aspect must first be clarified. It has been asserted, to reject the argument of an occupation, that the presence of the Russian military forces was limited to certain strategic points and did not cover the whole territory in question.[51] Article 2 of Geneva Convention IV contemplates cases of both partial and total occupation of a territory. As confirmed by the ICTY, under IHL "there is no requirement that an entire territory be occupied, provided that the isolated areas in

[48] *Idem*.

[49] *Ibid*., para. 219.

[50] *Ibid*., paras 221-222. It is also worth noting that in the case Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v. Uganda) the ICJ stressed that "in the present case the Court will need to satisfy itself that the Ugandan armed forces in the DRC were not only stationed in particular locations but also that they had substituted their own authority for that of the Congolese Government" (para. 173). While the establishment of a local administration in certain parts of the territory, and the adoption of regulatory acts, were sufficient for the court to ascertain occupation (para. 175), this does not mean that those two elements become prerequisites for a state of occupation to be ascertained. The lack of such elements was decisive in the case before the court in the absence of any other evidence. Going beyond that interpretation would lead to turning elements of proof of an occupation into conditions for considering a territory to be occupied.

[51] Public sitting held on Monday 8 September 2008, at 3 p.m., at the Peace Palace, Verbatim Record, in the case concerning Application of the International Convention on the Elimination of All Forms of Racial Discrimination (Georgia v. Russian Federation), CR 2008/23, *op. cit.*, para 17, p. 44.

which the authority of the occupied power is still functioning 'are effectively cut off from the rest of the occupied territory".[52]

If, as asserted in the chapter of this report on the use of force, Russia's military intervention cannot be justified under international law, and if neither Abkhazia nor South Ossetia is a recognised independent state, IHL – and in particular the rules concerning the protection of the civilian population (mainly Geneva Convention IV) and occupation – was and may still be applicable. This applies to all the areas where Russian military actions had an impact on protected persons and goods. However, the extent of the control and authority exercised by Russian forces may differ from one geographical area to another. It was possibly looser in the territories of South Ossetia and Abkhazia administered by the *de facto* authorities. In the Kodori Valley, and in districts and villages in South Ossetia such as Akhalgori,[53] where before the conflict the Georgian forces and administration had exercised control, the substitution is more evident. In those cases, such as the buffer zones, the argument of an existing administrative authority different from the Georgian one cannot be admissible, nor can the argument according to which "Russia has frequently dissociated itself from, and even condemned, the Ossetian and Abkhaz authorities."[54] Regarding the insufficient number of troops invoked by the Russian Federation,[55] this must be linked to the fact that the determination is not about ascertaining the occupation of the whole territory of Georgia. Moreover, in the *Armed Activities on the Territory of the Congo (Democratic Republic of the Congo* v. *Uganda)* case, the arguments used by Uganda of a "small number of its troops in the territory" and their confinement to "designated strategic locations"[56] were not used by the Court to reject the qualification of occupation. Finally, given the fact that a state of occupation may exist without armed resistance, the question of the number of troops cannot in itself be legally relevant.

The main rules of the law applicable in a case of occupation state *inter alia* that the occupying power must take measures to restore and ensure, as far as possible, public order and safety;

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[52] ICTY, Prosecutor v. Naletilic and Martinovich, op. cit., para. 218.

[53] For a list see Georgia, APPLICATION UNDER ARTICLE 33 OF THE EUROPEAN CONVENTION ON HUMAN RIGHTS AND RULES 46 AND 51 OF THE RULES OF COURT, *op. cit.*, p. 7.

[54] Public sitting held on Monday 8 September 2008, at 3 p.m., at the Peace Palace, Verbatim Record, in the case concerning Application of the International Convention on the Elimination of All Forms of Racial Discrimination (*Georgia* v. *Russian Federation*), CR 2008/23, *op. cit.*, para. 17, p. 44.

[55] Russia, Responses to Questions Posited by the IIFFMCG (Legal Aspects), *op. cit.*, p. 8.

[56] *Armed Activities on the Territory of the Congo (Democratic Republic of the Congo* v. *Uganda)*, *op. cit.*, para. 170.

the taking of hostages is prohibited; reprisals against protected persons or their property are prohibited and the destruction or seizure of enemy property is prohibited, unless absolutely required by military necessity during the conduct of hostilities.

As outlined by the ICJ, such application does not preclude the applicability of human rights law. If this is explained by the general principle of the continued applicability of human rights in times of war, it is also closely linked to another issue under human rights law: the control or exercise of jurisdiction, which is critical for recognising the extra-territorial application of human rights law. In this regard, a number of cases where human rights law was deemed applicable to forces abroad were cases of occupation.

The significance of ascertaining who is, actually, on the ground, exercising authority is exemplified by one assertion put forward by the Russian Federation. Stressing the difference between "measures taken during the hostilities to protect the civilian population from threats posed by these hostilities and those taken outside the scope of hostilities to protect the civilian population from looting, pillaging, abuse, etc.," the Russian Federation first dismissed the application of the law of occupation under IHL. Secondly, it noted, however, that while "South Ossetia had and still has its own government and local authorities that exercise effective control in this country, maintain the rule of law and protect human rights, (...) the Russian military contingent called upon to carry out purely military tasks in the territory of South Ossetia, to the best of their abilities tried to maintain law and order and prevent any offences in the areas of their deployment including Georgia proper, where due to the flight of Georgian government authorities an apparent vacuum of police presence ensued."[57] It is therefore necessary to clarify the application of human rights law in the present context.

B. International Human Rights Law

First, human rights law (HRL) is relevant given the preliminary remarks on the time frame and scope of the report, which go beyond the time of the conflict itself and require an examination of acts committed in peacetime. Secondly, it is now well established that HRL continues to apply in time of armed conflict.[58] In this regard, the current case pending before the ICJ between Georgia and the Russian Federation, concerning the application of the International Convention on the Elimination of All Forms of Racial Discrimination in this

[57] Russia, Responses to Questions Posited by the IIFFMCG (Legal Aspects), *op. cit.*, pp. 7-8.

[58] See for example, *Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion, I.C.J. Reports 1996*, para. 25; *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion, ICJ Reports 2004*, para. 106.

context, has given rise to extensive discussion between the parties on three intertwined issues to do with the applicability of human rights law: in time of war, in cases of occupation and extraterritorially.

The obligations of states under human rights treaties include not only the obligation to refrain from interfering with the exercise and enjoyment of those rights, but also the positive obligation to take measures to protect their enjoyment. As stressed by the Human Rights Committee, the legal obligation under Article 2(1) of the ICCPR "to respect and to ensure to all individuals within its territory and subject to its jurisdiction the rights recognized in the present Covenant is both negative and positive in nature."[59]

While it has been argued that only states could be bound by these obligations, it is now recognised that non-state actors too have obligations under human rights law. The joint report on Lebanon and Israel by a group of four UN special rapporteurs stressed that "although a non-State actor cannot become a party to these human rights treaties, it remains subject to the demand of the international community, first expressed in the Universal Declaration of Human Rights, that every organ of society respect and promote human rights."[60] This is particularly significant in cases where a non-state actor exercises effective control over a territory.[61]

a) Applicable treaty law

Georgia and the Russian Federation are parties to the main universal human rights treaties, notably the International Covenant on Civil and Political Rights (ICCPR), the International Covenant on Economic, Social and Cultural Rights, the Convention Against Torture, the International Convention on the Elimination of All Forms of Racial Discrimination and the Convention on the Prevention and Punishment of the Crime of Genocide.

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[59] General Comment No. 31 [80], Nature of the General Legal Obligation Imposed on States Parties to the Covenant, CCPR/C/21/Rev.1/Add.13. (General Comments), 26 May 2004, paras 6-7.

[60] Report of the Special Rapporteur on extrajudicial, summary or arbitrary executions, Philip Alston; the Special Rapporteur on the right of everyone to the enjoyment of the highest attainable standard of physical and mental health, Paul Hunt; the Representative of the Secretary-General on the human rights of internally displaced persons, Walter Kälin; and the Special Rapporteur on adequate housing as a component of the right to an adequate standard of living, Miloon Kothari, UN Doc. A/HRC/2/7, 2 October 2006, para. 19, quoted by Andrew Clapham, "Human rights obligations of non-state actors in conflict situations," International Review of the Red Cross, No. 863, 2006. For a review of the practice in this regard, see Clapham, pp. 503.

[61] See for example the Report of the Special Rapporteur on extrajudicial, summary or arbitrary executions, Philip Alston; the Special Rapporteur on the right of everyone to the enjoyment of the highest attainable standard of physical and mental health, Paul Hunt; the Representative of the Secretary-General on the human rights of internally displaced persons, Walter Kälin; and the Special Rapporteur on adequate housing as a component of the right to an adequate standard of living, Miloon Kothari, UN Doc. A/HRC/2/7, para. 19.

In addition to universal human rights treaties, they are both parties to regional instruments that impose obligations on them: notably the European Convention for the Protection of Human Rights and Fundamental Freedoms (EConvHR), the Framework Convention for the Protection of National Minorities, and the human dimension commitments of the Organisation for Security and Co-operation in Europe (OSCE).

b) Extraterritorial application

The territorial scope of the application of human rights treaties is a key question to be answered, given that the Russian Federation operated outside the borders of its territory in the context of the conflict in Georgia. The second question – that of derogation from human rights treaties in times of emergency – should then be addressed.

Under Article 2(1) of ICCPR, "[e]ach State Party to the present Covenant undertakes to respect and to ensure to all individuals within its territory and subject to its jurisdiction" the rights recognised in that convention. Article 1 of the EConvHR uses more general wording by stating that "the High Contracting Parties shall secure to everyone within their jurisdiction the rights and freedoms defined in Section I of this Convention." These two provisions have been interpreted as meaning that the application is not limited to the state's territory *per se* but also extends to places under its effective control. The UN Human Rights Committee noted that "a State Party must respect and ensure the rights laid down in the Covenant to anyone within the power or effective control of that State Party, even if not situated within the territory of the State Party."[62] The European Court of Human Rights already relied on the criteria of effective control for determining the application of the EConvHR: "Bearing in mind the object and purpose of the Convention, the responsibility of a Contracting Party may also arise when, as a consequence of military action, whether lawful or unlawful, it exercises effective control of an area outside its national territory."[63] This extraterritorial application of the human rights treaties where a state exercises jurisdiction outside its territory was also confirmed by the ICJ.[64]

The question of what types of situation constitute effective control also arises, as it does for the determination of an occupied territory. They comprise prolonged occupations as well as

[62] General Comment No. 31 [80], Nature of the General Legal Obligation Imposed on States Parties to the Covenant, op. cit., para. 10.

[63] European Court of Human Rights, *Loizidou* v. *Turkey*, Application No. 15318/89 (18 December 1996), para. 62.

[64] Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion, ICJ Reports 2004, paras 111-113.

situations that lasted only a short period of time.[65] In this regard, the European Court of Human Rights, ruling in the case of *Ilascu* v. *Moldova and the Russian Federation*, provides an interesting guideline for the definition of effective control: "the military and political support" of Russia, "military, economic, financial and political support given by the Russian Federation" and "the participation of its military personnel in the fighting."[66]

While it appears that in the *Ilascu* case there was not a situation of occupation,[67] this did not prevent the Court from recognising that Russia was exercising effective control over the Moldovan Republic of Transnistria and that consequently persons on this territory came within its jurisdiction.[68] Both states – Georgia[69] and Russia[70] – referred to this case but presented a different reading. It should be stressed that the issue of whether the Russian Federation exercises effective control over certain parts of Georgia is currently pending before the European Court of Human Rights. In this regard Georgia argues, in the light of the findings in the *Ilascu* case, and the support given by the Russian Federation to Abkhazia and South Ossetia, that Russia does exercise the control required for the EConvHR to apply.[71] Reaching a definite conclusion on this question would be a delicate matter. By justifying the possible infringement of specific rights as a result of the actions of the Russian forces, the

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[65] See examples in Rule of Law in Armed Conflict project, RULAC, Paper, *Interaction between international humanitarian law and human rights in armed conflicts*, available at: http://www.adh-geneva.ch/RULAC/interaction_between_humanitarian_law_and_human_rights_in_armed_conflicts.php

[66] *Ilascu and Others* v. *Moldova and the Russian Federation*, App. No. 48787/99, judgment of 8 July 2004, paras 382 and 392.

[67] This is asserted by Georgia in its application: Georgia, APPLICATION UNDER ARTICLE 33 OF THE EUROPEAN CONVENTION ON HUMAN RIGHTS AND RULES 46 AND 51 OF THE RULES OF COURT, *op. cit.*, para. 149.

[68] *Ilascu and Others* v. *Moldova and the Russian Federation*, App. No. 48787/99, judgment of 8 July 2004, para. 392.

[69] Public sitting held on Monday 8 September 2008, at 10 p.m., at the Peace Palace, Verbatim Record, in the case concerning the Application of the International Convention on the Elimination of All Forms of Racial Discrimination (*Georgia* v. *Russian Federation*), CR 2008/22, International Court of Justice, The Hague, 2008, para 35. See also Georgia, APPLICATION UNDER ARTICLE 33 OF THE EUROPEAN CONVENTION ON HUMAN RIGHTS AND RULES 46 AND 51 OF THE RULES OF COURT, *op. cit.*, paras 149-152, and Public sitting held on Monday 8 September 2008, at 10 p.m., at the Peace Palace, Verbatim Record, in the case concerning Application of the International Convention on the Elimination of All Forms of Racial Discrimination (*Georgia* v. *Russian Federation*), CR 2008/25, International Court of Justice, The Hague, 2008, para 40, p. 20. The advocate for Georgia stated: "If Russian control was found to exist over the region called the "Moldavian Republic of Transnistra" without military occupation, can there be any doubt about Russian control over Abkhazia and South Ossetia *with* military occupation?"

[70] Public sitting held on Monday 8 September 2008, at 10 p.m., at the Peace Palace, Verbatim Record, in the case concerning Application of the International Convention on the Elimination of All Forms of Racial Discrimination (*Georgia* v. *Russian Federation*), CR 2008/27, International Court of Justice, The Hague, 2008, paras 13 ff.

[71] Georgia, APPLICATION UNDER ARTICLE 33 OF THE EUROPEAN CONVENTION ON HUMAN RIGHTS AND RULES 46 AND 51 OF THE RULES OF COURT, *op. cit.*, paras 155-159.

Russian Federation indirectly recognises that such rights were relevant in the context of its operation abroad.[72] This raises the question of derogations from human rights norms.

c) Derogations

International human rights treaties contain provisions that allow States parties to derogate temporarily from their obligations under those treaties. Article 4(1) of ICCPR lays down the conditions for such a derogation to be lawful.[73] As specified by the UN Human Rights Committee in its General Comment, "measures derogating from the provisions of the Covenant must be of an exceptional and temporary nature" and two fundamental conditions must be met for a State to invoke this derogation: first, there must be a situation that amounts to a public emergency that threatens the life of the nation, and secondly, the state of emergency must be proclaimed officially and in accordance with the constitutional and legal provisions that govern such a proclamation and the exercise of emergency powers.[74] This treaty body further notes that "even during an armed conflict measures derogating from the Covenant are allowed only if and to the extent that the situation constitutes a threat to the life of the nation."[75] Article 15(1) of EConvHR also envisages derogations under certain conditions and makes an explicit reference to a situation of war.[76]

Article 4 of the ICCPR explicitly lays down the provisions which are non-derogable and which must therefore be respected at all times. These include the right to life; the prohibition of torture and cruel, inhuman or degrading punishment; the prohibition of slavery, the slave trade and servitude; and freedom of thought, conscience and religion. Furthermore, measures derogating from the Covenant must not involve discrimination on the grounds of race, colour, sex, language, religion or social origin. The Human Rights Committee also spelt out the other "elements" of the Covenant that cannot be lawfully derogated from under Article 4, such as

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[72] Russia, Responses to Questions Posited by the IIFFMCG (Legal Aspects), *op. cit.*, p. 11.

[73] This article prescribes that "in time of a public emergency which threatens the life of the nation and the existence of which is officially proclaimed, the States Parties to the present Covenant may take measures derogating from their obligations under the present Covenant to the extent strictly required by the exigencies of the situation, provided that such measures are not inconsistent with their other obligations under international law and do not involve discrimination solely on the ground of race, colour, sex, language, religion or social origin."

[74] Human Rights Committee, *General Comment No. 29 (Art. 4)*, Doc. ONU CCPR/C/21/Rev.1/Add.11, 31 August 2001, para. 2.

[75] *Ibid*., para. 3.

[76] This paragraph reads as follows: "In time of war or other public emergency threatening the life of the nation any High Contracting Party may take measures derogating from its obligations under this Convention to the extent strictly required by the exigencies of the situation, provided that such measures are not inconsistent with its other obligations under international law."

the right of all persons deprived of their liberty to be treated with humanity and with respect for the inherent dignity of the human person; the prohibition against the taking of hostages, abduction and unacknowledged detention; certain elements of the rights of minorities to protection; the prohibition on deportation or the forcible transfer of population groups; and the prohibition against propaganda for war and against the advocacy of national, racial or religious hatred that would constitute incitement to discrimination, hostility or violence.[77]

The Russian Federation, while not explicitly referring to a case of derogation, has made the following statement: "If in selected cases the actions of Russian military personnel may be deemed as an infringement of specific human rights (for instance, restricting the freedom of movement), these actions were taken to protect the lives and health of the civilian population, maintain public safety, prevent and preclude any unlawful actions and protect citizens regardless of their nationality and/or ethnic background."[78]

As noted by the Commissioner for Human Rights of the Council of Europe,[79] according to Article 15(3) of the EConvHR, any High Contracting Party availing itself of this right of derogation must keep the Secretary-General of the Council of Europe fully informed of the measures it has taken and the reasons for them. On 10 August 2008, Georgia did inform the Secretary-General of the Council of Europe that, on 9 August 2008, the President of Georgia had invoked his right under Articles 73(1)(f) and 46(1) of the Constitution and declared state of war in the whole territory for fifteen days. The President's decision had been approved by the Georgian Parliament. In the same *note verbale* informing the Secretary-General of the state of war, it was specifically pointed out that no derogation had been made for any rights under the EConvHR. Subsequently, on 3 September 2008 the Permanent Representative of Georgia to the Council of Europe informed the Committee of Ministers that a state of emergency would replace martial law in the country, beginning on 4 September 2008. In this instance, Georgia made no statement concerning possible derogations.

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[77] *Ibid*., para. 13.

[78] Russia, Responses to Questions Posited by the IIFFMCG (Legal Aspects), *op. cit.*, p. 11.

[79] Thomas Hammarberg, Commissioner for Human Rights of the Council of Europe, HUMAN RIGHTS IN AREAS AFFECTED BY THE SOUTH OSSETIA CONFLICT, *Special Mission to Georgia and the Russian Federation*, 22-29 August 2008, CommDH(2008)22, 8 September 2008, para. 12.

d) Relationship with IHL

The main issue is the type of relationship between these two bodies of norms; the question is therefore not whether but rather how human rights law interacts with IHL.[80] Although this question goes far beyond the scope of the work of the IIFFMCG, it nevertheless bears important consequences for the applicable legal framework. The ICJ, when discussing the continued application of the right to life in time of war, stressed that the arbitrary character of the deprivation of a life should be assessed against the standards of IHL and not those of human rights. In this case, IHL acts as a *lex specialis* vis-à-vis human rights law.[81]

While this does not resolve practical issues of application, it does shed some light on the various scenarios one may encounter. Bearing in mind this relevance of human rights law in the context of the armed conflict, it is now necessary to outline briefly the relevant standards applicable to the protection of IDPs.

C. Legal Framework for IDPs

While the armed conflict between Russia and Georgia resulted in persons who could potentially be qualified as refugees crossing the border into Russia, the main issue concerns IDPs, whether those still displaced following the armed conflict in Abkhazia and South Ossetia in the 1990s or IDPs forced to leave because of the hostilities in 2008 and their aftermath. There appear to be conflicting views regarding the qualification of certain displaced persons in the context of the 2008 conflict in Georgia. Contention arises about the qualification of those who fled, as a result of the conflict, from Abkhazia and South Ossetia to the Georgian controlled territory: the authorities in South Ossetia and Abkhazia used the term "refugees,"[82], which implies the crossing of an international border, whereas the Georgian authorities qualify those persons as IDPs. Given that at the time of the conflict there was no

[80] LUBELL, N., "Challenges in applying human rights law to armed conflict," *International Review of the Red Cross*, No. 860, 2005, p. 738.

[81] In a more systematic way, the ICJ further elaborated the various types of relationship between these two bodies of law: "As regards the relationship between international humanitarian law and human rights law, […] some rights may be exclusively matters of international humanitarian law; others may be exclusively matters of human rights law; yet others may be matters of both these branches of international law. In order to answer the question put to it, the Court will have to take into consideration both these branches of international law, namely human rights law and, as lex specialis, international humanitarian law." *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, op. cit.*, para. 106. The ICJ confirmed this approach in the *Armed Activities on the Territory of the Congo (Democratic Republic of the Congo* v. *Uganda) case, op. cit.*, para. 119.

[82] This term was used for example in the context of meetings with the IIFFMCG.

internationally recognised border[83] separating South Ossetia or Abkhazia from the rest of Georgia proper, persons displaced between these two territories should be classified as IDPs in the same way as the ethnic Georgians living in the regions adjacent to the administrative border with South Ossetia who had to leave for Gori and Tbilisi.

Although IDPs are not protected through the legal regime of refugee law, they benefit of course from the legal protection of HRL and, in time of armed conflict, of IHL. In addition to substantive rules protecting them as human beings, these branches of law also contain norms concerning displacement itself and the right to return. In order to address the specific needs of persons forcibly displaced from their homes in their own countries by violent conflicts, gross violations of human rights and natural and human-made disasters, the United Nations Guiding Principles on Internal Displacement have been drafted.[84] While, unlike treaties, these principles are not binding, they are consistent with existing international law, some of them restating or deriving from existing legal obligations,[85] and they set standards in relation to IDPs. They constitute a normative framework for the internally displaced. In this regard, OSCE participating States, including Georgia and Russia, have recognised these principles as a "useful framework for the work of the OSCE and the endeavours of participating States in dealing with internal displacement."[86]

Having outlined the main elements of the applicable international law, it is now necessary to ascertain the facts, as described by the parties and in the light of the other documentary sources, in order to clarify the allegations of violations.

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[83] On this criterion see *Guiding Principles on Internal Displacement Annotations*, Walter Kälin, The American Society of International Law, The Brookings Institution – University of Bern Project on Internal Displacement, Studies in Transnational Legal Policy, No. 38, The American Society of International Law, Washington, DC, 2008, p. 2, available at: http://www.asil.org/pdfs/stlp.pdf

[84] For the purpose of these Guidelines, IDPs are "persons or groups of persons who have been forced or obliged to flee or to leave their homes or places of habitual residence, in particular as a result of or in order to avoid the effects of armed conflict, situations of generalized violence, violations of human rights or natural or human-made disasters, and who have not crossed an internationally recognized border." See *Guiding Principles on Internal Displacement*, Report of the Representative of the Secretary-General, Mr Francis M. Deng, submitted pursuant to Commission resolution 1997/39E/CN.4/1998/53/Add.2, Addendum, E/CN.4/1998/53/Add.2, 11 February 1998, COMMISSION ON HUMAN RIGHTS.

[85] See *Guiding Principles on Internal Displacement Annotations*, Walter Kälin, The American Society of International Law, The Brookings Institution – University of Bern Project on Internal Displacement, Studies in Transnational Legal Policy. No. 38, The American Society of International Law, Washington, DC, 2008, available at: http://www.asil.org/pdfs/stlp.pdf

[86] OSCE, 2 December 2003, Ministerial Council Maastricht, DECISION No. 4/03 on Tolerance and Non-discrimination, para. 13.

III. Main facts and related legal assessment

Particular attention must be paid to the numbers of casualties. First of all, most of the casualties were reported in the context of the hostilities in South Ossetia and in adjacent areas. Secondly, the discrepancies between the first reports of the number of civilians killed and wounded during the hostilities in South Ossetia, as announced by Russia and South Ossetia, and the latest figures provided by the parties, are striking.[87] This was singled out as an "issue" in the 2009 report by Human Rights Watch.[88] The circumstances in which people were killed do matter. For this reason, some lists of people killed, not specifying whether they were participating in the hostilities,[89] should be considered carefully.

Under IHL, the exact figure of casualties is not relevant in itself and does not entail legal implications. What matters is rather the nature of the victims and the circumstances in which such casualties occurred. Furthermore, the Mission does not have the capacity to make a definitive estimate in this regard. The number of casualties given by different sources varies, mostly depending on who is considered.[90] However, all parties to the conflict have a responsibility to establish reliable figures. This is particularly crucial as, at the time of writing this report, some people have still been left with conflicting reports about the death of their relatives and no information about the location of their bodies.

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[87] AI, Civilians in the Line of Fire – The Georgia-Russia Conflict, op. cit., p. 10.

[88] HRW, Up In Flames – Humanitarian Law Violations and Civilian Victims in the Conflict over South Ossetia, op. cit., p. 74. See also AI, Civilians in the Line of Fire – The Georgia-Russia Conflict, op. cit., p. 10.

[89] See for example, Deceased victims list, Public Investigation Commission in South Ossetia, available at: www.osetinfo.ru

[90] For example the Russian Federation in its replies to the questionnaire sent by the IIFFMCG stated that 162 civilian residents – nationals of South Ossetia – had died and 255 had suffered injuries of various degrees; 48 servicemen from the Russian Federation Armed Forces were killed including 10 who served in the Mixed Peacekeeping Forces Battalion, and 162 servicemen sustained various degrees of injuries [Russia, Responses to Questions Posited by the IIFFMCG (Humanitarian Aspects)], p. 2). The August 2009 Report by the Government of Georgia entitled "The aggression by the Russian Federation against Georgia" gives the following figures for "[w]ar casualties among civilian, military and media personnel": 412 persons died. "These have included 228 civilians; 170 military; 14 policemen. Meanwhile, 10 military and 14 policemen remain missing. One foreign and two Georgian journalists have died and four journalists have been wounded in the exercise of their professional functions, 1 747 citizens of Georgia have been wounded; among them 973 military, 547 civilians, and 227 policemen." Report by the Government of Georgia on the aggression by the Russian Federation against Georgia, August 2009, p. 40. Following his visit to the region, Luc Van den Brande, the chairperson of the Ad Hoc Committee established by PACE to study the situation in Russia and Georgia, stated on 29 September 2008 that "independent reports put the total number of deaths at between 300 and 400, including the military." See PACE, Ad Hoc Committee of the Bureau of the Assembly, "The situation on the ground in Russia and Georgia in the context of the war between those countries," Memorandum by Luc Van den Brande, chairperson of the Ad Hoc Committee of the Bureau of the Assembly, Doc. 11720, Addendum II, September 29, 2008.

As mentioned earlier, the primary task of the IIFFMCG is to establish facts. At the same time, it has also been commissioned to assess allegations of violations. The chronology and sequencing of facts as presented below are not to be construed as establishing any type of causal links between them.

A. Conduct of hostilities

IHL governs the conduct of hostilities by parties to a conflict through a set of general principles and more specific rules. The fundamental tenets of this body of norms consist of the immunity of the civilian population and its corollary, the principle of distinction, and the general principle that the right of the parties to the conflict to choose methods or means of warfare is not unlimited.

While the conventional rules of IHL on the conduct of hostilities were applicable mainly to international armed conflicts, the recent decisions of the international criminal tribunals, as well as the consolidation of the customary nature of IHL rules,[91] demonstrate the exponential development of the applicable customary law in non-international armed conflicts.[92]

IHL requires that the parties to a conflict distinguish at all times between combatants and civilians, as well as between military objectives and civilian objects, and that they direct their operations only against combatants and military objectives.[93] Civilians lose their immunity from attack when and only for such time as they are directly participating in hostilities.[94] In this regard, and as far as objects are concerned, IHL defines military objectives as objects which by their nature, location, purpose or use make an effective contribution to military action and whose partial or total destruction, capture or neutralisation, in the circumstances ruling at the time, offers a definite military advantage. Civilian objects are all objects that are not military objectives. Civilian objects, such as homes and schools, are protected against attack, unless and for such time as they are used for military purposes.

In application of this principle of distinction, IHL further prohibits indiscriminate attacks defined in three categories: those (a) which are not directed at a specific military objective; (b)

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[91] In the key study published by the ICRC in 2005 it appears that out of 161 customary rules identified, 159 are also applicable to non-international armed conflicts.

[92] On the convergence between the two regimes, see MOIR, L., *The Law of Internal Armed Conflict*, Cambridge, Cambridge University Press, 2002, p. 306.

[93] As to who qualifies as a "combatant", see Articles 4(A)(1)-(3) and (6) Geneva Conventions (GC) III and Articles 43-44 of the Additional Protocol I. "Civilians" are all those who do not qualify as combatants thus defined, cf. Article 50 of the Additional Protocol I.

[94] See for example Article 52(3) of the Additional Protocol I.

which employ a method or means of combat which cannot be directed at a specific military objective; or (c) which employ a method or means of combat the effects of which cannot be limited as required by international humanitarian law; and consequently which, in each such case, are of a nature to strike both military objectives and civilians or civilian objects without distinction.

Among the cases of indiscriminate attack are those attacks by bombardment by any method or means which treats as a single military objective a number of clearly separated and distinct military objectives located in a city, town, village or other area containing a similar concentration of civilians or civilian objects. Such attacks are prohibited.

Even when an attack is directed at a clear military objective, IHL also prohibits such an attack as being indiscriminate if it is expected to cause incidental loss of civilian life, injury to civilians, damage to civilian objects, or a combination thereof, which would be excessive in relation to the concrete and direct military advantage anticipated.

In addition to the obligations to direct attacks only against combatants and military objectives, and to respect the principle of proportionality in attack, the parties to the conflict must also take a series of precautions at the time of planning, ordering or leading an attack. These precautions in attack, codified in Article 57 of Protocol I, are grounded in the principle that military operations must be conducted with in constant vigilance in order to spare the civilian population, civilian persons and civilian objects. All possible practical precautions must be taken in order to avoid and, in any event, to reduce to a minimum human casualties in the civilian population, injuries to civilian persons and incidental damage to civilian objects. These precautions include doing everything feasible to verify that the objects of attack are military objectives and not civilians or civilian objects, and giving “effective advance warning” of attacks when circumstances permit.

Finally, IHL on the conduct of hostilities also contains principles and rules on weapons.

Accounts of destruction and casualties do not *per se* constitute sufficient elements to conclude that violations of IHL have occurred: the circumstances of the attacks are to be assessed.

While the hostilities broke out in South Ossetia on the night of 7/8 August 2009, artillery shelling had been reported by various sources during the previous days. As this shelling is one

of the main justifications invoked by Georgia for intervening in South Ossetia,[95] those events have particular significance.[96]

A large number of allegations of violations from all sides relate to the conduct of Georgian, South Ossetian and Russian forces in Tskhinvali and the surrounding villages, as well as in the adjacent zones and in Gori, both during the conflict and after. There are particular issues depending on the party concerned.

As the hostilities took place partly in an urban setting, notably Tskhinvali and Gori and the surrounding villages, an assessment of the facts relating to the conduct of hostilities is complicated. While IHL does not prohibit fighting in urban areas, the presence of many civilians places greater obligations on the warring parties to take steps to minimise the harm to civilians. Forces deployed in populated areas must avoid locating military objectives near densely populated areas, and endeavour to remove civilians from the vicinity of military objectives.[97]

Addressing questions such as the types of objective that have been targeted, the circumstances at the time of the attack and the exact cause of damage has proved to be very delicate. For example, many administrative buildings were attacked, as well as schools and apartment buildings. In the case of these objectives, a key fact to establish would be whether or not Ossetian combatants were present in the buildings at the time they were attacked. According to Human Rights Watch, witnesses and members of South Ossetian militias themsleves "made it clear that South Ossetian forces set up defensive positions or headquarters in civilian infrastructure."[98] There are also cases where the presence of such combatants was not substantiated.

Although it appears very difficult to reach definite factual and legal conclusions on each and every specific attack, a number of facts do seem to emerge from testimonies collected on the ground by NGOs and from the comparison between the military objectives and the types of weapons used.

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[95] Mamuka Kurashvili, commander of Georgian peacekeepers in the region stated that Georgia had "decided to restore constitutional order in the entire region," quoted by AI, *Civilians in the Line of Fire – The Georgia-Russia Conflict, op. cit.*, p. 9.

[96] See Chapter 5 "Military Events of 2008".

[97] Art. 58 Additional Protocol I.

[98] HRW, *Up In Flames – Humanitarian Law Violations and Civilian Victims in the Conflict over South Ossetia, op. cit.*, p. 50.

First, a review of the specific controversial targets attacked in the course of the conflict is necessary. However, as objects may have been damaged, or persons affected, without their having been the actual targets attacked, this section will also address the collateral loss of civilians and damage to civilian objects. Secondly, a more general assessment of the conduct of the parties to the conflict under IHL will then be necessary. While most of the allegations of war crimes concern South Ossetia, a few relate to the Kodori Valley and will also be examined.

a) Targets attacked

According to Russia, "In the course of the entire military operation units of the Russian Federation Armed Forces, acting exclusively with a view to repelling an armed attack, used tanks, APCs and small arms to fire upon clearly identified targets only, which enabled them to minimise civilian losses."[99]

Georgia stated that "Georgian forces attacked a) predetermined military targets, including a Russian military convoy moving south and b) targets identified during the hostilities."[100] It provided details only about the former type of targets.

In the light of these two statements, and given the damage caused to civilian buildings, facts concerning targets need to be carefully established. For example the Human Rights Assessment Mission of the OSCE observed, within Tskhinvali, "... damage to mostly civilian buildings, as well as to the base of the Russian peacekeepers deployed under the 1992 Sochi Agreement," including "apartment blocks and civilian neighbourhoods, schools, a home for the elderly, and a psychiatric hospital, all of which were visited by the mission, were among the civilian objects badly damaged by military forces."[101]

A distinction on the conduct of hostilities derived from IHL, the distinction between persons and objects, will be used to structure the analysis of the targets attacked.

(i) Alleged Attacks on Peacekeepers

Alleged attacks on peacekeepers occurred both prior to the conflict, fuelling the tension between the parties, and during it. Given the status of those persons and the particular

[99] Russia, Responses to Questions Posited by the IIFFMCG (Humanitarian Aspects), *op. cit.*, pp. 8-9.

[100] Georgia, Responses to Questions Posited by the IIFFMCG (Humanitarian Aspects, question 3), provided to the IIFFMCG on 5 June 2009, p. 1.

[101] *United Nations Inter-agency Humanitarian Assessment Mission to South Ossetia, op. cit.*, para. 5.9.

attention paid to those attacks in the allegations by Georgia and the Russian Federation, it is crucial to clarify what the facts are and to assess their potential legal implications.

Under IHL, the protection afforded to peacekeepers is closely linked to the general protection of civilians. As stated in the ICRC Customary Law Study, customary IHL prohibits "directing an attack against personnel and objects involved in a peacekeeping mission in accordance with the Charter of the United Nations, as long as they are entitled to the protection given to civilians and civilian objects under international humanitarian law."[102] The use of force for strictly self-defence purposes or for the defence, within their peacekeeping mandate, of civilians or civilian objects would not be qualified as participation in hostilities. In this context they could not be regarded as a lawful target as they are not pursuing any military action. It is important to stress that, in both international and non-international armed conflict, the Rome Statute of the ICC regards it as a war crime intentionally to direct attacks against peacekeepers and related installations "as long as they are entitled to the protection given to civilians or civilian objects under the international law of armed conflict."[103]

During the conflict, according to Russian peacekeepers, posts manned by Russian and/or Ossetian forces were attacked by Georgian forces.[104] The Russian Federation claims that the peacekeepers were deliberately killed. It argues that Georgia committed "violations of international norms governing the conduct of war, resulting primarily in casualties among the peacekeeping personnel."[105] When meeting with the IIFFMCG's experts in Moscow in July 2009, the representatives of the Investigative Committee of the General Prosecutor's Office of Russia indicated that 10 Russian peacekeepers had been killed.[106]

According to Amnesty International, "on 31 July, reports indicate that South Ossetian forces attacked and blew up a Georgian military vehicle carrying Georgian peacekeepers."[107]

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[102] Rule 33, in J-M. HENCKAERTS, L. DOSWALD-BECK (eds), *Customary International Humanitarian Law*, Volume I, *op. cit.*, p. 112.

[103] See Article 8(2)(b)(iii) and (e)(iii), which read as follows: "Intentionally directing attacks against personnel, installations, material, units or vehicles involved in a humanitarian assistance or peacekeeping mission in accordance with the Charter of the United Nations, as long as they are entitled to the protection given to civilians or civilian objects under the international law of armed conflict."

[104] See short chronology provided by the Russian Federation.

[105] Russia, Responses to Questions Posited by the IIFFMCG (Humanitarian Aspects), *op. cit.*, p. 2.

[106] Meeting with the representatives of the Investigative Committee of the General Prosecutor's Office of Russia, Moscow, 29 July 2009.

[107] AI, *Civilians in the Line of Fire – The Georgia-Russia Conflict, op. cit.*, p. 8.

