EU-geförderter Bericht zum Augustkrieg 2008 – Tagliavini-Kommission - 30.09.2009

Zusammenfassung – Band 2

- Was in der Presse nicht gesagt wurde -

Der EU-Bericht erklärt im Kapitel 6 Teil 4 alle russischen Gewaltanwendungen als nicht gerechtfertigt, ebenso alle Gewaltanwendungen der Abchasen in Teil 5. Die Gewaltanwendungen der südossetischen Seite mit dem Beschießen georgischer Dörfer vor dem 7.8. verletzte das Gewaltverbot, welches für den Konflikt maßgeblich war. Die Gewaltanwendungen nach dem 12.8. nach dem Rückzug der georgischen Einheiten waren illegal.
In Teil 2 steht der Bericht Georgien das Eingreifen in Südossetien als gerechtfertigt zu als Selbstverteidigung in Form von „on-the-spot reaction“ und bezeichnet die georgische Offensive als nicht proportional zu dem einzigen erlaubten Ziel, zur Verteidigung gegen die andauernden südossetischen Angriffe.
Die georgische Sicht, dass russische Truppen vor dem 7./8. georgisches Territorium betreten hätten, konnte von der Kommission nicht bestätigt werden. Die Kommission schließt aber nicht aus, dass neue Beweise das Betreten Georgiens durch russische Soldaten zu diesem Zeitpunkt zeigen.
Der Bericht bestätigt auch die Anwesenheit regulärer russischer Streitkräfte in Südossetien vor dem 7.8. und die große Zahl an Provokationen zuvor auf georgischem Territorium. Die Kommission besteht im Kapitel 8 auf der Erfüllung des Sechs-Punkteabkommens, d.h. dem Rückzug der russischen Streitkräfte auf die Positionen vor dem 7.8. und stellt fest, dass dies Russland bis heute nicht erfüllt hat. Die Kommission nennt die Anerkennung Südossetiens und Abchasiens durch Russland einen "Anschlag auf die internationalen Anstrengungen zur Konfliktlösung".

Zusammenfassung in Civil Georgia-Nachrichten
30.09.2009 - http://www.civil.ge/eng/

- Unmöglich, die Gesamtverantwortlichkeit einer Seite alleine zuzuweisen;
- Offene Feindseligkeiten begannen mit Georgiens Beschuss von Tskhinvali;
- ‘Einige russische Streitkräfte’ außer den Friedenstruppen waren in Südossetien vor dem Angriff Georgiens;
- Georgiens Umfang von Anwendung von Gewalt ungerechtfertigt;
- Russlands Anwendung von Gewalt außerhalb Südossetiens ungerechtfertigt;
- Georgisches Vorhaben zu einem Genozid ‘konnte nicht belegt werden’;

Der Nachrichtendienst „Civil Georgia“ wird von der UN in Georgien betrieben, u.a. mit Hilfe der Friedrich-Ebert-Stiftung.

Stimmen zum Bericht

- aus der Presse in Georgien -

Britischer Außenminister Miliband - 09.10.2009, Civil Georgia
Der Bericht sei eine Mahnung zur Wichtigkeit der Konfliktprävention.

NATO-Generalsekretär Anders Fogh Rasmussen - 07.10.2009, Civil Georgia
"Nach dem Bericht gab es in diesem Konflikt Fehler auf beiden Seiten. ..." Zu Georgiens Streben in die NATO: "... der Bericht wird keine Auswirkung auf die Entscheidungen haben, welche bereits in der NATO getroffen wurden." In Bezug aufs Bukarest: Georgien und Ukraine würden eines Tages NATO-Mitglieder werden, wenn sie NATO-Standards erfüllen.

Tagliavini: Georgia started conflict, Russia created conditions - 04.10.09, Rustavi2
If Georgia started the conflict with assault on Tskhinvali on August 7, Russia had created conditions conducive to the outbreak of hostilities with Georgia, Heidi Tagliavini said in her exclusive interview with Le Temps French newspaper.

The Swiss diplomat, who was heading the independent international fact-finding mission on the conflict in Georgia said, that the conflict was not a local one and it has created danger to the relations between the West and the East.
`Russia violated the norms of international law, when conducted the military operations beyond the administrative boundaries of South Ossetia, on the rest territories of Georgia. In addition to it, Moscow recognized independence of Abkhazia and South Ossetia`, Heidi Tagliavini said.
The diplomat emphasized in the interview that blaming Georgia of committing a genocide against the population of South Ossetia was an unreal accusation.

Saakashvili on EU-Backed Report on War - 01.10.2009, Civil Georgia
President Saakashvili said on October 1, that the EU-funded fact-finding mission into the causes of the August war “said even more truth than I could ever imagine.”
“It is a great diplomatic victory of Georgia,” he said in live televised remarks at an outdoor meeting with the Tbilisi municipality officials and local residents of one of the capital city’s neighborhoods.

Georgischer Staatsminister Temur Iakobashvili - 30.09.2009, Civil Georgia
Der Bericht sagt, dass alle russischen Argumente, um die Invasion in Georgien zu rechtfertigen, nicht korrekt und eine Lüge sind.

Chapter 3 - Related Legal Issues
3.1. The Legal Status of South Ossetia and Abkhazia
III. Comment –Seite 136
South Ossetia should not be recognised, because the preconditions for statehood are not met.
Neither should Abkhazia be recognised. Although it shows the characteristics of statehood, the process of state-building as such is not legitimate, as Abkhazia never had a right to secession. Furthermore, Abkhazia does not meet basic requirements regarding human and minority rights, *especially because it does not guarantee a right of safe return to IDPs/refugees.*

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II. Legal qualification of the Georgian offensive - Seite 239:
… Consequently, a government is generally not prevented from using armed force in internal conflicts, e.g. against insurgents starting a civil war or against territorial entities fighting violently for secession. …