Georgia also claimed that Georgian peacekeepers were attacked by South Ossetian irregular armed groups in the evening of the 7 August.[108]

According to HRW, the organisation's researchers "witnessed the extensive damage caused to the peacekeepers' posts by Georgian attacks" in Tskhinvali and near the village of Khetagurovo.[109] Amnesty International refers to information from the Russian authorities reporting that 10 Russian peacekeepers were killed and a further 30 injured in the course of the attack on two bases located in Verkhny Gorodok in Tskhinvali and another attack north of Tskhinvali.[110]

Georgia has claimed that on 7 August "at 22:30, the armed formations of the proxy regime guided by Russian peacekeepers fired at the Georgian-controlled villages of Prisi and Tamarsheni, from Tskhinvali and the mountain of Tliakana."[111] This action, if confirmed, could be seen as direct participation in hostilities. More generally, Georgian forces allege that South Ossetian forces were firing from the peacekeepers' posts that were attacked during the conflict or providing South Ossetia militiamen with the coordinates of Georgian positions, thereby turning the posts into lawful military objectives.[112]

HRW further noted that it was unable to corroborate any of the serious allegations of attacks on or by peacekeepers from Russia and Georgia.[113]

Nor was the IIFFMCG able to corroborate such claims, or the claim that Georgian forces had attacked Russian peacekeepers' bases, with information from sources other than the sides. Even if these claims were to be confirmed, the lack of more precise information would make the establishment of relevant facts and their legal assessment problematic, as the Mission would find itself with two contradictory assertions. When considering direct attacks against peacekeepers, the conclusion depends on whether or not, at the time of the attacks, the peacekeepers and peacekeeping installations had lost their protection. On the other hand,

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[108] See: Georgia, Replies to Question 3 of the Questionnaire on humanitarian issues, provided to the IIFFMCG on 5 June 2009, p. 2.

[109] HRW, *Up In Flames – Humanitarian Law Violations and Civilian Victims in the Conflict over South Ossetia*, *op. cit.*, p. 33.

[110] *Ibid*., p. 26.

[111] See: Georgia, Replies to Question 3 of the Questionnaire on humanitarian issues, provided to the IIFFMCG on 5 June 2009, p. 2.

[112] See Georgia, Replies to the Questionnaire on Military Issues, provided to the IIFFMCG.

[113] HRW, *Up In Flames – Humanitarian Law Violations and Civilian Victims in the Conflict over South Ossetia*, *op. cit.*, p. 33.

peacekeepers may have been killed or injured as a result of an indiscriminate attack, not specifically directed against them.[114]

The Mission was unable to establish whether, at the time of the alleged attacks on Russian peacekeepers' bases, the peacekeepers had lost their protection owing to their participation in the hostilities. The Mission is consequently unable to reach a definite legal conclusion on these facts.

(ii) Objects

1. Administrative buildings

In March 2009 the IIFFMCG was shown by the *de facto* South Ossetian authorities several administrative buildings, such as those of the Parliament and the *de facto* Ministry of Foreign Affairs, which they alleged had been hit by Georgian forces.[115] It witnessed the damage caused by these attacks. The HRAM also observed "first-hand the destruction caused to many civilian public buildings in Tskhinvali, including the university, a library, the 'parliament building' and other 'governmental offices' in the same complex. A police station and the 'presidential' administration were also damaged."[116] Human Rights Watch also referred to administrative buildings hit by the Georgian artillery, such as the Ossetian parliament building.[117]

The IIFFMCG would like to stress that, as for other types of targets, while it is extremely important to establish the amount of the damage and destruction, ascertaining the circumstances and purpose of a given attack also remains crucial. In this regard, as outlined by Human Rights Watch, the Georgian authorities later claimed that their military had targeted mostly administrative buildings in these areas because these buildings were harbouring Ossetian militias.[118] Similarly, in his testimony to the parliamentary commission

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[114] See Chapter 5 "Military Events of 2008".

[115] Under IHL, only those objects may be lawfully targeted which by their nature, location, purpose or use make an effective contribution to military action and whose partial or total destruction, capture or neutralisation, in the circumstances ruling at the time, offers a definite military advantage. In this regard, attacks on administrative buildings during the August 2008 conflict raise some questions as to whether such buildings can be lawfully targeted.

[116] OSCE, *Human Rights in the War-Affected Areas following the Conflict in Georgia*, *op. cit.*, p. 41.

[117] HRW, *Up In Flames – Humanitarian Law Violations and Civilian Victims in the Conflict over South Ossetia*, *op. cit.*, p. 50.

[118] *Ibid*., p. 41, quoting Zaza Gogava, Chief of the Staff of the Georgian Armed Forces, Stenographic Record of the Session of the Parliamentary ad hoc Commission on Military Aggression and Acts of Russia against the Territorial Integrity of Georgia, Session of October 28, 2008, http://www.parliament.ge/index.php?lang_id=ENG&sec_id=1329&info_id=21212

studying the August war, Zaza Gogava, Chief of Staff of the Georgian Armed Forces, said that "Georgian forces used precision targeting ground weapons only against several administrative buildings, where headquarters of militias were located; these strikes did not cause any destruction of civilian houses."[119] Although this has yet to be clearly established, such an argument would necessarily have legal implications under IHL.

Under certain conditions, the military use of a particular civilian object may turn this object into a military objective that can be lawfully targeted. On the other hand the attacker still needs to ensure the protection of the civilian population, for example by assessing whether the attack will not be disproportionate and by taking appropriate precautions. These elements will be discussed later from a broader perspective.

The Mission was unable to assess each specific attack on administrative and public buildings in Tskhinvali but notes that, although not in themselves lawful military objectives, such buildings may be turned into a legitimate target if used by combatants. This would, however, not relieve the attacker of certain obligations under IHL (e.g. precautions, proportionality).

2. Schools

Under IHL, schools are by nature civilian objects that are immune from attack. Several cases of damage caused to schools in the course of the hostilities call for specific attention.

Referring to the shelling of Tskhinvali by Georgian forces, Human Rights Watch noted that "the shells hit and often caused significant damage to multiple civilian objects, including the university, several schools and nursery schools, stores, and numerous apartment buildings and private houses, (...) some of these buildings were used as defence positions or other posts by South Ossetian forces (including volunteer militias), which rendered them legitimate military targets."[120] For example, witnesses told Human Rights Watch that militias had taken up positions in School No. 12 in the southern part of Tskhinvali, which was seriously damaged by Georgian fire.[121]

The attack on School No. 7 in Gori on 9 August also exemplifies the need to pay particular attention to the circumstances of an attack. According to Human Rights Watch, relying on one

[119] HRW, Up In Flames – Humanitarian Law Violations and Civilian Victims in the Conflict over South Ossetia, *op. cit.*, p. 50.

[120] *Ibid.*, p. 41.

[121] *Ibid.*, p. 50.

eyewitness: "Russian aircraft made several strikes on and near School No. 7 in Gori city. (…) [A]bout one hundred Georgian military reservists were in the yard of the school when it was attacked. (..) None of the reservists was injured. The reservists as combatants were a legitimate target, and it is possible that the school was deemed as being used for military purposes. In such circumstances, it would lose its status as a protected civilian object. In the attack, one strike hit an apartment building next to the school, killing at least five civilians and wounding at least 18, and another hit a second building adjacent to the school causing damage, but no civilian casualties. There were civilians also taking shelter in the school."[122] In this regard, following the overview of specific objects that were attacked or hit, in this section an assessment will later be undertaken to determine whether the principle of proportionality was respected and whether precautions had been taken to minimise the death of civilians and damage to civilian buildings.

The Mission has no information indicating that schools not used for military purposes were deliberately attacked.

3. Hospitals

Under IHL hospitals, apart from the protection they benefit from as civilian objects, enjoy special protective status.[123]

Damage caused to hospitals in the course of a conflict does not in itself amount to a direct attack against such an object. While it may be so if the hospitals have lost their protection because they have been "used to commit, outside their humanitarian duties, acts harmful to the enemy," damage can also be collateral, caused by an attack on a legitimate military target.

According to Human Rights Watch, one of the civilian objects hit by GRAD rockets in Tskhinvali when the Georgian forces attacked was the South Ossetian Central Republican Hospital (Tskhinvali hospital), the only medical facility in the city that was assisting the

[122] *Ibid*., p. 94.

[123] Article 19 of Geneva Convention IV holds that: "The protection to which civilian hospitals are entitled shall not cease unless they are used to commit, outside their humanitarian duties, acts harmful to the enemy. Protection may, however, cease only after due warning has been given, naming, in all appropriate cases, a reasonable time limit, and after such warning has remained unheeded. The fact that sick or wounded members of the armed forces are nursed in these hospitals, or the presence of small arms and ammunition taken from such combatants and not yet handed to the proper service, shall not be considered to be acts harmful to the enemy," Articles 12 and 13 of Protocol I and Article 11 of Protocol II are also relevant.

wounded, both civilians and combatants, in the first days of the fighting.[124] According to this organisation, the rocket severely damaged treatment rooms on the second and third floors.[125]

Testimonies gathered by Human Rights Watch refer to heavy bombing and shelling of Kekhvi, an ethnic Georgian village north of Kurta in South Ossetia, between 7 and 9 August.[126] One of the residents stated that "on 9 August massive bombing started and the village administration and hospital buildings were destroyed."[127]

Human Rights Watch also documented the attack at around 2 a.m. on 13 August by a Russian military helicopter, which fired a rocket towards a group of hospital staff members who were on a break in the hospital yard. The rocket killed Giorgi Abramishvili, an emergency-room physician. Human Rights Watch reported that its researchers saw that the roof of the hospital building was clearly marked with a red cross.[128] This attack contradicts the claim by the Russian Federation that its forces fired "upon clearly identified targets only" during the conflict and that "all kill fire was monitored."[129]

While the damage caused to hospitals by GRAD rockets or artillery shelling resulted from the use of inaccurate means of warfare, the helicopter fire at the hospital in Gori seems to indicate a deliberate targeting of this protected object. This may amount to a war crime.

4. Vehicles

Under IHL, civilian vehicles are immune from attack owing to their civilian character. In the context of the August 2008 conflict, two circumstances may explain the damage caused to civilian vehicles and may have legal implications for whether such damage could amount to a violation of IHL: either a legitimate military target was in the vicinity of the vehicle when it was damaged, or armed militia fighters were in the vehicle when it was attacked. In this latter case, a militia fighter is a legitimate military target if he or she participates directly in hostilities. This is significant as in the course of the conflict many persons reported that South Ossetian militia fighters stole cars and used them for different purposes.[130] For example, in

[124] HRW, Up In Flames – Humanitarian Law Violations and Civilian Victims in the Conflict over South Ossetia, *op. cit.*, p. 42.

[125] *Idem*.

[126] *Ibid.*, p. 91.

[127] *Idem*.

[128] *Ibid.*, p. 95.

[129] Russia, Responses to Questions Posited by the IIFFMCG (Humanitarian Aspects), *op. cit.*, p. 8.

[130] See, inter alia, customary Rules 7-10, in J-M. HENCKAERTS, L. DOSWALD-BECK (eds), Customary International Humanitarian Law, Volume I, *op. cit.*, pp. 25-36.

June 2009 the IIFFMCG expert interviewed two inhabitants of Koshka who had witnessed South Ossetian military men stealing cars. A total of 14 vehicles were taken.

Testimonies collected by Human Rights Watch refer to attacks by Georgian forces on civilians fleeing the conflict zone, mainly on the Dzara road. The Georgian authorities stated in a letter to this organisation that their forces "fired on armor and other military equipment travelling from the Roki Tunnel along the Dzara Road, not at civilian vehicles."[131] A witness told Human Rights Watch that Ossetian forces had an artillery storage facility and firing position on a hill about one kilometre from the Dzara road. While both Russian forces and Ossetian military equipment constitute legitimate targets, accounts of vehicles being hit by Georgian weaponry raise questions about either the civilian nature of those vehicles or inaccurate targeting or collateral damage or deliberate attacks. According to the Georgian government, the movement of civilian transport vehicles was stopped during the combat. From information it collected, however, Human Rights Watch has suggested that "many cars were driven by South Ossetian militiamen who were trying to get their families, neighbours and friends out of the conflict zone."[132]

In its 2009 Report, Human Rights Watch stressed that it was not able to verify independently the claim that cluster bombs were used by Georgian forces in their attacks on the Dzara road, as recounted by one witness. It concluded that such allegations needed to be further investigated.[133]

There are also cases of aerial attacks on civilian convoys fleeing South Ossetia near Eredvi, more than likely carried out by Russian forces according to Human Rights Watch which interviewed residents who had fled. As stressed by this organisation, there appeared to be no Ossetian or Russian military positions in that area that would have been targeted by the Georgian army.[134]

An attack reported in interviews to Human Rights Watch took place on a taxi on 12 August in Tedotsminda, with two persons killed when Russian forces fired on the vehicle.[135] Another

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[131] HRW, Up In Flames – Humanitarian Law Violations and Civilian Victims in the Conflict over South Ossetia, *op. cit.*, p. 56.

[132] *Idem*.

[133] *Idem*.

[134] *Ibid*., pp. 115-116.

[135] *Ibid*., p. 117.

testimony gathered by an NGO recounts another similar incident on the main road heading north from this town to the crossroads near Sakasheti.[136]

The Mission was unable to reach a definite conclusion as to whether the attacks on vehicles by Georgian forces were contrary to IHL. Only deliberate Georgian attacks on civilian vehicles would amount to a war crime.
Similarly, circumstances surrounding the attacks on civilian convoys fleeing the area of conflict, possibly by Russian planes, are difficult to ascertain. If confirmed, such attacks would amount to a war crime.

5. Houses and residential buildings

By their nature, houses and residential buildings are civilian objects that, under IHL, cannot be attacked unless they are used for military purposes.

It is necessary to stress that although hostilities occurred in the Kodori Valley, few houses were damaged. The extent of the destruction gave rise to conflicting accounts.

During an interview with an elderly woman from Ajara conducted by one of the Mission's experts on 7 March 2009,[137] the respondent indicated that she had stayed on with her husband and sister after her family had left the village, and was evacuated by the ICRC in October 2008. She stressed that she had seen lots of houses being bombed in Ajara. The HRAM also reported information that a number of residents of the Kodori Valley lost homes and property as a result of the conflict: a villager from Chkhalta told the HRAM that his house and some of his neighbours' houses were damaged in the bombing. A woman from Sakheni reported that her house was damaged by bombs, as did a man from Gentsvishi. Another man's house was damaged when a bomb dropped in his yard, 20 metres from his house. In Ajara a woman

[136] A woman from Pkhvenisi was trying to go back to her village with her husband and a neighbour. She told the NGO staff:
"So we left from Igoeti after midnight on 12th, my husband, our neighbour and I, in order to go back. We went first to Gori, and then through Variani, heading home. No cars on the road in the dark.
"Then we came to the turn of the road by Sakasheti. We made a stop there, Something fell down in the front of the car, by my husband. There was an explosion. I remember my husband saying, I can't feel my legs.
"When I woke up, I was outside the car, in the shade of a tree. I saw my husband a few meters away from me, moaning. I tried to reach him but couldn't, as I could not use my legs. I later learned I had a bullet wound in my right leg, above the ankle which went through without touching the bone. A Georgian hostage with the Russian soldiers afterwards told me that our car had been fired upon first, and forced to stop.
"After 40 days my family told me that my husband was dead. I later learned that his body stayed behind the tree for four days before the representatives of the Georgian patriarchy took the body and buried it in Tbilisi.
"There were similar incidents in Khviti and Shindisi. Two women were killed in an attack on the car they were sitting in in Shindisi."
Interview by the NGO on 23 October 2008. The incident referred to in Shindisi has been identified as the one HRW documented with regard to the taxi.

[137] Interview conducted on 7 March 2009, with a Georgian interpreter, in Tbilisi.

reported that four or five houses were destroyed by bombs. On 9 August, "the Abkhaz *de facto* Deputy Ministry of Defence declared that aerial strikes were carried out on the military infrastructure in the upper Kodori Valley".[138] During a meeting with the IIFFMCG in March 2009, the *de facto* Deputy Minister for Defence stressed that only one civilian house had been destroyed and that there had been no major fighting in the valley, with only four soldiers wounded. According to the Georgian authorities, "in addition to South Ossetia, Russian forces have opened a second front in Abkhazia, attacking and destroying Georgian villages in the Kodori Gorge (...)."[139] The Abkhaz government in exile, however, indicated to the IIFFMCG that to their knowledge only three houses had been destroyed.[140] The IIFFMCG experts who travelled to the Kodori Valley on 30 May 2009 did not witness damage to houses.

Most of the damage to houses and residential buildings occurred in the context of the conflict in South Ossetia and along the Tskhinvali/Gori axis. The August 2008 conflict involved hostilities in cities and villages. Besides villages in the "buffer zones" and those located in South Ossetia, the two main cities affected by the hostilities were Tskhinvali and Gori.[141]

The Georgian authorities stated that "the Georgian military command minimised the list of targets for artillery and ground troops in the city of Tskhinvali and in the vicinity of populated villages. The list of predetermined targets included only places of heavy concentration of the

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[138] Report of the Secretary-General on the situation in Abkhazia, Georgia, 3 October 2008, S/2008/631, p. 8, para. 45. See also: Meeting with the Abkhaz *de facto* Minister for Defence, 4 March 2009, Sukhumi.

[139] REQUEST FOR THE INDICATION OF PROVISIONAL MEASURES OF PROTECTION SUBMITTED BY THE GOVERNMENT OF THE REPUBLIC OF GEORGIA, 13 August 2008, p. 6 para. 12. See also: Public sitting held on Monday 8 September 2008, at 10 a.m., at the Peace Palace, Verbatim Record, in the case concerning Application of the International Convention on the Elimination of All Forms of Racial Discrimination (Georgia v. Russian Federation), CR 2008/22, International Court of Justice, The Hague, 2008, p. 41, para. 9. Georgia also stated that "Beginning on August 8 at 09:45, Russian aviation bombed a series of civilian and military targets across Georgia, outside the zone of conflict in South Ossetia, damaging infrastructure and causing significant civilian casualties. These targets include but are not limited to: Kodori Gorge, Abkhazia region." See "Timeline of Russian Aggression in Georgia; Ethnic Cleansing of Georgians Resulting from Russian Invasion and Occupation since August 8, 2008; and Violations of IHL and IHRL in course of an International Armed Conflict: torture, inhuman and degrading treatment, hostage taking," document submitted by the Government of Georgia in 2009, pp. 10-11.

[140] Meeting on 4 June 2009.

[141] According to Human Rights Watch:
"In Tskhinvali, the most affected areas were the city's south, southeast, southwest, and central parts. Georgian authorities later claimed that their military was targeting mostly administrative buildings in these areas. The shells hit and often caused significant damage to multiple civilian objects, including the university, several schools and nursery schools, stores, and numerous apartment buildings and private houses. Such objects are presumed to be civilian objects and as such are protected from targeting under international law; but as described below, at least some of these buildings were used as defense positions or other posts by South Ossetian forces (including volunteer militias), which rendered them legitimate military targets," HRW, *Up In Flames – Humanitarian Law Violations and Civilian Victims in the Conflict over South Ossetia, op. cit.*, p. 41.

enemy's manpower and assets."[142] While this may be true with regard to the "list of predetermined targets" mentioned earlier, it does not rule out the possibility that the "targets identified during the hostilities" may have included houses and homes used by the South Ossetian forces.

The HRAM "confirmed first-hand that seven houses in the village of Nogkau were totally or partially destroyed by bombs and tank fire and that homes in the mostly ethnic Ossetian village of Khetagurovo were damaged by small-arms and artillery fire."[143] As stressed above, this damage is in itself not sufficient to constitute a violation of IHL.

It is worth noting that, in the case of Khetagurovo, Human Rights Watch "was able to establish that the positions of Ossetian militias were in close proximity to the civilian homes hit by the Georgian artillery," as claimed by the Georgian forces that said they came under heavy fire from Khetagurovo.[144]

Similarly, "another witness, a 50-year-old kindergarten teacher who showed Human Rights Watch the fragments of GRAD rockets that hit her kindergarten building on Isak Kharebov Street, also said that volunteer militias had been 'hiding' in the building". Several members of the Ossetian militia interviewed by Human Rights Watch confirmed that many school and nursery-school buildings were used as gathering points and defence positions by the militias.[145]

During the ground offensive, extensive damage was caused by Georgian tanks and infantry-fighting vehicles firing into the basements of buildings.[146]

In no way, however, does this mean that the presence of South Ossetian combatants in houses or residential buildings would release the attacker from his obligations under the principle of proportionality, or from the obligation to take precautionary measures as required by IHL.

The attacks by Russian forces in South Ossetia and deeper on the territory of Georgia proper involved aerial, artillery and tank strikes and caused civilian casualties and damage to houses and apartments. According to Human Rights Watch, "villagers from Tamarasheni (in South

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[142] Georgia, Responses to Questions Posited by the IIFFMCG (Humanitarian Aspects, Question 3), provided to the IIFFMCG on 5 June 2009, p. 1

[143] OSCE, *Human Rights in the War-Affected Areas following the Conflict in Georgia*, *op. cit.*, p. 41.

[144] HRW, *Up In Flames – Humanitarian Law Violations and Civilian Victims in the Conflict over South Ossetia*, *op. cit.*, p. 51.

[145] *Idem*.

[146] *Ibid*., p. 58.

Ossetia) described how Russian tanks fired on villagers' homes" and "witnesses told Human Rights Watch that there were no Georgian military personnel in their houses at the time that the tank fire took place."[147] This will be analysed in detail as part of our general assessment of allegations of indiscriminate attacks and failure to take precautionary measures.

While damage to civilian houses and buildings caused by Georgian and Russian forces does not in itself constitute a violation of IHL, the damage caused by artillery, aerial and tank attacks raises serious concern, especially with regard to the principle of proportionality and the obligation to take precautions as required by IHL.

6. Cultural objects, monuments, museums and churches

The basic principle is to be found in Article 4 of the 1954 Convention for the Protection of Cultural Property in the Event of Armed Conflict, applicable in both international and non-international armed conflict. It states that, as long as cultural property is civilian, under IHL it may not be the object of attack. Customary law provides that "Each party to the conflict must respect cultural property: a) Special care must be taken in military operations to avoid damage to buildings dedicated to religion, art, science, education or charitable purposes and historic monuments unless they are military objectives; b) Property of great importance to the cultural heritage of every people must not be the object of attack unless imperatively required by military necessity."[148]

Reports on the conflict in Georgia contain very few allegations of damage caused to cultural monuments, museums or churches. While not systematically put forward, such claims as have been made come from both Georgia and the Russian Federation. According to the latter, "a random examination of historic and cultural monuments conducted on 15-18 August 2008 showed that a number of unique objects had been lost as a result of large-scale heavy-artillery shelling of South Ossetian communities by the Georgian forces. Furthermore, instances of vandalism and the deliberate destruction of cultural monuments and ethnic Ossetian burial sites were attributed to the Georgian military as well."[149] Noting that the information provided is subject to verification, Georgia gives the following description of damage to cultural monuments, churches and museums "based on reports from the local population and museum staff, and data compiled by the Ministry of Culture, Monument Protection and Sport of Georgia." Georgia asserts that "a number of monuments have been damaged by bombings,

[147] *Ibid*., p. 114.

[148] Rule 38, in J-M. HENCKAERTS, L. DOSWALD-BECK (eds), *Customary International Humanitarian Law*, Volume I, *op. cit.*, p. 127.

[149] Russia, Responses to Questions Posited by the IIFFMCG (Humanitarian Aspects), *op. cit.*, p. 3.

shelling, looting and arson carried out by Russian forces and Ossetian militias operating in their wake." It stressed that "a precise survey of the damage is not yet available [as] the expert group mandated by the government cannot gain access to the zones controlled by Russian forces." It also indicates that the list[150] is provisional and that the high density of monuments in the Shida Kartli region makes it likely that many more churches or monuments have been damaged as well.[151]

There seems to be uncertainty as to the exact damage to cultural monuments caused as a result of the conflict. According to the Human Rights Assessment Mission of the OSCE, an NGO reported that the destruction in Disevi included cultural monuments dating from the14th century and earlier.[152] During an interview conducted by an NGO and made available to the IIFFMCG, a villager from Dvani, a village on the administrative border, declared that "the church was hit, and some houses were destroyed (...). It was artillery fire. The Russians should have known there were no military targets there."[153] There are no further details about the circumstances of the attack.

The most significant damage confirmed concerns the Bishop's Palace in Nikozi (10th/11th centuries). This is included in the list provided by Georgia of monuments that were allegedly damaged. It is described by the Georgian authorities as "one of the most important examples from the late medieval period, [and it] was heavily damaged following aerial bombardment on

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[150] Georgia gave the following list:
"Archangel church (19th century): The newly restored church in the village of Kheiti was damaged following shelling on 12th of August.
"Ikorta church (12th century): One of the most interesting examples of Georgian Christian architecture and home to three Georgian heroes' graves. The church was damaged following shelling on the 9th and 10th of August.
"Ivane Machabeli museum: The museum in the village of Tamarasheni just north of Tskhinvali was heavily bombed and destroyed.
"Giorgi Machabeli Palace (18th century): The Palace in the village of Kurta, situated between Tskhinvali and Djava, was leveled by bulldozer following its looting on 13-14th of August.
"Bishop's Palace in Nikozi (10th/11th centuries): This recently restored palace, one of the most important examples from the late medieval period, was heavily damaged following aerial bombardment on 9th August and a subsequent fire.
"Wooden Church of St George in Sveri (19th century): The church, one of the few surviving examples of sacred wooden architecture, was burned to the ground.
"Kemerti St George Church (9th-10th centuries): The church was bombed on 10th of August.
"Ksani Gorge Museum Reserve (Eristavi Palace) in Akhalgori district: Currently occupied by South Ossetia militias; looting is feared."
See: Document submitted by Georgia, "Russian Invasion of Georgia – Facts & Figures," 8 September 2008, p. 14.

[151] Document submitted by Georgia, "Russian Invasion of Georgia – Facts & Figures," 8 September 2008, p. 30.

[152] OSCE, *Human Rights in the War-Affected Areas following the Conflict in Georgia*, *op. cit.*, p. 52.

[153] Interviews conducted by an NGO on 11 September 2008, which does not want to be quoted.

9th August and a subsequent fire."[154] This is confirmed by the Council of Europe Assessment Mission on the Situation of the Cultural Heritage in the Conflict Zone in Georgia. This mission visited Georgia in October 2008 and assessed the damage inflicted on the cultural heritage and, by extension, buildings, in the August 2008 conflict zone in Georgia, and more specifically in the former so-called "buffer zone" to the north of Gori. The Technical Assessment Report refers to "the 10th-century Bishop's Palace which, together with a group of domestic buildings to the south, was badly damaged by bomb blast." It further indicates that "the religious community members were in the buildings at the time of the blast."[155] There is a need to collect further information on the circumstances of the attack.

Generally, more information is needed in order to assess both the extent of the damage and the facts relating to the circumstances of the military operations. This is critical as the special protection given to cultural property ceases only in cases of imperative military necessity.

b) Indiscriminate attacks including disproportionate attacks

Some of the most serious allegations by all sides in the August 2008 conflict relate to indiscriminate attacks and the deliberate targeting of civilians. The Russian Federation argues that Georgia committed "violations of international norms governing the conduct of war, resulting in dramatic humanitarian consequences and, primarily, casualties, among the civilian population, and the destruction of residential quarters and civilian facilities."[156] Georgia claims that: "Throughout the armed conflict, the Russian Federation, in conjunction with proxy militants under their control, conducted indiscriminate and disproportionate attacks."[157] Allegations in this regard focus *inter alia* on the use of certain types of weapons having indiscriminate effects. Russia reported the "large-scale and indiscriminate use of heavy weapons and military equipment by the Georgian side against the civilian population of Ossetia on the night of 7 to 8 August"[158] including the "shelling of residential areas and

[154] Document submitted by Georgia, "Russian Invasion of Georgia – Facts & Figures," 8 September 2008, p. 30.

[155] Council of Europe, Directorate-General IV: education, culture and heritage, youth and sport, *Assessment Mission on the situation of the cultural heritage in the conflict zone in Georgia*, Technical Assessment Report, Report prepared by: Mr David Johnson, 20 October 2008, Reference: AT(2008)386, p. 9. See also: *Council of Europe Post-Conflict Immediate Actions for the Social and Economic Revitalisation of Communities and Cultural Environment in the Municipality of Gori (Georgia)*, General Reference Document, Directorate-General IV: education, culture and heritage, youth and sport, 18 February 2009, Reference: AT(2008)450rev, p. 11.

[156] Russia, Responses to Questions Posited by the IIFFMCG (Humanitarian Aspects), *op. cit.*, p. 1.

[157] See: Georgia, Replies to Question 5 of the Questionnaire on Humanitarian Issues, provided to the IIFFMCG on 5 June 2009, p. 4. See also p. 1.

[158] Russia, Responses to Questions Posited by the IIFFMCG (Humanitarian Aspects), *op. cit.*, p. 1. See also p. 2.

infrastructure facilities"[159] and the use of "multiple launch rocket systems that cause massive civilian casualties when used in populated areas and inflict large-scale damage to vital civilian facilities."[160] Georgia claims that "the Russian Federation has failed to meet this duty by indiscriminately bombing and shelling areas which were not legitimate military targets, and by utilizing means of warfare, such as landmines and cluster bombs, in a manner which failed to distinguish between civilians and combatants."[161]

The IIFFMCG deems it necessary first to address the issue of the types of weapons used and the ways in which they were used before proceeding with a general assessment of the question of indiscriminate attacks.

(i) The types of weapons used and the ways in which they were used

IHL governing the use of weapons is articulated in general principles prohibiting the use of means or methods of warfare that provoke superfluous injury or unnecessary suffering[162] or indiscriminate effects,[163] and specific rules banning or limiting the use of particular weapons. None of the weapons used in the context of this conflict is covered by a specific ban, whether be it conventional or customary. Nevertheless, while none of the weapons used during the August 2008 conflict could be regarded as unlawful *per se* under the general principles of IHL, the way in which these weapons were used raises serious concern in terms of legality. This is significant considering that the weapons in question were used mostly in populated areas. The two types of controversial weapon are the GRAD rockets and cluster bombs.

As rightly stated by Georgia, "at the time of the international armed conflict between Russia and Georgia in August 2008, Georgia was not party to any of the international legal instruments expressly prohibiting the use of GRAD Multiple Rocket Launching systems or cluster munitions in international armed conflict; neither was there any rule of customary

[159] *Ibid*., p. 2.

[160] *Ibid*., p. 4.

[161] Georgia, Responses to Questions Posited by the IIFFMCG (Humanitarian Aspects, Question 5), provided to the IIFFMCG on 5 June 2009, p. 1.

[162] Article 35(2) of Additional Protocol I of 1977 states that "It is prohibited to employ weapons, projectiles and material and methods of warfare of a nature to cause superfluous injury or unnecessary suffering."

[163] Under Article 51(4) of Additional Protocol I of 1977, indiscriminate attacks include "(b) those which employ a method or means of combat which cannot be directed at a specific military objective; or (c) those which employ a method or means of combat the effects of which cannot be limited as required by this Protocol; and consequently, in each such case, are of a nature to strike military objectives and civilians or civilian objects without distinction."

international law, applicable to Georgia, prohibiting the above."[164] This also holds true for Russia.

Where GRAD rockets are concerned, Georgia, as reported by HRW, stated that such rockets were used only on "Verkhny Gorodok district of Tskhinvali, where [separatist] artillery was deployed," while the city centre was hit with "modern, precision targeting weapons."[165] Georgia reiterated this position in its replies to the questionnaire sent by the IIFFMCG: "The Armed Forces of Georgia used GRAD rockets only against clear military objectives and not in populated areas."[166] Georgia stressed that "the types of weapons used, including GRAD Multiple Rocket Launching Systems [MLRS] or cluster munitions, had been used in full compliance with the applicable rules of international humanitarian law, in particular the principles of distinction and proportionality."[167]

These statements on the use of GRAD rockets, however, contradict the information gathered by the IIFFMCG. According to many reports and accounts from witnesses present in Tskhinvali on the night of 7 August 2008,[168] Georgian artillery started a massive area bombardment of the town. Shortly before midnight the centre of Tskhinvali came under heavy fire and shelling. OSCE observers assessed that this bombardment originated from MLRS GRAD systems and artillery pieces which were observed stationed North of Gori in the Karaleti area just outside the zone of conflict on 7 August at 3 p.m.[169] Narratives of the first hours following the offensive indicate intense shelling with incoming rounds exploded at intervals of 15 to 20 seconds. Within 50 minutes (8 August, 0.35 a.m.) the OSCE observers counted more than 100 explosions of heavy rounds in the town, approximately half of them in the immediate vicinity of the OSCE field office which was located in a residential area. The OSCE compound was hit several times, and damaged.

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[164] Georgia, Response to Questions Posited by the IIFFMCG (Humanitarian Aspects), provided to the IIFFMCG on 5 June 2009, p. 1.

[165] HRW, *Up In Flames – Humanitarian Law Violations and Civilian Victims in the Conflict over South Ossetia*, *op. cit.*, p. 50.

[166] Georgia, Responses to Questions Posited by the IIFFMCG (Humanitarian Aspects), provided to the IIFFMCG on 5 June 2009, p. 1. See also: Meeting of the IIFFMCG with the Ministry of Defence of Georgia on 4 June 2009.

[167] *Idem*.

[168] See Chapter 5 "Military Events of 2008".

[169] OSCE Mission to Georgia, Spot Report Update No. 1 (11:00 Tbilisi time) dtd 8 August 2008; confirmed by OSCE Military Monitoring Officers and other staff personnel in talks on 16/17 October 2008. See also OSCE Mission to Georgia, Spot Report. Update on the situation in the zone of the Georgian-Ossetian conflict, dtd 7 August 2008.

Investigations and interviews carried out by HRW and Amnesty International seem to confirm these facts. Human Rights Watch concluded that Georgian forces fired GRAD rockets using, among other weapons, BM-21 "GRAD," a multiple rocket launcher system capable of firing 40 rockets in 20 seconds, self-propelled artillery, mortars, and Howitzer cannons.[170] According to Amnesty International, "the entry of Georgian ground forces into these villages, and into Tskhinvali itself, was preceded by several hours of shelling and rocket attacks as well as limited aerial bombardment. Much of the destruction in Tskhinvali was caused by GRADLAR MLRS (GRAD) launched rockets, which are known to be difficult to direct with any great precision."[171] Shelling, including with Howitzer cannons and self-propelled artillery, caused damage, death and injury, in particular in Tskhinvali, even though some of the population had been evacuated.[172] Amnesty International representatives observed extensive damage to civilian property within a radius of 100-150 m from these points, particularly in the south and south-west of the town, highlighting the inappropriateness of the use of GRAD missiles for targeting these locations.[173]

The Fact-Finding Mission concludes that during the offensive on Tskhinvali the shelling in general, and the use of GRAD MLRS as an area weapon in particular, amount to indiscriminate attacks by Georgian forces, owing to the characteristics of the weaponry and its use in a populated area. Furthermore, the Georgian forces failed to comply with the obligation to take all feasible precautions in the choice of means and methods of warfare with a view to avoiding, and in any event to minimising, incidental loss of civilian life, injury to civilians and damage to civilian objects.

The other highly debated weapons used in the course of the conflict are the cluster munitions. While the use of cluster bombs in order to stop the advance of the Russian forces was acknowledged by the Georgian authorities, Moscow did not officially authorise such use by its own forces.

According to Amnesty International, the Georgian authorities stressed that cluster munitions were deployed only against Russian armaments and military equipment in the vicinity of the Roki tunnel in the early hours of 8 August and only by Georgian ground forces. The Georgian

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[170] HRW, *Up In Flames – Humanitarian Law Violations and Civilian Victims in the Conflict over South Ossetia, op. cit.*, p. 50.

[171] AI, Civilians in the Line of Fire – The Georgia-Russia Conflict, *op. cit.*, p. 24.

[172] HRW, *Up In Flames – Humanitarian Law Violations and Civilian Victims in the Conflict over South Ossetia, op. cit.*, pp. 41

[173] AI, Civilians in the Line of Fire – The Georgia-Russia Conflict, *op. cit.*, p. 26.

authorities informed Amnesty International that such cluster munitions were also used on 8 August to attack Russian and Ossetian forces on the Dzara bypass road.[174] Amnesty International noted that "the Georgian authorities maintain that there were no civilians on the Dzara road at the time of the Georgian cluster bombing as the movement of all kinds of civilian transport vehicles was stopped during combat operations in the area, and this was confirmed by Georgian forward observers." Amnesty International stressed that it was not "able to establish whether there were definitely civilians in the areas targeted by Georgian cluster bombs along the Dzara road at the precise time of their deployment." However, it noted that "it is clear that several thousand civilians were fleeing their homes both towards central Georgia and to North Ossetia during the course of 8 August and that the Dzara road was an obvious avenue of flight for South Ossetians heading north."[175]

Georgia explained the military necessity for using cluster bombs in the following terms:

"Cluster munitions, specifically the GRADLAR160 missile system and the MK4 LAR160 type missiles with M-85 cluster bombs, have been used exclusively against heavily armored vehicles and equipment moving into the territory of Georgia. The use of the aforementioned was based on a thorough analysis of the military necessity and the military advantage it could give to the Georgian army in the given situation. The pressing military necessity was to halt the advance of Russian military personnel and equipment into Georgian territory. The attack was directed specifically at military personnel and objects and the use of the GRADLAR160 missile system and the MK4 LAR160 type missiles with M-85 cluster bombs impeded the advance of the Russian Army into Georgian territory for several hours, thus giving the Georgian Army, which in numbers was several times less than the advancing Russian troops, a military advantage which created the opportunity to facilitate the safe evacuation of civilians from the theatre of war."[176]

As for the presence of clusters that hit nine villages in the Gori District, HRW noted that "several factors suggest that Georgian forces did not target these villages, but rather that the submunitions landed on these villages owing to a massive failure of the weapons system."[177]

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[174] AI, Civilians in the Line of Fire – The Georgia-Russia Conflict, *op. cit.*, p. 33.