Seite 244 – 246:
2. Legal assessment: "Armed attack" by South Ossetia on Georgia?
The underlying question is whether the military operations of the South Ossetian militia preceding the Georgian air and ground offensive constituted an "armed attack" on Georgia which could justify the use of force by Georgia as an act of self-defence based on Art. 51 of 53 See Chapter 5 "Military Events of 2008". …

a) Attacks on Georgian villages by South Ossetian forces as "armed attack" on Georgia
… The attacks on Georgian villages (Zemo Nikozi, Kvemo Nikozi, Avnevi, Nuli, Ergneti, Eredvi and Zemo Prisi) by South Ossetian forces *can be qualified as equivalent to an "attack by the armed forces of a State on the territory of another State"* resembling the situations described in Art. 3(a) of UN Resolution 3314. In this context, the delineation of the territories of South Ossetia and Georgia follows de facto jurisdiction of the South Ossetian entity short of statehood. Because the Georgian villages attacked by South Ossetian forces were not under the jurisdiction of South Ossetia before 8 August 2008, the actions by the South Ossetian militia are equivalent to an attack on the "territory of another State".
To the extent that heavy artillery was used, the attacks against Georgian villages by South Ossetia can also be qualified as "bombardment by the armed forces of a State against the territory of another State or the use of any weapons by a State against the territory of another State" (cf. Resolution 3314, Art. 3(b)). These acts were serious and surpassed a threshold of gravity and ***therefore also constituted an "armed attack" in terms of Art. 51 of the UN Charter." in terms of Art. 51 of the UN Charter.*** …

b) South Ossetian attacks on the Georgian peacekeepers and police as an "armed attack"
The South Ossetian attacks on the villages were primarily directed against Georgian peacekeepers and against Georgian police. This constitutes an attack by the armed forces of South Ossetia on the land forces of Georgia, as also described in Art. 3 (d) UN Resolution 3314.61

c) Military action by South Ossetia beyond a minimum threshold
… There may be military operations which amount to a use of force but nevertheless do not yet constitute an armed attack in the sense of Art. 51 of the UN Charter. To be deemed an armed attack, an operation must have a minimum "scale and effects". …
It can therefore be assumed that the South Ossetian attacks on Georgian villages as well as on Georgian peacekeepers and police had a minimum scale and effects, but further conditions must be met in order to allow for the Georgian claim of self-defence, which will discussed next. …

3. Burden of proof for the armed attack
The problem remains that it cannot be clearly determined which side began the fighting prior to the Georgian air and ground offensive. The situation was highly explosive, and both sides seem to have prepared for use of force and were ready to use force. *It is impossible to decide who fired the first shot in the incidents noted above.* …
When Georgia argues that its air and ground offensive on 7 August 2008 is justified by self-defence because of a cumulative armed attack by South-Ossetia, *the burden of proof falls on Georgia.*

IV. Conclusions: no self-defence by Georgia beyond on-the-spot reactions
To the extent that the attacks on Georgian villages, police and peacekeepers were conducted by South Ossetian militia, **self-defence in the form of on-the-spot reactions by Georgian troops was necessary and proportionate and thus justified under international law**.
On the other hand, the offensive that started on 7 August, even if it were deemed necessary, **was not proportionate to the only permissible aim**, the defence against the on-going attacks from South Ossetia.

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Chapter 6 - Use of Force

Part 3: Use of force by South Ossetia against Georgia – ab Seite 262

I. Facts

As explained above, the South Ossetian militia were involved in shooting at Georgian villages, police and peacekeepers before the outbreak of the armed conflict. After the air and ground offensive by the Georgian army the South Ossetian militia probably tried to defend their positions.

II. Legal qualification: use of force, but partly justified as self-defence

To the extent that South Ossetian militia initiated the shooting on Georgian villages, police and peacekeepers before the outbreak of the armed conflict, South Ossetia violated the prohibition of the use of force, which was applicable to the conflict.

South Ossetian use of force could have been justified as self-defence only in the event of an armed attack by Georgia on South Ossetia. ... Use of force by South Ossetia after 12 August 2008 is not justifiable as self-defence, because there was no longer any on-going attack by Georgia. A ceasefire agreement had been concluded. The Georgian army had by that time retreated from the territory of South Ossetia. Use of force was therefore illegal from the ius ad bellum perspective. ...

Part 4: Use of force by Russia against Georgia

I. Facts

Russia was involved in the conflict in several ways. First, Russian peacekeepers who were stationed in South Ossetia on the basis of the Sochi Agreement were involved in the fighting in Tskhinvali. Second, Russian regular troops were fighting in South Ossetia, Abkhazia and deeper in Georgian territory. Third, North Caucasian irregulars took part in the fighting. Finally, Russia supported Abkhaz and South Ossetian forces in many ways, especially by
training, arming, equipping, financing and supporting them.

II. Legal qualification of the Russian involvement in the conflict

Under Art. 2(4) of the UN Charter and the parallel customary law, **the military operations of the Russian army** as described in Chapter 5 "Military Events of 2008"130 in the territory of Georgia (including South Ossetia and Abkhazia and elsewhere in Georgia) **in August 2008 constituted a violation of the fundamental international legal prohibition of the use of force.** The main legal issue is whether these activities could be justified as legally recognized exceptions.

III. No justification of the use of force as self-defence

... The means employed by Russia were not in a reasonable relationship to the only permissible objective, which was to eliminate the threat for Russian peacekeepers. In any case, much of
the destruction (see Chapter 5 "Military Events in 2008") after the conclusion of the ceasefire
agreement is not justifiable by any means. According to international law, the Russian
military action taken as a whole was therefore neither necessary nor proportionate to protect
Russian peacekeepers in South Ossetia.

IV. No justification of Russian use of force as fulfilment of the peacekeeping mission

… Conclusion: Russia could not justify its use of force as a mere reinforcement and fulfilment
of its peacekeeping mission.

V. No justification of the use of force by invitation of the South Ossetian authorities

… To conclude, both under the doctrine of asymmetry and under the new doctrine of negative equality concerning intervention in a civil war, the South Ossetian authorities could not validly invite Russia to support them by military means.

VI. No justification of the use of force by collective self-defence

… Russian military activities against the Georgian military forces were not justified as collective self-defence under international law.

VII. No justification of the use of force as "humanitarian intervention"

To conclude, the Russian use of force cannot be justified as a humanitarian intervention.

VIII. No justification of the use of force as action to rescue and protect nationals abroad

In conclusion, the Russian intervention in Georgia cannot be justified as a rescue operation for Russian nationals in Georgia.

Part 5: Use of force in Abkhazia

II. Legal qualification of the Abkhaz and Russian offensive: **violation of the prohibition of the use of force and armed attack on Georgia**

III. Legal qualification of the Georgian operation: self-defence

The military operation in the upper Kodori Valley was, for the reasons just explained, an armed attack on Georgia. **The use of force by Georgia was justified as self-defence.**

IV. No justification of the Abkhaz and Russian use of force against Georgia

... All these arguments can constitute a legally permissible justification only to the extent that
they point to an armed attack by Georgia on Abkhazia. Only in the event of an armed attack
by Georgia … could Abkhazia have relied on selfdefence. Russian involvement could not be justified as collective self-defence in favour of Abkhazia, because third-party involvement in an internal military conflict in support of the seceding
party is not allowed for the reasons explained above. ...

2. No previous "armed attack" by Georgia

a) No Georgian military operation in the Kodori Valley by Georgia

b) No preceding terrorist attacks sponsored by Georgiab) No preceding terrorist attacks sponsored by Georgia

c) No imminent armed attack on Abkhazia as a whole by Georgia

4. Conclusion

The use of force by Abkhazia was not justified under international law and was thus illegal.

The same applies to the Russian support for Abkhaz use of force.

Chapter 8 - Back to Diplomacy

On 12 August, the Russian Government reported to the European Union High Representative for Common Foreign and Security Policy, Javier Solana, that "the aim of Russia's operation to force the Georgian side to peace had been achieved and it had been decided to conclude the operation". Later that day President Medvedev met with President Sarkozy, who presented a ceasefire plan on behalf of the EU after telephone consultations with President Bush, German Chancellor Angela Merkel and other European leaders. President Medvedev reportedly backed some elements of the plan. French Foreign Minister Kouchner then flew to Tbilisi to present the proposals to the Georgian side. **Presidents Medvedev and Saakashvili consulted by phone and reportedly agreed to a six-point peace plan.** It called for all parties to the conflict to accept the following conditions :

• to refrain from the use of force;
• to end hostilities definitively;
• to provide free access for humanitarian aid;
• Georgian military forces will have to withdraw to their usual bases;
• **Russian military forces will have to withdraw to the lines held prior to the outbreak of hostilities.** Pending an international mechanism, Russian peacekeeping forces will implement additional security measures;
• opening of international talks on the security and stability arrangements in Abkhazia and South Ossetia.

As long as international mechanisms were not put into place, Russian peacekeepers patrolled in a large so-called buffer zone outside South Ossetia. The plan did not specifically state that international peacekeepers would be deployed within South Ossetia.

South Ossetia and Abkhazia agreed to and signed this ceasefire plan on 14 August 2008. The same day Georgia initiated the legal procedure for the cancellation of its membership within the CIS, finally taking a step which had been discussed for years. On 22 August, several Western media reported sizeable but not complete Russian military withdrawal from "Georgia proper". Diverging interpretations of the status quo ante bellum called for a follow-on ceasefire agreement.

A diplomatic event called the six- point peace plan into even greater question. On 25 August, Russia's Federation Council and the State Duma recommended that the President recognise the independence of Abkhazia and South Ossetia. Even at this point some Russian and Western experts did not believe that the Kremlin would follow this recommendation. However, in an announcement on 26 August, President Medvedev announced Russia's official recognition of the independence of both regions, and he called on other countries to follow this diplomatic step. On 5 September, Nicaragua recognised the independence of Abkhazia and South Ossetia. Within Russian-dominated regional formats like the Collective Security Treaty Organisation (CSTO) no government followed suit . At a late August 2008 summit of the Shanghai Cooperation Organisation (SCO) the communiqué appeared to reflect disapproval of recognition of the breakaway regions. After the armed conflict, Russian President Medvedev formulated a doctrine of privileged zones of interest.

On 8 September, President Sarkozy and President Medvedev signed a follow-on ceasefire agreement setting out the provisions of the six point plan in detail. It provided for measures on the withdrawal of armed forces and for international monitoring mechanisms. It also referred to the continuation of the activities of the international observers of UNOMIG and OSCE Mission to Georgia. This should happen within their existing mandates and would be subject to further adjustments by respectively the UN Security Council and the OSCE Permanent Council. International observers, including at least 200 from the EU, would have to be deployed in the areas adjacent to South Ossetia and Abkhazia. Thus the EU became a guarantor of the principle of the non-use of force. The agreement also referred to the holding of international discussions, as provided for in the six point plan, to begin in Geneva on 15 October 2008.

Russian troops withdrew from Poti and Senaki on 13 September and pulled back by 9 October from so-called buffer zones in accordance with the follow-on ceasefire plan. However, only one day after this plan was agreed upon, the Russian Defence Minister asserted that several thousand Russian troops would remain in Abkhazia and South Ossetia. Additionally, Russian checkpoints remained in some areas like the Akhalgori district in the eastern part of South Ossetia, which had been administered by Georgia before the August 2008 armed conflict. **Thus Russia did not follow the call to pull back its troops to the pre-war level.**

Moreover the Kremlin's recognition of the independence of Abkhazia and South Ossetia on the basis of the Kosovo precedent formula has an impact on international conflict resolution efforts. The newly-created Monitoring Mission in Georgia (EUMM) defined its area of action as "throughout Georgia" or "the whole of Georgia", but did not obtain free access to South Ossetia and Abkhazia. *It soon became clear that Russia and its protégés in Sukhumi and Tskhinvali did not grant access to international observers to both regions.* This limitation had serious consequences for a mission like the EUMM. Without access to both regions it could not fulfil its task to monitor the post-war stabilisation process in Georgia and the implementation of the ceasefire accords. Limited in this way in its area of action to the "adjacent regions" around Abkhazia and South Ossetia, the EUMM would be contributing to the safeguarding of de facto borders not recognised by Europe and the rest of the world, with the exception of Russia and Nicaragua. **Thus the post-war stabilisation process in Georgia was based on a rather uncertain foundation.**

The international discussions on Georgia began at the United Nations in Geneva with a first meeting on 15 October 2008, with the full involvement of the European Union, the United Nations and the OSCE.