[175] *Idem*.

[176] Georgia, Responses to the Questions Posited by the IIFFMCG (Humanitarian Aspects, Question 4), provided to the IIFFMCG on 5 June 2009, p. 1.

[177] HRW, *Up In Flames – Humanitarian Law Violations and Civilian Victims in the Conflict over South Ossetia*, *op. cit.*, p. 66.

HRW documented a number of civilian casualties as a consequence of these incidents, either when cluster munitions landed, or from unexploded duds.[178]

Russia informed the IIFFMCG that "the Chief Military Prosecutor's Office jointly with the Prosecutor-General's Office of the South Ossetian Republic (SOR) identified instances where in the course of the military operation Georgian armed forces used cluster munitions and 500-kg air-delivered bombs against the civilian population." The Russian Federation stated that "this is prohibited by the Convention on Prohibitions or Restrictions on the Use of Certain Conventional Weapons Which May Be Deemed to Be Excessively Injurious or to Have Indiscriminate Effects dated 10 October 1980."[179]

There are two separate questions arising from the above claim. The first concerns whether Georgia deliberately targeted the civilian population, which is prohibited whatever type of weapon is used; the second question is whether the use of these two weapons (mainly cluster munitions), either *per se* or because of how they have been used by Georgia, contravenes the 1980 Conventional Weapons Convention. There seems to be no evidence of such a direct attack against civilians by Georgian forces. With regard to the question of legality vis-à-vis the 1980 Convention, it is crucial to stress that not only is this treaty merely a framework convention that does not consider specific weapons, but none of its related protocols addresses the legality of the weapons in question here.

Concerning the alleged use of cluster bombs by Russia, this state reiterated its position in its replies to the IIFFMCG questionnaire: "Cluster munitions, though available to the strike units of the Russian Federation Air Force and designed to inflict casualties on the enemy and destroy military equipment in open spaces, have never been used."[180] This contradicts evidence, collected by Human Rights Watch, which asserted that cluster munitions were used, *inter alia*, in the village of Variani, killing three people; in Ruisi; and in the main square of Gori city, killing six people.[181]

The death of a Dutch journalist in the course of the 12 August cluster munitions strike on Gori's main square strengthens this claim that Russia did use cluster munitions. This is

[178] *Ibid*., pp. 66-67.

[179] Russia, Responses to Questions Posited by the IIFFMCG (Humanitarian Aspects), *op. cit.*, p. 4.

[180] Russia, Responses to Questions Posited by the IIFFMCG (Humanitarian Aspects), *op. cit.*, p. 10. See also p. 9.

[181] HRW, *Up In Flames – Humanitarian Law Violations and Civilian Victims in the Conflict over South Ossetia, op. cit.*, pp. 105-113.

significant as not only HRW but also the commission of inquiry set up by the Dutch Ministry of Foreign Affairs concluded that this journalist had been killed as a result of the use of such weapons by the Russian side.[182]

Information also collected by Amnesty International seems to rule out any doubt about the use of cluster munitions by Russia in populated areas.[183] This is confirmed by the recent report by HRW which investigated the use of cluster bombs by Georgia and Russia during the August 2008 conflict.[184]

The use by Georgia of certain weapons including GRAD MRLS during the offensive against Tskhinvali and other villages in South Ossetia did not comply with the prohibition of indiscriminate attacks and the obligation to take precautions with regard to the choice of means and methods of warfare.

The use of artillery and cluster munitions by Russian forces in populated areas also led to indiscriminate attacks and the violation of rules on precautions.

(ii) Indiscriminate attacks by Russia and Georgia

While Amnesty International noted that Russian aerial bombardments appear to have been quite localised and that most of the bombing would appear to have targeted Georgian military positions outside built-up areas, it noted, however, that villages and towns were hit, even though the damage would appear to be limited to stretches of streets and isolated houses here

[182] Human Rights Watch noted: "on August 29 the Dutch Ministry of Foreign Affairs dispatched an investigative commission consisting of military and diplomatic experts to Gori to investigate Storimans's death. (…) Based on visual characteristics, the serial numbers found on the missile pieces and the nature of the strike, the commission concluded that Russian forces had hit the square with an Iskander SS-26 missile carrying cluster munitions. The information gathered by Human Rights Watch researchers on the ground supports the Dutch investigation's conclusions. The Russian Ministry of Defense has denied that it used the missile system Iskander in South Ossetia, though this would not preclude that it had been used against a target in another part of Georgia, such as Gori. Presented with the findings of the Dutch investigative commission, the Russian authorities asserted that there was not enough evidence to conclude that Storimans had been killed as a result of the use of weapons by the Russian side." See HRW, *Up In Flames – Humanitarian Law Violations and Civilian Victims in the Conflict over South Ossetia*, *op. cit.*, pp. 112-113. See also for the report of the Dutch Commission: "Report of the Storimans investigative mission," October 20, 2008, http://www.minbuza.nl/binaries/enpdf/scannen0001.pdf

[183] "Although Russia continues to deny the use of cluster bombs, Amnesty International delegates heard numerous independent eye-witness accounts suggesting their use in Kvemo Kviti, Trdznisi, Tqviavi, Pkhvenisi, Kekhvi, Ruisi and Akhaldaba, mostly on 8 August, but also in the following days. Material evidence of the use of both AO 2.5 RTM cluster munitions (dropped from planes in RBK 500 bombs) and Uragan fired M210 bomblets have been found around several villages just north of Gori. These areas were still populated by many civilians, many of whom were on the roads trying to flee the conflict. It has also been alleged that the bomb attack on the central square of Gori on 12 August was conducted using cluster munitions," AI, *Civilians in the Line of Fire – The Georgia-Russia Conflict*, *op. cit.*, pp. 33-34.

[184] HRW, *A Dying Practice: Use of Cluster Munitions by Russia and Georgia in August 2008*, April 2009, available at: http://www.hrw.org/en/reports/2009/04/14/dying-practice-0.

and there in the villages affected.[185] The IIFFMCG witnessed the nature of this damage in Tkviavi in June 2009. Amnesty International also suggested that in this regard the Russian bombing was different from the Georgian assault on Tskhinvali.[186] It nevertheless pointed out that its "delegates also heard a number of accounts in which civilians and civilian objects were struck by aerial and missile attacks in the apparent absence of nearby military targets." It expressed concern "that civilians and civilian objects may have been directly attacked in violation of Article 51(3) of Protocol I to the Geneva Conventions, or that they were hit in the course of indiscriminate attacks in violation of Article 51(4)."[187]

HRW, which conducted a more in-depth analysis of the bombardment of places and other incidents, reached a firmer conclusion, stating that:

"Russian forces attacked areas in undisputed Georgian territory and South Ossetia with aerial, artillery, and tank fire strikes, some of which were indiscriminate, killing and injuring civilians. All Russian strikes using cluster munitions were indiscriminate."[188]

Many cases investigated by HRW raise serious concerns under IHL. Discussing the circumstances and methods of the attacks, this organisation made the following assessment:

"Russian forces attacked Georgian military targets in Gori city and in ethnic Georgian villages in both South Ossetia and undisputed Georgian territory, often causing civilian casualties and damage to civilian objects such as houses or apartment blocks. The proximity of these targets to civilian objects varied. In several cases, the military targets were within meters of civilians and civilian homes, and the attacks against them resulted in significant civilian casualties. In other cases the apparent military targets were located as far as a kilometer away from civilian objects, and yet civilian casualties also resulted. In attacking any of these targets the Russian forces had an obligation to strictly observe the principle of proportionality, and to do everything feasible to assess whether the expected civilian damage from the attack would likely be excessive in relation to the direct and concrete military advantage to be gained. In many cases the attacks appear to have violated the principle of proportionality."

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[185] AI, *Civilians in the Line of Fire – The Georgia-Russia Conflict, op. cit.*, p. 29.

[186] *Idem.*

[187] *Idem.*

[188] HRW, *Up In Flames – Humanitarian Law Violations and Civilian Victims in the Conflict over South Ossetia, op. cit.*, p. 87.

HRW also documented cases in which villagers from Tamarasheni described how Russian tanks had fired on villagers' homes. Witnesses told Human Rights Watch that there were no Georgian military personnel in their houses at the time when the tank fire took place. HRW also referred to "one witness [who] described an incident in which tanks methodically moved through the streets, firing on numerous houses in a row, suggesting that the fire was not directed at specific military targets and that such attacks were indiscriminate."[189]

Georgian attacks, both during the shelling of Tskhinvali and during the ground offensive, raise serious concerns. In the former, according to HRW, "at the very least the Georgian military effectively treated a number of clearly separate and distinct military objectives as a single military objective in an area that contained a concentration of civilians and civilian objects,"[190] amounting under IHL to indiscriminate attacks. In some cases where Georgian forces did target military objectives, HRW pointed out that "evidence suggests that (…) the attacks may have been disproportionate because they could have been expected to cause loss of civilian life or destruction of civilian property that was excessive compared to the anticipated military gain."[191]

As for the ground offensive, according to HRW it is very difficult to reach a definitive conclusion in terms of legality under IHL owing to the presence of Ossetian combatants throughout Tskhinvali and in some villages. The organisation noted that "numerous witnesses confirmed to Human Rights Watch that virtually all able-bodied males joined the volunteer militias, often after moving their families to safety in North Ossetia."[192] HRW however "believes that, particularly during the attempt to take Tskhinvali, on a number of occasions Georgian troops acted with disregard for the protection of civilians by launching attacks where militias were positioned that may have caused predictably excessive civilian loss compared to the anticipated military gain."[193]

In several cases, Georgia and Russia conducted attacks that were indiscriminate and consequently violated IHL.

[189] *Ibid*., p. 114.

[190] *Ibid*., p. 89.

[191] *Idem*.

[192] *Ibid*., p. 57.

[193] *Idem*.

c) Precautionary measures in attacks

Obligations regarding precautions in attack on the part of the attacker are key to ensuring that other rules of IHL on the conduct of hostilities are respected. Article 57 of Additional Protocol I spells out the general obligation that "in the conduct of military operations, constant care shall be taken to spare the civilian population, civilians and civilian objects" in this regard, as well as more specific precautionary measures to be taken, such as to:

"(i) do everything feasible to verify that the objectives to be attacked are neither civilians nor civilian objects and are not subject to special protection but are military objectives;

(ii) take all feasible precautions in the choice of means and methods of attack with a view to avoiding, and in any event to minimizing, incidental loss of civilian life, injury to civilians and damage to civilian objects;

(iii) refrain from deciding to launch any attack which may be expected to cause incidental loss of civilian life, injury to civilians, damage to civilian objects, or a combination thereof, which would be excessive in relation to the concrete and direct military advantage anticipated;" as well as:

"(c) effective advance warning shall be given of attacks which may affect the civilian population, unless circumstances do not permit."[194]

These obligations played a very important role given that hostilities took place in populated areas and, at least with regard to Ossetian militia fighters, involved very mobile forces.

The offensive on Tskhinvali by Georgian forces raises serious concerns in the light of these obligations on warring parties to take all possible steps to minimise harm to civilians and not to attack civilian objects.[195]

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[194] Such obligations are of a customary nature and are applicable in both international and non-international armed conflict. See Rules 15-21, in J-M. HENCKAERTS, L. DOSWALD-BECK (eds), *Customary International Humanitarian Law*, Volume I, *op. cit.*, pp. 51-67.

[195] In its replies to the Questionnaire sent by the IIFFMCG, Georgia indicated that:
"Georgian military command minimised list of targets for artillery and ground troops in the city of Tskhinvali and vicinity of populated villages. The list of predetermined targets included only places of heavy concentration of the enemy's manpower and assets. Georgian military command did not use any MRLS system inside populated areas. Finally, the command was informed both by open sources and intelligence of massive evacuation of civilians from proxy-controlled territories, including from the city of Tskhinvali."
Georgia, Responses to Questions Posited by the IIFFMCG (Humaneterian Aspects), Question 3, provided to the IIFFMCG on 5 June 2009, p. 1.

While the identification of legitimate military targets and the efforts made by the Georgian forces to minimise those located in the city or near populated areas seem to meet the requirements of IHL, some issues remain: one concerns the choice of artillery for conducting the attacks; another concerns the list of targets "identified during the hostilities," for example during the ground offensive. Most important are the issue of the intelligence used to select targets and the question of the presence of the civilian population in Tskhinvali at the time of the offensive. Amnesty International expressed concern "that the Georgian forces may have selected targets in areas with large numbers of civilians on the basis of outdated and imprecise intelligence and failed to take necessary measures to verify that their information was accurate before launching their attacks."[196] It further noted that "at the time of the initial shelling of Tskhinvali, Georgian forces were positioned several kilometres from Tskhinvali, at a distance from which it would have been difficult to establish the precise location of the Ossetian positions firing on them. Nor, as Ossetian forces were lightly armed and mobile, could there have been any guarantee that positions from which munitions had been fired in preceding days were still occupied on the night of 7 August."[197] It also expressed concern about whether precautions were actually taken in relation to the choice of means and methods and issuing a warning to the civilians.[198]

This latter point, regarding the giving of effective advance warning, is closely linked to the controversial question of the number of inhabitants remaining at the time of the offensive. Different figures were being given, even among the South Ossetian authorities.[199] During a meeting at the Ministry of Defence of Georgia on 4 June 2009, the IIFFMCG was told that, according to the information available to the military command at the time, "most of the population was evacuated by the 5th of August." Anatoly Barankevich, the National Security Council Secretary of South Ossetia, referring to the plan for the evacuation of civilians, declared that "on August 8 we have completely cleared the city."[200]

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[196] AI, *Civilians in the Line of Fire – The Georgia-Russia Conflict, op. cit.*, p. 27. In the same vein, HRW noted that "It is also not clear to Human Rights Watch to what extent the Georgian command had the necessary intelligence to establish the exact location of the South Ossetian forces at any given moment, in part because the forces were very mobile." HRW, *Up In Flames – Humanitarian Law Violations and Civilian Victims in the Conflict over South Ossetia, op. cit.*, p. 51.

[197] *Idem.*

[198] *Idem*.

[199] AI, *Civilians in the Line of Fire – The Georgia-Russia Conflict, op. cit.*, p. 27.

[200] Georgia, Responses to Questions Posited by the IIFFMCG (Humaneterian Aspects), Question 3, provided to the IIFFMCG on 5 June 2009, p. 2.

These statements contradict the testimony of the Georgian army chief of staff, Zaza Gogava, to a parliamentary commission examining the conduct of the war, namely, that the Georgian military command was clearly aware of the presence of civilians in Tskhinvali and other areas subjected to artillery strikes.[201] A Georgian soldier – interviewed by HRW – who entered Tskhinvali on the morning of 8 August said that they could see civilians in a basement. There is thus no doubt that many people were still in Tskhinvali on the night of 7 August. Consequently, the question is about the type of precautionary measures that were taken by the Georgian military command to minimise the harm to civilians, both during the shelling and afterwards, in the course of the ground operation.

During the meeting between representatives of the Ministry of Defence of Georgia and the IIFFMCG in June 2009, the Mission's experts were told that the Georgian forces had used smoke grenades to warn the population before artillery shelling. This seems to fall short of giving effective advance warning under IHL. In its replies to the questionnaire, Georgia indicated that "moreover, at 15:00 on 8 August, the Georgian authorities declared a three-hour unilateral cease-fire to allow the remaining civilians to leave the conflict area in the southern direction from Tskhinvali towards Ergneti."[202] This appears to be not enough in the light of the IHL obligation to take all feasible measures. When the offensive on Tskhinvali was carried out, at night, no general advance warning was given to the remaining population.

It should be mentioned that the presence of South Ossetian fighters, mostly in buildings in whose basements civilians were sheltering, and the fact that they even shot at Georgian soldiers from these very basements, complicates the conduct of warfare on the part of the attacker. This does not, however, release the Georgian forces from their obligations. In this regard, one of the most worrying examples of the lack of precautionary measures taken by the Georgian forces is their use of tanks and infantry fighting vehicles to fire at those buildings while knowing that there were civilians inside. HRW has documented cases where tanks fired at close range into the basements of buildings.[203]

Russia described as follows the precautions its forces took in the course of the conflict:

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[201] See "Chief of Staff Testifies before War Commission," Civil Georgia, http://www.civil.ge/eng/article.php?id=19851.

[202] See: Georgia, Replies to Question 3 of the Questionnaire on Humanitarian Issues, provided to the IIFFMCG on 5 June 2009, p. 2.

[203] HRW, *Up In Flames – Humanitarian Law Violations and Civilian Victims in the Conflict over South Ossetia*, *op. cit.*, p. 58.

"In the course of the entire military operation units of the Russian Federation Armed Forces, acting exclusively with a view to repelling an armed attack, used tanks, APCs and small arms to fire upon clearly identified targets only, which enabled them to minimise civilian losses. These units targeted multiple launch rocket systems as well as artillery and mortar batteries, personnel and firepower of the opposing force in its staging areas. The actual overall effect was as expected. Artillery fire and air strikes inflicted significant damage, undermined morale and brought considerable psychological pressure to bear upon the opposing forces. During the active phase of the operation the Russian command undertook a number of effective measures aimed at minimising the damage for the civilian population and to the property of local citizens. Artillery fire and air strikes were planned and carried out in areas situated at a considerable distance from local communities against clearly identified targets only. Key artillery fire missions were completed against well-observed targets – in the process, commanders of combined arms units adjusted artillery fire through spotters and artillery reconnaissance units. Local communities and civilian facilities were not fired upon. All fire would cease once Georgian units withdrew from their positions. The Russian air component acting in support of the army units on the ground delivered a number of strikes against pockets of Georgian forces, firing emplacements and columns of military equipment en route. The Russian air component did not fly any missions in areas adjacent to or bordering on residential communities. All kill fire was monitored. As a result of these measures civilian casualties were minimised."[204]

While the above description shows efforts to minimise civilian casualties and damage to civilian objects, it also presents the Russian forces as having systematically proceeded with the appropriate precautions. The evidenced use in populated areas by Russia of cluster munitions, a weapon which, by virtue of its wide area coverage and its unexploded duds, demonstrates that the obligation to take all feasible precautions in the choice of means of warfare was not systematically respected. Furthermore, as documented by HRW, "with regard to many aerial and artillery attacks, Russian forces failed to observe the obligations to do everything feasible to verify that the objects to be attacked were military objectives (and not civilians or civilian objects) and to take all feasible precautions to minimise harm to civilians."[205]

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[204] Russia, Responses to Questions Posited by the IIFFMCG (Humanitarian Aspects), *op. cit.*, p. 8.

[205] HRW, *Up In Flames – Humanitarian Law Violations and Civilian Victims in the Conflict over South Ossetia*, *op. cit.*, p. 87.

In the light of the extensive damage and relatively large number of civilian casualties of the conflict in and around South Ossetia, the conduct of the Abkhaz forces during the hostilities looks considerably better, although the Abkhaz forces reportedly also inflicted some damage to civilian property both in the upper Kodori Valley and the Zugdidi district.

During the offensive on Tskhinvali and other villages in South Ossetia, Georgian forces failed to take the precautions required under IHL.
In several cases the Russian forces also failed to comply with their obligations under IHL with regard to precautions before attacks.

d) Passive precautions and human shields

Under IHL, the defender too is bound by obligations to minimise civilian casualties and damage to civilian objects such as houses. Article 58 of Additional Protocol I of 1977 sets out the obligations with regard to precautions against the effects of attacks: "the Parties to the conflict shall, to the maximum extent feasible: (a) endeavour to remove the civilian population, individual civilians and civilian objects under their control from the vicinity of military objectives; (b) avoid locating military objectives within or near densely populated areas; (c) take the other necessary precautions to protect the civilian population, individual civilians and civilian objects under their control against the dangers resulting from military operations." This is a rule of customary law applicable in both types of conflict.[206] IHL also prohibits the use of human shields.[207]

Of very serious concern for the IIFFMCG are the numerous testimonies, some by South Ossetian combatants themselves, that they used houses and residential basements in Tskhinvali from which to fire at Georgian ground troops, putting at risk the lives of civilians who were sheltering in the basements of the same buildings. HRW also raised this issue.[208]

This is a clear violation of the obligation to avoid locating military objectives within or near densely populated areas. It probably did not constitute a violation of the prohibition against

[206] ICRC Study, Rules 22-24, pp. 68.

[207] *Ibid*, Rule 97, p. 337, and article 51(7) Protocol I.

[208] For example, witnesses told Human Rights Watch that militias had taken up positions in School No. 12 in the southern part of Tskhinvali, which was seriously damaged by the Georgian fire.
"Another witness said South Ossetian fighters were co-mingled with civilians in the basement of Tskhinvali School No. 6, which drew Georgian tank fire. No civilian casualties resulted.
Yet another witness, a 50-year-old kindergarten teacher who showed Human Rights Watch the fragments of GRAD rockets that hit her kindergarten building on Isak Kharebov Street, also said that volunteer militias had been 'hiding' in the building. Several members of the Ossetian militia interviewed by Human Rights Watch confirmed that many of the school and nursery school buildings were used as gathering points and defence positions by the militias," HRW, pp. 50-51.

using human shields, however, as this rule requires the specific intent to prevent attacks by deliberately collocating military objectives and civilians.[209]

South Ossetian forces reportedly violated IHL by firing from houses and residential buildings and using them as defensive positions, putting the civilian population at risk.

B. Treatment of persons and property in areas under changing control

Given that, although the conflict lasted no more than five days, insecurity continued and serious violations of HRL occurred even weeks after the cease-fire, both IHL and HRL are relevant and offer complementary protection of persons and property. Under IHL, this protection is partly ensured through the recognition of fundamental guarantees.[210]

During the conflict and after the cease-fire, there was a campaign of deliberate violence against civilians: houses were torched and villages looted and pillaged. Most of these acts were carried out in South Ossetia and in the undisputed territory of Georgia, mainly in the areas adjacent to the administrative border with South Ossetia.

These acts occurred even weeks after the cease-fire and the end of the hostilities. Such violations raise the critical question of the general lack of protection in areas under changing control, such as Georgian-administered villages in South Ossetia or the so-called "buffer zone". As highlighted by interviews conducted by Human Rights Watch, most of the acts of violence against civilians, pillage and looting were committed by Ossetian forces.[211] Information gathered from eyewitnesses also indicates the presence of Russian forces while these violations were taking place, and sometimes the participation of Russian forces in these acts. While most of the violations were committed against ethnic Georgians, ethnic Ossetians were also not immune from looters.[212]

According to Human Rights Watch:

"South Ossetian forces include South Ossetian Ministry of Defence and Emergencies servicemen, riot police (known by the Russian acronym OMON), and several police companies, working under the South Ossetian Ministry of Internal Affairs, and servicemen of

[209] See J-M. HENCKAERTS, L. DOSWALD-BECK (eds), *Customary International Humanitarian Law*, Volume I, *op. cit.*, p. 340.

[210] See Article 75 of the Additional Protocol I of 1977.

[211] HRW, *Up In Flames – Humanitarian Law Violations and Civilian Victims in the Conflict over South Ossetia*, *op. cit.*, p. 61.

[212] *Ibid*., p. 143.

the South Ossetian State Committee for Security (KGB). Many interviewees told Human Rights Watch that most able-bodied men in South Ossetia took up arms to protect their homes. As South Ossetia has no regular army its residents tend to refer to the members of South Ossetian forces as militias (opolchentsy) unless they can be distinctly identified as policemen or servicemen of the Ministry of Defence and Emergencies. Credible sources also spoke about numerous men from North Ossetia and several other parts of Russia who fought in the conflict in support of South Ossetia and who were involved in the crimes against civilians that followed."

"In some cases, it is difficult to establish the exact identity and status of the Ossetian perpetrators because witnesses' common description of their clothing (camouflage uniform, often with a white armband) could apply to the South Ossetian Ministry of Defence and Emergencies, South Ossetian Ministry of Internal Affairs, volunteer fighters, or even common criminal looters. Several factors, however, indicate that in many cases the perpetrators belonged to South Ossetian forces operating in close cooperation with Russian forces. The perpetrators often arrived in villages together with or shortly after Russian forces had passed through them; the perpetrators sometimes arrived on military vehicles; and the perpetrators seem to have freely passed through checkpoints manned by Russian or South Ossetian forces."

"Witnesses sometimes also referred to the perpetrators as Chechens and Cossacks; whether this was an accurate identification is not clear, although there were media reports of Chechens and Cossacks participating in the conflict."[213]

Two closely linked questions arise at this point: that of identifying the perpetrators of these violations and that of the exact role played by the Russian forces in the violations. Answering these questions will have key legal implications, as it requires us to distinguish between those who committed these acts of violence and those who did not act to prevent them or stop them.

While it appears difficult to conclude that Russian forces systematically participated in or tolerated the conduct of South Ossetian forces, there do seem to be credible and converging reports establishing that in many cases Russian forces did not act to prevent or stop South Ossetian forces. Human Rights Watch refers to three types of situation: passive bystanders, active participation and the transport of militias. Some testimonies also mention the positive involvement of Russian troops in stopping militias from looting or preventing them from

[213] *Ibid*., p. 128.

looting and burning houses. HRW refers also to checkpoints and roadblocks set up on 13 August which effectively stopped the looting and torching campaign but which were inexplicably removed after just a week. Interviews conducted in March 2009 by the IIFFMCG's expert also produced different accounts ranging from active intervention to stop violations, to passive observation, and even involvement.

Lastly, it is important to stress from the outset that patterns of violence differed depending on the area concerned. The most extensive destruction and brutal violence seem to have taken place in South Ossetia, with certain characteristics that appear to be different from what happened in the buffer zone. This difference in pattern was explicitly recognised by representatives from the Georgian Ministry of Internal Affairs when meeting with IIFFMCG experts on 4 June 2009. There is, finally, no comparison possible between the situations in these two former areas and the effects of the hostilities in Abkhazia, which were very limited.

a) Summary executions

The right to life is the most fundamental of human rights. Several rules of IHL[214] and HRL[215] prohibit murder, which is a war crime under IHL.

There are several testimonies of alleged extrajudicial killings or summary executions by Ossetian forces during the torching of villages. To date, however, only a few have come from direct eyewitnesses. Others are from indirect sources: either information reported by elderly people who stayed on in affected villages to persons who left, or general information that people heard. While this does not mean that we question the potential existence of such acts when reported by indirect sources, there is a need to double-check such information carefully. "Human Rights Watch received uncorroborated reports of at least two extrajudicial killings of ethnic Georgians in South Ossetia that took place amidst the pillage."[216] Amnesty International documented "unlawful killings, beatings, threats, arson and looting perpetrated by armed groups associated with the South Ossetian side."[217] The HRAM of the OSCE noted

[214] Common Article 3 of the Geneva Conventions prohibits "violence to life and person, in particular murder of all kinds with respect to the persons taking no active part in the hostilities, including members of armed forces who have laid down their arms and those placed 'hors de combat' by sickness, wounds, detention, or any other cause."

[215] ICCPR Article 6, EConvHR Article 2.1.

[216] *Ibid*., pp. 142-143.

[217] AI, *Civilians in the Line of Fire – The Georgia-Russia Conflict, op. cit.*, p. 39.

that "some of the key conflict-related human rights violations identified by the HRAM in interviews with displaced persons include killings of civilians."[218]

In interviews conducted by NGOs and provided to the IIFFMCG, a number of IDPs reported that residents who stayed in villages gave accounts of several persons being killed by Russian forces in Pkhvenisi or by Ossetian militias in Disevi. A 56-year-old woman who fled Disevi reported the same information given by Human Rights Watch: she described the burning of Disevi and said that she witnessed Ossetian militias burn the house of 70-year-old Elguja Okhropiridze and shoot him dead.[219]

In Dvani, a person interviewed by an NGO that provided information to the IIFFMCG described the following: "two guys were killed in our village (by Ossetians), Ervandi Bezhanishvili and Vasil Mekarishvili. I think Ervandi was killed (shot) trying to run away, while Vasil was shot when he refused to kiss the Russian flag. People in the village told me this."

According to the HRAM of the OSCE, "displaced persons witnessed killings of unarmed civilians by incoming military forces in Gori and in the villages of Megvrekisi, Tirdznisi, Ergneti, and Karaleti." The HRAM gave the following accounts: "In Ergneti, for example, a villager described to the HRAM how he saw a group of ten 'Ossetians' in Russian uniforms hit an 80-year-old man in the back and then shoot him. The victim, according to the villager, crawled into a building, said 'I've been shot,' and then fell down and died. In Karaleti, a villager reported, a car with four 'Ossetians' dressed in military uniforms entered the village and shot and killed one of his neighbors with an automatic weapon."[220]

Another testimony suggests that the general insecurity and sometimes vengeful types of attacks also affected Ossetians. A resident from Disevi who returned to his village in September 2008 told the following to an NGO interviewing him:

"At my third visit to the village Ossetians were particularly aggressive. Their aggression was caused by murder of Oleg, the Ossetian person whom we saw in white 'Niva' at our first visit. Ossetians found him dead at the village public school. Oleg had very good relation with the

[218] OSCE, HUMAN RIGHTS IN THE WAR-AFFECTED AREAS FOLLOWING THE CONFLICT IN GEORGIA, *op. cit.*, p. 18.

[219] HRW, *Up In Flames – Humanitarian Law Violations and Civilian Victims in the Conflict over South Ossetia, op. cit.*, p. 143.

[220] OSCE, Human Rights in the War-Affected Areas Following the Conflict in Georgia, *op. cit*., p. 23.

residents of our village and I suppose he had controversy with other Ossetians for that reason. Consequently, certain Ossetian killed him for having protected Georgians."[221]

According to Human Rights Watch: "during and in the immediate aftermath of the war, at least 14 people were deliberately killed by Ossetian militias in territory controlled by Russian forces. Human Rights Watch documented six deliberate killings in Georgian settlements controlled by Russian forces, and received credible allegations of another six cases. Human Rights Watch also heard allegations of two such killings in South Ossetia."[222] All these reports coming from different sources should be checked carefully as some may refer to the same cases.

While the exact number of summary executions has not been established, and some facts remain uncertain, the Mission nevertheless believes that there is credible evidence of cases of summary executions carried out by South Ossetian forces.

b) Rape and sexual and gender-based violence

Under IHL, the prohibition against rape and other forms of sexual violence, which is a norm of customary law,[223] derives from numerous provisions of treaty law applicable both in non-international armed conflicts and in international armed conflicts. For example Common Article 3 of the Geneva Conventions prohibits "violence to life and persons" including cruel treatment and torture, and "outrages upon personal dignity". Article 75 of Additional Protocol I of 1977 prohibits "at any time and in any place whatsoever, whether committed by civilian or by military agents (…) violence to the life, health, or physical or mental well-being of persons" and "outrages upon personal dignity, in particular humiliating and degrading treatment, enforced prostitution and any form of indecent assault."[224] Article 4 of Additional Protocol II of 1977 specifically adds "rape" to this list. Under the Rome Statute of the ICC, "committing rape (...) or any other form of sexual violence," in addition to constituting a grave breach of the Geneva Conventions or a serious violation of Common Article 3, constitutes a war crime in both international and non-international armed conflict.[225] Under

[221] Interview conducted on 15 December 2008.

[222] HRW, *Up In Flames – Humanitarian Law Violations and Civilian Victims in the Conflict over South Ossetia, op. cit.,* p. 154.

[223] See Rule 93, in J-M. HENCKAERTS, L. DOSWALD-BECK (eds), Customary International Humanitarian Law, Volume I, *op. cit.*, p. 323.

[224] See Article 75 para. 2 a) and b) respectively.

[225] Article 8(2)(b) xxii and (e)vi.

HRL, sexual violence is prohibited through the prohibition of torture and cruel, inhuman or degrading treatment.

In the context of the August 2008 armed conflict and its aftermath, there are a number of accounts of sexual and gender-based violence (SGBV), including rape. However, given the very sensitive nature of such crimes, they are usually under-reported – even more so in Georgia, as highlighted by many NGOs and international organisations. For example, victims of rape during the 1990s conflicts are only now beginning to report what happened then.

Human Rights Watch received numerous reports of the rape of ethnic Georgian women during the August 2008 war. It stressed that "due to the sensitive nature of the crime, rape is frequently under-reported, and it is particularly difficult to document cases during conflict."[226] The HRAM also acknowledged that it had not gathered comprehensive information on SGBV. As outlined by that Mission: "Although the issue of SGBV was raised in interviews with individuals, it did not feature prominently, which may well be because the subject is still considered largely taboo in much of Georgia and victims may face a very real threat of ostracism. In addition, many of the interviews were carried out in circumstances – such as the lack of privacy – which were not conducive to discussing this issue."[227]

The extent of the SGBV in the context of the conflict or in certain areas following the hostilities has still to be fully ascertained. To date, however, SGBV does not seem to have been widespread. An NGO reported to the HRAM that it had not found evidence that rape occurred frequently during the conflict, but that there had been some instances.[228] Similarly, the Office of the Prosecutor-General of Georgia told the HRAM that while there was no evidence of systematic rape during the conflict, there had been at least four or five rapes related to the conflict.[229]

Human Rights Watch "was able to document two cases of rape in undisputed areas of Georgia under Russian control."[230] Testimonies gathered by NGOs do not give direct information from victims of potential SGBV. One case was reported in Prizi, in the Gori region. Persons detained in SIZO ("Investigative Isolator" or detention facility) in Tskhinvali referred to a

[226] HRW, *Up In Flames – Humanitarian Law Violations and Civilian Victims in the Conflict over South Ossetia, op. cit.*, p. 59.

[227] OSCE, Human Rights in the War-Affected Areas following the Conflict in Georgia, op. cit., p. 19.

[228] *Ibid*., p. 25.

[229] *Ibid*., p. 37.

[230] HRW, *Up In Flames – Humanitarian Law Violations and Civilian Victims in the Conflict over South Ossetia, op. cit.*, p. 59.

woman approximately 22 years old who was "regularly taken outside the cell for interrogation, away for an hour or two, and when she came back she seemed upset and wouldn't talk to anyone". In Meghvrekisi there is also an account of one 14-year-old girl who was raped. In particular, NGO staff interviewed by the HRAM reported that they had evidence of a case in which a woman who was hiding in a church in Gori was gang-raped; a woman who was held in custody in Tskhinvali was taken out by guards and repeatedly raped; a girl kidnapped in Gori was raped; and the NGO's doctors had found physical evidence indicative of rape on a Georgian male soldier.[231] According to the Office of the Prosecutor-General of Georgia, cases of rape included a girl who was taken from a minibus near Akhalsopeli (Shida Kartli) and raped several times, and a woman who was kept in detention alone in a house and was reportedly raped by four persons.[232]

A woman interviewed in March 2009 by the IIFFMCG expert in a settlement near Gori, and who is tasked by the UN with collecting information on alleged violations of human rights, confirmed both the reality of rapes during the conflict and the difficulty of documenting such crimes. The *Rapid Needs Assessment of Internally Displaced Women as a Result of the August 2008 Events in Georgia* carried out by the Institute for Policy Studies with financial and technical support from the United Nations Development Fund for Women (UNIFEM) provides an overview of the SGBV in relation to the conflict and its aftermath, following interviews of 1 144 persons and based on a methodology designed to take into account the sensitive nature of this violence by using indirect questions.[233] This study notes that "due to stigma attached to sexual abuse it is likely that in general many women simply do not admit that they have been exposed to any physical or verbal abuse."[234] The survey revealed that 6.3% of respondents reported having information about sexual violence against women; out of these 70 respondents, 21.4% said they had information about cases of rape, 32.8% – group rape, 14.3% – attempted rape, and 31 % did not specify kind of abuse.[235]

The IIFFMCG concludes that although the SGBV in the context of the conflict and its aftermath does not appear to have been systematic or widespread, it is fundamental to address it both in terms of practical responses and in terms of accountability.

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[231] OSCE, Human Rights in the War-Affected Areas following the Conflict in Georgia, *op. cit.*, p. 25.

[232] *Ibid.*, p. 37.

[233] Human Rights Assessment Mission of the Office for Democratic Institutions and Human Rights, OSCE, Human Rights in the War-Affected Areas following the Conflict in Georgia, 27 November 2008, p. 8.

[234] *Ibid*., p. 7.

[235] *Ibid*., p. 8.

The Mission believes that although sexual and gender based violence in the context of the conflict and its aftermath does not appear to have been systematic or widespread, it is fundamental to address it both in terms of practical responses and in terms of accountability.

c) Ill-treatment and torture

The prohibition of torture, cruel or inhuman treatment and outrages upon personal dignity, in particular humiliating and degrading treatment, is contained in both IHL and HRL.

Numerous cases of ill-treatment have been reported by various sources in the course of the conflict and its aftermath. While such acts were committed against persons detained, there were also extensive beatings and threats against civilians mainly of Georgian ethnicity who remained in villages either in South Ossetia or in the undisputed territory of Georgia. These acts were committed mainly by South Ossetian forces, as reported by the victims interviewed. Though limited in scope and in quantity, the interviews of inhabitants from Achabeti, Tamarasheni, Disevi, Eredvi and Kekvi conducted by the Mission's expert in March confirmed existing information. Additional interviews were conducted by the IIFFMCG expert in June 2009, especially in villages close to the administrative border with South Ossetia such as Koshka. Two inhabitants of this village had been severely beaten by South Ossetians when they entered the territory of Georgia proper.