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Chapter 6 - Use of Force

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Introduction

Part 2: Use of force by Georgia - Seite 238
A. Use of force by Georgia against South Ossetia
I. Facts
It is not contested that the Georgian armed forces started an armed offensive in South Ossetia on the basis of President Saakashvili's order given on 7 August 2008 at 23.35.38 It is also uncontested that this offensive was directed – at least among other aims – against South Ossetian militia.39 Finally, it is also uncontested that as a result of this attack both civilians
para. 13; S/RES/1494 (30 July 2003), para. 13; S/RES/1462 (30 January 2003), para. 16 ("to dissociate themselves from militant rhetoric and demonstrations of support for military options"); S/RES/1427 (29 July 2002), para. 14; S/RES/993 (12 May 1995), para. 5.
36 S/RES/1808 (15 April 2008), para. 6. See also S/RES/1781 (15 October 2007), para. 6.
37 Since none of the parties can claim justification for the threats of force they issued, it is therefore immaterial, first, whether or not South Ossetia and Abkhazia were entitled to invite and thus to validate Russia's use of threats, second, which side began to issue threats of force, and third, to what extent any of the threats met the additional requirements of necessity and proportionality.
38 This order and the ground offensive of the Georgian forces are confirmed by the Georgian side (Answer to question 1 – military).
39 According to the information given by the Georgian side, the offensive had the following aims: (1) to protect civilians in South Ossetia; (2) to neutralize the firing positions from which the fire against civilians, Georgian
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and South Ossetian militiamen died, and that a considerable number of buildings were destroyed in Tskhinvali and in the surrounding villages.
II. Legal qualification of the Georgian offensive
The use of military force is prohibited by Art. 2 (4) of the UN Charter and by customary law, and the prohibition is also endorsed in the Helsinki Final Act of 1975.40 Related concepts include an "act of aggression" (Art. 39 of the UN Charter), which empowers the Security Council to make recommendations or to decide on measures for the purpose of restoring international peace and security, and an "armed attack" (Art. 51 of the UN Charter), which justifies the right to self-defence. It must first be clarified whether these rules are applicable to military operations within the territory of Georgia itself.
1. Application of the prohibition of the use of force to the armed conflict between Georgia and South Ossetia
The armed conflict between Georgia and South Ossetia took place exclusively within the borders of the sovereign state of Georgia as they had been internationally recognized at the time when Georgia became member of the United Nations. The use of force by Georgia was directed against an entity short of statehood that formally belonged to the territory of Georgia and was therefore neither sovereign nor independent (see Chapter 3 "Related Legal Issues"). Under Art. 2 (4) of the UN Charter, the use of force is prohibited only if it is directed against "the sovereignty, territorial integrity or political independence of another State", or if it is "in any other manner inconsistent with the Charter of the United Nations". Consequently, a government is generally not prevented from using armed force in internal conflicts, e.g. against insurgents starting a civil war or against territorial entities fighting violently for secession.41
In the Georgian–South Ossetian armed conflict, the use of force is "inconsistent with the Charter of the United Nations", and therefore the prohibition of the use of force is applicable peacekeeping units and police originated; and (3) to halt the movement of regular units of the Russian Federation through the Roki Tunnel inside Tskhinvali Region/South Ossetia; cf. Document provided by the Georgian authorities: "The Chronology of Russian Aggression against Georgia in 2008".
40 Part 1 (a) "Declaration on Principles Guiding Relations between Participating States", Principle II, "Refraining from the threat or use of force".
41 Albrecht Randelzhofer, in Bruno Simma (ed), The Charter of the United Nations: A Commentary, vol. 1 (Oxford University Press 2002), Article 2(4) of the UN-Charter, para. 28. Examples of such a situation during the cold war were the military conflicts between North Korea and South Korea, and between North and South Vietnam, where the majority of states rejected the applicability of Article 2(4) of the UN Charter; for a detailed analysis of state practice see Corten, Le droit contre la guerre (above note 6), pp. 205-220.
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to the conflict, for the following reasons. First, the Sochi Agreement concluded in 1992 between the Republic of Georgia (represented by Eduard Shevardnadze) and the Russian Federation (represented by Boris Yeltsin)42 reaffirms in its preamble "the commitment to the UN Charter and the Helsinki Final Act". This clause is a clear indication that Georgia accepts the applicability of the prohibition of the use of force in its conflict with South Ossetia. South Ossetia is not a party to that Agreement; parties are only Russia and Georgia. Yet, the purpose of the 1992 Agreement was to "bring about the immediate cessation of bloodshed and achieve comprehensive settlement of the conflict between Ossetians and Georgians".43 The reference to the UN Charter would not make any sense if it did not include the prohibition of the use of force, as this is the centrepiece of the Charter. This interpretation is also in line with the spirit of the Sochi Agreement aiming at the termination of hostilities between the opposing parties, i.e. between Georgia and South Ossetia.
Second, the legal obligation of Georgia to refrain from the use of force in its relations with South Ossetia is enshrined in the 1994 Agreement "On the further development of the process of the peaceful regulation of the Georgian-Ossetian conflict and on the Joint Control Commission".44 This Agreement states: "The Parties to the conflict reiterate pledged commitments to settle all the issues in dispute exclusively by peaceful means, without resort to force or threat of resort to force." There are four parties to the 1994 Agreement: Georgia, Russia, South Ossetia and North Ossetia. The status of the contracting parties differs: While Georgia and Russia are full subjects of international law, North Ossetia is, under Russian constitutional law, part of a federation with limited competence to conclude international treaties.45 South Ossetia, as a party to an armed conflict, has limited treaty-making power to conclude international treaties related to the military conflict, especially armistices.46 The legal nature of the document is not that of a treaty in its own right. The 1994 "Agreement" is rather based on the above-mentioned Sochi Agreement of 1992. Although there are not only two, but four partners to the 1994 Agreement, it is closely linked to the 1992 Agreement between Russia and Georgia. The 1994 Agreement builds on the compromise reached in 1992
42 "Agreement on Principles of Settlement of the Georgian-Ossetia Conflict of 24 June 1992", in Tamaz Diasamidze, Regional Conflicts in Georgia (Tbilisi 2008), p. 110.
43 Preamble of the Sochi Agreement of 24 June 1992 (emphasis added).
44 "Agreement of 31 October 1994", in Tamaz Diasamidze, Regional Conflicts in Georgia (Tbilisi 2008), p. 192.
45 According to Article 72 lit. n) of the Russian Constitution, the constituent entities of the Russian Federation may establish their own "international and foreign economic relations", i.e. are granted limited treaty-making power at least in those areas where they have exclusive jurisdiction. The coordination of these activities falls within the joint jurisdiction of the Federation and the constituent entities.
46 Anne Peters, "Treaty-Making Power", in Rüdiger Wolfrum (ed), Max Planck Encyclopedia of Public International Law (Oxford University Press 2009), paras 61-62, www.mpepil.com (online database).
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and develops it further. It can therefore be qualified as "subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation" in the sense of Art. 31 para. 3(b) of the Vienna Convention on the Law of Treaties (VCLT). This means that the second text is an important guideline for the interpretation of the Sochi Agreement.
Third, the "Memorandum on Measures to Provide Security and Strengthen Mutual Trust between Sides in the Georgian-South Ossetian Conflict" of 16 May 1996 explicitly states: "We have agreed on the following: (1) The Parties to the conflict shall denounce application of force or threat of force …."47 The reference to the "UN Charter, fundamental principles and decisions of the OSCE, and universally recognized norms of international law" is repeated as well. The document was signed by the representative of Georgia (Minister of Foreign Affairs), by the representatives of South Ossetia and North Ossetia. Mediators were the Russian Minister of Foreign Affairs for the Russian Federation, and finally the OSCE. Like the 1994 Agreement, the 1996 Memorandum constitutes "subsequent practice" in the sense of Art. 31 para. 3 (b) of the VCLT, and thus a guideline for the interpretation of the 1992 Agreement. It is true that the formal parties of those three texts are not identical. For instance, Russia is not a formal party to the 1996 Memorandum (but signed only as a "mediator"), and South Ossetia is not a party to the 1992 Sochi Agreement. Yet, the Memorandum also indicates how the original 1992 Agreement must be understood. It is important to note that these three agreements not only prohibit the use of force in search of a solution to the conflict, but also establish peace-building mechanisms in order to prevent further conflicts.
Additionally, it may be noted that the Security Council condemned the use of force in the Georgian-Abkhaz conflict on several occasions. 48
This finding guides not only the applicability of Art. 2(4), but also of Art. 51 of the UN Charter. According to the wording of Art. 51, this provision applies only to UN member states. Yet, if the use of force is prohibited in the relations between a state and an entity short
47 "Memorandum on Necessary Measures to be Undertaken in Order to Ensure Security and Strengthening of Mutual Trust between the Parties to the Georgian-Ossetian Conflict", in Tamaz Diasamidze, Regional Conflicts in Georgia (Tbilisi 2008), p. 244.
48 Concerning the armed conflict between Georgia and Abkhazia, the Security Council in Res. 876 (1993) "demands that all parties refrain from the use of force" and condemns violations of the ceasefire agreement between Georgia and forces in Abkhazia (Res. 876 of 19 October 1993, paras 4 and 2). Again in SC Res. 1187 (1998), para. 11, the Security Council "calls upon the parties …to refrain from the use of force". The subsequent Security Council resolutions on Abkhazia do not mention the prohibition of the use of force, but merely regularly call on the parties to refrain from action that might impede the peace process. Some of the Resolutions additionally condemned any violations of the 1994 Moscow Agreement on a Ceasefire and a

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Separation of Forces (SC Res. 1494 (2003), para. 19; SC Res. 1524 (2004), para. 22; SC Res. 1554 (2004), para. 22; SC Res. 1582 (2005), para. 24; Res. 1615 (2005), para. 25.
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of statehood, then self-defence must be available to both sides as well. The scope of both rules ratione personae must be identical, because otherwise the regime of use of force would not be coherent. This means that self-defence is admissible also for an entity short of statehood.
Conclusion: Despite the differing status of the parties to the conflict (Georgia as a state, South Ossetia as an entity short of statehood and legally a part of Georgia), the prohibition of the use of force as endorsed in the UN Charter applies to their relations.
2. The Georgian attack on Tskhinvali and the surrounding villages as prohibited use of force
The next question is whether the Georgian shelling and ground offensive was "use of force" in the sense of Art. 2(4) of the UN Charter. The prohibition of the use of force covers all physical force which surpasses a minimum threshold of intensity.49 Two General Assembly resolutions, the so called "Friendly Relations Declaration" of 1970,50 and the General Assembly Resolution "Definition of Aggression" (3314 (XXIX)) of 1974 51 offer guidance for determining the material scope of Art. 2(4) of the UN Charter. The latter Resolution was primarily adopted for defining the term "aggression" in the sense of Art. 39 of the UN Charter, which is not identical with "use of force" in terms of Art. 2(4) of the UN Charter. However, the threshold for "use of force" is lower than that of "aggression". Put differently, when an act of military violence constitutes an aggression, it a fortiori also constitutes prohibited use of force.52
Resolution 3314 distinguishes different forms of attacks in its Art. 3. The following are relevant in the context of the Georgian action in South Ossetia:
"(a) The invasion or attack by the armed forces of a State of the territory of another State, or any military occupation, however temporary, resulting from such invasion or attack, or any annexation by the use of force of the territory of another State or part thereof;
49 Only very small incidents lie below this threshold, for instance the targeted killing of single individuals, forcible abductions of individual persons, or the interception of a single aircraft. (See Kolb, Ius contra bellum (above note 30), p. 247).
50 GA Res. 2625 (XXV) of 24 Oct. 1970, principle on the use of force. This resolution was referred to by the ICJ for determining whether "use of force" was present in ICJ, Case Concerning Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v. Uganda), ICJ Reports 2005, 116, paras 162-63, and has in scholarship been called an "authentic interpretation" of Article 2(4) UN Charter (Kolb, Ius contra bellum (above note 30), p. 245).
51 Definition of aggression, Resolution No. 3314 (XXIX) of the General Assembly of 14 December 1974, UN Yearbook 1974, p. 846 (quoted as Resolution 3314).
52 Cf. Corten, Le droit contre la guerre (above note 6), p. 67.
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(b) Bombardment by the armed forces of a State against the territory of another State or the use of any weapons by a State against the territory of another State;
c) An attack by the armed forces of a State on the land, sea or air forces, or marine and air fleets of another State".
Although there were no internationally determined borders dividing the territory of Georgia and the territory of South Ossetia, the city of Tskhinvali and the villages west of Tskhinvali were under South Ossetian de facto jurisdiction. Therefore the attacks by the armed forces of Georgia against the city of Tskhinvali and the villages by means of heavy weapons might even be qualified as acts of aggression under Art. 3 (a) and (b) of UN Resolution 3314, and a fortiori as prohibited use of force. They were not directed against the territory of "another state", but against the territory of an entity short of statehood outside the jurisdiction of the attacking state. But as argued above, the prohibition of the use of force applies here as well. The attack was primarily targeted at the South Ossetian militia defending the city of Tskhinvali and the surrounding villages. Therefore it might fall under Art. 3 (d) Resolution 3314, and a fortiori constituted "use of force" in the sense of Art. 2(4) of the UN Charter.
III. Justification of Georgia's use of force against South Ossetia
The fundamental question therefore is whether the use of force by Georgia against South Ossetia can be justified under international law. Georgia's base argument claims self-defence.
1. Facts
The long history of hostilities between Georgian security forces (paramilitary, heavily armed "police") and South Ossetian militia considerably intensified after spring 2008 both in quality and quantity. In July 2008 several armed clashes took place. For a legal assessment of the Georgian air and ground offensive starting on 7 August it is important to note the incidents that were extensively described by the Georgian side.53
2. Legal assessment: "Armed attack" by South Ossetia on Georgia?
The underlying question is whether the military operations of the South Ossetian militia preceding the Georgian air and ground offensive constituted an "armed attack" on Georgia which could justify the use of force by Georgia as an act of self-defence based on Art. 51 of
53 See Chapter 5 "Military Events of 2008".
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the UN Charter. To assess the justification of the Georgian reaction, it is necessary to take into account the series of incidents that had occurred since the beginning of August.
a) Attacks on Georgian villages by South Ossetian forces as "armed attack" on Georgia
Although both terms are not explicitly linked in the UN Charter, General Assembly Resolution 3314 on the Definition of Aggression can serve as the reference for the definition of the notion of "armed attack".54 The threshold of an "armed attack" is higher, hence not every "aggression" is considered an "armed attack".55 Still, states relied on Resolution 3314 to determine what is considered an "armed attack".56 ICJ case-law confirms that at least some graver actions which qualify as aggression under that Resolution also constitute an armed attack in terms of Art. 51 of the UN Charter.57
The attacks on Georgian villages (Zemo Nikozi, Kvemo Nikozi, Avnevi, Nuli, Ergneti, Eredvi and Zemo Prisi) by South Ossetian forces can be qualified as equivalent to an "attack by the armed forces of a State on the territory of another State" resembling the situations described in Art. 3(a) of UN Resolution 3314. In this context, the delineation of the territories of South Ossetia and Georgia follows de facto jurisdiction of the South Ossetian entity short of statehood. Because the Georgian villages attacked by South Ossetian forces were not under the jurisdiction of South Ossetia before 8 August 2008, the actions by the South Ossetian militia are equivalent to an attack on the "territory of another State".
To the extent that heavy artillery was used,58 the attacks against Georgian villages by South Ossetia can also be qualified as "bombardment by the armed forces of a State against the territory of another State or the use of any weapons by a State against the territory of another State" (cf. Resolution 3314, Art. 3(b)). These acts were serious and surpassed a threshold of gravity and therefore also constituted an "armed attack" in terms of Art. 51 of the UN Charter.
54 Cf. Christine Gray, International Law and the Use of Force (3rd edn, Oxford University Press 2008), p. 183.
55 Yoram Dinstein, War, Aggression and Self-defence (Cambridge University Press 2005), p. 184; Corten, Le droit contre la guerre (above note 6), p. 615 note 27.
56 See the references to governmental statements in that sense during the drafting debate of Res. 3314 in Corten, Le droit contre la guerre (above note 6), p. 615 fn. 28.
57 ICJ, Nicaragua (Merits) (above note 7), para. 195; ICJ, Case Concerning Armed Activities on the Territory of the Congo (above note 50), para. 146.
58 See the description of the fighting on 6 August Chapter 5 "Military Events of 2008".
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b) South Ossetian attacks on the Georgian peacekeepers and police as an "armed attack"
The South Ossetian attacks on the villages were primarily directed against Georgian peacekeepers59 and against Georgian police.60 This constitutes an attack by the armed forces of South Ossetia on the land forces of Georgia, as also described in Art. 3 (d) UN Resolution 3314.61
c) Military action by South Ossetia beyond a minimum threshold
Military actions constitute an armed attack in the sense of Art. 51 of the UN Charter only if they surpass a certain threshold. According to the ICJ, it is necessary to distinguish the gravest forms of the use of force (those constituting an armed attack) from other less grave forms.62 There may be military operations which amount to a use of force but nevertheless do not yet constitute an armed attack in the sense of Art. 51 of the UN Charter. To be deemed an armed attack, an operation must have a minimum "scale and effects".63 On the other hand, the ICJ has assumed that a cumulative series of minor attacks may constitute an armed attack.64 According to the findings of the Mission, the acts preceding the outbreak of the hostilities led to several fatalities on both sides. They not only involved de facto border guards, but also the inhabitants of the villages that were attacked. From 6 August on, continuous heavy fighting took place. As explained in the section on International Humanitarian Law, the firing caused many civilians to leave their villages.65
59 See the description of the incidents on 7 August in Chapter 5 "Military Events of 2008".
60 See Chapter 5 "Military Events of 2008".
61 There might be doubts whether the Georgian peacekeeping forces can be qualified as "land forces" of Georgia. As they were not neutral, but belonged to one of the conflicting parties, the attack against Georgian peacekeepers can be seen as directed against Georgia as a state. This is all the more true after the Georgian peacekeepers had left the PKF Headquarters. The situation is different for the Russian peacekeepers, as will be discussed below.
62 ICJ, Nicaragua (Merits) (above note 7), para. 191; ICJ, Oil Platforms Case, ICJ Reports 2003, 161, para. 51.