There were numerous cases of civilians having been beaten. In Tirdznisi, for example, in an interview with an NGO a man owning a bakery told how Ossetian militias had entered the village on 12 August and beaten his brother and his neighbour. His brother had had his ribs and arm broken.[236]

Many of the civilians who were ill-treated in South Ossetia were elderly people who could not flee in the early days of the conflict. An 80-year-old woman from Eredvi explained to the IIFFMCG expert how Ossetian and Russian military men came into her house in September. While they were surprised to find her in the house, they asked her for money. Then they put a phone wire around her neck and threw her on the ground and dragged her outside.

A Tbilisi-based NGO specialising in assistance to victims of torture told the HRAM that they have identified 50 torture cases related to the conflict for long-term follow-up.[237] While Human Rights Watch documented far fewer cases, they all occurred in the context of detention.

[236] Interviews conducted on 11 December 2008.

[237] OSCE, Human Rights in the War-Affected Areas following the Conflict in Georgia, *op. cit.*, p. 24.

The Mission believes that there are confirmed cases of ill-treatment and torture committed by South Ossetian forces.

d) Detention of combatants

Under IHL, rules regarding detention and related status are different depending on the type of conflict, i.e. whether it is international or non-international in character. In the former case, combatants benefit from the status of prisoner of war under certain conditions.

With respect to persons detained by Georgian forces, according to the Georgian authorities 32 persons were detained because of their participation in hostilities. According to Human Rights Watch the authorities did not display evidence that they were all combatants.[238] A few Ossetian civilians were also detained. One possible case of enforced disappearance is recounted in the 2009 HRW Report,[239] although the Georgian authorities deny that the person who is allegedly missing is in their custody. According to information given by an NGO to the HRAM of the OSCE, "14 Ossetians, including two teenagers, were detained by Georgian police following the Russian withdrawal from the 'buffer zone' and were held incommunicado."[240]

Georgia provided additional information on persons it detained: "Russian military personnel held as POWs: five; – Members of separatist illegal armed formations: thirty-two; – Apparent mercenary: one (Russian citizen)." Georgia indicated that:

"All Georgian-held prisoners were exchanged for the 159 Georgian civilians and 39 POWs held under Russian authority. The ICRC was afforded unimpeded access to Georgian detention facilities and visited three of the five POWs – the other two were taken prisoner late in the war. The ICRC visited facilities maintained by the Ministries of Defence and Justice on a number of occasions, inspecting the conditions in which not only the POWs were detained, but also those of the detained members of separatist illegal armed formations.

"Those detained in the context of the conflict were placed separately from other prisoners."[241]

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238 HRW, *Up In Flames – Humanitarian Law Violations and Civilian Victims in the Conflict over South Ossetia, op. cit.*, p. 79.

239 *Ibid*., p. 85.

240 OSCE, Human Rights in the War-Affected Areas following the Conflict in Georgia, *op. cit.*, p. 25.

241 Georgia, Responses to Questions Posited by the IIFFMCG (Humaneterian Aspects), Question 3, provided to the IIFFMCG on 5 June 2009, pp. 2-3.

According to the Russian Federation, "during the operation Russian and South Ossetian military units detained 85 Georgian nationals" and "Taking into consideration the fact that some Georgian servicemen deserted from their units, disposed of their weapons and military uniform, destroyed their identity papers, changed into civilian clothing, etc., it proved impossible to ascertain the exact number of military personnel among those detained."[242] The Russian Ministry of Foreign Affairs added the following in its replies to the questionnaire sent by the IIFFMCG:

"Throughout the entire period during which Russia's armed forces took part in the military operation in South Ossetia and Abkhazia between 8 and 12 August 2008, the Russian military forces detained Georgian military personnel only (as of 12.08.2008 no other Georgian military were detained). Since Russia took part in an armed conflict that was international in nature, these detainees were treated as combatants in accordance with IHL. Therefore, once detained they received the status of prisoners of war. To the best of our knowledge after the conflict ended and the prisoners of war were cleared of any potential military crimes, on 19 August all of them were handed over to the Georgian side in the presence of ICRC delegates with the Council of Europe Commissioner for Human Rights T. Hammarberg acting as a mediator. The Russian side treated these prisoners of war in accordance with the requirements set out in IHL. They were never subjected to torture."[243]

In its replies to the IIFFMCG questionnaire Georgia indicated, on the contrary, that "as many as 30 soldiers who were detained during and after the conflict experienced torture and ill-treatment, including being beaten with rifles, burned with cigarettes and cigarette lighters, and subjected to electric shocks."[244]

In the case of the detention of Georgian military servicemen by South Ossetian forces, however, direct eyewitnesses reported that Russian forces were present in the place of detention. Some of those Georgian combatants were captured by South Ossetian militias. Some were transferred first to Ossetian police and then handed over to Russian forces. Human

[242] Russia, Responses to Questions Posited by the IIFFMCG (Humanitarian Aspects), *op. cit.*, pp. 12-13.

[243] Russia, Responses to Questions Posited by the IIFFMCG (Legal Aspects), *op. cit.*, p. 11.

[244] Georgia, Responses to Questions Posited by the IIFFMCG (Humanitarian Aspects, Question 6), provided to the IIFFMCG on 5 June 2009, p. 1.

Rights Watch documented cases of ill treatment and torture and three executions of Georgian soldiers in the presence of Russian forces.[245]

The Mission believes that there are confirmed cases of ill-treatment and torture against combatants detained. Such acts seem to have been committed mainly by South Ossetian forces, in some cases possibly with Russian soldiers present.

e) Detention of civilians, arbitrary arrests, abduction and taking of hostages

There are also many cases where civilians of Georgian ethnicity have been deprived of their liberty. Such cases include the arrest and detention of civilians in inappropriate conditions by Ossetian forces, some being kidnapped and released against payment of a ransom. Many civilians also described their arrest as being taken hostage to be used in exchanges later.

Two elderly women from Achabeti village were brought by South Ossetian forces to Tskhinvali on 11 August and were detained together with more than 40 people, most of them also elderly, in the basement of what they identified as the FSB building in Tskhinvali. They were all kept together for three days in the same small room, where they had to take turns to lie down on a few wooden beds, and with very little bread or water. They were then kept in the yard for five days and had to clean the streets. Many civilians detained had to burry corpses.

Two men from Achabeti and Tskhinvali respectively described how they were beaten while detained in SIZO.[246]

During the meeting the IIFFMCG experts had on 5 June 2009 with representatives of the *de facto* Ministry of Defence and Ministry of Interior of South Ossetia, these authorities actually acknowledged that civilians had been present in the Ministry of Interior building, but they indicated that they had been taken there in the context of safety measures to protect them from the effects of the hostilities. Not only is this in complete contradiction with numerous

[245] HRW, *Up In Flames – Humanitarian Law Violations and Civilian Victims in the Conflict over South Ossetia, op. cit.,* pp. 185.

[246] The first said: "There were about 80 people there, and every day there came more. I stayed there for 18 days, during which time I was beaten, including with rifle butts, kicked and humiliated. I had bruises and wounds on my face and hands. They beat me in the kidneys. [He had visible damage on finger, broken nail, which we photographed] There were only seven cells in the SIZO, very little room and some people slept in the corridor."
The second declared: "We were taken to the SIZO, where the other hostages were. At the most, there were 170 people there – mostly older people, but also women and children – in a space which measured perhaps 10 by 10 meters. It was so crowded we could hardly stand, we slept in shifts. We got some bread and cereals, and tea without sugar. A doctor came and looked at my leg. The doctor and his colleague were attentive and gave me good treatment during the 18 days I stayed there."

testimonies from persons detained there but, even if it were so, it would be impossible to explain why, if such measures were taken for protection purposes, those persons were not released until 27 of August, two weeks after the hostilities had ended, and why they had to clean the streets and bury dead bodies.[247]

The HRAM heard many reports of the kidnapping of villagers who were then held for ransom. For example, a family of four was kidnapped in Gogeti; the wife and two children were released and asked to bring money in exchange for the husband.[248]

It seems that there have been numerous cases of illegal detention of civilians, arbitrary arrests, abduction and taking of hostages, mostly committed by South Ossetian forces and other South Ossetian armed groups.

f) Pillage and looting

IHL prohibits pillage both in time of international armed conflict and in time of armed conflict of a non-international character. In treaty law, for example, pillage is prohibited according to Article 33 of Geneva Convention IV of 1939 and Article 4(2) of Additional Protocol II of 1977. This is also a rule of international customary law.[249] Under the Rome Statute, pillage is a war crime in both types of conflict.[250]

The conflict in Georgia and its aftermath have been characterised by a campaign of large-scale pillage and looting against ethnic Georgian villages in South Ossetia and in the so-called buffer zones. While this was mainly committed by Ossetian military and militias, including Ossetian civilians, there are many eyewitness reports of looting by Russian forces. Most importantly, numerous testimonies refer to Russian soldiers being present while armed

[247] Human Rights Watch "also received reports of Georgians who were abducted by Ossetians and not handed over to the police. Lia B., 76, tearfully told Human Rights Watch on September 10 how she witnessed two Ossetian men abduct her 17-year-old granddaughter, Natia B., on August 13 in the middle of the day." A 70-year-old woman from Prisi had to go back to her village from Gori with her 17-year-old granddaughter because there was no available place for them to stay in Gori. She explained what happened mid-August 2008:
"We walked for nine hours. When we were walking though the village of Kidznisi, an old broken Zhiguli car, maybe stolen, stopped in front of us. Two young blond Ossetians in paramilitary uniform (with white stripes at the arm) got out of the car, took my granddaughter and kidnapped her", Interview conducted on 9 September 2008".

[248] OSCE, Human Rights in the War-Affected Areas following the Conflict in Georgia, *op. cit.*, p. 39.

[249] See Rule 52, in J-M. HENCKAERTS, L. DOSWALD-BECK (eds), Customary International Humanitarian Law, Volume I, *op. cit*., p. 182.

[250] In international armed conflict (Article 8, 2, b, xvi) and in non-international armed conflict (Article 8, 2, e, v), "pillaging a town or place, even when taken by assault," is a war crime.

Ossetians were looting. Some pillage started immediately after the withdrawal of the Georgian forces.

HRW documented – and sometimes directly witnessed – systematic looting in Tamarasheni, Zemo Achabeti, Kvemo Achabeti, Kurta, Tkviavi, Tirdznisi, Dvani, Koshka, Megrekisi, Nikozi, Karaleti, Knolevi, Avlevi, Tseronisi, and Kekhvi.[251] The HRAM of the OSCE also reported a number of cases of looting and pillage.[252] By way of example, the HRAM told of a woman in Kekhvi who saw her house being looted by a group of "Ossetians" wearing military uniforms with white arm bands. The men also stole her car and loaded it with furniture from a neighbour's house before driving away. As she fled the village, she saw "Ossetian" soldiers who were being protected by Russian forces and were pillaging shops and other houses.[253]

It is critical to stress that in the aftermath of the conflict the looting and pillage intensified both in South Ossetia and in the buffer zone in Dvani, Megvrekisi and Tkviavi.[254]

Moreover, Ossetian villagers also participated in looting in September, demonstrating a lack of protection and policing by the Ossetian and Russian forces. Many testimonies refer to Russian forces being present whilst Ossetian militias were looting.

Far from being a few isolated cases, in certain villages the pillage seems to have been organised, with looters first using trucks to take the furniture and then coming to steal the windows and doors of houses.[255]

Human Rights Watch also pointed out that "in some communities where Ossetians lived side-by-side with Georgians, or in mixed marriages, the Ossetians were also targeted for looting, harassment, and accusations of collaboration," such as in Zonkar, a tiny Tskhinvali-administered hamlet in the Patara Liakhvi valley surrounded by ethnic Georgian villages.[256]

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[251] HRW, *Up In Flames – Humanitarian Law Violations and Civilian Victims in the Conflict over South Ossetia*, 22 January 2009, pp. 130-142 and 164-169.

[252] Human Rights Assessment Mission of the Office for Democratic Institutions and Human Rights, OSCE, Human Rights in the War-Affected Areas following the Conflict in Georgia, 27 November 2008, p. 44.

[253] *Idem*.

[254] Amnesty International noted that: "Extensive looting of Georgian-administered villages appears to have taken place over the two weeks following the cessation of hostilities. Eye-witness accounts of some villages dating from the 13-14 August refer only to limited looting, yet when Amnesty International representatives visited these same villages almost two weeks later on the 26 August, they observed first hand that looting and pillaging was still going on", AI, Civilians in the Line of Fire – The Georgia-Russia Conflict, op. cit., p. 41.

[255] Interview of IDPs from South Ossetia by the IIFFMCG expert in March 2009.

[256] HRW, *Up In Flames – Humanitarian Law Violations and Civilian Victims in the Conflict over South Ossetia*, *op. cit*., pp. 143-144.

Amnesty International expressed particular concern at the "many reports of Russian forces looking on while South Ossetian forces, militia groups and armed individuals looted and destroyed Georgian villages and threatened and abused the residents remaining there."[257] It described the following situation:

"In the village of Eredvi on 26 August Amnesty International representatives witnessed ongoing looting and pillaging, including by armed men. As the looting was going on, Russian military equipment continued to pass through Eredvi (due west of Tskhinvali) and Russian checkpoints controlled the entry and exit to the village; Amnesty International observed that only ordinary cars, rather than trucks or other large vehicles, were searched, and not in all cases."[258]

There is consequently extensive evidence of a widespread campaign of looting and pillage by Ossetian forces, as well as unidentified armed Ossetians and sometimes civilians, during the conflict but mostly after the cease-fire. While the Russian forces do not seem to have played an important part in this campaign, they did little to stop it.

NGOs present in Georgia reported information from some of the IDPs they interviewed on looting by Abkhaz forces in the Kodori Valley and villages in the former "security zone" as identified under the 1994 Moscow agreement, notably villages near the administrative border, such as Anaklia. For example a villager from Ganmukhuri reported looting and robbing by Abkhaz soldiers.[259] While UN officials in Zugdidi stated that there was no report of human rights violations during the conflict in the Kodori Valley, they noted conflicting accounts of the looting of the Svan property and livestock.[260] An elderly woman from Ajara stated during the interview that Russian Forces[261] took her cattle and her furniture. On the other hand, there are reports through information collected by NGOs that Russian forces appear to have exercised a certain amount of restraint and discipline on the Abkhaz forces to prevent misconduct. The Abkhaz *de facto* Deputy Minister for Defence, when asked about alleged looting, stressed that Abkhaz soldiers had been instructed not to damage property, and he pointed out that although it was not possible to look after every single house and that he could not rule out some acts by reservists motivated by revenge, in his view these were minor,

[257] AI, Civilians in the Line of Fire – The Georgia-Russia Conflict, *op. cit.*, p. 32.

[258] *Ibid*., p. 43.

[259] Interviewed by an NGO on 10 September 2008.

[260] Meeting with UNOMIG officials, March 2009, Zugdidi.

[261] This contradicts the version given by the Abkhaz *de facto* Ministry of Defence who claimed that no Russian forces were involved in the fighting.

isolated incidents.[262] He indicated that he saw only one house burning when he visited the area on 15 August.

The HRAM however also indicated reports of looting in the Kodori Gorge: "One villager reported that his house had survived without damage, but when he returned he found that his television, radio and curtains had been stolen. A woman from Ptishi said that she returned to find her house looted, as did several of her neighbours. The houses were not burned, however. Even the UNOMIG base in Ajara was emptied of all movable assets and was occupied by Abkhaz personnel. As a result of the conflict, many villagers also lost cattle, which for many is essential for their livelihood. A woman from Ptishi reported that some cattle were killed by bombs. A man from Gentsvishi said that he had not been able to locate his cattle since his return. An international humanitarian organisation also confirmed that villagers' cattle had disappeared.[263] Thus although some looting may have taken place in the Kodori Valley, it seems to have happened in isolated incidents, unlike the patterns identified in South Ossetia and in the adjacent buffer zone.

During and, in particular, after the conflict a systematic and widespread campaign of looting took place in South Ossetia and in the buffer zone against mostly ethnic Georgian houses and properties. Ossetian forces, unidentified armed Ossetians, and even Ossetian civilians participated in this campaign, with reports of Russian forces also being involved.
The Russian forces failed to prevent these acts and, most importantly, did not stop the looting and pillage after the ceasefire, even in cases where they witnessed it directly.
The Abkhaz forces did not embark on such pillage; there are, however, reports of a few instances of looting and destruction.

g) Destruction of property

While IHL provides that parties to an international armed conflict may seize military equipment belonging to an adversary as war booty,[264] in both international and non-international armed conflict it prohibits the destruction or seizure of the property of an adversary, unless required by imperative military necessity.[265] Article 33 of Geneva Convention IV states that "Reprisals against protected persons and their property are prohibited." Under Article 147 of this convention, "extensive destruction and appropriation of

[262] Meeting with the Abkhaz *de facto* Minister for Defence, 4 March 2009, Sukhumi.

[263] Human Rights Assessment Mission of the Office for Democratic Institutions and Human Rights, OSCE, Human Rights in the War-Affected Areas following the Conflict in Georgia, 27 November 2008, p. 61.

[264] See Rule 49, in J-M. HENCKAERTS, L. DOSWALD-BECK (eds), Customary International Humanitarian Law, Volume I, *op. cit*., p. 173.

[265] *Ibid*, Rule 50, p. 175.

property, not justified by military necessity and carried out unlawfully and wantonly" is a grave breach. The ICC Rome Statute also qualifies these acts as war crimes in non-international armed conflict.[266] This prohibition should also be read in conjunction with the prohibition under IHL against collective punishment.

It is critical to stress that in the context of the August 2008 conflict, as in other armed conflicts, the destruction of property is closely linked to the need for IDPs to leave their houses. In this regard, as underlined above, the UN Guiding Principles on Internal Displacement restates the above prohibitions, reflecting existing IHL and HRL, within the framework of the rights of displaced persons.[267]

When considering the destruction of civilian property in the context of the conflict in South Ossetia and its aftermath, a key distinction must be made between on the one hand destruction as a result of shelling, artillery strikes, aerial bombardment or tanks firing, which might constitute a violation of IHL but does not systematically do so, and destruction as a result of deliberate acts of torching and burning. As noted by the HRAM, some destruction resulted from the hostilities proper, whether during the offensive by Georgian forces against Tskhinvali and other villages in South Ossetia, or during Russian aerial bombardments and artillery shelling.[268] Here it is necessary to refer to the section on indiscriminate attacks, above.

This type of destruction is in no way less serious. But it must be stressed from the outset that the extensive damage caused through burning, with some villages almost completely burned down, raises grave concern as to the motives behind such acts. The practice of burning reached such a level and scale that it is possible to state that it characterised the violence of the conflict in South Ossetia. This large-scale campaign of burning targeted ethnic Georgian villages in South Ossetia and, to a lesser extent, the areas adjacent to the administrative border.

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[266] Article 8, 2, xii, of the Rome Statute.

[267] "1. No one shall be arbitrarily deprived of property and possessions.
"2. The property and possessions of internally displaced persons shall in all circumstances be protected, in particular, against the following acts: (a) Pillage; (b) Direct or indiscriminate attacks or other acts of violence; (c) Being used to shield military operations or objectives; (d) Being made the object of reprisal; and (e) Being destroyed or appropriated as a form of collective punishment.
"3. Property and possessions left behind by internally displaced persons should be protected against destruction and arbitrary and illegal appropriation, occupation or use," See Principle 21.

[268] Human Rights Assessment Mission of the Office for Democratic Institutions and Human Rights, OSCE, Human Rights in the War-Affected Areas following the Conflict in Georgia, 27 November 2008, pp. 41.

In this regard it is also paramount to stress that a number of testimonies seem to suggest a pattern of deliberate destruction and torching in the ethnic Georgian villages in South Ossetia that was different in scale and motives from what happened in the buffer zone.

Regarding the burning and torching of entire villages in South Ossetia, the explanation given by Russia and the *de facto* South Ossetian authorities failed to convince the IIFFMCG.

According to the Russian Federation, "one of the reasons accounting for the fires and destruction in Georgian villages was the deliberate policy of arson perpetrated by the retreating Georgian Armed Forces. As a result a number of ordnances detonated including armour-piercing rocket-launcher rounds that had been placed and stored in advance in residential homes in a number of Georgian villages (Kekhvi, Tamarasheni, Kheita, Kurta, Eredvi, Avnevi, etc.) to arm Georgian paramilitary self-defence units."[269] Explanations given by South Ossetia also point the finger at Georgians: the representative of one of the two South Ossetian organisations accompanying the IIFFMCG during its visit to South Ossetia in March claimed that the houses were burned by Georgians. These claims, however, are not supported by any information available through interviews of IDPs or of villagers who remained during the hostilities and after. Moreover, according to HRW, the majority of the witnesses it interviewed did not complain about violations against them by the Georgian forces, in the context of the ground offensive.[270]

The South Ossetia *de facto* Prosecutor-General told the HRAM that the Georgian forces had been using these villages as military positions.[271] This latter explanation could in no way account for the extensive and systematic torching of entire villages witnessed by the IIFFMCG. All the information gathered from a variety of sources points to South Ossetian forces and militias as being the perpetrators, with dozens of testimonies in this regard. Interviews of inhabitants from ethnic Georgian villages as direct eyewitnesses, by Georgian NGOs, Human Rights Watch[272] and Amnesty International, as well as information collected by the IIFFMCG itself, substantiate this pattern.

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[269] Russia, Responses to Questions Posited by the IIFFMCG (Humanitarian Aspects), *op. cit*., p. 10.

[270] HRW, *Up In Flames – Humanitarian Law Violations and Civilian Victims in the Conflict over South Ossetia*, *op. cit*., p. 61.

[271] Human Rights Assessment Mission of the Office for Democratic Institutions and Human Rights, OSCE, Human Rights in the War-Affected Areas following the Conflict in Georgia, 27 November 2008, p. 42.

[272] HRW, *Up In Flames – Humanitarian Law Violations and Civilian Victims in the Conflict over South Ossetia*, *op. cit*., pp. 130.

After the cease-fire this campaign did not stop, but actually intensified. Regarding the extent of the damage caused, it is clear from both eyewitness reports and satellite images that many houses were burned in the last two weeks of August and in September.[273]

This was also confirmed by IDPs interviewed by the IIFFMCG expert and other organisations. Furthermore, although to date unverifiable, one person interviewed by the Mission's expert claimed that some burned houses were later destroyed to conceal the fact that they had been torched. This may be related to confirmed reports of burned houses having been "bulldozed" in September.[274]

The IIFFMCG also wishes to note that this campaign of burning houses in South Ossetia was accompanied by violent practices such as preventing people from extinguishing fires under threat of being killed[275] or forcing people to watch their own house burning.[276]

The IIFFMCG concludes that – as also stated by the HRAM and by HRW – after the bombing, South Ossetians in uniform as well as Ossetian civilians who followed the Russian forces' advance undertook a systematic campaign of arson against homes and other civilian buildings in villages populated predominantly by ethnic Georgians. Interviews by the IIFFMCG expert confirmed that with few exceptions Russian forces did not participate directly in the destruction of villages, aside from a brief period in mid-August, but nor did they intervene to stop it.

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[273] For example Amnesty International noted:
"Satellite imagery obtained for Amnesty International has confirmed extensive destruction in various settlements that occurred after the ceasefire.
"Looting and arson attacks appear to have been concentrated on Georgian-majority villages north and east of Tskhinvali, associated prior to the conflict with the Tbilisi-backed alternative administration headed by Dmitri Sanakoev. In particular, the villages of Kekhvi, Kurta, Kvemo Achabeti, Zemo Achabeti, Tamarasheni, Ergneti, Kemerti, Berula and Eredvi sustained heavy damage. (…) The destruction of houses and property in some Georgian-majority settlements in South Ossetia took place in the aftermath of hostilities and not as a direct result of them. Satellite images obtained for Amnesty International by the American Association for the Advancement of Science reveal no damage to the village of Tamarasheni, for example, on 10 August. Satellite photos from the 19 August, however, already reveal extensive destruction, with 152 damaged buildings in Tamarasheni. By the time that Amnesty International delegates were able to visit these villages at the end of August, they were virtually deserted and only a very few buildings were still intact," AI, Civilians in the Line of Fire – The Georgia-Russia Conflict, op. cit., pp. 40-41. See also Human Rights Watch (HRW), Georgia: Satellite Images Show Destruction, Ethnic Attacks, available at: http://www.hrw.org/en/news/2008/08/27/georgia-satellite-images-show-destruction-ethnic-attacks

[274] HRW, *Up In Flames – Humanitarian Law Violations and Civilian Victims in the Conflict over South Ossetia*, *op. cit*., p. 131. See also Human Rights Assessment Mission of the Office for Democratic Institutions and Human Rights, OSCE, Human Rights in the War-Affected Areas following the Conflict in Georgia, 27 November 2008, p. 43.

[275] See for example Human Rights Assessment Mission of the Office for Democratic Institutions and Human Rights, OSCE, Human Rights in the War-Affected Areas following the Conflict in Georgia, 27 November 2008, p. 24.

[276] Interview of IDPs by an expert of the IIFFMCG.

With regard to the destruction of property in the buffer zone, it is first necessary to state that both types of destruction (as a result of hostilities, and from deliberate torching) were documented in this area. The IIFFMCG expert, travelling in June 2009 on the road from Karaleti to Koshka, saw several houses that had been destroyed by Russian aerial bombardment and artillery shelling. While these forms of destruction do not in themselves amount to a violation of IHL, some instances, discussed earlier, do constitute indiscriminate attacks. As for the burning of houses, the members of the OSCE HRAM counted approximately 140 recently burned homes during their travels in the "buffer zone," none of which showed traces of combat activity.[277]

Without questioning the reality of the destruction by torching of houses in the buffer zone, the IIFFMCG wishes to observe that, at least for the villages its expert visited in June 2009 and in the light of the interviews it conducted, the patterns of destruction through arson appear to be slightly different than in South Ossetia. First, the scale of the destruction is less vast. In Karaleti, inhabitants indicated that 25 houses had been burned.[278] The motive for torching deserves particular attention. While it is true that revenge and private motives are also relevant in explaining the torching of ethnic Georgian villages in South Ossetia, the destruction of only selected houses in the village indicates a more targeted form of violence in the places the IIFFMCG visited. Information gathered by the IIFFMCG expert appears to suggest that lists of houses to be burned down were pre-established. Some inhabitants felt that the destruction was prompted by the fact that the owner had a relative in the police who had allegedly been involved in acts committed against ethnic Ossetians. An elderly woman living with her family on the outskirts of Karaleti explained that the house in front of hers had been burned down by a group of Ossetians because the owner had bought cattle that had previously been stolen from ethnic Ossetians. Similar accounts of the selective torching of houses were collected by the IIFFMCG expert in Tkviavi.

Another explanation for this more selective violence could be that many mixed families with Ossetian relatives live in the buffer zone. When acknowledging the different pattern of violence in the buffer zone, the representatives of the Ministry of Internal Affairs the IIFFMCG met with offered this as a justification for it.[279]

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[277] Human Rights Assessment Mission of the Office for Democratic Institutions and Human Rights, OSCE, Human Rights in the War-Affected Areas following the Conflict in Georgia, 27 November 2008, p. 27.

[278] Interviews conducted on 3 June 2009.

[279] Meeting on 4 June 2009.

While these considerations cannot be generalised, they need to be taken into account when reflecting on the patterns of violence during the conflict, especially with regard to property rights. This aspect of individualised revenge is critical and should not be overshadowed by more general patterns. For a comprehensive post-conflict solution to be meaningful, this aspect should be addressed in order to defuse tension and deal with the different types of violence effectively.

South Ossetians in uniform, and Ossetian civilians who followed the Russian forces' advance, undertook a systematic campaign of arson against homes and other civilian buildings in villages populated predominantly by ethnic Georgians, including in the so-called buffer zones.
With few exceptions, Russian forces did not participate directly in the destruction of villages, aside from a brief period in mid-August, but neither did they intervene to stop it.

h) Maintenance of law and order

Under the IHL on military occupation the occupying power, once it has authority over a territory, has an obligation to take all the measures in its power to restore, and ensure, as far as possible, public order and safety.[280] Ensuring safety includes protecting individuals from reprisals and revenge. There is also an obligation to respect private property.[281]

Even where the law on occupation is not applicable, under HRL states have an obligation to protect persons under their jurisdiction and prevent violations against them.

In the context of the conflict in Georgia the issue of the maintenance of law and order, and consequently that of the authorities responsible for such maintenance, is critical for several reasons. First, control over certain areas changed during the period of the conflict and its aftermath: in South Ossetia, in villages or districts that had previously been administered by the Georgian authorities, and also in the buffer zones and in Abkhazia, in the Kodori Valley. But it is also relevant for those parts of South Ossetia and Abkhazia where the *de facto* authorities had been exercising control before the outbreak of the conflict. Secondly, the presence of Russian forces on those territories raises the issue of their responsibilities, whether under the law of occupation or under human rights law. Thirdly, numerous, if not

[280] Article 43 of Convention (IV) respecting the Laws and Customs of War on Land and its annex: Regulations concerning the Laws and Customs of War on Land. The Hague, 18 October 1907.

[281] Article 46 of Convention (IV) respecting the Laws and Customs of War on Land and its annex: Regulations concerning the Laws and Customs of War on Land. The Hague, 18 October 1907. According to Article 87(1) of Additional Protocol I, "the High Contracting Parties and the Parties to the conflict shall require military commanders, with respect to members of the armed forces under their command and other persons under their control, to prevent and, where necessary, to suppress and to report to competent authorities breaches of the [1949] Conventions and of this Protocol."

most, violations occurred after the conflict, at a time when the main question was actually one of policing and maintaining order to prevent or stop such violations. Apart from the question of identifying who had responsibility for maintaining public order and ensuring security, there has clearly been, with some exceptions, a vacuum in this regard.

One of the most worrying areas was the buffer zone. The Representative of the Secretary-General on the human rights of internally displaced persons reported that "during his visit to the so-called buffer zone, he witnessed evidence of widespread looting of property and listened to villagers reporting incidents of harassment and violent threats committed by armed elements, in tandem with a failure by Russian forces to respond and carry out their duty to protect, particularly in the northernmost area adjacent to the *de facto* border with the Tskhinvali region/South Ossetia. Villagers explained their permanent fear of attack by what they described as armed bandits coming from the Tskhinvali region/South Ossetia, and their repeated but unsuccessful requests to the Russian forces for protection. Villagers insisted that there were no problems between neighbours within the same villages, irrespective of their ethnic origins, but that the perpetrators were coming from outside the villages, i.e. the Tskhinvali region/South Ossetia."[282] In September 2008 the Council of Europe Commissioner for Human Rights also noted that "in the northern part – i.e. the area adjacent to the administrative border of South Ossetia – there are still reports of looting, torching and threats, and far fewer people have been able to return."[283] Following his special mission to Georgia and the Russian Federation on 22-29 August 2008, the Council of Europe Commissioner for Human Rights stressed the "right to protection against lawlessness and inter-community violence." He noted that he had "received a great number of reports of physical assault, robbery, kidnapping for ransom, looting and torching of houses as well as personal harassment by South Ossetian militia or other armed men in the Georgian villages in South Ossetia and in the 'buffer zone'."[284] He further stated that he "was alarmed over the rampant criminality in the 'buffer zone'."[285]

While denying the status of occupying power, the Russian Federation acknowledged that it had tried to exercise police powers on the ground. With regard to "measures taken outside the

[282] Report of the Representative of the Secretary-General on the human rights of internally displaced persons, Walter Kälin, A/HRC/10/13/Add.2, 13 February 2009, para. 44.

[283] SPECIAL MISSION TO GEORGIA INCLUDING SOUTH OSSETIA SUMMARY OF FINDINGS, *op. cit.*, p. 3.

[284] HUMAN RIGHTS IN AREAS AFFECTED BY THE SOUTH OSSETIA CONFLICT, Special Mission to Georgia and Russian Federation, *op. cit.*, para. 87, p. 16.

[285] *Ibid.*, para. 88, p. 16.

scope of hostilities to protect the civilian population from looting, pillaging, abuse etc.," it describes the situation as follows. In terms of "a police function":[286]

"South Ossetia had and still has its own government and local authorities which exercise effective control in this country, maintain the rule of law and protect human rights. At the same time, the Russian military contingent called upon to carry out purely military tasks in the territory of South Ossetia, to the best of their abilities tried to maintain law and order and prevent any offences in the areas of their deployment, including Georgia proper, where owing to the flight of Georgian government authorities an apparent vacuum of police presence ensued. The Russian military force could not substitute for the government of South Ossetia. The Russian military have never been granted the jurisdiction to maintain the rule of law, not to mention that their sheer numbers are insufficient for that task. Nevertheless, the Russian troops apprehended more than 250 persons on suspicion of looting and other crimes. All of them have been handed over to the authorities of South Ossetia for further investigation and criminal prosecution."[287]

This argument of relying on the South Ossetian *de facto* authorities to maintain public order and prevent violations of human rights is flawed, however. In the first place, these authorities failed to ensure the protection or safety of persons living on the territory they controlled, as demonstrated above. This is additionally proven by the fact that even Ossetians did not enjoy protection. One of the two remaining residents of Zonkar, a tiny Tskhinvali-administered hamlet in the Patara Liakhvi valley surrounded by ethnic Georgian villages, told Human Rights Watch how men dressed in Ossetian peacekeeper uniforms looted her house and tried to set fire to it. She said that although she reported the incident to the police, no officials from the South Ossetia prosecutor's office came to her house to investigate.[288] Even more worrying, however, is the fact that Ossetian forces were themselves among the main perpetrators of violations of human rights.

Furthermore, the position adopted by the Russian Federation is not admissible in the buffer zone, where the South Ossetian *de facto* authorities were not exercising control.

Another aspect of the Russian argumentation calls for further analysis. Russia claims that although it was not an occupying power, "the Russian military contingent called upon to carry

[286] Russia, Responses to Questions Posited by the IIFFMCG (Legal Aspects), *op. cit.*, p. 6.

[287] *Ibid*., pp. 7-8.

[288] HRW, Up In Flames – Humanitarian Law Violations and Civilian Victims in the Conflict over South Ossetia, *op. cit*., p. 144.

out purely military tasks in the territory of South Ossetia, to the best of their abilities tried to maintain law and order and prevent any offences in the areas of their deployment including Georgia proper, where owing to the flight of Georgian government authorities an apparent vacuum of police presence ensued." First, it recognises the absence of policing by Georgian authorities. Second and most importantly it clearly states that effectively the Russian forces, to a certain extent, were trying to maintain order and safety. Russia elaborated further on the actions it carried out in this regard:

"From day one of the operation, the Russian military command undertook exhaustive measures to prevent pillaging, looting and acts of lawlessness with respect to the local Georgian population. All personnel serving in units that took part in the operation was familiarised with the Directive issued by the General Staff of the Russian Armed Forces and the order given by the Army Commander-in-Chief 'to maintain public safety and ensure the security and protection of citizens residing in the territory of the South Ossetian Republic'.

"Russian troops, jointly with South Ossetian law-enforcement and military units, provided round-the-clock protection of the homes and land allotments that remained undamaged in Georgian villages, at the same time ensuring the safety and security of South Ossetian residents regardless of their ethnic background."[289]

First of all, this contradicts the information according to which "in October an official from the Council of Europe who requested anonymity told Human Rights Watch that a senior member of the Russian military in the region said that the military was given no mandate for the protection of civilians."[290]

In general, these elements demonstrate that to a certain degree, Russian forces were in a position to ensure public order and safety in the territories they were stationed in, and claim to have undertaken measures in this regard. This contrasts strikingly with what happened on the ground, where there was a serious lack of action by the Russian troops to prevent violations and protect ethnic Georgians.

One of the main measures taken by Russian troops was to set up roadblocks and checkpoints. Regarding South Ossetia, Human Rights Watch noted that "roadblocks set up by Russian

[289] Russia, Responses to Questions Posited by the IIFFMCG (Humanitarian Aspects), *op. cit.*, p. 11.

[290] HRW, Up In Flames – Humanitarian Law Violations and Civilian Victims in the Conflict over South Ossetia, *op. cit.*, p. 124.

forces on August 13 effectively stopped the looting and torching campaign by Ossetian forces, but the roadblocks were inexplicably removed after just a week."[291]

As reported by HRW, two residents of Tkviavi, a village 12 kilometres south of Tskhinvali that was particularly hard hit by looters from South Ossetia, said that the looting had decreased when the Russian forces maintained a checkpoint in the village, although the marauders kept coming during the night. Furthermore, several Tkviavi villagers told Human Rights Watch that they believed that more frequent patrolling by the Russian forces or Georgian police would have improved security in the area. A witness told Human Rights Watch that looters "seemed to be afraid to encounter the Russians, and were hiding from them," suggesting, according to HRW, that had Russian forces taken more preventive measures to stop violence against civilians these measures would have been effective.[292]

In this regard, other measures by the Russian troops consisted of patrolling and informing the inhabitants and giving the villagers phone numbers so they could contact the Russian military authorities if they witnessed any kind of violation. Regarding these measures, an habitant of Tkviavi, the former mayor of the village, told the IIFFMCG expert on 3 June that while having offered to help, the Russian military authorities did not do much concretely to stop the looting.

At this stage it is critical to note that the measures such as checkpoints introduced by the Russian forces were meant to prevent violations by South Ossetian militias, and consequently ensure respect of IHL. Oddly, one result of the checkpoints was actually to prevent the Georgian police from maintaining law and order in those areas,[293] and in some cases to stop villagers attempting to return home from Gori to villages in the "buffer zone," while Russia continued to invoke the lawlessness.[294]

On the other hand, testimonies gathered by the IIFFMCG and by HRW[295]also report Russian ground forces trying to protect the civilian population from Ossetian forces, militia members, or criminal elements.

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[291] *Ibid*., p. 9.

[292] *Ibid*., p. 126.

[293] *Ibid*., p. 126.

[294] UNHCR, "Situation north of Gori is deteriorating," Emergency Operation in Georgia Update, 27 August 2008, http://www.unhcr.org/news/NEWS/48b55da74.pdf.

[295] HRW, *Up In Flames – Humanitarian Law Violations and Civilian Victims in the Conflict over South Ossetia, op. cit.*, p. 125.

Nevertheless, from all the testimonies collected, it appears that the Russian authorities did not take the necessary measures to prevent or stop the widespread campaign of looting, burning and other serious violations committed after the ceasefire.[296]

Referring to the situation at the end of August, the Council of Europe Commissioner for Human Rights also stressed that "the Russian forces have the duty under international humanitarian law to maintain law and order in the zone they control," and he "raised his serious concerns about the security of the civilians with all sides." He noted that the Russian head of the peacekeeping presence in the buffer zone and other high-level Russian officials "acknowledged that policing and maintaining law and order were major challenges. According to them, the area had been infiltrated by marauders, criminal gangs and militia, who were committing serious crimes."[297]

In September 2008, as a way to address this failure to maintain law and order properly, Human Rights Watch called for the EU to provide the monitoring mission scheduled to move into areas near South Ossetia with a policing mandate to protect the civilians.[298]

The Russian authorities and the South Ossetian authorities failed overwhelmingly to take measures to maintain law and order and ensure the protection of the civilian population as required under IHL and HRL.

C. Missing and dead persons

Article 33(1) of Additional Protocol I sets out the obligation on each party to a conflict to search for persons reported missing. Although Additional Protocol II contains no provisions with regard to missing persons, the general obligation to account for them and to transmit

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[296] As underlined by Amnesty International, distinguishing between South Ossetia and the buffer zone: "As the occupying force, the Russian army had a duty to ensure the protection of civilians and civilian property in areas under their control. Whilst this may have been difficult in practice in the early days of the conflict, when Russian forces were still engaging the Georgian army, the looting and destruction of property owned by ethnic Georgians, and the threatening of remaining Georgians in South Ossetia and the surrounding "buffer zone," continued on a large scale for several weeks after the formal cessation of hostilities. It is clear that the Russian authorities singularly failed in their duty to prevent reprisals and serious human rights abuses being carried out by South Ossetian forces and militia units. In the "buffer zones," Russia was bound by its obligations as an occupying power as codified in the Fourth Geneva Convention. This means that it was primarily responsible for the security and welfare of Georgian civilians in those areas. In South Ossetia, while it may not formally have been the occupying power, it was nevertheless bound by its obligations under human rights law to respect and protect the rights of all those under its effective control", AI, Civilians in the Line of Fire – The Georgia-Russia Conflict, *op. cit*., p. 32.

[297] HUMAN RIGHTS IN AREAS AFFECTED BY The SOUTH OSSETIA CONFLICT, Special Mission to Georgia and Russian Federation, *op. cit*., para. 89, p. 16

[298] Human Rights Watch, "*Georgia: EU Mission Needs to Protect Civilians – In Security Vacuum, Frequent Attacks and Pervasive Fear*," 15 September 2008, http://www.hrw.org/en/news/2008/09/15/georgia-eu-mission-needs-protect-civilians

information has been recognised as applicable in both international and non-international armed conflict. The ICRC Customary Law Study identified the rule according to which "Each party to the conflict must take all feasible measures to account for persons reported missing as a result of armed conflict and must provide their family members with any information it has on their fate."[299]

As with missing persons, families are entitled to be informed if their relatives are dead. The two main obligations – to search for the dead and to protect them against pillage and ill-treatment – are restated in Geneva Conventions I, II and IV (1949). Article 8(2) of Additional Protocol II also states the duty to search for the dead and to prevent ill-treatment. Complying with these obligations is a prerequisite for the respect of subsequent obligations requiring the return of remains and decent burial.[300]

The issue of missing persons is an ongoing one which by definition cannot be limited to the August conflict. It also relates therefore to the conflict in Abkhazia and South Ossetia at the beginning of the 1990s. The Abkhaz *de facto* authorities stated, for example:

"After the war of 1992-1993 a special commission on missing persons was created. A similar commission was set up by the Georgian authorities. Both sides cooperated proactively in trying to identify such instances. Specialists were invited to identify the bodies of those killed. During the initial stages the cooperation was relatively efficient; however, gradually the intensity of the commission's work subsided. As of today both Abkhazia and the Georgian side have identified a significant number of missing persons, however, it seems unlikely that they will ever be found. The Abkhaz side believes that these people are most likely dead."[301]

While to date there is no exact figure for the number of persons reported missing as a result of the August conflict, the ICRC stated the following:

"People seeking missing relatives continue to contact the ICRC in Tskhinvali, Gori, Tbilisi and Moscow. Today, 37 families are still without news of their loved ones. The ICRC follows up each individual case of people who went missing during the conflict and its aftermath with the relevant authorities and on a confidential basis. In addition, an ICRC forensic expert in

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[299] See Rule 117, in J-M. HENCKAERTS, L. DOSWALD-BECK (eds), Customary International Humanitarian Law, Volume I, *op. cit*., p. 421.

[300] *Ibid*., see Rules 111-116, pp. 406-420.

[301] Abkhaz authorities, Responses to Questions Posited by the IIFFMCG (Legal aspects), submitted to the IIFFMCG in April 2009, p. 9.

Tbilisi is on hand to help authorities identify mortal remains. There are still over 1,900 people missing as a result of previous conflicts in the region."[302]

In June 2009, in its replies to the IIFFMCG questionnaire, Georgia, referring to the statistics to hand, gave the following information about Georgians missing: "19 civilians are missing as a result of the armed conflict between Georgia and Russia. The families of these persons have been mediated by the MoIA and brought to the National Bureau of Court Expertise to undertake DNA analysis with the aim of identifying the corpses of their missing relatives. As a result, 2 missing persons were identified."[303] Georgia also indicated that "3 police officers are still missing" and "10 military persons are still missing."[304]

The Russian Federation reported that "to clarify the fate of missing persons as well as those who perished in the territory of South Ossetia as a result of terrorist attacks organised by Georgian intelligence services, the Inquiry Committee appointed by the Russian Federation Prosecutor-General's Office submitted a request for legal assistance to the Office of the Prosecutor-General of the South Ossetian Republic."[305] While this initiative is commendable, it should be recalled that existing reports mention persons unaccounted for as a result of acts committed by the South Ossetians forces and that such an initiative should concern all persons reported missing.

There are accounts by IDPs to whom the fate of their relatives is still unknown at the time of writing this Report, or who have received unconfirmed reports that they are dead without having been able to have their body returned. Despite having interviewed only some persons affected by the conflict, the IIFFMCG expert heard two such testimonies from ethnic Georgians: a woman from Achabeti whose husband's body was identified by his brother but never given back to her; and another woman from Achabeti who has had no news of her brother.

Another case highlighted by Human Rights Watch gives grounds for particular concern. Researchers from this organisation were told by an Ossetian taxi-driver that his friend, a resident of Kvemo Achabeti, and the friend's wife were shot dead by unknown persons at

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[302] ICRC, "*Western/Central Georgia and South Ossetia: helping the most vulnerable,*" Operational update, 20-03-2009, available at: http://www.icrc.org/Web/eng/siteeng0.nsf/html/georgia-update-200309

[303] Georgia, Responses to Questions Posited by the IIFFMCG (Humanitarian Aspects, Questioni 8), provided to the IIFFMCG on 5 June 2009, p. 2.

[304] *Idem*.

[305] Russia, Responses to Questions Posited by the IIFFMCG (Humanitarian Aspects), *op. cit*., pp. 13 and 14.

some point between August 13 and 16, and the researchers went with him to photograph the grave. They found, however, that the grave appeared to have been dug up, and the bodies were missing."[306]

There were also commendable acts to be noted. According to the HRAM of the OSCE "a villager from Kurta told how she heard that Russian soldiers sometimes helped people to get back to the village to look for missing persons."[307]

The issue of persons missing as a result of the conflict, together with unsettled allegations of arbitrary detention and the prevention of hostage-taking, are still ongoing at the time of writing this Report and give rise to conflicting views between all sides.[308] These issues thus remain sources of concern for the Fact-Finding Mission.

Bearing in mind the suffering of families faced with the loss of a relative or uncertainty about his or her fate, it should be stressed that all parties to the conflict must fulfil their obligations under IHL with regard to missing and dead persons. It is worth recalling the importance of cooperation between all the parties, including through the establishment of joint mechanisms to address these questions.

D. Forced displacement

The issue of displacement in the context of the 2008 armed conflict and its aftermath is manifold, notably because it is constituted of different patterns. A complicating factor in terms of the protection of displaced persons is that, as outlined by the United Nations Inter-agency Humanitarian Assessment Mission to South Ossetia, "many people have lived as internally displaced persons in South Ossetia, or from South Ossetia elsewhere, since the first conflict of 1991-92."[309]

As stated earlier, displacement is not limited to the period of the conflict itself, given the continuing violence and insecurity that lasted for weeks after the cease-fire of 12 August. In this regard, the United Nations Inter-agency Humanitarian Assessment Mission to South Ossetia, following its visit in September 2008, noted that "the protection of civilians emerged

[306] HRW, *Up In Flames – Humanitarian Law Violations and Civilian Victims in the Conflict over South Ossetia, op. cit*., p. 143 and Footnote No. 396.

[307] Human Rights Assessment Mission of the Office for Democratic Institutions and Human Rights, OSCE, Human Rights in the War-Affected Areas following the Conflict in Georgia, 27 November 2008, p. 49.

[308] See Amnesty International, *Civilians in the aftermath of war: The Georgia-Russia Conflict one year on*, August 2009, p. 21.

[309] United Nations Inter-agency Humanitarian Assessment Mission to South Ossetia, 16-20 September 2008, Mission Report, para. 5.1.

as the most urgent humanitarian concern."[310] There are still some displacements of population in the Akhalgori district at the time of the writing of this Report.

Displacements were of course not limited to persons fleeing the territory of South Ossetia. But since most of the hostilities and damage occurred in South Ossetia, the displacement of population in and around that territory was more extensive. It should then be determined to what extent this was due to causes other than the hostilities *per se*. Similarly, the question of the return of internally displaced persons from ethnic Georgian villages in South Ossetia seems to be raised in different terms than for those who left the so-called buffer zone. Amnesty International states: "Prospects for return may be seen as sharply distinguished between areas falling within the 1990 boundaries of the South Ossetian autonomous region and areas beyond, falling in the so-called 'buffer zones'. Return to the former, above all to those areas formerly associated with the Tbilisi-backed Dmitri Sanakoev administration, is extremely unlikely. Villages in those areas were subjected to a high level of destruction and pillaging."[311]

The UN Guiding Principles on Internal Displacement apply to all phases of displacement – providing protection against arbitrary displacement, offering a basis for protection and assistance during displacement, and setting forth guarantees for safe return, resettlement and reintegration.[312] Consequently, assessing displacement in the context of the conflict in Georgia entails looking at five main issues: first, bearing important legal consequences is the question of the reasons for the displacement and the prohibition on arbitrary displacement; second, as the displacement of persons is closely linked to allegations of ethnic cleansing, this issue will be addressed; third, the treatment of displaced persons; fourth, the right to return; and finally, the issue of property rights and compensation for IDPs, especially as, owing to pillage, destruction and torching, many of these people have no prospect of returning in the near future.

It is necessary, however – as a preliminary question and to have an overview of the situation – to look at the scale of the displacement. At the same time, it is not the aim of IIFFMCG to reach definite conclusion or to discuss figures. Walter Kälin, the Representative of the Secretary-General on the human rights of internally displaced persons, noted that "precise

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[310] United Nations Inter-agency Humanitarian Assessment Mission to South Ossetia, 16-20 September 2008, Mission Report, para. 5.1.

[311] AI, Civilians in the Line of Fire – The Georgia-Russia Conflict, *op. cit.*, p. 51.

[312] See Guiding Principles on Internal Displacement, *op. cit.*, para. 9.

data on current displacement patterns remain difficult to establish."[313] There are also conflicting versions of the number of IDPs who have already returned.

a) Figures

According to the February 2009 report on the human rights of internally displaced persons written by the Representative of the Secretary-General following his visit in October 2008, "as a result of the hostilities in northern Georgia that escalated on 7/8 August 2008, some 133 000 persons became displaced within Georgia."[314] Walter Kälin stressed that "currently, displacement in Georgia can be divided into the three categories described below:

"(a) Approximately (according to the Civil Registry Agency) 107 026 persons fled the area adjacent to the Tskhinvali region/South Ossetia. IDPs from the Tskhinvali region/South Ossetia are estimated as of November 2008 as 19 111, from the upper Kodori Valley as 1 821, and those displaced from Akhalgori as 5 173. According to the Office of the United Nations Resident/Humanitarian Coordinator, an estimated 75 000 persons displaced from Gori and surrounding areas returned soon after the end of hostilities in August and September, while an estimated 24 596 of the persons who fled the so-called buffer zone have been able to return home in the Shida Kartli region following the withdrawal of Russian troops between 7 October and 10 November 2008.[315] The main needs of the latter category relate to the challenge of recovery after return including safety (including humanitarian demining) and the re-establishment of law and order. The reconstruction and repair of destroyed or looted houses; humanitarian assistance with food and firewood; and the re-establishment of basic services such as education and health, as well as the re-establishment of economic activities, are important concerns;

"(b) According to government estimates, some 37 605 IDPs will not return in the foreseeable future. This figure includes the 19 111 IDPs from the Tskhinvali region/South Ossetia and the 1 821 IDPs from the upper Kodori Valley, as well as those IDPs who will spend the winter in displacement, namely 11 500 who cannot return to the area adjacent to the Tskhinvali region/South Ossetia for reasons such as security or the destruction of property, and some 5

[313] Report of the Representative of the Secretary-General on the human rights of internally displaced persons, Walter Kälin, A/HRC/10/13/Add.2, 13 February 2009, para. 11.

[314] *Idem*, para. 9.

[315] Office of the United Nations Resident/Humanitarian Coordinator, Situation Report No. 35 on the situation in Georgia, 6-13 November 2008.

173 IDPs from Akhalgori.[316] *The Government estimates that some 21 000 displaced persons will be accommodated in durable housing by the end of the year;*

"(c) Approximately 220 000 internally displaced persons from the territories of Abkhazia and the Tskhinvali region/South Ossetia have been living in protracted displacement for more than a decade following the conflicts in the aftermath of the independence of the former Soviet Republic of Georgia in 1991, as described in the Representative's previous report."[317, 318]

In his latest report on human rights issues following the August 2008 armed conflict, issued on 15 May 2009, the Commissioner for Human Rights of the Council of Europe indicated that "according to the information available, a total number of approximately 138,000 people were displaced in Georgia."[319]

According to the information from international organisations gathered by the Human Rights Assessment Mission (HRAM) of the OSCE's Office for Democratic Institutions and Human Rights, "since the new South Ossetian *de facto* administration has taken over in the Akhalgori area, many people have left the region" and "more than 5 100 individuals had left Akhalgori by the end of October."[320] In June 2009 the IIFFMCG experts met with the administration in Akhalgori which provided the following figures: before the 2008 August conflict there were approximately 9 000 inhabitants, 2 388 of them ethnic Ossetians and the rest Georgian; on 1 December 2008 there were 6 900 persons and on 1 March 2009, 5 074. According to information gathered during the visit, at least two Georgian families left Akhalgori while the IIFFMCG was there in the afternoon of 5 June. Considering that, according to the South Ossetian authorities, approximately 2 400 Georgians still live there, there is a clear indication that Georgians are continuing to leave the region, contrary to claims by the administration in Akhalgori that they are "slowly returning".

316 *Ibid.*

317 E/CN.4/2006/71/Add.7, paras 6-9.

318 Report of the Representative of the Secretary-General on the human rights of internally displaced persons, Walter Kälin, A/HRC/10/13/Add.2, *op. cit.*, para. 11, with footnotes included.

319 Commissioner for Human Rights of the Council of Europe, Report on human rights issues following the August 2008 armed conflict, 15 May 2009, CommDH(2009)22, para. 9.

320 Human Rights Assessment Mission of the Office for Democratic Institutions and Human Rights, OSCE, Human Rights in the War-Affected Areas following the Conflict in Georgia, 27 November 2008, p. 50.

b) The prohibition of arbitrary or forcible displacement and the reasons for displacement in the context of the 2008 armed conflict and its aftermath

(i) Applicable law

The international legal norms relevant for addressing the various issues relating to displacement derive from IHL (for displacement in time of armed conflict), HRL (for displacement following the end of hostilities) and the UN Guiding Principles on Internal Displacement, which aim to provide a set of common standards based on the two former branches of international law.

Provisions of IHL[321] and HRL[322] explicitly or implicitly point to a general prohibition against arbitrary or forcible displacement, with only restricted circumstances in which displacement is permissible. For example, Article 17 of Protocol II states that "the displacement of the civilian population shall not be ordered for reasons related to the conflict unless the security of the civilians involved or imperative military reasons so demand." Under HRL, as recalled by Walter Kälin, the Representative of the Secretary-General on the Human Rights of Internally Displaced Persons, "the key norm is Article 12 of ICCPR [which] guarantees not only the right to liberty of movement but also the freedom to choose one's residence, which includes the right to remain there (paragraph 1)."[323] This provision further stipulates that this right "shall not be subject to any restrictions except those which are provided by law, are necessary to protect national security, public order (*ordre public*), public health or morals or the rights and freedoms of others, and are consistent with the other rights recognized in the present Covenant (paragraph 3)." This prohibition against arbitrary displacement is restated in the UN Guiding Principles under Principle 6(1): "Every human being shall have the right to be protected against being arbitrarily displaced from his or her home or place of habitual residence." The quality of arbitrariness refers to displacements that do not meet the requirements of IHL and HRL. Consequently, evacuations of civilians to ensure their security against the effects of hostilities or "a displacement designed to prevent the population from being exposed to grave danger cannot be expressly prohibited."[324]

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[321] Articles 49 and 147 of Geneva Convention IV, Articles 51(7), 78(1) and 85(4) of Protocol I, Articles 4(3)(e) and 17 of Protocol II.

[322] Article 12 of the Universal Declaration of Human Rights, Articles 12(1) and 17 of the ICCPR, and Article 8 of the EConvHR.

[323] Guiding Principles on Internal Displacement Annotations, *op. cit.*, p. 28.

[324] ICRC Commentary to Article 17 of Additional Protocol II, p. 1472.

Unless the security of the civilians involved or imperative military reasons so demand, the deportation of the civilian population from an occupied territory and the forced movement of civilians in internal armed conflicts amount to war crimes, according to Articles 8(2)(b)(viii) and (e)(viii) of the Rome Statute and Article 85(4)(a) of Protocol II.

In the light of this general prohibition and its exceptions, it is necessary to analyse the displacement patterns of the approximately 138,000 persons displaced in the context of the August 2008 armed conflict. It appears critical to determine the main reasons for the displacement of those persons, and the sequencing of and reasons for their displacement should be nuanced.

(ii) Patterns of and reasons for the displacements

First, without prejudging the causes of or motives for this displacement, it is critical to note that, in fact, ethnic considerations were involved. As stressed by Amnesty International, "the direction of flight divided largely, though not exclusively, along ethnic lines, with Ossetians having fled northwards to the Russian Federation and ethnic Georgians having fled southwards into other regions of Georgia."[325] According to Russia, in its replies to the IIFFMCG questionnaire, the massive exodus of the population from Georgia to the territory of the Russian Federation primarily involved groups of Ossetians, Abkhaz, Russians, Armenians, Azeris and other ethnic minorities residing in Georgia.[326]

The Russian Federation insisted that "one of the most dramatic consequences of the Georgian military operation against South Ossetia was the massive exodus of local population to the territory of the Russian Federation in search of refuge."[327] Georgia claims on the contrary that more than 130,000 civilians have fled as a result of the campaign of expulsion of ethnic Georgians and raids against Georgian villages by Russian forces in conjunction with irregular proxy armed groups.[328] While these statements account for the general consequences of the hostilities, none of them seems to reflect the various factual causes of the displacement of people taking into account the time, i.e. whether prior to the conflict, during the conflict of in its aftermath. In this regard, there is also a need to distinguish between geographical areas.

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[325] AI, Civilians in the Line of Fire – The Georgia-Russia Conflict, *op. cit.*, p. 48.

[326] Russia, Responses to Questions Posited by the IIFFMCG (Humanitarian Aspects), *op. cit.*, p. 5.

[327] *Ibid.*, p. 3.

[328] Georgia, Responses to Questions Posited by the IIFFMCG (Humanitarian Issues, Question2), provided to the IIFFMCG on 5 June 2009, p. 1.

In the course of the oral pleadings before the ICJ it was submitted that "before the recent attacks on Georgian villages in the Kodori Valley, there was a community of 3 000 Georgians in that area of Upper Abkhazia, to the north of Gali district."[329] According to Georgia, its Department of Statistics estimated that there were 1 900 inhabitants in Ajara municipality (upper Kodori Valley) as of 1 January 2008. The Civil Registry Agency had registered 1 218 IDPs from this municipality on 8 September 2008.[330] Georgia argued that these displacements from the upper Kodori Valley were the result of attacks on and the destruction of Georgian villages, which had forcibly displaced their entire population.[331] Similarly, Amnesty International, though referring to a different figure, noted that some 2 500 people had been displaced from that valley, as a result of military hostilities between Georgian and Abkhaz forces in the area.[332] When considering the displacement of inhabitants from the valley, it is necessary to stress that most of the civilians and military personnel left the region before the hostilities began.[333]

In South Ossetia, the pattern of displacement appears to be more complex. The first period to consider is that prior to the outbreak of the conflict. It is worth noting that testimonies recount that many South Ossetians left the Tskhinvali region at the end of July 2008. Evacuations were also carried out by the *de facto* authorities of South Ossetia. According to the Georgian authorities, "the evacuation of civilians from the Tskhinvali region to the Russian Federation began on 2nd of August 2008."[334] They also state: "At 12:23, the proxy regime announced the evacuation of civilian population from Tskhinvali and from the separatist-controlled villages of the region. The evacuation continued through 6 August 2008. This fact is further confirmed by the statement of Anatoly Barankevich, then National Security Council Secretary of the

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[329] Public sitting held on Monday 8 September 2008, at 10 a.m., at the Peace Palace, Verbatim Record, in the case concerning Application of the International Convention on the Elimination of All Forms of Racial Discrimination (Georgia v. Russian Federation), CR 2008/22, International Court of Justice, The Hague, 2008, p. 41, para. 9.

[330] See: Document submitted by Georgia, "Russian Invasion of Georgia – Facts & Figures," 8 September 2008, p. 14.

[331] REQUEST FOR THE INDICATION OF PROVISIONAL MEASURES OF PROTECTION SUBMITTED BY THE GOVERNMENT OF THE REPUBLIC OF GEORGIA, 13 August 2008, p. 6 para. 12. See also: Public sitting held on Monday 8 September 2008, at 10 a.m., at the Peace Palace, Verbatim Record, in the case concerning Application of the International Convention on the Elimination of All Forms of Racial Discrimination (Georgia v. Russian Federation), CR 2008/22, International Court of Justice, The Hague, 2008, para. 14, p. 57.

[332] AI, Civilians in the Line of Fire – The Georgia-Russia Conflict, *op. cit.*, p. 9.

[333] Report of the Secretary-General on the situation in Abkhazia, Georgia, 3 October 2008, S/2008/631, p. 8, para. 45.

[334] Georgia, Responses to Questions Posited by the IIFFMCG (Humanitarian Aspects, Question 3), provided to the IIFFMCG on 5 June 2009, p. 2.

proxy regime."[335] This is confirmed by a construction worker from Karaleti who, with three other Georgians, arrived in Java on 23 July 2008 to work. This man indicated that on 6 August Eduard Kokoity ordered women and children out and that he, together with his colleagues, saw them passing on the road while they were working.[336] The Russian Federation also indicated that its "Armed Forces helped to organise the evacuation of civilians from the conflict zone"[337] and that "more than 25 thousand people were evacuated from the conflict area including more than 7 thousand children."[338] Such evacuations do not constitute violations of HRL or IHL as they were carried out in order to ensure the security of the persons concerned.

According to the Russian Federation, "as for the predominantly ethnic Georgians who fled from South Ossetia towards Georgia, a significant number of such persons left their homes before the military operation. This fact has been recognised in particular in the report presented by the Council of Europe Commissioner for Human Rights T. Hammarberg. Our assumption is that the primary reason that drove ethnic Georgians to flee both prior to 8 August 2008 and in the following days was the initial information pointing to the fact that the Georgian side was gearing up for a military operation and then the military operation that unfolded around their places of residence. This process was not caused by any premeditated actions directed against ethnic Georgians *per se*."[339] This seems to contradict various testimonies according to which, days prior to the outbreak of the conflict, ethnic Georgians left because of the shelling against ethnic Georgian villages in South Ossetia, such as in Prisi and Tamarasheni. Although less well documented, the intermittent shelling of those villages before the conflict is substantiated by various testimonies.[340] Three persons from Achabeti, a village north of Tskhinvali, interviewed by one of the Mission's experts in Tbilisi on 7 March, indicated that the village was shelled from ethnic Ossetian villages uphill, but they were not able to see clearly who was firing. Shelling and artillery were heard in Achabeti, on 4, 5 and 6 August. These interviewees, as well as others (interviewed by NGOs) who left their village on

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[335] According to this statement: "Since August 1 conditions on border have started to become heated, at the beginning there were simple bombardments, then there appeared the first victims. Then Prime Minister Iury Ionovich Morozov has decided to evacuate people, thanks to him hundreds of lives have been rescued: both children, and women, and old men. Approximately 35 thousand persons were taken out from there (…). On August 8 we have completely cleared the city." See *Idem*.

[336] Testimony gathered by an NGO and forwarded to the IIFFMCG, p. 4.

[337] Russia, Responses to Questions Posited by the IIFFMCG (Humanitarian Aspects), *op. cit.*, p. 9.

[338] Russia, Responses to Questions Posited by the IIFFMCG (Legal Aspects), *op. cit.*, p. 8.

[339] Russia, Responses to Questions Posited by the IIFFMCG (Humanitarian Aspects), *op. cit.*, p. 7.

[340] HRW, *Up In Flames – Humanitarian Law Violations and Civilian Victims in the Conflict over South Ossetia*, *op. cit.*, p. 90.

7 August,[341] declared that inhabitants started to leave because of the growing insecurity and tension.

When the conflict broke out, displacements increased. The Commissioner for Human Rights of the Council of Europe stated that he "met a great number of displaced persons, who had left their homes due to hostilities (...), they all said they felt that they had been forced to leave."[342] The United Nations Inter-agency Humanitarian Assessment Mission to South Ossetia noted with concern that there were "multiple and credible accounts by civilian victims of the widespread targeting of civilians, both ethnic Ossetian and ethnic Georgian, during the immediate armed confrontation and its aftermath" and that this had caused the widespread displacement of civilians in the capital, Tskhinvali, and surrounding villages in the Didi Liakhvi and Frone valleys.[343] Following his visit to Georgia from 1 to 4 October 2008, Walter Kälin noted that after he had spoken "to persons displaced in August from areas adjacent to the Tskhinvali region/South Ossetia, most of them fled, primarily in order to avoid the dangers of war and general insecurity."[344] This was also the general impression the Mission's expert had after interviewing several people who had left ethnic Georgian villages in South Ossetia.

It is worth noting that Georgians living on the main axis between Gori and Tskhinvali in the buffer zone did not flee before the hostilities reached this zone. Instead, they were taken by surprise when Russian troops and South Ossetian forces crossed the administrative border and advanced southwards in the direction of Gori. Interviews conducted by an IIFFMCG expert in June 2009 with inhabitants who had returned to their homes in the villages of Koshka, Tkviavi and Karaleti illustrate this fact.

While it is not always possible to identify the exact reason for displacement in the context of armed conflict, it appears critical here to distinguish the general motive of fleeing the conflict zone to avoid the dangers of war from more specific actions deliberately carried out to force a displacement. In this regard, looting and the burning of houses and property were the reasons for the displacement of ethnic Georgians living in villages around Tskhinvali. This is

[341] Testimonies from inhabitants of Tamarasheni, Disevi and Kurta.

[342] Thomas Hammarberg, Commissioner for Human Rights of the Council of Europe, HUMAN RIGHTS IN AREAS AFFECTED BY The SOUTH OSSETIA CONFLICT, Special Mission to Georgia and Russian Federation, 22-29 August 2008, CommDH(2008)22, 8 September 2008, para 31.

[343] United Nations Inter-agency Humanitarian Assessment Mission to South Ossetia, *op. cit.*, para. 5.7.

[344] Report of the Representative of the Secretary-General on the human rights of internally displaced persons, Walter Kälin, A/HRC/10/13/Add.2, 13 February 2009, para. 10.

particularly significant for people who had decided to stay in those villages despite the hostilities, but who were forced to leave. A villager from Kemerti had to leave after he saw his house being looted and then set on fire.[345] The IIFFMCG expert also interviewed inhabitants from Achabeti and Eredvi who told similar stories and who left because their property was either looted or burned or both.[346] According to the HRAM: "A man from Eredvi described to the HRAM how 'Ossetians' forced his wife's elderly parents out of their house and then burned it down before their eyes. Several other displaced persons from the same village provided nearly identical accounts of their own experiences and of the near total destruction of the village. The perpetrators in Eredvi, according to all accounts, were Ossetians wearing white arm bands. Many witnesses described how the fires were often started by putting a flammable red substance on the beds and then setting it ablaze. (...) The HRAM visited Eredvi and confirmed extensive damage to the village."[347] Other testimonies from people who stayed in their villages, such as in Nuli or Kurta,[348] seem to indicate a pattern of intimidation, beating, threats, looting and the destruction and burning of houses by Ossetian military or paramilitary forces, in order to force the remaining people to leave ethnic Georgian villages.

According to Georgia's Ministry of Foreign Affairs, the total population in some 21 majority-ethnic-Georgian villages in these areas – i.e., those under the Government of Georgia's control prior to August 2008 – comprised 14,500 persons, of whom some 13,260 had been registered as IDPs in Georgia by 8 September.[349] The United Nations Inter-agency Humanitarian Assessment Mission to South Ossetia visited at least six of these villages in the conflict zone in and around the capital, and noted that they appeared to be empty of all population.[350] Two visits carried out by IIFFMCG experts in March and June confirmed that Georgian villages to the north of Tskhinvali, from Tamarasheni to Kekhvi, are still completely empty.

The causes for displacement are more striking when we consider the period after 12 August when, as the EU-brokered peace deal was being discussed, hostilities virtually ceased. Of

[345] Testimony from NGO interviews.

[346] Interviews conducted in March 2009.

[347] Human Rights Assessment Mission of the Office for Democratic Institutions and Human Rights, OSCE, Human Rights in the War-Affected Areas following the Conflict in Georgia, 27 November 2008, p. 42.

[348] Testimonies from interviews by NGOs, pp. 7 and 13.

[349] United Nations Inter-agency Humanitarian Assessment Mission to South Ossetia, *op. cit.*, para. 5.7.

[350] *Idem*.

particular concern is what happened in the so called "buffer zone." As outlined by the United Nations Inter-agency Humanitarian Assessment Mission to South Ossetia, "according to reports received from UN and NGO colleagues with access to the buffer zone outside the administrative boundaries of South Ossetia, a pattern of intimidation leading to displacement, and of destruction of properties, continues in certain targeted villages in that zone."[351] The Assessment Mission also referred to "reports from reliable humanitarian partners detailing continued cases of looting, intimidation, and forced displacement."[352]

It must be underlined that despite the existence, in addition to this pattern, of other reasons for displacement, such as a warning to leave by the Georgian police or by the residents' relatives or neighbours, we cannot dismiss the fact that there are numerous accounts of acts deliberately committed to force displacements.

The situation in the Akhalgori district shows that displacement was not caused merely by general direct hostilities. Indeed there were no hostilities in this district – an area in the east of South Ossetia, populated mostly by ethnic Georgians and under Georgian administration before the war. The Georgian authorities stated that "to date, remaining ethnic Georgians in Akhalgori live in constant fear; their rights and freedoms are limited; they are forced to accept Russian or so-called Ossetian passports and to cut links with the rest of Georgia."[353] According to the HRAM, "Georgians are leaving Akhalgori because of the strong presence of Russian and Ossetian forces and [because they] believe that fighting may break out."[354] As noted by Human Rights Watch, "residents of Akhalgori district face threats and harassment by militias and anxiety about a possible closure of the district's administrative border with the rest of Georgia. Both factors have caused great numbers of people to leave their homes for undisputed Georgian territory."[355] This climate of insecurity was confirmed through interviews by the IIFFMCG expert in March 2009 with several persons from this district who fled and who are currently living in Tserovani settlements.

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[351] United Nations Inter-agency Humanitarian Assessment Mission to South Ossetia, *op. cit.*, para. 5.8.

[352] *Ibid*., para. 4.2.

[353] Georgia, Response to Questions Posited by the IIFFMCG (Humanitarian Aspects, Question 2) provide to the IIFFMCG on 5 June 2009, p. 3.

[354] Human Rights Assessment Mission of the Office for Democratic Institutions and Human Rights, OSCE, Human Rights in the War-Affected Areas following the Conflict in Georgia, 27 November 2008, p. 50.

[355] HRW, *Up In Flames – Humanitarian Law Violations and Civilian Victims in the Conflict over South Ossetia, op. cit*., p. 87. See also pp. 147.

There were several reasons for the displacement of approximately 135,000 persons in the context of the 2008 August conflict and its aftermath.
While the need to avoid the danger of hostilities and the general climate of insecurity account for most of the displacements, numerous documented cases of violations of IHL and HRL committed in order to force the displacement of ethnic Georgians in South Ossetia lead us to conclude that the prohibition against arbitrary or forced displacement has been violated.

c) Allegations of ethnic cleansing against Georgians

While Georgia did not make allegations of genocide, it claimed that the crime of ethnic cleansing had been committed by South Ossetian and Russian forces. It submitted that "ethnic Georgians were subjected to ethnically motivated crimes committed either directly by Russian armed forces or through their tacit consent by South Ossetian militias (on the territories falling under Russian control)."[356]

More specifically, one of the advocates representing Georgia before the ICJ in the CERD case stated that it is "Georgia's case that there is in fact, and has long been, 'discrimination based on ethnicity in the policy of voluntary return of refugees and other displaced persons', that this policy is associated with ethnic cleansing in relevant areas of Georgia, that the process of ethnic cleansing continues and that to at least a significant degree it is attributable to the Russian Federation."[357]

Such a claim has to be seen in the context of the importance attributed by both sides to the ethnic dimension of the August conflict, and the link with previous allegations of ethnic cleansing regarding "the conflicts of 1991-1994, 1998 [and] 2004" made by Georgia,[358] which complicate the assessment of the claim. Georgia reiterated, for example, that "Ethnic Georgians and other ethnic minorities have been ethnically cleansed from Abkhazia and the Tskhinvali region/South Ossetia as a result of the war in 1992-1993 in Abkhazia and in 1991-

[356] Georgia, Responses to Questions Posited by the IIFFMCG (Humanitarian Aspects, Question 1), provided to the IIFFMCG on 5 June 2009, p.1

[357] Public sitting held on Monday 8 September 2008, at 4.30 p.m., at the Peace Palace, Verbatim Record, in the case concerning Application of the International Convention on the Elimination of All Forms of Racial Discrimination (Georgia v. Russian Federation), CR 2008/25, International Court of Justice, The Hague, 2008, para. 9, p. 12.

[358] Case concerning Application of the International Convention on the Elimination of All Forms of Racial Discrimination (Georgia v. Russian Federation), Request for the indication of provisional measures, International Court of Justice, ICJ, 15 October 2008, p. 6.

1992 in the Tskhinvali region/South Ossetia."[359] It should also be stressed that such a conclusion, and the use of the expression "ethnic cleansing," have implications – politically and even emotionally, for all sides – that go far beyond the present legal assessment.

The assessment of this claim is complicated by the fact that ethnic cleansing is not a term defined in international treaty law. Taking stock of the various attempts to define "ethnic cleansing", Professor William Schabbas noted: "while there is no generally recognized text defining ethnic cleansing, [such attempts] concur that it is aimed at displacing a population in order to change the ethnic composition of a given territory, and generally to render the territory ethnically homogeneous or 'pure'..."[360] The link to a territory appears critical in these attempts at a definition. The Security Council Commission of Experts on violations of IHL during the war in the former Yugoslavia stated that "'ethnic cleansing' means rendering an area ethnically homogeneous by using force or intimidation to remove persons of given groups from the area."[361]

Ethnic cleansing does not equate to genocide. This has been acknowledged by Georgia.[362]

In the 2007 Genocide case the ICJ differentiated between the two. When considering the specific intent of genocide, the Court had to elaborate on the relationship between this crime and what is known as "ethnic cleansing." After having noted that "the term 'ethnic cleansing' has frequently been employed to refer to the events in Bosnia and Herzegovina," it considered "what legal significance the expression may have."[363]

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[359] Georgia, Responses to Questions Posited by the IIFFMCG (Humanitarian Aspects, Question 2), provided to the IIFFMCG on 5 June 2009, p.1.