63 ICJ, Nicaragua (Merits) (above note 7), para. 195. In the Nicaragua case, the Court specifically distinguished an armed attack from a mere "frontier incident" below the threshold. Mere frontier incidents are not apt to trigger the right to self-defence. Ibid. See for the debate in scholarship Gray, Use of force (above note 54), pp. 177-181. This approach has been upheld in the Eritrea/Ethiopia Claims Commission Award: "Localized border encounters between small infantry units, even those involving the loss of life, do not constitute an armed attack for purposes of the Charter." (Eritrea/Ethiopia Claims Commission, Award on Ethiopia's Ius ad Bellum Claims 1-8, 45 ILM (2006), 430). The General Assembly Resolution on the definition of aggression also contains a de minimis clause to exclude minor incidents from the category of "aggression" (which is, as stated above, not identical, but related to the concept of an "armed attack"). The acts themselves or their consequences must have a "sufficient gravity". (Art. 2 of GA Res. 3314 (XXIX)).
64 ICJ, Oil Platforms (above note 62) para. 64.
65 See Chapter 7 "International Humanitarian Law and Human Rights Law".
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It can therefore be assumed that the South Ossetian attacks on Georgian villages as well as on Georgian peacekeepers and police had a minimum scale and effects, but further conditions must be met in order to allow for the Georgian claim of self-defence, which will discussed next.
3. Burden of proof for the armed attack
The problem remains that it cannot be clearly determined which side began the fighting prior to the Georgian air and ground offensive. The situation was highly explosive, and both sides seem to have prepared for use of force and were ready to use force. It is impossible to decide who fired the first shot in the incidents noted above.
In a trial, the state which seeks to rely on self-defence would have to demonstrate that it was the victim of an "armed attack" by the other state such as to justify the use of armed force in self-defence; and the burden of proof of the facts showing the existence of such an attack rests on the potential victim state.66 Concerning the incidents before the outbreak of a war, this rule of evidence applies to both conflicting parties, to the extent that they claim that they had to react to attacks by the other side. When Georgia argues that its air and ground offensive on 7 August 2008 is justified by self-defence because of a cumulative armed attack by South-Ossetia, the burden of proof falls on Georgia.
4. Notification of self-defence to the UN Security Council
According to Art. 51 of the UN Charter, a conflicting party relying on the right to self-defence has to report immediately to the Security Council.
Georgia stated in the emergency meeting of the Security Council of 8 August at 1.15 (New York time) that the "Government's military action was taken in self-defence after repeated armed provocations and with the sole goal of protecting the civilian population and preventing further loss of life among residents of various ethnic backgrounds. … The Government acted because the separatists not only defied the ceasefire but also sharply escalated the violence, killing several peacekeepers and civilians within hours of the ceasefire. Additional illegal forces and military equipment were and are entering Georgian territory from Russia through the Roki tunnel, threatening even worse violence."67 With this statement, Georgia claimed self-defence both against South Ossetia and against Russia. Nevertheless,
66 ICJ, Oil Platforms (above note 65), para. 57. The ruling of the court with respect to the standards of evidence has been criticized by several judges, cf. Higgins paras 30-9, Buergenthal paras 33-46, Owada paras 41-52.
67 Statement of the Georgian representative in the Security Council debate of 8 August 2008, 1.15 a.m. (UNDoc. S/PV.5951), p. 5.
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and contrary to Russia, Georgia did not formally and "immediately" notify the Security Council that it acted in self-defence, as required by Art. 51 of the UN Charter.
This reporting requirement is procedural. According to the International Court of Justice, the absence or presence of a report to the Security Council "may be one of the facts indicating whether the State in question was itself convinced that is was acting in self-defence".68 An eventual failure to notify the Security Council does not in itself destroy Georgia's claim to self-defence.69
5. Adequacy of the Georgian Reaction
The Georgian response was justifiable as self-defence only if its modalities satisfied established legal criteria.
a) Immediacy of the Georgian reaction
Self-defence must be immediate and may not happen when an attack has ended. It is generally accepted that there may be a time-lag between the original armed attack and the response of the victim state, because it is necessary to prepare self-defensive operations.70 A stricter minority view holds that self-defence may only be undertaken while the armed attack is in progress.71 The South Ossetian attacks on Georgian villages near Tskhinvali and the attacks on Georgian "police" and peacekeepers that had started in the beginning of August were a protracted action. They were still on-going when the Georgian military operation began on 7 August 2008. Therefore the Georgian reaction was still "immediate" even under the stricter view.
b) Necessity and proportionality of the Georgian reaction
Self-defence must be necessary and proportionate.72 This requirement has been confirmed and substantiated in the case-law of the International Court of Justice.73 The criteria of necessity
68 ICJ, Nicaragua (Merits), (above note 7), para. 200.
69 See in detail Judge Schwebel, dissenting opinion, in ICJ, Nicaragua (Merits), (above note 7), paras 221-7. In scholarship Gray, Use of Force (above note 54), p. 122.
70 Cf. Dinstein, War (above note 55), p. 200.
71 Gamal Moursi Badr, "The Exculpatory Effect of Self-defence in State Responsibility", Georgia Journal of International and Comparative Law 10 (1980), 1-28, p. 26.
72 See in detail Corten, Le droit contre la guerre (above note 6), pp. 705-735; Gardam, Necessity (above note 29), pp. 158-173, both with extensive reference to state practice.
73 ICJ, Nicaragua (Merits), (above note 7), para. 194. In that case, the US-mining of Nicaraguan ports was not proportionate to the aid received by the Salvadorian opposition from Nicaragua (ibid., para. 237). See also ICJ, Legality of the Threat or Use of Nuclear Weapons (above note 7), para. 141; ICJ, Oil Platforms (above
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and proportionality overlap, and proportionality has been mostly considered just as one aspect of necessity, or as the other side of the coin.74 Whether a military reaction is, in the way it is conducted, necessary and proportionate in the sense of Art. 51 of the UN Charter depends on the facts of the particular case.
The assessment of what is "necessary" is not at the discretion of the reacting state.
"Necessity" is a legal term which must be defined in an objective manner, taking into account the situation as a neutral observer putting himself in the place of the victim state could reasonably evaluate it. The subjective impression and judgment of the affected state about what was necessary is not decisive.75
Necessity (in terms of Art. 51 of the UN Charter) has been understood by some writers to denote a situation in which it is unavoidable to rely on force in response to the armed attack, where no alternative means of redress is available.76 However, necessity has, in practice and in case-law on self-defence not been understood in the very strict sense that a defensive measure is necessary only if it is absolutely indispensable, and when no other peaceful option is available. Although state practice shows that peaceful means for resolving a dispute are preferred, states never were asked to demonstrate that they had exhausted all peaceful means before resorting to military means in self-defence.77 Rather, necessity means what is essential and important, and what is useful to reach the objective of defence.78
Proportionality has in scholarship been defined in different terms. According to one view, the scale and effects of force and counter-force must be similar.79 But according to the prevailing view, there need not be proportionality between the conduct constituting the armed attack and
note 62), paras 43, 51, and 73-78; ICJ, Case Concerning Armed Activities on the Territory of Congo (above note 50), para. 147.
74 Roberto Ago, Special Rapporteur, Addendum to the Eighth Report on State Responsibility, YB ILC 1980 II (1), para. 121 (p. 69).
75 Cf. ICJ, Nicaragua (Merits), (above note 7), paras 222 and 282. The requirement does not leave room for any measure of discretion or margin of appreciation of the victim (ICJ, Oil Platforms (above note 62), paras 43 and 73).
76 This strict view can be related to the Caroline formula (below note 105).
77 Corten, Le droit contre la guerre (above note 6), pp. 719-20; Gardam, Necessity (above note 29), p. 153; Kolb, Ius contra bellum (above note 30), p. 293.
78 Corten, Le droit contre la guerre (above note 6), p. 723. In the Oil Platforms case, the destruction of the Iranian oil platforms by the US military was qualified as unnecessary: "In the case of both of the attack on the Sea Isle City and the mining of the USS Samuel B Roberts, the Court is not satisfied that the attacks on the platforms were necessary to respond to those incidents." (ICJ, Oil Platforms (above note 62), para. 76). One reason for qualifying it as unnecessary was that the USA had not complained that the Iranian platforms had been used for military purposes (ibid.). They were thus not military objectives.
79 Kolb, Ius contra bellum (above note 30), pp. 294-95. Dinstein, War (above note 55), p. 237 favours this notion of proportionality only for on-the-spot reactions (as opposed to full wars of self-defence).
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the opposing conduct, but only between reaction and its objective. In the latter view, a reaction is proportionate if there is a reasonable relationship between the measures employed and the objective, the only permissible objective being the repulsion of the armed attack.80 The operation needed to halt and repel the attack may well have to assume dimensions much greater than the attack suffered, and may still be proportionate to the objective of countering the attack. The latter view seems to be the more appropriate one, because otherwise the requirement would lack the necessary flexibility and thereby become unacceptable.81
In this context it makes sense to distinguish between on-the-spot reactions and national selfdefence. On-the-spot reactions relate to the "employment of counter-force by those under attack or present nearby", whereas national self-defence involves "the entire military

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structure".82
The fighting before 7 August can be seen as an on-the-spot reaction by Georgia against the attack by South Ossetia. In contrast, the Georgian military offensive starting on 7 August at 23.35 went much further and involved substantial parts of the Georgian military forces (10 000 to 11 000 troops).83
Therefore, the necessity and proportionality of the Georgian response to the alleged shelling of the villages and the attack on peacekeepers and police has to be analysed in two steps: first with a view to the on-the-spot responses and second with a view to the air and ground offensive.
i) Necessity and proportionality of the on-the-spot response
When considering the necessity of the immediate on-the-spot reactions to the alleged attacks by the South Ossetian side, it must be kept in mind that in July 2008 and at the beginning of August the mechanism for preventing the outbreak of hostilities established on the basis of the 1992 Sochi Agreement still existed.84 But it had been undermined by all parties and was not functioning properly any more.
80 Dissenting opinion Judge Higgins in ICJ, Legality of the Threat or Use of Nuclear Weapons (above note 7), pp. 583-84 (para. 5); in scholarship Gardam, Necessity (above note 29), p. 158; Corten, Le droit contre la guerre (above note 6), pp. 730 and 733.
81 Ago, Addendum (above note 74), para. 121 (p. 69).
82 Dinstein, War (above note 55), pp. 192-3. Dinstein stresses that there is only a quantitative and not a qualitative difference between the two forms of self-defence.
83 Georgian and Russian answers to military questions.
84 The Sochi Agreement was denounced by Georgia on 29 August 2008.
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Therefore the alleged attacks on Georgian villages, peacekeepers and police in July/August 2008 could no longer be countered by the JPKF. Because the peacekeeping mechanism had broken down, reactivating the peacekeeping mechanism was not an alternative means of redress available for Georgia. So Georgian on-the-spot self-defence was necessary, even under a narrow conception of necessity, but this does not suffice to justify the Georgian reaction.
The on-the-spot reaction must additionally have been proportionate. According to the findings of the Mission, the reactions were proportionate under both concepts of proportionality: scale and effects of force and counter-force were similar, and the Georgian on-the-spot reaction was reasonable in relation to the permissible object of the Georgian reaction, namely to halt the South Ossetian attack on the Georgian villages.
To conclude, the condition of proportionality was met with regard to the on-the spot reaction of Georgia in the phase of hostilities before the full armed conflict began.
ii) Necessity and proportionality of the Georgian air and ground offensive
The question remains whether the large-scale offensive starting on 7 August at 23.35 was also justified under the heading of self-defence. Due to the malfunctioning of the peacekeeping mechanism, a military reaction was arguably necessary to stop the repeated outbreaks of violence. The Russian Commander of the Joint Peacekeeping Forces in Tskhinvali, General Marat Kulakhmetov, reported on 7 August at 17:00 that he could not stop the attacks by the de facto regime irregular forces.85 In this sense the attack might have been "necessary", but again this is not the only requirement.
Furthermore, every act has to be in keeping with the principle of proportionality. As stated above, proportionality basically means that there has to be a reasonable relationship between the measures employed and the objective, the only permissible objective being the repulsion of the armed attack. According to Roberto Ago, "what matters in this respect is the result to be achieved by the 'defensive action', and not the forms, substance and strength of the action itself."86 Retaliatory or punitive actions are excluded.87
85 Georgian version; Document "Major hostile actions by the Russian Federation against Georgia in 2004-2007), p. 12.
86 Ago, Addendum (above note 74), 69-70.
87 Albrecht Randelzhofer, in Bruno Simma (ed), The Charter of the United Nations: A Commentary, vol. I, (Oxford University Press 2002), Article 51, para 42; Gray, Use of Force (above note 54), at 150.
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Therefore it is not per se decisive that the offensive ordered by President Saakashvili exceeded the South Ossetian armed attacks on Georgian villages, police and peacekeepers by far in quality and the quantity. Proportionality must be judged on the basis of the answers to the following questions: Was the objective of the Georgian air and ground offensive indeed nothing else but the repulsion of the armed attacks on the Georgian villages, peacekeepers and police? Was there a reasonable relationship between the form, substance and strength of the attack on Tskhinvali and this objective?
There is convincing evidence that the Georgian operation of August 2008 was not meant only as a defensive action. A first indication is that the responsible commander of the Georgian peacekeeping troops Brig. Gen. Kurashvili stated immediately after the attack that the aim was the "restoration of the constitutional order."88 But he later withdrew the statement89 and President Saakashvili explicitly contradicted it. More important is the targeting of the capital of Tskhinvali.90 This indicates that the action was not only meant as an immediate reaction to the preceding incidents, but had rather a political objective. Furthermore, it is not evident for an outside observer that the bombardment of Tskhinvali constituted a reasonable measure to stop the fighting in the villages.
Taking into account all these factors, it can be said that the air and ground offensive against Tskhinvali on the basis of the order given by President Saakashvili was not proportionate and therefore the use of force by Georgia could not be justified as self-defence.
IV. Conclusions: no self-defence by Georgia beyond on-the-spot reactions
To the extent that the attacks on Georgian villages, police and peacekeepers were conducted by South Ossetian militia, self-defence in the form of on-the-spot reactions by Georgian troops was necessary and proportionate and thus justified under international law.
On the other hand, the offensive that started on 7 August, even if it were deemed necessary, was not proportionate to the only permissible aim, the defence against the on-going attacks from South Ossetia.