[360] Schabbas, W., *op. cit.*, p. 199.

[361] "Interim Report of the Commission of Experts Established Pursuant to Security Council resolution 780 (1992),", UN Doc. S/35374 (1993), para 55.

[362] In its replies to the IIFFMCG Questionnaire, Georgia stated:
"Neither the intent, as a matter of policy, to render an area "ethnically homogeneous," nor the operations that may be carried out to implement such policy, can as such be designated as genocide: the intent that characterizes genocide is 'to destroy, in whole or in part' a particular group, and deportation or displacement of the members of a group, even if effected by force, is not necessarily equivalent to destruction of that group, nor is such destruction an automatic consequence of the displacement."
It does not mean that ethnic cleansing can not constitute genocide, if it reaches the specific intent of the crime – destruction of the group in comparison with the intent of the removal of the group from a region," Georgia, Replies to Question 1 of the Questionnaire on humanitarian issues, provided to the IIFFMCG on 5 June 2009, p. 3.

[363] The Court noted:
"It is in practice used, by reference to a specific region or area, to mean 'rendering an area ethnically homogeneous by using force or intimidation to remove persons of given groups from the area' (S/35374 (1993), para. 55, Interim Report of the United Nations Commission of Experts). It does not appear in the Genocide Convention (…). It can only be a form of genocide within the meaning of the Convention, if it corresponds to or falls within one of the categories of acts prohibited by Article II of the Convention. Neither

Georgia claims "that the expulsion of ethnic Georgians from certain regions of Georgia, through the acts committed and steps taken by the Russian Federation along with South Ossetian proxy militants, is equal to the act of ethnic cleansing." It "considers 'ethnic cleansing' an extreme form of racial discrimination under Article 1 of the Convention on the Elimination of All Forms of Racial Discrimination."[364]

This allegation has been echoed by various organisations. In its Resolution 1633 (2008) on "The consequences of the war between Georgia and Russia," the Parliamentary Assembly of the Council of Europe stated that it was "especially concerned about credible reports of acts of ethnic cleansing committed in ethnic Georgian villages in South Ossetia and the 'buffer zone' by irregular militia and gangs which the Russian troops failed to stop." It further "stresse[d] in this respect that such acts were mostly committed after the signing of the cease-fire agreement on 12 August 2008, and [were] continuing" at the date of the adoption of the resolution.[365] The rapporteurs of the Committee on the Honouring of Obligations and Commitments by Member States of the Council of Europe (Monitoring Committee) who visited Georgia and Russia at the end of September detailed the basis for this qualification:

"The systematic nature of the looting and destruction of property in South Ossetia, together with indications from the de facto leadership in Tskhinvali that ethnic Georgian IDPs are not welcome to return, even if they take on the citizenship of the self-proclaimed state as demanded by the de facto authorities, is a clear indication that ethnic cleansing is taking place in South Ossetia. This is confirmed by reports from international humanitarian and relief organisations, as well as human rights organisations and the diplomatic community in Georgia, who have reported systematic acts of ethnic cleansing of Georgian villages in South Ossetia by South Ossetian irregular troops and gangs. Reports have been received that, in

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the intent, as a matter of policy, to render an area "ethnically homogeneous," nor the operations that may be carried out to implement such policy, can as such be designated as genocide: the intent that characterizes genocide is "to destroy, in whole or in part" a particular group, and deportation or displacement of the members of a group, even if effected by force, is not necessarily equivalent to destruction of that group, nor is such destruction an automatic consequence of the displacement. (…) In other words, whether a particular operation described as "ethnic cleansing" amounts to genocide depends on the presence or absence of acts listed in Article II of the Genocide Convention, and of the intent to destroy the group as such. In fact, in the context of the Convention, the term "ethnic cleansing" has no legal significance of its own. That said, it is clear that acts of "ethnic cleansing" may occur in parallel to acts prohibited by Article II of the Convention, and may be significant as indicative of the presence of a specific intent (dolus specialis) inspiring those acts," ICJ, Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro), *op. cit.*, para. 190.

[364] Georgia, Replies to Questions Posited by theIIFFMCG (Humanitarian aspects, Question 1), provided to the IIFFMCG on 5 June 2009, p. 3.

[365] Parliamentary Assembly of the Council of Europe, Resolution 1633, adopted on 2 October 2008, para. 13.

some cases, complete villages have been bulldozed and razed. This pattern also seemed to be confirmed by the visit of the PACE delegation to the region, which saw that the Georgian village of Ksuisi in South Ossetia had been completely looted and virtually destroyed."[366]

Human Rights Watch also concluded that ethnic cleansing took place in Georgia.[367]

Several elements all lead to the conclusion that ethnic cleansing was carried out during and, most importantly, after the August 2008 conflict. When considering the territory at stake and its ethnic composition, it must be stressed that South Ossetia was populated by ethnic Georgians in certain areas and villages. The UN Guiding Principles on Internal Displacement, in Principle 6(2), give examples of situations in which displacement would be arbitrary: "when it is based on (…) 'ethnic cleansing' or similar practices aimed at or resulting in alteration of the ethnic, religious or racial composition of the affected population." As well as through displacement, ethnic cleansing can be achieved through other acts such as the threat of attacks against the civilian population and the wanton destruction of property.[368]

Many ethnic Georgian villages in South Ossetia were and still are completely empty of people. Furthermore, a number of testimonies report destruction and torching done explicitly to force people to leave and prevent them from returning. This is significant when one considers that while most of the population of those villages left at the outbreak of the hostilities, this violence was directed against the few inhabitants who had stayed on. In this regard, during its latest visit to the area north of Tskhinvali, on the road linking Tamarasheni, Achabeti, Kurta and Kekhvi, the IIFFMCG experts witnessed that all of these ethnic villages had been burned down and were completely uninhabited.

While no definition of ethnic cleansing exists, and there is consequently no requirement of a particular scale in the material acts, it is critical to note that the extensive damage and the acts committed against the remaining ethnic Georgian inhabitants can in no way be regarded as isolated incidents. At the same time, it is difficult to regard them as systematic. This is closely linked to another issue.

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366 Committee on the Honouring of Obligations and Commitments by Member States of the Council of Europe (Monitoring Committee), Report, The consequences of the war between Georgia and Russia, Doc. 11724, 1 October 2008, Co-rapporteurs Luc van den BRANDE and Mátyás EÖRSI, para. 41, available at: http://assembly.coe.int/Main.asp?link=/Documents/WorkingDocs/Doc08/EDOC11724.htm

367 HRW, *Up In Flames – Humanitarian Law Violations and Civilian Victims in the Conflict over South Ossetia*, *op. cit.* p. 131.

368 See on this issue, 'Interim Report of the Commission of Experts Established Pursuant to Security Council resolution 780 (1992)', *op. cit.*, para. 56.

Although there is no legal requirement for any particular mental element to be present in ethnic cleansing, this qualification does seem to require an aim of "changing the ethnic composition of a given territory" or "generally rendering the territory ethnically homogeneous." Acts committed during and after the conflict show clearly that violence is being targeted against one particular ethnic group, i.e., ethnic Georgians.

In this regard it is necessary to acknowledge that the causes of displacement are numerous and that some acts, while apparently committed solely on ethnic grounds, may also be motivated by revenge for acts committed during the 1990s conflicts. During the latest visit by the IIFFMCG, in June, one of its experts interviewed a South Ossetian inhabitant of Tskhinvali who explicitly stated that ethnic Georgian villages from Kekhvi to Tamarasheni had been destroyed as revenge for what their inhabitants had done to South Ossetia in 1991-1992 and after. But this person also added that other ethnic Georgian villages had not been destroyed because they had always had good relationships with South Ossetians.[369]

On the other hand, ethnic cleansing does not necessarily mean that a whole territory must be homogeneous – it also relates to the aim of changing the ethnic composition of a territory.

Several elements suggest that there was ethnic cleansing in South Ossetia against Georgians living there.

Given the scale and the type of acts of violence such as forced displacement, pillage and the destruction of homes and property committed in South Ossetia, the question of whether they could amount to a crime against humanity arises. Under the Rome Statute, a crime against humanity is defined as particular acts including the "forcible transfer of population" and "persecution against any identifiable group or collectivity on political, racial, national, ethnic, cultural, religious, gender or other grounds", "when committed as part of a widespread or systematic attack directed against any civilian population, with knowledge of the attack."[370] While the discriminatory intent is not a common element of the crime against of humanity,

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[369] In this regard, in Georgian-populated villages that were under the control of the *de facto* South Ossetian authorities until the conflict, Amnesty International observed a very different situation from that in ethnic Georgian villages administered by the Georgian authorities:
"On 26 August, representatives of the organisation visited the villages of Nedalti and Akhalsheni in the Znaur district, to the west of Tskhinvali, which saw much less fighting. Akhalsheni has the only Georgian-language school operational in South Ossetian-controlled territory. Amnesty International representatives met representatives of the Georgian community of Akhalsheni, who said that while most of the village's population had left for Georgia on the eve of the conflict, not one house had been damaged or looted nor had there been any casualties in the village," AI, p. 44.

[370] See Article 7 of the Rome Statute of the International Criminal Court.

and is required only for the acts of persecution,[371] most of the acts identified were carried out against a particular group – ethnic Georgian inhabitants of South Ossetia. The key criterion for any of those acts to be classified as crime against humanity is that it was demonstrably committed as part of a widespread or systematic attack directed against a civilian population. To the extent that such an element is present, these acts could be classified as crime against humanity.

Several elements suggest the conclusion that ethnic cleansing was carried out against ethnic Georgians in South Ossetia both during and after the August 2008 conflict.

d) Treatment of displaced persons

As civilians, IDPs benefit from the general protection of IHL and, when the law of armed conflict ceases to apply, protection under HRL. Alleged violations in this regard will be addressed later. It is, however, very important to highlight the vulnerability of IDPs in the context of displacement. Numerous testimonies of ill treatment, beating, kidnapping and arbitrary arrest and detention in the course of their displacement during the conflict and its aftermath have been reported. The set of rules protecting IDPs is compiled in the UN Guiding Principles on Internal Displacement.[372]

Responses from the parties to the conflict on the issue of displaced persons and their treatment must be addressed in the light of the fact that before the outbreak of the conflict many people had been living as internally displaced persons in South Ossetia, and people from South Ossetia and Abkhazia had been displaced elsewhere, since the first conflict of 1991-92.[373]

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[371] See for example Larry May, *Crimes Against Humanity: A Normative Account*, New York, Cambridge University Press, 2005, p. 125, and Patricia M. Wald, "*Genocide and Crimes Against Humanity*," Washington University Global Studies Law Review, 2007, Vol. 6, p. 629.

[372] Principle 10 re-states that "every human being has the inherent right to life which shall be protected by law. No one shall be arbitrarily deprived of his or her life" and that "attacks or other acts of violence against internally displaced persons who do not or no longer participate in hostilities are prohibited in all circumstances." Principle 11 re-states that "every human being has the right to dignity and physical, mental and moral integrity." Principle 12 inter alia restates that: "Every human being has the right to liberty and security of person. No one shall be subjected to arbitrary arrest or detention. Internally displaced persons shall be protected from discriminatory arrest and detention as a result of their displacement. In no case shall internally displaced persons be taken hostage."

[373] In November 2008, the HRAM of the Office for Democratic Institutions and Human Rights of the OSCE noted that: "The Government of Georgia has made efforts under difficult circumstances to meet the needs of a large, new population of displaced persons. Despite these efforts, as well as those of international and national humanitarian organisations, many displaced persons are still living in very difficult conditions and have not yet been provided with adequate assistance or shelter as winter approaches. The de facto authorities in South Ossetia have provided some assistance for war-affected persons in territories under their control, but others continue to face arduous conditions and depend on international assistance," Human Rights Assessment Mission of the Office for Democratic Institutions and Human Rights, OSCE, Human Rights in the War-Affected Areas following the Conflict in Georgia, 27 November 2008, p. 6.

The Representative of the Secretary-General on the human rights of internally displaced persons noted that "the immediate humanitarian response from the Government to the rapid displacement resulting from the escalation of the conflict on 7/8 August is generally considered to have been speedy and adequate."[374] He was also nevertheless informed "that in the initial stages of the emergency, the coordination of the Government response was unclear and changed several times, revealing a lack of preparedness at the level of the competent authorities." The UN Representative noted that "this observation is shared by the Council of Europe Commissioner on Human Rights who considered, following his August visit, that neither the authorities nor the international community had done enough to provide the displaced with adequate living conditions, which had, however, improved in the course of September."[375] Walter Kälin welcomed "the fact that in contrast to earlier responses to displacement, in the aftermath of the August conflict the Government endorsed a policy of full support to local integration of IDPs from the Tskhinvali region/South Ossetia and Abkhazia and quickly adopted implementation measures, in particular in the area of housing", such as in Tserovani.[376]

e) The right to return, and obstacles

(i) Right to return under international law

According to the UN Guiding Principles on Internal Displacement, the competent authorities have the primary duty and responsibility to establish the conditions, and also to provide the means, to make three possible solutions available to IDPs: return to their former homes; local integration; and resettlement in another part of the country.[377]

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[374] Report of the Representative of the Secretary-General on the human rights of internally displaced persons, *op. cit.*, para. 16.

[375] *Idem*. Following its Special Follow-Up Mission to the Areas Affected by the South Ossetia Conflict, in November 2008, the Commissioner for Human Rights expressed "his serious concern over the fact that the Georgian Government, despite the substantial assistance of the international community, still has not managed to secure adequate living conditions and support to a number of those who continue to be displaced." See Special Follow-up Mission to the Areas Affected by the South Ossetia Conflict: Implementation of the Commissioner's six principles for urgent human rights and humanitarian protection (12-14 November 2008, Tbilisi, Tskhinvali and Gori), Thomas Hammarberg Commissioner for Human Rights of the Council of Europe, CommDH(2008)37, 16 December 2008.

[376] Report of the Representative of the Secretary-General on the human rights of internally displaced persons, *op. cit.*, para. 18.

[377] Principle 28(1) states: "Competent authorities have the primary duty and responsibility to establish conditions, as well as provide the means, which allow internally displaced persons to return voluntarily, in safety and with dignity, to their homes or places of habitual residence, or to resettle voluntarily in another part of the country. Such authorities shall endeavour to facilitate the reintegration of returned or resettled internally displaced persons."

While HRL focuses primarily on the right of return from another country, there is an obligation on the governments concerned to do everything possible to protect the right to return within countries too.[378] This is also a rule under conventional and customary IHL, whereby "displaced persons have a right to voluntarily return in safety to their homes or places of habitual residence as soon as the reasons for their displacement cease to exist."[379] As underlined in Principle 6(3) of the UN Guiding Principles, "displacement shall last no longer than required by the circumstances." This right is strengthened by the IDPs' freedom of movement and right to choose their place of residence.

Guarantees relating to decisions to return are fundamental. Such decisions must be voluntary, meaning that they are made without coercion and based on an informed choice, and return must take place in conditions of safety and dignity, which would allow the returnees to live without threats to their security and under economic, social and political conditions compatible with the requirements of human dignity.

(ii) Impediments to the full exercise of the right to return

The return of IDPs is one the most pressing concerns and one of the most complex issues in the context of the August 2008 conflict, as well as in a broader perspective with regard to IDPs from the conflicts in the 1990s.[380] From the outset, two points must be stressed: first, there is a desperate expectation on the part of IDPs to return to their homes and places of residence. This was underlined by all IDPs interviewed by the IIFFMCG's expert in March 2009 as well as in other interviews conducted by international organisations and NGOs.[381] At the same time, all IDPs stressed that their return would be possible only if their security was guaranteed. The second point to be highlighted: under no circumstances should the current question of the status of South Ossetia and Abkhazia be used to hamper or impede the right of IDPs to return. This has also been clearly stated by the Commissioner for Human Rights of the Council of Europe.[382]

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[378] Thomas Hammarberg, Commissioner for Human Rights of the Council of Europe, HUMAN RIGHTS IN AREAS AFFECTED BY The SOUTH OSSETIA CONFLICT, 8 September 2008, *op. cit*., para. 32.

[379] See Rules 132 in J-M. HENCKAERTS, L. DOSWALD-BECK (eds), Customary International Humanitarian Law, Volume I, *op. cit*., p. 468.

[380] See for example, among the five reports issued by the High Commissioner of the CoE, SPECIAL MISSION TO GEORGIA INCLUDING SOUTH OSSETIA SUMMARY OF FINDINGS, *op. cit*., p. 2.

[381] For example, *ibid*., para. 31.

[382] *Ibid*., para. 32.

As noted above, according to government estimates in November 2008, 37,605 or so IDPs will not return in the foreseeable future, including 19,111 IDPs from the Tskhinvali region/South Ossetia, 1,821 IDPs from the upper Kodori Valley, and those IDPs who have spent the winter in displacement, namely 11,500 who cannot return to the area adjacent to the Tskhinvali region/South Ossetia and some 5,173 IDPs from Akhalgori.[383] According to United Nations estimates, there will be some 30,000 long-term displaced persons as a result of the conflict.[384]

While the winter and weather conditions might have explained why only few families returned to their homes in the upper Kodori Valley, the IIFFMCG visited the Kodori Valley in June and witnessed that most of the IDPs had not yet returned. According to different sources, between 150 and 200 persons have returned.[385]

The most difficult issue appears to be the return of persons displaced from South Ossetia. As stressed by the Commissioner for Human Rights of the Council of Europe in September, "the right to return should encompass the whole area of conflict, not only the 'buffer zone', but also South Ossetia itself."[386] In this regard there seem to be differences among the population returning to this region. The Russian Federation stated that "by late September more than 25 thousand people had returned from the territory of Russia to South Ossetia,"[387] whereas ethnic Georgians are not able to return.[388]

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[383] Report of the Representative of the Secretary-General on the human rights of internally displaced persons, *op. cit*., p. 2

[384] United Nations, Georgia Crisis Flash Appeal, October 2008, p. 15.

[385] Meetings of the IIFFMCG with the *de facto* Minister for Foreign Affairs of Abkhazia on 29 May 2009 and with the "Abkhaz government in exile" on 4 June 2009.

[386] SPECIAL MISSION TO GEORGIA INCLUDING SOUTH OSSETIA SUMMARY OF FINDINGS, *op. cit*, para. 35.

[387] Russia, Responses to Questions Posited by the IIFFMCG (Legal Aspects), *op. cit.*, p. 8. According to the Office for Democratic Institutions and Human Rights of the OSCE, "the vast majority of the more than 30,000 persons who found refuge in Russia during the conflict have returned to their homes in South Ossetia." See OSCE, Human Rights in the War-Affected Areas following the Conflict in Georgia, *op. cit.*, pp. 6-7.

[388] The Commissioner for Human Rights of the Council of Europe in his latest report of 15 May 2009 confirmed that:
"According to recent estimates from the Georgian Government and UNHCR, over 30,000 persons still remain displaced. Around 18,000 individuals have been offered durable housing solutions by the Georgian Government and almost 4,000 opted for financial compensation. Approximately 12,500 still reside in collective centres or temporary private accommodation. As for the people who fled to the Russian Federation, most of them have returned to South Ossetia, except for some 1,200 who have chosen to remain in the Russian Federation. Most of the people displaced by the August 2008 conflict have been able to return to their homes in the areas adjacent to South Ossetia, and most of those who fled to the Russian Federation have been able to return. However, most ethnic Georgians who have fled South Ossetia have not been in a

The obstacles hampering the return of displaced persons are numerous. In September 2008 the United Nations Inter-agency Humanitarian Assessment Mission to South Ossetia stated *inter alia* that "a lack of the rule of law, violation of property rights, limited livelihood prospects, and broader political developments affecting reconciliation, render this a complex undertaking."[389]

According to Georgia, "many of the ethnic Georgians who fled their villages in the Tskhinvali region/South Ossetia during the conflict and its immediate aftermath have not been able to return." It referred *inter alia* to declarations made by the *de facto* South Ossetian authorities making people's return conditional on their acceptance of South Ossetian passports and renunciation of Georgian passports, and mentioned testimonies from persons who had been stopped at Russian/Ossetian checkpoints reported by the HRAM of the OSCE.[390]

The IIFFMCG has come to the conclusion that security and the destruction of property are currently the two main obstacles. These have also been highlighted by the Georgian authorities.[391] Similarly, the Russian Federation has noted that "as for their return to communities located to the North and North-East of Tskhinvali, this process has been physically hampered by the fact that a significant number of homes were destroyed during the military operation as well as by the remaining security risks."[392] According to the Office for Democratic Institutions and Human Rights of the OSCE, "although many of the more than 130,000 persons displaced by the [August 2008] conflict have returned to their former places of residence, mainly in the 'buffer zone', over 20,000 persons, overwhelmingly ethnic Georgians, have been prevented from returning to their former places of residence in South Ossetia due to fear of insecurity, damage to their homes, or restrictions placed on their return,

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position to return," Report on human rights issues following the August 2008 armed conflict, 15 May 2009, para 10.

389 United Nations Inter-agency Humanitarian Assessment Mission to South Ossetia, op. cit., para. 4.2. The Russian Federation also identified the following:
"[D]ue to the fact that the Russian Federation severed diplomatic ties with Georgia, since 29 August 2008 the process of voluntary repatriation of Georgian nationals to their home country has become significantly more complicated since many of these people have no proof of identity. Other key factors that hamper the efforts to ensure organised repatriation of displaced persons include the remaining ethnic tensions and the situation in the 'buffer zones,' which continues to teeter on the brink of conflict due to the build-up of Georgian military forces. These factors may potentially create new sources of tension along [the] South Ossetian and Abkhaz borders.," Responses to Question, *op. cit*., p. 6.

390 Georgia, Responses to Questions by the IIFFMCG (Humanitarian Aspects, Question 2), provided to the IIFFMCG on 5 June 2009, pp. 2-3.

391 Report of the Representative of the Secretary-General on the human rights of internally displaced persons, *op. cit*., p. 2.

392 Russia, Responses to Questions Posited by the IIFFMCG (Humanitarian Aspects), *op. cit*., p. 7.

while many who fled from the Kodori region of Abkhazia fear to return because of uncertainties about the security situation."[393]

When considering the extensive destruction and burning of houses carried out after the cease-fire of 12 August, and after most of the ethnic Georgians had left the villages, there are many indications that this destruction was committed deliberately in order to prevent IDPs from returning. In this regard, destruction as an obstacle to the right of return cannot be seen as a mere consequence of the hostilities. As Human Rights Watch have underlined, their researchers came to the conclusion that this destruction of ethnic Georgian villages around Tskhinvali – most of it after mid-August – was done "with the express purpose of forcing those who remained to leave and ensuring that no former residents would return."[394]

In March 2009 the IIFFMCG was able to travel on the road between Tskhinvali and the village of Kurta where it witnessed extensive damage, with almost all the houses burned down or otherwise destroyed. Travelling along the same road in June, the IIFFMCG saw that all the ethnic Georgian villages were still completely empty.

As highlighted above, the IIFFMCG is also concerned at the fact that looting, destruction and torching occurred after the cease-fire. The United Nations Inter-agency Humanitarian Assessment Mission to South Ossetia stated that "the UNOSAT images of the villages north of Tskhinvali taken on 19 August appear now to be only a partial reflection of the current extent of property damage there." In the village of Avnevi in the Frone valley, to the west of Tskhinvali, the Mission members observed "smoke rising from one ruin on 18 September, making it unlikely that it had been burned during the August conflict."[395] There are also testimonies according to which some destruction and torching were being done deliberately to prevent displaced persons from returning. On 30 September 2008, during its mission, the Committee on Legal Affairs and Human Rights of the Council of Europe echoed the information provided by the Human Rights Watch investigators: "They have personally observed the looting and burning of the houses of ethnic Georgians (...) They have also asked several looters and arsonists, who were acting in complete openness, for the reasons for their

[393] OSCE, Human Rights in the War-Affected Areas following the Conflict in Georgia, *op. cit.*, pp. 6-7.

[394] HRW, *Up In Flames – Humanitarian Law Violations and Civilian Victims in the Conflict over South Ossetia, op. cit.*, p. 131.

[395] *Idem*.

actions. The answer they received was that they wanted to make sure that the Georgian inhabitants had no houses they could return to."[396]

With regard to the measures undertaken to make the return of displaced persons possible, the Office for Democratic Institutions and Human Rights of the OSCE stressed that it is clear that the *de facto* authorities in South Ossetia and Abkhazia, including Russian military authorities, have not taken steps to ensure that displaced persons can return voluntarily to their former places of residence in safety and dignity, in line with the obligations on these authorities under international standards.[397]

Of particular concern is the practice by the *de facto* authorities in South Ossetia and Abkhazia of imposing certain conditions on those wishing to return. One of these is the requirement to become a citizen of Abkhazia or South Ossetia. This condition was described to the Commissioner for Human Rights of the Council of Europe by the *de facto* authorities in Tskhinvali.[398] The HRAM referred to declarations by the authorities in South Ossetia explicitly stating this condition.[399] Testimony from IDPs being prevented from returning seems to suggest that these declarations have produced an effect on the ground.[400]

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[396] Parliamentary Assembly of the Council of Europe (PACE), Committee on Legal Affairs and Human Rights, "The consequences of the war between Georgia and Russia," Opinion by rapporteur Christos Pourgourides, Doc. 11732 rev, 1 October 2008, para. 14, available at:http://assembly.coe.int/Main.asp?link=/Documents/WorkingDocs/Doc08/EDOC11732.htm, para.34.

[397] OSCE, Human Rights in the War-Affected Areas following the Conflict in Georgia, *op. cit.*, p. 6.

[398] Special Follow-up Mission to the Areas Affected by the South Ossetia Conflict: Implementation of the Commissioner's six principles for urgent human rights and humanitarian protection, *op. cit*., p. 1.

[399] The HRAM report states:
"Mr Kokoity (the leader of the separatist forces) reportedly made a statement in mid-September that Georgian "refugees" holding South Ossetian citizenship can freely return to their former places of residence. Displaced Georgians will be allowed to come back if they are ready to renounce Georgian citizenship and acquire South Ossetian citizenship.
"Other *de facto* South Ossetian officials have expressed similar views. The *de facto* Minister for the Interior, for example, told the HRAM that he has found records of 4,000 ethnic Georgians living in South Ossetia who had been issued weapons since 2006 and that if these people tried to return they would be prosecuted. Others, he said, would only be allowed to return if they renounced their Georgian citizenship. The Deputy Chairperson of the *de facto* Council of Ministers (the *de facto* Deputy Prime Minister) told the HRAM: 'If a Georgian who decides to remain in South Ossetia does not meet our expectations, they will be expelled… I don't want Georgians to return to the northern villages of Tamarasheni and others, and they won't be able to.'" See Human Rights Assessment Mission of the Office for Democratic Institutions and Human Rights, OSCE, Human Rights in the War-Affected Areas following the Conflict in Georgia, 27 November 2008, p. 48.

[400] According to the HRAM:
"A displaced person from the village of Disevi, for example, told the HRAM that she tried to return to Disevi but was prevented from doing so by Russian soldiers. Another concurred in a separate interview that 'it is impossible to get through the Russian-Ossetian check points' and that it was not safe to return to tend the fields.
"A displaced couple from Vanati told the HRAM they have not been able to return to their house because police stop people from entering that area. A villager who tried to return to Ksuisi village said he was turned

While the Abkhaz *de facto* Minister for Foreign Affairs has declared that "there were no Abkhaz obstacles to the return of refugees in the Kodori Valley,"[401] based on information from UNOMIG the UN Secretary-General has noted that the "Abkhaz *de facto* authorities announced that all the local population, estimated in 2002 at up to 2,000, could return if the displaced persons obtained Abkhaz 'passports' and gave up their Georgian citizenship."[402] This alleged link between return and the issuance of an Abkhaz passport raises broader questions regarding acts and situations that are not limited to the August conflict.

According to the HRAM, "some displaced persons appear to have been pressured by the Georgian authorities to return to their former places of residence in the areas adjacent to South Ossetia before conditions were in place to guarantee their security or an adequate standard of living, in contravention of OSCE commitments and other international standards."[403]

The IIFFMCG concludes that serious obstacles have prevented IDPs from returning to their homes in South Ossetia, and that for them to return no conditions other than those recognised by international standards should be imposed on them. Furthermore, the *de facto* South Ossetian and Abkhaz authorities, together with Russia, should take all appropriate steps to ensure that IDPs can return to their homes. Georgia must also respect the principle that a decision to return must be free from coercion. Finally, all sides should act in order to ensure that the right of return is fully implemented. This is critical with regard to the consequences of the August 2008 conflict, but also as a general measure to ensure a lasting solution to this conflict. Working to ensure the realisation of this right to return should give each side some leverage in negotiations and provide a basis for cooperation.

The authorities in Abkhazia and South Ossetia, together with Russia, should take all appropriate measures to ensure that IDPs are able to return to their homes. No conditions for exercising this right, other than those laid down by international standards, shall be imposed on IDPs. Georgia shall respect the principle of return as a free, individual decision by displaced persons.
Ensuring the realisation of the right to return is one of the basic prerequisites for achieving a lasting solution to the conflict.

back at a checkpoint after being told he should apply for a Russian passport and citizenship if he wanted to return to the village. Other villagers reported they were afraid to go back to their villages after their experiences there," *ibid*., pp. 48-49.

401 Meeting with the Abkhaz *de facto* Minister for Foreign Affairs, 3 March 2009, Sukhumi.

402 Report of the Secretary-General on the situation in Abkhazia, Georgia, pursuant to Security Council resolution 1839 (2008), 3 February 2009, S/2009/69, p. 8, para. 41.

403 OSCE, Human Rights in the War-Affected Areas following the Conflict in Georgia, *op. cit*., p. 7.

f) Protection of property rights

Under IHL the property rights of displaced persons must be respected. This rule is considered to be a norm of customary law.[404] The protection of the right to property, subject to restrictions imposed by law in the public interest, is also guaranteed in Article 1 of the First Protocol to the EConvHR. The UN Guiding Principles on Internal Displacement state that "No one shall be arbitrarily deprived of property and possessions" and that "[t]he property and possessions of internally displaced persons shall in all circumstances be protected."[405] Moreover Principle 29(2) holds that the "competent authorities have the duty and responsibility to assist returned and/or resettled internally displaced persons to recover, to the extent possible, their property and possessions which they left behind or were dispossessed of upon their displacement" and that "when recovery of such property and possessions is not possible, competent authorities shall provide or assist these persons in obtaining appropriate compensation or another form of just reparation."

The protection of property rights constitutes a critical issue: first, it entails ensuring that the property of displaced persons remains untouched until they can effectively return to their homes; secondly, it concerns property that has already been destroyed. It is therefore a prerequisite for a lasting peace in the region, as it also includes the issue of compensation.

According to the Russian Federation, the "property rights of displaced persons in the territory of South Ossetia are protected by the South Ossetian law enforcement authorities. Russian organisations cooperating with South Ossetia have been instructed not to engage in any transactions involving real estate of dubious legal standing."[406] Russia has also stated that "Russian troops, jointly with South Ossetian law enforcement and military units, provided round-the-clock protection of homes and land allotments that remained undamaged in Georgian villages, at the same time ensuring the safety and security of South Ossetian residents regardless of their ethnic background."[407]

On the contrary, many reports indicate the absence of proper measures to protect houses. The Office for Democratic Institutions and Human Rights of the OSCE indicated that the issue of

[404] See Rule 133 in J-M. HENCKAERTS, L. DOSWALD-BECK (eds), Customary International Humanitarian Law, Volume I, *op. cit*., p. 472.

[405] See Principle 21.

[406] Russia, Responses to Questions Posited by the IIFFMCG (Humanitarian Aspects), *op. cit*., p. 7.

[407] Russia, Responses to Questions Posited by the IIFFMCG (Humanitarian Aspects), *op. cit*., p. 11.

compensation for homes and other property lost during the conflict remains unresolved.[408] It stressed that "the most disturbing aspect of property loss was the apparently widespread, deliberate burning of houses by those whom villagers described as 'Ossetians'."[409] Furthermore, north of Tskhinvali, when HRW researchers returned in September certain villages had been almost fully destroyed, while in Kekhvi the debris of some houses along the road appeared to have been bulldozed.[410]

The Commissioner for Human Rights of the Council of Europe recalled that those who are unable to return to their homes, because they are occupied or have been destroyed, are entitled to restitution or compensation.[411] Both governments have to respect the ICJ order on provisional measures of 15 October 2008, to "do all in their power (…) to ensure, without distinction as to national or ethnic origin, the protection of the property of displaced persons and of refugees."[412]

A 2009 report commissioned by the Council of Europe on the destruction of cultural monuments indicated that "owners of buildings damaged or destroyed in the villages in the so-called former 'Buffer Zone' are being consulted by the Governor's services in order to know if they either prefer to receive subventions for repairing their houses or an amount of money to rebuild elsewhere. This measure aims at offering to all those affected by the conflict the possibility of being properly accommodated before the winter."[413]

In June, Georgia indicated that "the Law on Restitution was adopted on December 29, 2006. The aim of the law is to provide property restitution, adequate immovable property in place or compensation of the material (property) damage to the victims who suffered damage as a

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[408] OSCE, Human Rights in the War-Affected Areas following the Conflict in Georgia, *op. cit.*, p. 7.

[409] *Ibid*., p. 27.

[410] HRW, *Up In Flames – Humanitarian Law Violations and Civilian Victims in the Conflict over South Ossetia, op. cit.,* p. 131.

[411] Thomas Hammarberg, Commissioner for Human Rights of the Council of Europe, Special Mission to Georgia and Russian Federation, *op. cit.*, para. 38.

[412] Case concerning Application of the International Convention on the Elimination of All Forms of Racial Discrimination (Georgia v. Russian Federation), Request for the indication of provisional measures, International Court of Justice, ICJ, 15 October 2008, p. 41.

[413] Council of Europe, Directorate-General IV: education, culture and heritage, youth and sport, Assessment Mission on the situation of the cultural heritage in the conflict zone in Georgia, Technical Assessment Report, report prepared by: Mr David Johnson, 20 October 2008, Reference: AT(2008)386, p. 6.

result of a conflict in the Former Autonomous District of South Ossetia. Currently, steps are being taken for the implementation of the Law on Restitution."[414]

The issue of property rights in connection with the conflicts in the 1990s is still unsettled.

At the time of writing this Report there also seem to be issues with regard to property rights in the Akhalgori district. When meeting with the IIFFMCG on June 2009, the head of the administration suggested that the land which had been privatised by the Georgian government before the August 2008 conflict would now be nationalised. Furthermore, the head of the administration also referred to houses that had been taken from Ossetians by Georgians in 1991 and would now need to be given back to the Ossetians. Such issues raise serious concerns and, if not properly addressed, in accordance with international standards, will certainly fuel more tensions between the communities in the region.

The IIFMCG considers that property rights of IDPs is an issue which indeed dates back to the conflict in the 1990s and goes far beyond the effects of the August hostilities. It requires a common effort from all stakeholders to ensure that it is included in a global restorative justice initiative together with the right to return.

The IIFFMCG found that, in relation to the August 2008 conflict, there is a critical difference between the situation of property rights in Abkhazia and in South Ossetia. While only a very limited number of houses have been damaged in the course of the operations in Abkhazia, the situation in South Ossetia is dramatically different. Not only did the *de facto* South Ossetian authorities and Russian forces not take steps to protect the property of IDPs, but Ossetian forces actively participated in the looting and burning of houses. These violations also took place after the cease-fire.

Comprehensive programmes of compensation or another form of reparation should be designed to address the violation of IDPs' property rights. Such measures, however, cannot be a substitute for the right to return, and should be considered together with it.

[414] Georgia, Responses to Questions Posited by the IIFFMCG (Humanitarian aspects, Question 2), provided to the IIFFMCG on 5 June 2009, p. 5.

The protection of the property rights of IDPs is a longstanding issue, with still unsettled disputes over property rights dating back to the conflicts in the 1990s.
In South Ossetia there has been a serious failure on the part of the authorities and the Russian forces to protect the property rights of IDPs during – and, especially, after – the August 2008 conflict. Furthermore, South Ossetian forces did participate in the looting, destruction and burning of houses during and after the conflict.
Comprehensive reparation programmes should be designed and implemented. They should be seen as a complement to the exercise of the right to return of IDPs, and not a substitute for this right.

E. Respect for human rights, discrimination against minorities

While the conflict in Georgia cannot be seen as being solely related to ethnic and minority issues, this consideration does remain critical. Furthermore, the questions of discrimination against and respect for the human rights of minorities go far beyond the conflict itself. The HRAM of the OSCE stated:

"The August conflict had clear minority implications. Ethnic Ossetians and Abkhaz are minority communities within Georgia, while as of the writing of this report ethnic Georgians are, in fact, minority communities in both South Ossetia and Abkhazia. The conflict unfolded to a significant degree along ethnic lines. In general, therefore, the human rights concerns resulting from the conflict are compounded by their implications as minority issues. In addition, a number of specific issues of discrimination and failure to protect the rights of persons belonging to minority communities have arisen or worsened in the aftermath of the conflict, especially with regard to the southern Gali district of Abkhazia."[415]

As noted by HRAM, existing human rights and minorities issues worsened following the August 2008 conflict. There is therefore a need to provide a brief overview of the situation with respect to human rights and discrimination against minorities before the conflict. An analysis of how the situation evolved in the aftermath of the conflict will then be conducted. While it goes far beyond the mandate of this Mission to look at the overall human rights situation, the purpose is to address the main issues in as much as they amount to discrimination and fuel resentment between communities. In this regard, dealing with such issues appears to be a prerequisite for reaching a lasting solution to the conflict and ensuring a true and comprehensive reconciliation between communities.

[415] Human Rights Assessment Mission of the Office for Democratic Institutions and Human Rights, OSCE, Human Rights in the War-Affected Areas following the Conflict in Georgia, 27 November 2008, *op. cit.*, p. 18.

a) Overview of human rights and discrimination against minorities before the August 2008 conflict

First it is necessary to outline the relationship between the conflicts in the 1990s and some human rights issues. As stressed in 2005 by the UN Committee on the Elimination of Racial Discrimination, "the conflicts in South Ossetia and Abkhazia have resulted in discrimination against people of different ethnic origins, including a large number of internally displaced persons and refugees."[416]

Second, it is critical to be mindful of both the polarisation and the politicised way of dealing with human rights and humanitarian issues as a result of past conflicts, especially in the context of violations of IHL and HRL. These two aspects are particularly acute for Abkhazia.[417] As one researcher on Abkhazia rightly put it:

"The serious mass violations of human rights in this period – with ethnically motivated murders, civilians among them – extremely aggravated the 'enemy image' and mutual intolerance. In practically all the issues connected with this problem, be they the numbers of returnees, their legal status, the acquisition of passports, their security or even their access to education in their mother tongue, there are wide differences between the views of the conflicting sides."[418]

Third, existing human rights issues, mainly in the Gali district, worsened as a result of the conflict and its various consequences, while new issues also arose, for example in the Akhalgori district.

Fourth, the authorities in Abkhazia and South Ossetia are bound by human rights obligations. As recalled by the OSCE High Commissioner on National Minorities following his visit to Georgia in November 2005, "international norms and standards require that any authority

[416] Concluding Observations of the Committee on the Elimination of Racial Discrimination, Georgia, 15 August 2005, CERD/C/GEO/CO/3, 27/03/2007, para. 5.

[417] See Shalva Pichkhadze, "*Settlement of the Georgian-Abkhaz conflict: The Problem of Displaced Persons*," in: Georgian and Abkhaz Perspectives on Human Security and Development in Conflict-Affected Areas: A Policy Research Initiative, CITpax, May 2009, p. 61; for the polarisation issue, see Natella Akaba, "*Problems of reintegration of returnees to the Gal District of Abkhazia through the perspective of the human rights*," in: Georgian and Abkhaz Perspectives on Human Security and Development in Conflict-Affected Areas: A Policy Research Initiative, *op. cit*., p. 48.

[418] *Idem.*

controlling territory and people, even if not recognised by the international community, must respect the human rights, including minority rights, of everyone."[419]

To mention just one situation in which past issues are still relevant, one could take the Gali district in Abkhazia: the property rights of displaced persons, the language of education, freedom of movement and access to essential services and employment opportunities were already some of the key human rights issues prior to the August 2008 conflict. This was stressed *inter alia* by the UN High Commissioner for Human Rights following her visit to Georgia in February 2008.[420]

In his latest report on the human rights issues following the August 2008 armed conflict, dated May 2009, the Council of Europe Commissioner for Human Rights referred to his previous visit to this region in February 2007, when he examined a number of questions resulting from the earlier conflict in the 1990s. According to him "these are still relevant today" and "the main issues include further returns and security of returnees, freedom of movement, issues related to passports and identity documents, and education in the Georgian language in the Gali district."[421] In October 2007 the UN Secretary-General had noted that "the Human Rights Office in Abkhazia, Georgia, continued to follow closely the issues that have an impact on the life of residents in the Gali district. It monitored conscription practices in the district, as well as the situation related to the freedom of movement of local residents and the issue of language of instruction, which remained a concern to the local population and those willing to return."[422] In January 2008 he stressed that the language of instruction in schools in the Gali district also remained of concern.[423] Already in 2006 the OSCE High Commissioner on National Minorities had "appealed to the Abkhaz leadership to show flexibility regarding teaching in the mother-tongue, specifically teaching students in the

[419] Statement by Rolf Ekéus, the OSCE High Commissioner on National Minorities, to the 616th Plenary Meeting of the OSCE Permanent Council, Vienna, Austria 29 June 2006, p. 3, available at: http://www.osce.org/documents/hcnm/2006/06/19959_en.pdf.

[420] In this regard, Louise Arbour encouraged "the Abkhaz leadership to continue working towards sustainable rights-based solutions for internally displaced people, including protection of property rights. She also stressed the importance for education to be provided in relevant mother tongues, and for all local residents to be able to exercise their right to freedom of movement, including access to essential services and employment opportunities." See UN Press Release, UN High Commissioner for Human Rights, "*Georgia makes progress but human rights concerns remain*," 28 February 2008, available at: http://www.unhchr.ch/huricane/huricane.nsf/view01/EF7E5E7D706BF6E1C12573FD007B237F?opendocument

[421] Report on human rights issues following the August 2008 armed conflict, by Thomas Hammarberg, Commissioner for Human Rights of the Council of Europe (Visit: Tbilisi, Sukhumi and Gali, 8 to 12 February 2009), CommDH(2009)22, 15 May 2009, para. 51.

[422] Report of the Secretary-General on the situation in Abkhazia, Georgia, S/2007/588, 3 October 2007, para. 15.

[423] Report of the Secretary-General on the situation in Abkhazia, Georgia, S/2008/38, 23 January 2008, para. 24.

Georgian language in the Gali district, and to ensure that this matter is resolved in full accordance with international norms."[424] With regard to the so-called Abkhaz "passport," this issue was referred to by the UN Secretary-General in April 2008, when he noted that "UNOMIG continued to follow [Abkhaz] plans to issue Abkhaz 'passports' to Gali district residents." In his view, "while the *de facto* heads of administration and heads of villages have been instructed about the process, the issuing procedures are still unclear," and "the concern of the Mission is that Gali district residents should not be forced to renounce their nationality, which would be at variance with international human rights norms."[425]

In South Ossetia the consequences of the 1991-1992 conflict for human rights were still acute years after the cease-fire. As stressed in 2005 by the International Crisis Group, for example, there were still issues of displaced persons who were due to regain property or be compensated for their losses.[426]

While to address the human rights situation following the August 2008 conflict would take a report in itself, two regions of particular concern will be addressed here: the Gali district in Abkhazia and the Akhalgori region in South Ossetia. The IIFFMCG welcomes the finding of the OSCE report of February 2009 entitled "The Situation of Ossetians in Georgia Outside the Former Autonomous District of South Ossetia – after the war with Russia in August 2008," that "contrary to initial concerns shared by human rights and humanitarian actors, the August 2008 war did not lead to a change of the situation of ethnic Ossetians in Georgian-controlled territory or to their long-term displacement in any significant numbers."[427]

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[424] Statement by Rolf Ekéus, the OSCE High Commissioner on National Minorities, *op. cit*., p. 3.

[425] Report of the Secretary-General on the situation in Abkhazia, Georgia, S/2008/219, 2 April 2008, para. 26.

[426] International Crisis Group, "Georgia-South Ossetia: Refugee Return the Path to Peace," Europe Briefing No. 38, 19 April 2005, available at: http://www.crisisgroup.org/home/index.cfm?l=1&id=3380.

[427] The Reports states: "Contrary to initial concerns shared by human rights and humanitarian actors, the August 2008 war did not lead to a change of the situation of ethnic Ossetians in Georgian controlled territory or to their long-term displacement in any significant numbers. The population of ethnically mixed villages in the adjacent areas to the administrative boundary line of the former Autonomous District of South Ossetia has not raised any concerns over discrimination. On the contrary, firsthand reports testify to mutual support among neighbours of different ethnic background during wartime. Ethnic Ossetians to whom UNHCR had talked in collective centres had not raised concerns over discrimination either. The Representative of the UN Secretary-General on the Human Rights of IDPs, who visited Georgia in October 2008, met with persons of Ossetian ethnic origin among IDPs, usually from mixed marriages, and could not identify concerns related to their ethnic origin. Inhabitants of the areas adjacent to the former Autonomous District of South Ossetia had insisted that there were no inter-ethnic problems between Georgians and Ossetians, because they often lived in mixed marriages". See OSCE, Report on The Situation of Ossetians in Georgia Outside the Former Autonomous District of South Ossetia; pp. 4-5, extracts from the Replies to Question 7, provided by Georgia, p. 1.

There is a clear need to address the current human rights/discrimination issues following the August 2008 conflict in conjunction with the previously existing human rights concerns, many of them related to the conflict in the 1990s. It is critical to adopt a comprehensive approach in order for the settlement of those issues to be part of a lasting solution.

a) Grounds

(i) Ethnic origin

Ethnic considerations with regard to the August 2008 conflict in Georgia and its aftermath concern the ethnic Georgians, the South Ossetians and the Abkhaz. Discussing the question of ethnicity and its nuances goes far beyond the scope of this Report. Nevertheless, it is important to stress that in Abkhazia, in the Gali Distric for example, ethnic Georgians are in fact Mingrelians, a sub-ethnic group of the Georgian people.

The question of ethnicity is, however, closely intertwined with the issue of citizenship acquired through new passports.

(ii) The question of the issuance of passports

Although this phenomenon first referred to the issuance by the Russian Federation of Russian passports to Abhkaz and South Ossetians,[428] it also relates to the acquisition by Georgians of Abkhaz or South Ossetian passports.

"Passportisation" was described as the process whereby the Russian Federation conferred Russian nationality on South Ossetians and Abkhaz, *inter alia* to allow them to travel internationally.[429] The *de facto* Ministry of Foreign Affairs of Abkhazia stated:

"So in actual fact only Russia came to our assistance, agreeing to provide the people of Abkhazia with international-type Russian passports. From that moment on Abkhaz were able to travel outside the Republic and take advantage of the rights and freedoms afforded to them under international laws and standards."[430]

As outlined by Human Rights Watch, "by the end of 2007, according to the South Ossetian authorities, some 97 per cent of residents of South Ossetia had obtained Russian passports. As

[428] AI, *Civilians in the Line of Fire – The Georgia-Russia Conflict, op. cit.*, p. 7.

[429] *Idem*. See also HRW, *Up In Flames – Humanitarian Law Violations and Civilian Victims in the Conflict over South Ossetia, op. cit.*, p. 18.

[430] Abkhaz authorities, Responses to Questions Posited by the IIFFMCG (Legal Aspects), submitted to the IIFFMCG in April 2009, p. 3.

Russia imposed a visa regime with Georgia in 2000, Russian passports allowed Ossetians and Abkhaz to cross freely into Russia and entitled them to Russian pensions and other social benefits."[431]

Following the conflict, the acquisition of Russian citizenship became even more politicised, with claims by Georgia in the case of the Akhalgori district that "the separatist authorities are making territorial claims supported by the Russian Federation and actively disseminating Russian passports to the remaining residents."[432]

The question of passports now also concerns the acquisition of Abkhaz or South Ossetian passports by ethnic Georgians. For Abkhazia, for example, according to the UN Secretary-General, "the issuance of Abkhaz 'passports' in the Gali district started formally at the end of March"; "[i]t appears that during the following two months the issuance was put on hold," and "[i]n June the *de facto* authorities in the Gali district restarted the process, with limited results, owing to the reluctance of Gali district residents to state in the application forms that they renounce their Georgian citizenship."[433] In April 2009 the Abkhaz *de facto* Ministry of Foreign Affairs stated that "according to the Passport and Visa Service of the Abkhaz Ministry of the Interior, 2,108 Gali district residents applied for citizenship and 583 passports have already been issued."[434]

The question of Abkhaz and South Ossetian "passports" is a highly sensitive and politicised one. While they are more internal identity papers than passports in the international meaning of the term, the related issues surrounding the procedures and conditions in which they are issued, as well as the concrete consequences of not having such a document, give rise to many debates and disputes. This is mainly due to the fact that the documents are discussed in the context of the unsettled status of these two break-away regions.

Beyond the specific question of passports, the key objective is that people living in the region of Gali or in South Ossetia are provided with the same basic rights, regardless of their ethnic background or citizenship. The question of a passport becomes a human rights issue insofar as

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[431] HRW, *Up In Flames – Humanitarian Law Violations and Civilian Victims in the Conflict over South Ossetia*, *op. cit*., p. 18.

[432] Amended request for the indication of provisional measures of protection submitted by the Government of Georgia, Request to the ICJ, *op. cit.*, p. 2.

[433] Report of the Secretary-General on the situation in Abkhazia, Georgia, 23 July 2008, S/2008/480, p. 6, para. 30.

[434] Abkhaz authorities, Replies to questions on legal issues related to the events of last August, submitted to the IIFFMCG in April 2009, p. 10.

either people are coerced, directly or indirectly, into giving up their current citizenship or they are discriminated against on this basis.

c) Rights concerned and alleged discrimination

The Gali District is identified by Georgia as "the only remaining territory where ethnic Georgians continue to live in Abkhazia, with a Georgian population of approximately 42,000 persons."[435] According to Georgia, "immediately prior to the August 8 Russian aggression, this population faced increasing intimidation and pressure to adopt Russian citizenship."[436] In September 2008 Tbilisi also stressed that these "ethnic Georgians [lived] in constant fear of violent attacks and expulsions"[437] and that they were being "forced out of their homes by a campaign of harassment and persecution."[438] The Georgian authorities referred more specifically to "the continuing discriminatory treatment of ethnic Georgians in the Gali District of Abkhazia, including but not limited to pillage, hostage-taking, beatings and intimidation, denial of the freedom of movement, denial of their right to education in their mother tongue, pressure to obtain Russian citizenship and/or Russian passports, and threats of punitive taxes and expulsion for maintaining Georgian citizenship."[439]

One of the most practical consequences of the conflict seems to be the limitation of freedom of movement in both the Gali District[440] and Akhalgori.[441] This is a critical issue with far-reaching disruptive effects on the lives of the people living there, as many residents have close links with outside areas and are reliant in many ways on having the freedom to move across the administrative boundary.

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[435] Public sitting held on Monday 8 September 2008, at 10 a.m., at the Peace Palace, Verbatim Record, in the case concerning Application of the International Convention on the Elimination of All Forms of Racial Discrimination (Georgia v. Russian Federation), CR 2008/22, International Court of Justice, The Hague, 2008, p. 9, para. 41.

[436] Amended request for the indication of provisional measures of protection submitted by the Government of Georgia, 13 August 2008, p. 7, para. 17.

[437] Public sitting held on Monday 8 September 2008, at 10 a.m., at the Peace Palace, Verbatim Record, in the case concerning Application of the International Convention on the Elimination of All Forms of Racial Discrimination (Georgia v. Russian Federation), CR 2008/22, International Court of Justice, The Hague, 2008, p. 18, para. 10.

[438] *Idem*.

[439] Case concerning Application of the International Convention on the Elimination of All Forms of Racial Discrimination (Georgia v. Russian Federation), Request for the indication of provisional measures, International Court of Justice, ICJ, 15 October 2008, p. 6.

[440] Human Rights Assessment Mission of the Office for Democratic Institutions and Human Rights, OSCE, Human Rights in the War-Affected Areas following the Conflict in Georgia, 27 November 2008, p. 57 and p. 63.

[441] *Ibid.*, p. 33 and p. 50.

This issue of the increasing restrictions on freedom of movement in the Gali District following the conflict was underlined by the Council of Europe Commissioner for Human Rights:

"The people living in that district have been relying – for various reasons, including commercial purposes, commuting for employment, family ties, medical care or social needs, education, security concerns, etc. – on freedom of movement across the Inguri river to the Zugdidi area. Prior to the summer of 2008, such movement was essentially unrestricted. Since the summer of 2008, new restrictions have been imposed on movement across the administrative border, which has rendered the population in Gali more isolated than before. The restrictions on movement have reportedly led to cases of bribery at crossing points."[442]

The IIFFMCG supports the statement by the Commissioner on "a need to find a solution which will reconcile appropriate security measures with the legitimate interest of local populations to enjoy free movement across the Inguri river."[443]

The freedom of movement also includes the right to return for displaced persons, notably the return of ethnic Georgian IDPs. For example, a villager who was trying to return to Ksuisi village in South Ossetia said he was turned back at a checkpoint after being told he should apply for a Russian passport and citizenship if he wanted to return to the village.[444] This practice also concerns Abkhaz and South Ossetian citizenship as a condition for ethnic Georgians to return to their place of residence. As highlighted above, this condition was described to the Commissioner for Human Rights of the Council of Europe by the *de facto* authorities in Tskhinvali.[445] While the Abkhaz *de facto* Minister for Foreign Affairs declared that "there were no Abkhaz obstacles to the return of refugees in the Kodori Valley,"[446] the UN Secretary-General noted that the "Abkhaz *de facto* authorities announced that all the local population, estimated in 2002 at up to 2,000, could return if the displaced persons obtained Abkhaz 'passports' and gave up their Georgian citizenship."[447]

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[442] Report on human rights issues following the August 2008 armed conflict, 15 May 2009, *op. cit*., paras 55 ff.

[443] *Ibid*., p. 58.

[444] Human Rights Assessment Mission of the Office for Democratic Institutions and Human Rights, OSCE, Human Rights in the War-Affected Areas following the Conflict in Georgia, 27 November 2008, pp. 48-49.

[445] Special Follow-up Mission to the Areas Affected by the South Ossetia Conflict: Implementation of the Commissioner's six principles for urgent human rights and humanitarian protection, *op. cit*., p. 1.

[446] Meeting with the Abkhaz *de facto* Minister for Foreign Affairs, 3 March 2009, Sukhumi.

[447] Report of the Secretary-General on the situation in Abkhazia, Georgia pursuant to Security Council resolution 1839 (2008), 3 February 2009, S/2009/69, p. 8, para. 41.

A similar question arises in the case of Akhalgori. Human Rights Watch stated:

"The new head of the Akhalgori district administration, Anatoly Margiev, told Human Rights Watch that the border was not likely to close, though not all of his staff shared this view. Margiev also told Human Rights Watch that as of January 2009 the administration would start processing South Ossetian passports for all residents of Akhalgori, 'in order [for them] to be able to move freely in North and South Ossetia. Following that, they will be also given Russian citizenship'."[448]

More generally, as mentioned earlier, the issue of passports raises several questions. First are the coercive nature of the acquisition of passports and the related question of renouncing Georgian citizenship. This issue is particularly salient in the case of the Gali district.

According to the HRAM of the OSCE, "moves by the *de facto* authorities to encourage residents of Gali to give up their Georgian citizenship appear coercive and discriminatory and are further exacerbating the situation of the Georgian community in the district."[449] This seems to apply as regards both Abkhaz passports and Russian ones. The Committee on the Honouring of Obligations and Commitments by Member States of the Council of Europe referred to "ethnic Georgians in the Gali District of Abkhazia [who] are reportedly also beginning to be put under pressure to accept Abkhaz passports."[450] According to Georgia, "reports received from residents of Gali – which is now isolated from the rest of Georgia due to the closure of the administrative border at the Enguri Bridge – suggest that they are being harassed, attacked, and threatened of expulsion if they do not accept Russian passports."[451]

The *de facto* Abkhaz authorities rejected these allegations and stated:

"Despite the fact that the refugees who returned to the Gali district felt a certain political pressure (parenthetically, this political pressure continues to this day) and expressed uncertainty with respect to applying for Abkhaz citizenship and passports, Abkhaz authorities have done everything within their power to regain the trust of its people. Currently, the returnees have the right to obtain the Abkhaz nationality and passports without any pressure

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[448] HRW, *Up In Flames – Humanitarian Law Violations and Civilian Victims in the Conflict over South Ossetia*, *op. cit*., p. 150.

[449] Human Rights Assessment Mission of the Office for Democratic Institutions and Human Rights, OSCE, Human Rights in the War-Affected Areas following the Conflict in Georgia, 27 November 2008, pp. 7-8.

[450] Committee on the Honouring of Obligations and Commitments by Member States of the Council of Europe (Monitoring Committee), The implementation of Resolution 1633 (2008) on the consequences of the war between Georgia and Russia, Report, *op. cit.*, para. 60.

[451] Document submitted by Georgia, "Russian Invasion of Georgia – Facts & Figures," 8 September 2008, p. 4.

or coercion – this is a free choice of every citizen of Abkhazia and every person who considers him or herself to be a resident of this country."[452]

The Secretary-General of the United Nations noted that "the Human Rights Office continued to monitor developments concerning the issuance of Abkhaz passports in the Gali district."[453] There seem to be different degrees of pressure. Whether or not this amounts to coercion is questionable. According to the HRAM of the OSCE "there are now growing pressures on residents of the Gali district to obtain Abkhaz passports, which may be significant enough to constitute coercion."[454] In March 2009 UNOMIG informed the IIFFMCG that while renouncing one's Georgian nationality was not an explicit condition when filing a request for obtaining an Abkhaz passport,[455] in practice, applications without a declaration of renunciation were systematically rejected, and all 18 applications without such declarations had been refused. UNOMIG noted that although ethnic Georgians are not forced to take an Abkhaz passport, in practice there is a certain amount of pressure to do so, given that such passports are required in order to access certain services.[456] Whatever type of pressure is used, credible reports indicate an absence of free choice. This appears to be reaching a point where, as stressed by an NGO to the HRAM, "conditions are being created that will make it impossible for many of the residents of Gali to live normally without an Abkhaz passport."[457]

While the *de facto* authorities in Sukhumi reaffirmed, at a meeting with the IIFFMCG in June 2009, that the process of giving Abkhaz passports to Georgians residing in Gali is carried out exclusively on a voluntary basis, the above information on direct or indirect coercion is cause for serious concern. The IIFFMCG strongly states that the process of obtaining a passport and, most importantly, the renouncing of one's nationality, must not involve coercion, be it direct or indirect.

The second issue with regard to passports is the consequence for ethnic Georgians of not having one. According to information received by the HRAM of the OSCE, an Abkhaz

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[452] Abkhaz authorities, Responses to Questions Posited by the IIFFMCG (Legal Aspects), submitted to the IIFFMCG in April 2009, p. 10.

[453] Report of the Secretary-General on the situation in Abkhazia, Georgia, pursuant to Security Council resolution 1839 (2008), 3 February 2009, S/2009/69, p. 5, para. 25.

[454] Human Rights Assessment Mission of the Office for Democratic Institutions and Human Rights, OSCE, Human Rights in the War-Affected Areas following the Conflict in Georgia, 27 November 2008, p. 68.

[455] The OSCE however noted that "Reportedly, the application form for an Abkhaz passport includes a statement that 'I voluntarily renounce my Georgian citizenship'." *Ibid*., p. 69.

[456] Meeting with UNOMIG officials, March 2009, Gali.

[457] Human Rights Assessment Mission of the Office for Democratic Institutions and Human Rights, OSCE, Human Rights in the War-Affected Areas following the Conflict in Georgia, 27 November 2008, p. 68.

passport is required for all employees of the local administration, including doctors and teachers; a passport is also needed to transact business and for other legal activities.[458] The HRAM also stressed that "Abkhaz law permits dual citizenship with Russia, but not with Georgia, a provision that many consider discriminatory."[459]

As underlined by the authorities in Sukhumi, at a meeting with the IIFFMCG, the alternative option for people who do not wish to obtain an Abkhaz passport is to obtain a residence permit. However, as stressed by the Council of Europe Commissioner for Human Rights, "the information as to the rights and entitlements applying to holders of residence permits is somewhat unclear."[460]

While the question of passports is a very complex and highly controversial one, the IIFFMCG believes that the main objective must be to ensure in practice that this issue does not deprive ethnic Georgians of their rights.

Another much-debated issue in the Gali district is education in the Georgian language for the population of this area. The UN Secretary-General noted that "the Human Rights Office continued to monitor developments concerning the language of instruction, reporting that the number of academic hours allocated to studying the Georgian language was reduced for the 2008-2009 school year."[461]

The Abkhaz *de facto* authorities stated that "the Gali district has 21 schools, 11 of which are Georgian schools." They also stressed that "there has been no interruption of teaching in Georgian, a fact confirmed by international observers." According to Article 6 of the Constitution of the Republic of Abkhazia: "The State guarantees all ethnic groups that inhabit Abkhazia the right to freely use their native language."[462]

However, as pointed out by the Council of Europe Commissioner for Human Rights in May 2009, "there have been many assertions about a deterioration of the situation following the

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458 *Idem*.

459 *Ibid*., p. 69.

460 Report on human rights issues following the August 2008 armed conflict, 15 May 2009, *op. cit*., para. 59.

461 Report of the Secretary-General on the situation in Abkhazia, Georgia pursuant to Security Council Resolution 1839 (2008), 3 February 2009, S/2009/69, p. 5, para. 25.

462 Abkhaz authorities, Responses to Questions Posited by the IIFFMCG (Legal Aspects), submitted to the IIFFMCG in April 2009, p. 6.

August 2008 conflict"[463] concerning the language of education for ethnic Georgians. In this regard the OSCE High Commissioner on National Minorities "underlined that measures to reinforce the role of one language and culture should not be pursued at the expense of other languages and cultures."[464]

Serious concern is expressed about the situation of ethnic Georgians in the Gali disctrict (Abkhazia) and the Akhalgori district and the effective protection of their rights. The de facto authorities in Abkhazia and South Ossetia must ensure that the rights of these persons are protected. The issue of the status of Abkhazia and South Ossetia can under no circumstances be allowed to result in discrimination or the infringement of their rights.

F. Investigation into and prosecution of violations of IHL and human rights law

Under IHL, States have an obligation to investigate war crimes allegedly committed by their nationals and members of their armed forces, as well as other persons falling under their jurisdiction.[465] The obligation to investigate and prosecute applies in both international and non-international armed conflict.[466]

A number of human rights treaties include a clear obligation on States to prosecute persons suspected of having committed serious violations of human rights. Notably, the International Covenant on Civil and Political Rights (ICCPR) and the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment impose a general obligation on all States Parties to provide an effective remedy against violations of the rights and freedoms contained in these two core human rights treaties. This also includes a duty to investigate and punish those responsible.[467]

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[463] Report on human rights issues following the August 2008 armed conflict, 15 May 2009, *op. cit.*, para. 68.

[464] Press release, Statement by the OSCE High Commissioner on National Minorities following his visit to Georgia (14-20 September 2008), The Hague, 23 September 2008.

[465] See for example Article 146 of Geneva Convention IV.

[466] According to Rule of 158 of the ICRC Study on Customary International Law: "States must investigate war crimes allegedly committed by their nationals or armed forces, or on their territory, and, if appropriate, prosecute the suspects. They must also investigate other war crimes over which they have jurisdiction and, if appropriate, prosecute the suspects." See J-M. HENCKAERTS, L. DOSWALD-BECK (eds), Customary International Humanitarian Law, Volume I, *op. cit*, p. 607.

[467] Principle 4 of the Basic Principles and Guidelines on the Right to a Remedy and Reparation For Victims of Gross Violations of Human Rights and Serious Violations of International Humanitarian Law adopted by the UN General Assembly in December 2005, states: "In cases of gross violations of international human rights law and serious violations of international humanitarian law constituting crimes under international law, States have the duty to investigate and, if there is sufficient evidence, the duty to submit to prosecution the person allegedly responsible for the violations and, if found guilty, the duty to punish her or him."

These obligations to investigate and prosecute call for accountability on the part of of all the sides that committed violations of IHL and HRL, whether they be Russians, Georgians, South Ossetians or Abkhaz.

Furthermore, it is not enough under international law merely to conduct an investigation into war crimes and violations of HRL. Such an investigation must be effective, prompt, thorough, independent and impartial, and must be followed by prosecution if violations are established.[468]

This obligation to investigate and prosecute must be read in the light of documented cases of violations of IHL and HRL committed during and after the August 2008 conflict. It must also be recalled that this obligation applies primarily to violations committed by a State's own forces or persons under its control, and must not be limited to investigating the violations committed by the other parties to the conflict.

First it is crucial to note the contrast between the efforts undertaken by the Russian Federation to investigate, with a view to prosecution, crimes allegedly committed by Georgian forces and the absence to date of prosecutions of Russian citizens, including soldiers. In its Monitoring Committee Report, the Council of Europe Parliamentary Assembly pointed out:

"The Investigative Committee of the General Prosecutor's Office of Russia launched an investigation into genocide committed by Georgian troops against Russian citizens (ethnic Ossetians) in South Ossetia. In addition, it opened an investigation into crimes committed by Georgia against the Russian military. It would seem that there is no intention to investigate possible violations of human rights and humanitarian law committed by Russian forces and forces under the control of the de facto South Ossetian authorities. Indeed, the special Investigative Committee reportedly closed its investigations on the ground in South Ossetia in mid-September, at a time when credible reports indicated that looting, pillaging, as well as

[468] Principle 19 of the Updated Set of Principles for the Protection and Promotion of Human Rights Through Action to Combat Impunity endorsed by the Commission on Human Rights in 2005 refers to the States' "…obligation to undertake prompt, thorough, independent and impartial investigations of violations of human rights and international humanitarian law and take appropriate measures in respect of the perpetrators, particularly in the area of criminal justice, by ensuring that those responsible for serious crimes under international law are prosecuted, tried and duly punished."

acts of ethnic cleansing were taking place on a daily basis in the areas under Russian control, including in the so-called 'buffer zone'".[469]

In its replies to the questionnaire sent by the IIFFMCG, the Russian Ministry of Defence first stated that "during the peace enforcement operation against Georgia no instances have been identified where norms of International Humanitarian Law or Human Rights were violated by military personnel of the Russian Federation Armed Forces."[470] In responses to additional questions asked by the IIFFMCG, the Russian Federation was less categorical but still noted that "to the best of its knowledge, Russian military personnel never committed any violations of International Humanitarian Law." "As for the potential violations of human rights committed by Russian servicemen," it pointed out *inter alia* that "victims of such violations have specific legal options to obtain reparations for such violations." It further indicated that they could begin by filing lawsuits with the Russian courts, but that it was not aware of any such cases.[471]

When meeting with the IIFFMCG's experts in Moscow in July 2009, the representatives of the Investigative Committee of the General Prosecutor's Office of Russia indicated that the Committee's mandate was only to investigate violations committed against Russian nationals.[472] They also informed the IIFFMCG that investigations into crimes against other persons was the responsibility of the South Ossetian authorities, and that to their knowledge approximately 80 cases were currently being investigated by these authorities. Given the large number of inhabitants of South Ossetia having Russian nationality, the former argument is only partly relevant. Furthermore, coordination procedures must be set up in order for the Russian Investigative Committee to exchange information with the relevant South Ossetian authorities if it comes across evidence of violations against persons that are not covered by its activities. Most importantly, owing to the limited mandate of the Investigative Committee, there is a need to ensure that other investigative bodies from Russia carry out comprehensive investigations.

In its replies to the questionnaire, Georgia noted the following:

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[469] The implementation of Resolution 1633 (2008) on the consequences of the war between Georgia and Russia, op. cit., para. 50, available at:http://assembly.coe.int/Main.asp?link=/Documents/WorkingDocs/Doc09/EDOC11800.htm

[470] Russia, Responses to Questions Posited by the IIFFMCG (Humanitarian Aspects), *op. cit.*, p. 16.

[471] Russia, Responses to Questions Posited by the IIFFMCG (Legal Aspects), *op. cit.*, pp. 11-12.

[472] Meeting with the representatives of the Investigative Committee of the General Prosecutor's Office of Russia, Moscow, 29 July 2009.

"The investigation was launched concerning the violations committed in the course of the Russian-Georgian war in August 2008. Namely, on 9 August 2008, a couple of days after the Russian invasion of Georgia, the Office of the Prosecutor launched an investigation including under Article 411 (deliberate violation of humanitarian law provisions during internal and international armed conflicts) and Article 413 (other violations of international humanitarian law, including looting, illegal acquisition and destruction of civilian property) of the Criminal Code of Georgia. On August 11, another criminal case was opened on the facts of looting as provided by Article 413 of the Criminal Code of Georgia. These investigations have been merged. It is important to note that the investigation is not against anyone, but is launched on the facts and intends to shed light on the overall situation. Every person whose culpability is revealed in the course of the investigation will be subject to relevant legal proceedings. No charges have yet been made due to the difficulties to gather sufficient evidence. Initial statements from prisoners of war, civilian hostages have been taken, forensic examinations have been conducted, and seizure and inspection of affected areas under Georgian control has been implemented. However, lack of access to the affected areas in the Tskhinvali region/South Ossetia is a substantial impediment for a results-oriented efficient investigation."[473]

In no way can the current issue regarding the status of South Ossetia be allowed to prevent investigations or diminish the accountability of those responsible for IHL or HRL violations during and, most importantly, after the conflict in South Ossetia and in the buffer zone, be they from the regular forces, volunteers or other individuals. While there is a role for the *de facto* authorities to play in this regard, Russia also has a responsibility as it has forces in South Ossetia. Moreover, given the documented cases of violations committed by volunteers from Russia who may currently be on Russian territory, the obligation to investigate and prosecute these, in addition to the violations committed by its own forces, is directly applicable to Russia.

This obligation to investigate and prosecute goes beyond a mere requirement in law. It is critical for the sake of initiating a meaningful and comprehensive reconciliation process following the conflict, and for a lasting peace.

In the light of the grave violations of IHL and HRL committed during the conflict and in the weeks after the cease-fire, Russia and Georgia should undertake or continue prompt,

[473] Georgia, Responses to Questions Posited by the IIFFMCG (Humanitarian Issues, Questions 9 and 10), provided to the IIFFMCG on 5 June 2009, p. 2.

thorough, independent and impartial investigations into these violations, and should prosecute their perpetrators. This is also an obligation incumbent on the authorities in South Ossetia. The fight against impunity is one of the prerequisites for a true and lasting solution to the conflict.

G. Reparation

There is a general obligation under IHL for a state responsible for violations of international humanitarian law to make full reparation for the loss or injury caused.[474]

The United Nations Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law set out in more detail the rights of victims to restitution, compensation and rehabilitation.

It is worth noting that the Russian Federation stated that "residents of South Ossetia who suffered as a result of the hostilities received compensation paid out of the Federal budget. Several types of such compensation were envisaged: 1) all civilian victims residing in South Ossetia received a one-time payment in the amount of 1 000 roubles; 2) separate payments were earmarked for retirees; 3) finally, residents who had lost their property during the hostilities were paid up to 50 thousand roubles."[475]

This raises serious concerns as it would mean that no such reparations were paid to persons who suffered as a result of the hostilities on the territory of Georgia proper or in Abkhazia. Furthermore, it is crucial that such compensation should also be allocated to ethnic Georgians for the reconstruction of their homes in South Ossetia.

The Russian and Georgian governments should provide compensation for civilian damage and destruction caused by violations of international humanitarian law for which they are respectively responsible. Compensation is also vital in the light of the extensive destruction of property by South Ossetian forces and other armed individuals.

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[474] See for example Article 91 of Additional Protocol I of 1977 and Rule 150 of the ICRC Study on International Customary Humanitarian Law, in J-M. HENCKAERTS, L. DOSWALD-BECK (eds), Customary International Humanitarian Law, Volume I, *op. cit.*, p. 537.

[475] Russia, Responses to Questions Posited by the IIFFMCG (Legal Aspects), *op. cit.*, p. 12.

Accountability and reparation for violations of IHL and HRL are vital for a just and lasting peace. In the short term, this is also crucial in order to enable individuals who lost their property to rebuild their lives.

IV Allegations of genocide

Although the allegations of ethnic cleansing, made by Georgia against the Russian Federation and South Ossetia in relation to the armed conflict between Russia and Georgia and its aftermath, could be addressed together with those of genocide, as they are two clearly distinct concepts it is preferable to review the former separately. Furthermore, as ethnic cleansing is linked mainly to the displacement of persons, it will be discussed later under that heading.

Allegations of genocide were made during the conflict in Georgia and after the cease-fire. Owing to both the seriousness of the term "genocide" for public opinion and in the collective consciousness, and its very specific legal definition and corresponding consequences in international law, it is extremely important to assess these allegations carefully. The expression "crime of crimes," used by the ICTR, illustrates the highly unique nature of genocide.[476] There is consequently a need not only to establish facts and ascertain the law, but – more than for any other allegations – to aim at avoiding any post-conflict tension that could result from persisting resentment among communities over accusations of genocide. The gravity of this crime is translated into the very strict conditions required under international law for acts to be qualified as such.[477] As allegations were made by the Russian Federation and by the *de facto* South Ossetian authorities, the available evidence produced should be analysed against the backdrop of this legal definition. Georgia did not make such claims. In the context of their replies to the questionnaire sent by the IIFFMCG, the Georgian authorities stressed that Georgia "does not concede that the crime of the genocide has been committed by either party to the conflict during and/or in the aftermath of the 2008 hostilities."[478]

[476] Prosecutor v. Kambanda (Case No. ICTR-97-23-S) Judgment and Sentence, 4 September 1998, para. 16.

[477] William Schabbas rightly stresses: "Why is genocide so stigmatized? In my view, this is precisely due to the rigorousness of the definition and its clear focus on crimes aimed at the eradication of ethnic minorities or, to use the Convention terminology, 'national, racial, ethnical and religious'." In Genocide in international law: the crime of crimes, Cambridge University Press, 2000, p. 9.

[478] Georgia, Responses to Questions Posited by the IIFFMCG, (Humanitarian Aspects), provided to the IIFFMCG on 5 June 2009, p. 1.

Allegations of genocide were made by the Russian Federation against the Georgian forces. A number of political declarations by Russian authorities in the early days of the conflict explicitly accused Georgia of genocide.[479] These accusations have to be linked to the number of victims given by the Russian authorities at the time, who claimed 2,000 people had been killed. The declarations were accompanied by measures to investigate into alleged genocide.[480] The Deputy Chairman of the Committee announced that his office was opening "a genocide probe based on reports of actions committed by Georgian troops aimed at murdering Russian citizens – ethnic Ossetians – living in South Ossetia."[481] As reported by the Committee on the Honouring of Obligations and Commitments by Member States of the Council of Europe, "on 23 December 2008, the Head of the Investigation Commission of the General Prosecutor's Office of Russia announced that the Commission had finalised its investigations into the deaths of 162 South Ossetian civilians – a considerably lower number of deaths of civilians than originally announced by the Russian authorities – and of 48 members of the Russian military troops during the war, and that it had collected sufficient evidence to bring charges against Georgia of genocide against South Ossetians."[482]

Georgia was also accused of genocide by the *de facto* South Ossetian authorities and non-governmental organisations from South Ossetia. An adviser to the *de facto* President of South Ossetia stated that over 300 lawsuits had been sent to the International Criminal Court, seeking to bring the Georgian authorities to justice for "genocide" committed in the August 8-

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[479] For instance, the President of the Russian Federation, Dmitry Medvedev, stated on 10 August 2008 that "the actions of the Georgian side cannot be called anything other than genocide" in "SKP RF Opened a Criminal Investigation into the Killings of Russian Citizens in South Ossetia," Kommersant Online, August 14, 2008, http://www.kommersant.ru/doc.aspx?DocsID=1011523&ThemesID=301, quoted by HRW, Up In Flames – Humanitarian Law Violations and Civilian Victims in the Conflict over South Ossetia, *op. cit.*, p. 70.
The Prime Minister, Valdimir Putin, declared the same day: "I believe there were elements of genocide" in "Putin accuses Georgia of genocide," Russia Today, 10 August 2008, available at http://www.russiatoday.com/news/news/28744

[480] President Medvedev asked the Investigative Committee of the Russian Federation Prosecutor's Office to document the evidence of crimes committed by Georgian forces in South Ossetia in order to create a "necessary basis for the criminal prosecution of individuals responsible for these crimes" in "SKP RF Opened a Criminal Investigation into the Killings of Russian Citizens in South Ossetia," Kommersant Online, August 14, 2008, http://www.kommersant.ru/doc.aspx?DocsID=1011523&ThemesID=301, quoted by HRW, Up In Flames – Humanitarian Law Violations and Civilian Victims in the Conflict over South Ossetia, *op. cit.*, p. 70.

[481] Igor Komissarov, Deputy Chairman of the Investigative Committee of the General Prosecutor's Office. Reported by RIA Novosti, 14 August 2008, quoted by AI, 2008, p. 56. See also Committee on the Honouring of Obligations and Commitments by Member States of the Council of Europe (Monitoring Committee), The implementation of Resolution 1633 (2008) on the consequences of the war between Georgia and Russia, Report, Doc. 11800, 26 January 2009, Co-rapporteurs Luc van den BRANDE and Mátyás EÖRSI, para. 50.

[482] *Idem*. para. 50.

12 attack.[483] As noted by Human Rights Watch, such accusations were also "widely publicised by the Public Commission for Investigating War Crimes in South Ossetia, a group of Russian and South Ossetian public activists working with the prosecutor's office of the *de facto* South Ossetian authorities."[484] The commission was created on 12 August 2008 and issued a report aimed at documenting the case of genocide against South Ossetians. The head of the Public Committee declared that "now the world community has got access to photo and video and other documents which prove that Georgian soldiers in South Ossetia were actually committing genocide against its people."[485] Representatives of two NGOs whom the IIFFMCG met in Tskhinvali in March 2009 made the same accusations of genocide.

Allegations of genocide were also made by the *de facto* Abkhaz authorities, who stated that "documented proof of genocide perpetrated by the Georgian government against ethnic Abkhaz is still to be presented before the highest international judicial institutions."[486]

In its replies to the IIFFMCG questionnaire, Georgia submitted "that no crime of Genocide has been committed by the Georgian side, as neither acts meeting the gravity of the said crime nor the facts commonly known to support this allegation took place or were substantiated."[487] Georgia also noted that "unlike the SKP [Investigative Committee of the Prosecution Service of the Russian Federation], even international humanitarian organisations were not given access to the territory before August 19-20, 2008" and that "as such, during the first stages of evidence-gathering, the SKP was the sole fact-finding institution present on the ground."[488] It contested the "reliability of the information" allegedly gathered by the SKP and denounced the "exaggerated claims made by the Russian authorities." It stressed that "the SKP has not given any legal explanation as to how the acts allegedly committed by Georgian soldiers amounted to genocide by Georgia."[489] Georgia further noted that "the number of dead (civilian) persons officially declared by the Russian authorities poses question marks as to

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[483] RIA Novosti, "South Ossetians sue Georgia for genocide," 1 September 2008, http://en.rian.ru/world/20080901/116453506.html

[484] HRW, *Up In Flames – Humanitarian Law Violations and Civilian Victims in the Conflict over South Ossetia*, *op. cit.*, p. 72.

[485] Public Committee for Investigation of War Crimes in South Ossetia, South Ossetia – Chronicle of Contract Murder, available at: http://www.ossetia-war.com/book

[486] *De facto* Abkhaz authorities, Replies to questions on legal issues related to the events of last August, submitted to the IIFFMCG in April 2009, p. 10.

[487] Georgia, Responses to Questions Posited by the IIFFMCG (Humanitarian Aspects), provided to the IIFFMCG on 5 June 2009, p. 1.

[488] *Ibid*. pp. 1-2.

[489] *Ibid*., p. 2.

whether the list includes only civilians or also representatives of South Ossetia militias, who during the combat operation represented legitimate military targets."[490]

The 1948 Genocide Convention defines genocide as "any of the following acts committed with intent to destroy, in whole or in part, a national, ethnical, racial or religious group, as such: (a) Killing members of the group; (b) Causing serious bodily or mental harm to members of the group; (c) Deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part; (d) Imposing measures intended to prevent births within the group; (e) Forcibly transferring children of the group to another group."[491] The acts listed in Article 2 must be carried out with intent to destroy the group as such, in whole or in part.[492] The words "as such" emphasise that intent to destroy the protected group.[493] This "specific intent" is the key to qualifying a series of acts as genocide and distinguishing them from other crimes. The term "in part" in the context of the intent "to destroy a protected group" implies a certain scale, as clarified by international case-law. It requires the intention to destroy "a considerable number of individuals"[494] or "a substantial part" of a group.[495] Finally, intent must also be distinguished from motive. The Commission of Inquiry on Darfur, defining the motive as "the particular reason that may induce a person to engage in criminal conduct," stressed that "from the viewpoint of criminal law, what matters

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[490] *Idem*.

[491] See article 2 of the Convention on the Prevention and Punishment of the Crime of Genocide of 9 December 1948.

[492] Report of the International Commission of Inquiry on Darfur to the United Nations Secretary-General, 25 January 2005, p. 124, para. 490. The commission further elaborates these two elements:
"The objective element is twofold. The first, relating to the prohibited conduct, is as follows: (i) the offence must take the form of (a) killing, or (b) causing serious bodily or mental harm, or (c) inflicting on a group conditions of life calculated to bring about its physical destruction; or (d) imposing measures intended to prevent birth within the group, or (e) forcibly transferring children of the group to another group. The second objective element relates to the targeted group, which must be a 'national, ethnical, racial or religious group.' Genocide can be charged when the prohibited conduct referred to above is taken against one of these groups or members of such a group.
"Also the subjective element or mens rea is twofold: (a) the criminal intent required for the underlying offence (killing, causing serious bodily or mental harm, etc.) and, (b) "the intent to destroy, in whole or in part" the group as such. This second intent is an aggravated criminal intention or dolus specialis: it implies that the perpetrator consciously desired the prohibited acts he committed to result in the destruction, in whole or in part, of the group as such, and knew that his acts would destroy, in whole or in part, the group as such" (paras 490-491).

[493] ICJ, Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro), Judgment of 26 February 2007, I.C.J. 2007 Reports, para. 187. See also: Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion, I.C.J. Reports 1996, para. 26.

[494] See Kayishema and Ruzindana (ICTR, Trial Chamber, 21 May 1999), at § 97, quoted by International Commission of Inquiry on Darfur, *op. cit.*, para. 492.

[495] See Jelisić (ICTY Trial Chamber, 14 December 1999, at para. 82), Bagilishema (ICTR, Trial Chamber, 7 June 2001,, at § 64) and Semanza (ICTR, Trial Chamber, 15 May 2003, at para. 316, quoted by International Commission of Inquiry on Darfur, *op. cit*., para. 492.

is not the motive, but rather whether or not there exists the requisite special intent to destroy a group."[496]

Given the specificity of such a requirement, the question of whether there is proof of this genocidal intent is consequently critical.[497] In practice, however, clearly establishing the proof of such an intent, by means of facts, may be a very difficult task. The International Commission of Inquiry on Darfur, relying on established jurisprudence from international *ad hoc* criminal tribunals, made the following assessment:

"Whenever direct evidence of genocidal intent is lacking, as is mostly the case, this intent can be inferred from many acts and manifestations or factual circumstances. In Jelisić the Appeals Chamber noted that 'as to proof of specific intent, it may, in the absence of direct explicit evidence, be inferred from a number of facts and circumstances, such as the general context, the perpetration of other culpable acts systematically directed against the same group, the scale of atrocities committed, the systematic targeting of victims on account of their membership of a particular group, or the repetition of destructive and discriminatory acts' (§ 47)."[498]

The term "genocide," whether in the context of a judicial or fact-finding process or in a more political context, must still be used in a careful assessment based on the existing legal

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[496] International Commission of Inquiry on Darfur, op. cit., para 493: "For instance, in the case of genocide a person intending to murder a set of persons belonging to a protected group, with the specific intent of destroying the group (in whole or in part), may be motivated, for example, by the desire to appropriate the goods belonging to that group or set of persons, or by the urge to take revenge for prior attacks by members of that groups, or by the desire to please his superiors who despise that group".

[497] This holds true beyond the issue of whether the type of standards of proof must be different when considering state responsibility or when assessing of international individual criminal responsibility for genocide. With respect to ICJ ruling in the Genocide Convention case, this question raised significant discussion. An author criticized the fact that "behind the formula of 'fully conclusive evidence', when dealing with Articles II and III of the Genocide Convention the Court adopted for all practical purposes a typical criminal law 'beyond any reasonable doubt' standard of proof. See Andrea Gattini, "Evidentiary Issues in the ICJ's Genocide Judgment," Int Criminal Justice 2007, Vol. 5, pp. 889-904. See also: Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro), Judgment of 26 February 2007, I.C.J. 2007 Reports, para 189. In case such intent is not established, the qualification of genocide cannot be ascertained. In the case of Darfur, the Commission of inquiry "concluded that the Government of the Sudan has not pursued a policy of genocide. Arguably, two elements of genocide might be deduced from the gross violations of human rights perpetrated by Government forces and the militias under their control. These two elements are, first, the actus reus consisting of killing, or causing serious bodily or mental harm, or deliberately inflicting conditions of life likely to bring about physical destruction; and, second, on the basis of a subjective standard, the existence of a protected group being targeted by the authors of criminal conduct. However, the crucial element of genocidal intent appears to be missing, at least as far as the central Government authorities are concerned. Generally speaking the policy of attacking, killing and forcibly displacing members of some tribes does not evince a specific intent to annihilate, in whole or in part, a group distinguished on racial, ethnic, national or religious grounds." International Commission of Inquiry on Darfur, *op. cit.*, p. 4.

[498] International Commission of Inquiry on Darfur, *op. cit.*, para. 502.

definition and on facts. In the light of this brief overview of the legal definition of genocide, the allegations made in the context of the conflict in Georgia were unsupported by clear factual evidence, both at the time they were made and at the time of writing this Report.

In its replies to the question asked by the IIFFMCG with respect to allegations of genocide, the Russian Federation first noted the following:

"References made by the Russian side to acts of genocide perpetrated against the Ossetian people by the Georgian side in August 2008 should be viewed in the context of the preliminary information that was received during the first hours of the conflict and prior to it. As far as we can judge, there were indeed reasons to believe that the actions undertaken by the Georgians were aimed at exterminating fully or partially the Ossetian ethnic group as such (large-scale and indiscriminate use of heavy weapons and military equipment by the Georgian side against the civilian population of Ossetia on the night of 7 to 8 August, a proactive 'anti-Ossetian' policy conducted by the Georgian government)."[499]

This statement contrasts strikingly with the legal conditions and the type of evidence required under international law in order to qualify certain acts as genocide. While the facts may be no less serious even where the term is not used, declarations that do use the term "genocide" must rely on a careful and timely analysis of facts. Such a cautious approach seems to be favoured by the Russian Federation itself in its replies to the IIFFMCG when it further states that "the Inquiry Committee appointed by the Russian Federation Prosecutor-General's Office is about to finalise its investigation" and that "once all of the available pieces of evidence are analysed a decision will be taken with respect to a specific legal determination as well as whether it would be expedient to submit the materials of this criminal case to a court of law."[500]

The question remains whether, one year after the conflict, the available evidence supports the allegations of genocide. Although the Russian Federation made the aforementioned nuanced statements, it also reaffirmed that "at the same time it should also be noted that crimes committed by Georgian paramilitary forces in the territory of South Ossetia were mentioned in numerous transcripts detailing testimonies of victims and witnesses and shown on photographic materials" and that "the foregoing materials contain detailed information proving in essence that there were instances of genocide against ethnic Ossetians and military

[499] Russia, Responses to Questions Posited by the IIFFMCG (Humanitarian Aspects), p. 1.

[500] *Idem.*

crimes were perpetrated by the Georgian side."[501] When meeting with the IIFFMCG's experts in Moscow in July 2009, the representatives of the Investigative Committee of the General Prosecutor's Office of Russia reiterated the conclusion that in their view, based on the same elements contained in the Russian replies to the IIFFMCG's questionnaire, genocide has been committed against ethnic South Ossetians.[502]

Georgia, on the contrary, claimed that "according to publicly available evidence (witness statements), not only genocidal intent but even discriminatory intent was missing among Georgian soldiers during the ground operations."[503]

As described the alleged facts identified by the Russian Federation do not establish the "specific intent" required for acts to be qualified as genocide. Here are the main reasons that prevent the IIFFMCG from reaching the same conclusion as Russia in the light of the facts presented.

These facts, taken separately or together, do not substantiate the specific intent. First, the destruction of buildings predominantly used by South Ossetia may have been the result of combat. Second, the indiscriminate use of artillery systems, if proved, would actually not be

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[501] *Ibid*, p. 2. The replies provided by the Russian Federation further refer inter alia to the following alleged facts documented and established by the Inquiry Committee appointed by the Russian Federation Prosecutor General's Office:
Figures of victims (with "162 civilian residents – nationals of South Ossetia [who] were murdered and 255 suffered various degrees of injuries");
accounts of destruction with for example "655 residential buildings destroyed and torched by state-of-the-art weapons systems used by Georgia against Tskhinvali and other communities in South Ossetia, 2139 residential buildings and facilities used predominantly by ethnic Ossetians were partially destroyed";
"records of inspections conducted on locations, transcripts detailing testimonies of witnesses and victims as well as information made available by the General Staff of the Russian Federation Armed Forces backed by documents and electronic media captured during the peace enforcement operation in Georgia (detailed aerial photographs of local terrain and tactical maps, military staff plans, orders and other documents)" that showed according to Russia that "the [General] Staff of the Georgian Armed Forces had developed plans to invade the territory of South Ossetia and Abkhazia well in advance; [i]n particular, these documents envisaged that villages populated predominantly by ethnic Ossetians were to be destroyed";
"indiscriminate artillery systems were to be used during the offensive, including multiple launch rocket systems that cause massive civilian casualties when used in populated areas and inflict large-scale damage to vital civilian facilities";
"instances where in the course of the military operation Georgian armed forces used cluster munitions and 500 kg air-delivered bombs against the civilian population"; "more than 36 thousand ethnic Ossetians left the territory of South Ossetia between 7 and 16 August 2008"; "an Action Plan designed to block and poison water supplies to Tskhinvali and adjacent communities during the military operation [that] has recently been annexed to the materials of the criminal case currently under review by the Inquiry Committee" (pp. 2-5).
The Russian Federation concluded that "the foregoing facts give us reasons to believe that the Georgian side had a deliberate plan to destroy Ossetians as an ethnic group" (p. 5).

[502] Meeting with the representatives of the Investigative Committee of the General Prosecutor's Office of Russia, Moscow, 29 July 2009.

[503] Georgia, Responses to Questions Posited by the IIFFMCG (Humanitarian Aspects), provided to the IIFFMCG on 5 June 2009, p. 3.

an element demonstrating a specific intention but would rather show the absence of such intent, precisely because they are used in an indiscriminate manner, which could make it difficult or impossible to target a particular group. Third, the nature or type of a weapon is not sufficient to indicate a specific intent to destroy a protected group.[504] Fourth, as stressed by the ICJ, a bombardment in itself is not sufficient to prove the specific intent.[505] Nor does the report issued by the Public Committee for the Investigation of War Crimes in South Ossetia, and identified as proving the genocide against South Ossetians, contain evidence of this specific intent.[506]

More generally, various sources contested the allegations of genocide, questioning whether the available evidence was sufficient to support them. The Rapporteur of the Committee on Legal Affairs and Human Rights of the Parliamentary Assembly of the Council of Europe noted that "the facts do not seem to support the genocide allegations against Georgia: the number of Ossetian (civilian) victims of the Georgian assault ('thousands' according to early numbers cited by the Russian authorities relying on 'provisional data') seem to be much exaggerated; now it appears that most Ossetian victims (whose number is also much lower now) were combatants. Individual atrocities such as those described in certain Russian media and submissions to the Committee of Ministers would be serious crimes in their own right, but not attempted genocide."[507] Human Rights Watch questioned the reliability of the investigation conducted by the Investigative Committee of the Russian Federation Prosecutor's Office.[508]

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[504] As underlined by the ICJ in its Nuclear Weapons Advisory Opinion: "in the view of the Court, it would only be possible to arrive at such a conclusion after having taken due account of the circumstances specific to each case." Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion, I.C.J. Reports 1996. para. 26.

[505] Legality of Use of Force (Serbia and Montenegro v. Belgium), Request for the Indication of Provisional Measures, Order, 2 June 1999, para. 40.

[506] Public Committee for Investigation of War Crimes in South Ossetia, South Ossetia – Chronicle of Contract Murder, http://www.ossetia-war.com/book

[507] Parliamentary Assembly of the Council of Europe (PACE), Committee on Legal Affairs and Human Rights, "The consequences of the war between Georgia and Russia," Opinion by rapporteur Christos Pourgourides, Doc. 11732 rev, 1 October 2008, para. 14, available at: http://assembly.coe.int/Main.asp?link=/Documents/WorkingDocs/Doc08/EDOC11732.htm. See also PACE, Political Affairs Committee, "The consequences of the war between Georgia and Russia," Opinion by the rapporteur Mr Lindblad, Doc. 11731, 1 October 2008, para. 17, available at: http://assembly.coe.int/Main.asp?link=/Documents/WorkingDocs/Doc08/EDOC11731.htm

[508] This organisation referred to two cases where atrocities where reported by the investigators to have been committed in Tsinagari and in Khetagurovo, but were then attributed by the Russian authorities to two other villages, respectively Dmenisi and Sarabuki. A number of inhabitants of those villages were interviewed by HRW but said they never heard about such facts. HRW stated that such elements "raise serious concerns about the accuracy and thoroughness of the investigation." *Up In Flames – Humanitarian Law Violations and Civilian Victims in the Conflict over South Ossetia, op. cit.*, pp. 71-72.

In view of the above, the IIFFMCG expresses serious doubts about the allegations of genocide made against the Georgian authorities. While this could not be construed as interfering with a pending determination still under review before judicial or investigative bodies, such as the ICC Prosecutor's Office,[509] or within the Investigative Committee of the Russian Federation Prosecutor's Office, it is the Mission's opinion that such allegations were made too prematurely and lacked certain elements required under international law. Given the nature and gravity of such a crime, there is an imperative need for all sides to conduct informative and educational initiatives to counteract the negative impact of such accusations among the population. This is particularly significant when considering that some violations of IHL and HRL during the conflict and its aftermath were motivated by referring to "thousands of civilian casualties in South Ossetia," as reported by Russian federal TV channels."[510]

In the light of the above, the Mission believes that to the best of its knowledge the allegations of genocide in the context of the armed conflict between Russia and Georgia and its aftermath are not founded in law nor substantiated by factual evidence.

The Mission suggests that measures should be taken to ensure that unfounded allegations of genocide do not further fuel tensions or revengeful acts. Educational and informative initiatives in this respect should be envisaged.

V. Main findings and observations under IHL and HRL

a) Main Findings

Two general findings should be stressed before spelling out in detail the conclusions of this Chapter, as both are central to any measure aimed at addressing the situation:

First, two categories of conduct seem to emerge from the research, each on a different scale. On the one hand were acts perpetrated within the framework of the hostilities, such as violations of the law on the conduct of hostilities and, in a small number of cases, summary executions. Of course such acts can still be qualified as violations of IHL. At the same time there were also acts on a much larger scale, such as the burning and looting of villages, which

[509] "ICC Prosecutor Confirms Situation in Georgia under Analysis," International Criminal Court press release, August 20, 2008, available at: http://www.icc-cpi.int/press/pressreleases/413.html

[510] HRW stressed that "some of the local residents interviewed by Human Rights Watch justified the torching and looting of the ethnic Georgian enclave villages by referring to 'thousands of civilian casualties in South Ossetia,' as reported by Russian federal TV channels." See HRW, *Up In Flames – Humanitarian Law Violations and Civilian Victims in the Conflict over South Ossetia, op. cit.*, p. 74.

were committed during the conflict but, most importantly, also continued for weeks after the cease-fire.

Secondly, it is critical to realise and take into account the influence of and role played in the August 2008 conflict by the legacies of past abuses (whether from the 1990s conflicts or later incidents), both in fuelling allegations of violations and as motives – notably revenge – that help explain substantiated violations. This factor is crucial if measures conducive to a lasting peace are to be introduced.

While the first main finding is highly sensitive and would carry heavy implications in terms of the predictable reactions of the parties, it is crucial to be aware of this difference and to take it into account when considering lessons learned and prospects for the future.

Moreover this difference could also have an impact on the formulation of lessons learned, which the IIFFMCG would like to draft. Indeed, while certain violations call for accountability and compensation/reparation measures, others require more detailed, tailored measures, especially as violations are still occurring at the time of writing the Report.

Here are the main findings under IHL and HRL:

- Allegations of genocide against Ossetians are not substantiated by evidence.
- There is serious and concurring evidence to indicate that ethnic cleansing has been committed against ethnic Georgians in South Ossetia, through forced displacement and the destruction of property.
- Violations of IHL and HRL were committed by Georgia, Russia and South Ossetia. Very few examples of violations by Abkhaz forces were documented during the conflict or in its aftermath.
- While the August 2008 conflict lasted only five days, numerous violations of IHL were committed during this period by Georgia, Russia and South Ossetia.
- Very serious violations of IHL and HRL were committed by South Ossetian forces, armed groups and individuals after the cease-fire.
- Violations mainly concern IHL on the conduct of hostilities, treatment of persons and property and forced displacement.

- More specifically, violations include indiscriminate attacks and a lack of precautions by Georgia and Russia; a widespread campaign of looting and burning of ethnic Georgian villages by South Ossetia, as well as ill treatment, beating, hostage-taking and arbitrary arrests; and the failure by Russia to prevent or stop violations by South Ossetian forces and armed groups and individuals, after the cease-fire, in the buffer zone and in South Ossetia.

- The situation of the ethnic Georgians in the Gali District following the conflict and still at the time of writing this Report gives cause for serious concern under HRL.

- The situation of the ethnic Georgians in the Akhalgori region also raises serious concerns, as many continue to leave this region at the time of writing.

- Issues relating to insecurity and the destruction of property are key obstacles to the return of displaced persons, in particular the return of ethnic Georgians to South Ossetia.

- Dangers posed by explosive remnants of war, notably unexploded munitions from cluster bombs, also need to be addressed.

- Measures still need to be taken by all sides to ensure accountability and reparation for all violations.

Regarding areas of concern, the situation of IDPs should be highlighted. As stressed by the Representative of the Secretary-General on the Human Rights of Internally Displaced Persons, three elements must be in place for successful return operations, which will also lead to a stabilisation of the situation: "(i) ensuring safety for the life and limb of returnees, (ii) returning property to the displaced and reconstructing their houses, and (iii) creating an environment that sustains return and reintegration, that is, which allows life under adequate conditions, including income-generating opportunities, non-discrimination and possibilities for political participation."[511]

[511] Walter Kälin, Representative of the Secretary-General on the Human Rights of Internally Displaced Persons, "*Legal aspects of the return of internally displaced persons and refugees to Abkhazia, Georgia*," 29 November 2007.

b) Lessons Learned

Six main lessons learned can be outlined:

- The conduct of hostilities in populated areas requires particular precautions in order to minimise civilian losses and damage to civilian property. The use of artillery or cluster bombs does not allow IHL to be respected in such areas

- Georgia and Russia should sign the Convention on Cluster Munitions of 30 May 2008.

- Given the link between the violations committed in past conflicts and during the August 2008 conflict:

first, there is a need for education and information measures to dismiss unfounded allegations of genocide against Ossetians which could fuel more tension between the communities;

second, there is a vital need for accountability and reparation measures in relation to the August 2008 conflict in order to address violations committed and defuse further resentment among the communities;

finally, comprehensive transitional justice approaches should be envisaged, both to cover the August 2008 conflict and its links to past conflicts and to address the legacy of past abuses, in order to build a lasting peace and allow victims from all sides to express their needs and views. In this regard, the IIFFMCG should embrace and back the proposals outlined by the International Center for Transitional Justice in its recent report entitled *Transitional Justice and Georgia's Conflicts: Breaking the Silence*.[512]

- Measures to ensure the protection of the rights of minorities should be taken by all sides to defuse tension and avoid fuelling new resentments.

- Issues of property rights, in relation to this conflict and also to past conflicts, should be addressed.

- The issue of the status of South Ossetia and Abkhazia remains as salient as ever. This is not only a political and diplomatic question but also a legal and practical one. In this regard the "Law on Occupied Territories of Georgia" adopted by the Georgian Parliament on 23 October 2008 raises certain issues that need to be dealt with by the Georgian

[512] Magdalena Frichova, *Transitional Justice and Georgia's Conflicts: Breaking the Silence*, International Center for Transitional Justice, May 2009, available at: www.ictj.org/.../ICTJFrichova_GEO_BreakingtheSilence_pa2009.pdf

authorities, as recommended by the European Commission for Democracy through Law (Venice Commission) in its Opinion of March 2009.[513] When meeting with the IIFFMCG in June 2009, representatives of the Ministry of Foreign Affairs of Georgia indicated that the Parliament intended to look at the recommendations of the Venice Commission at the end of summer 2009, to improve the Law.

c) Further preventive measures and recommendations

The authorities of Abkhazia and South Ossetia are encouraged to commit themselves formally to respecting and ensuring the implementation of the Geneva Conventions and their Additional Protocols.

Additionally or alternatively, the parties should endeavour to sign special agreements on specific humanitarian issues (such as protected zones, or displaced persons), or on bringing into force in their relationship the entirety of the Geneva Conventions and Protocols, as for example envisaged in Article 3(2) of the Geneva Conventions.

Once the relevant international instruments have been acceded to, the principles and rules they embody must be incorporated into domestic law and practice. This first means thinking about and adapting the appropriate domestic regulations, recommendations, procedures and practical actions. Such measures have already been adopted in the region, but they may not be fully satisfactory and should in any case be re-examined in the light of the lessons learned from the August 2008 conflict. Here are some specific practical measures whose adoption is highly recommended:

All the authorities concerned should, already in peacetime, plan the location of military establishments in areas as remote as possible from civilian population concentrations and civilian buildings, in particular hospitals, schools and cultural sites.

As envisaged in particular by the Geneva Conventions and Protocols, the authorities are invited to mark relevant establishments and transports with the specific protection signs/emblems (i.e. in particular: the red cross for medical installations; a shield, pointed below, per saltire blue and white, for cultural goods; and three bright orange circles on the same axis for works and installations containing dangerous forces).

[513] European Commission for Democracy through Law (Venice Commission) Opinion on the Law on Occupied Territories of Georgia, Adopted by the Venice Commission at its 78th Plenary Session (Venice, 13-14 March 2009), CDL-AD(2009)015, Strasbourg, 17 March 2009, Opinion No. 516 / 2009.

It is also extremely useful to identify – already in peacetime – a service, which may be the local Red Cross Society, entrusted in particular with the tasks of collecting, registering and transmitting information about missing, displaced and dead persons, separated family members and prisoners.

For IHL to be respected in time of armed conflict, the principles need to be familiar to everybody and the more specific rules known to those who will have to implement them in practice. This of course also goes for human rights standards and rules. We know that efforts to achieve this are being made in Russia and Georgia. They should indeed be continued and strengthened. Similar steps should be taken in Abkhazia and South Ossetia. Basic knowledge should be the concern of everybody. However, more advanced dissemination, education and training should target particular sectors of the population, such as civil servants, journalists and the younger generations through secondary-school and university programmes. But, obviously, the most important target population are the arms-bearers (i.e. armed and police forces, militias, etc.). They must be properly instructed, and IHL requirements must be incorporated into their "rules of engagement." Cooperation and support programmes for dissemination, education and training in IHL and HRL with NGOs, international organisations or third States, such as those already initiated by the ICRC or the OSCE, are highly recommended.

The Fact-Finding Mission supports the following recommendations made by some representatives of the relevant UN agencies and regional and nongovernmental organisations, as essential elements conducive to a lasting peace in the region:

- The Commissioner for Human Rights of the Council of Europe has "call[ed] upon all concerned parties to allow free and unhindered access for international organisations to all the conflict-affected areas (including those which were indirectly affected), from all directions, at all times, so that the population can be provided with all the necessary humanitarian assistance and human rights support and the work of confidence-building can proceed."[514]

- The Human Rights Assessment Mission of the Office for Democratic Institutions and Human Rights of the OSCE has recommended that all parties to the conflict "respect fully, within their respective jurisdictions, all OSCE human rights commitments and other

[514] Commissioner for Human Rights of the Council of Europe, Report on human rights issues following the August 2008 armed conflict, 15 May 2009, CommDH(2009)22, para. 75.

international human rights obligations. Special attention should be devoted to ensuring that conditions are created for members of minority communities to enjoy all their human rights and freedoms."[515]

- The Representative of the UN Secretary-General on the human rights of internally displaced persons has "call[ed] on all parties to take all necessary steps to ensure persons displaced by the recent and past conflicts are able to enjoy their right to return voluntarily to their former homes in safety and dignity, and to guarantee recovery of their property and possessions. Where such recovery is not possible, they should obtain appropriate compensation or another form of just reparation."[516]

- The International Center for Transitional Justice has noted that "fifteen years of abortive efforts at conflict resolution indicate that political settlements in the region could be difficult to achieve without addressing demands for justice and the need for reconciliation."[517]

- The Human Rights Assessment Mission of the Office for Democratic Institutions and Human Rights of the OSCE has recommended that all parties to the conflict "undertake a thorough and genuine investigation of allegations of, and prosecute, human rights violations and other unlawful acts committed during the conflict by persons under their jurisdiction or control. Any individuals believed to have been involved in human rights violations or other serious crimes should be held to account and prosecuted in accordance with the law. The parties should co-operate in exchanging information and evidence for such prosecutions. In addition to holding individuals accountable, there should be full public disclosure of the facts surrounding human rights violations during the conflict." [518]

- The Human Rights Assessment Mission of the Office for Democratic Institutions and Human Rights of the OSCE has also noted that "bearing in mind the obligation to provide remedies for human rights violations contained in the ECHR and other international human rights conventions, and following the United Nations Basic Principles and

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[515] Human Rights Assessment Mission of the Office for Democratic Institutions and Human Rights, OSCE, Human Rights in the War-Affected Areas following the Conflict in Georgia, 27 November 2008, p. 77.

[516] Report of the Representative of the Secretary-General on the human rights of internally displaced persons, Walter Kälin, A/HRC/10/13/Add.2, 13 February 2009, para. 59.

[517] Magdalena Frichova, Transitional Justice and Georgia's Conflicts: Breaking the Silence, International Center for Transitional Justice, May 2009, p. 39, available at: www.ictj.org/.../ICTJFrichova_GEO_BreakingtheSilence_pa2009.pdf

[518] Human Rights Assessment Mission of the Office for Democratic Institutions and Human Rights, OSCE, Human Rights in the War-Affected Areas following the Conflict in Georgia, 27 November 2008, p. 76.

Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law, the parties should 'establish national programmes for reparation and other assistance to victims in the event that the parties liable for the harm suffered are unable or unwilling to meet their obligations.' Reparations should include the restitution of victims to their situation before the violation, compensation for economic damage suffered, and rehabilitation including medical and psychological care. Any compensation programme should take gender considerations into account to ensure that women heads of households and other female victims have equal access to restitution, compensation and rehabilitation." [519]

- The International Crisis Group noted that both investigation and prosecution "serve multiple purposes, not the least of which is to correct misinformation on the scale and nature of atrocities, when appropriate, so as to reduce the likelihood of revenge violence and to promote longer-term reconciliation."[520]

- "The Commissioner for Human Rights of the Council of Europe has also taken note of the decision, reached by the parties at the Geneva talks on 17 February 2009, to establish a joint incident prevention mechanism. The aim of the mechanism is to promote stability and security by providing a timely and adequate response to security incidents and/or criminal activities, ensuring the security of vital installations and infrastructure, as well as ensuring the effective delivery of humanitarian aid. Under the agreement, the security forces of all parties to the conflict and international monitors (UN, EU and OSCE) are to meet at least every week, or more often if needed, and may agree to conduct joint visits. The Commissioner considers that this mechanism has the potential to contribute to improving security in the conflict-affected areas, and calls upon all of the actors to implement it in practice and in good faith."[521]

Many of these measures entail cooperation between all the parties; dealing with such issues in a transparent and equal manner, with concrete solutions, may lay the foundations for dialogue and understanding.

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[519] *Idem*.

[520] International Crisis Group, RUSSIA VS GEORGIA: THE FALLOUT, Europe Report No.195 – 22 August 2008, p. 29.

[521] Commissioner for Human Rights of the Council of Europe, Report on human rights issues following the August 2008 armed conflict, 15 May 2009, CommDH(2009)22, para. 36.

VI Cases before International Courts

The August 2008 conflict gave rise to a number of complaints, both individual and interstate, which have been lodged with the available courts.

It is crucial to consider the findings of the IIFFMCG against this background. Given the cases pending, the report of the IIFFMCG, if made public, will be used extensively by all parties and by the relevant courts. So, in addition to providing victims and parties with a balanced analysis of the August 2008 conflict and its aftermath, it is also advisable for the Report to be made public in order to provide information in the context of judicial proceedings.

The first case in relation to the August 2008 conflict regards the proceedings instituted by Georgia before the European Court of Human Rights on 11 August 2008 alleging that the Russian Federation was violating the European Convention on Human Rights. On 6 February 2009, in accordance with Article 33 of the European Convention on Human Rights, Georgia lodged an inter-state application against the Russian Federation with the European Court of Human Rights.

There are also a number of applications from individuals that have been or are to be filed with the European Court of Human Rights. On 14 January 2009, for example, the Court announced that it had examined seven applications against Georgia, and that it had received a total of more than 3 300 cases from South Ossetians and Russians "with a similar factual background."[522] Several Georgian nongovernmental organizations are also providing assistance to ethnic Georgians in bringing cases to the Court.

Another interstate complaint relating to the August 2008 conflict has been lodged by Georgia against the Russian Federation in the International Court of Justice (ICJ). On 12 August 2008 Georgia instituted proceedings against the Russian Federation, and on 14 August it submitted a request to the ICJ for the indication of provisional measures. This case is based on the International Convention on the Elimination of All Forms of Racial Discrimination (ICERD). On 15 October 2008 the ICJ issued an order on provisional measures calling on Russia and Georgia to observe their legal obligations under the ICERD to prevent "irreparable prejudice"

[522] European Court of Human Rights, "Seven applications against Georgia Concerning Hostilities in South Ossetia", Press release by the Registrar, 14 January 2009, available at: http://cmiskp.echr.coe.int/tkp197/view.asp?item=1&portal=hbkm&action=html&highlight=&sessionid=18135459&skin=hudoc-pr-en

to the rights of persons before the court could rule on the merits of the case.[523] This case is currently pending before the Court.

While there are currently no cases pending before the International Criminal Court, on 20 August 2008 the ICC Prosecutor confirmed that the situation in Georgia is under analysis by his Office.[524]

[523] Case Concerning Application of the International Convention on the Elimination of All Forms of Racial Discrimination (Georgia v. Russian Federation), International Court of Justice, General List 140, Request for the Indication of Provisional Measures, October 15, 2008.

[524] ICC Press Release, "ICC Prosecutor confirms situation in Georgia under analysis," ICC-OTP-20080820-PR346, 20 August 2008. http://www2.icc-cpi.int/menus/icc/press%20and%20media/press%20releases/press%20releases%20(2008)/icc%20prosecutor%20confirms%20situation%20in%20georgia%20under%20analysis?lan=en-GB