B. Use of force by Georgia against Russia - Seite 252

I. Facts: Military operations against Russian peacekeepers, irregulars and regular Russian troops
... Furthermore, it is uncontroversial that irregulars from southern Russia and the North Caucasus were involved in the fighting. The involvement of Russian peacekeepers and North Caucasian irregulars was rather marginal, though it was important because it was linked to the beginning of the armed conflict. Nevertheless, the bulk of the military conflict took
place between regular Russian and regular Georgian troops.

II. Legal qualification: use of force in terms of Art. 2(4) of the UN Charter by Georgia
From a legal point of view, the issue is whether the Georgian military action against Russian troops was "use of force" in the sense of Art. 2(4) of the Charter. Significantly, the prohibition of the use of force can also apply in a state's own territory, and certainly if it is directed against another state.
As explained above, grave acts described as "aggression" in Resolution 3314 may constitute an "armed attack" in the sense of Art. 51 of the Charter and also "use of force" in terms of Art. 2(4). The Resolution mentions the "attack by the armed forces of a State on the land, sea or air forces, or marine and air fleets of another State" in Art. 3

III. Justification: self-defence by Georgia? - Seite 253
The Georgian use of force against Russian troops might have been justified under the title of self-defence. Self-defence by Georgia is permitted only if Georgia reacted against an armed attack by Russia. The following scenarios have to be analysed: first, there might have been an on-going or an imminent attack by Russia which the Georgian military sought to prevent. Second, the employment of the Russian armed forces in violation of the Sochi Agreement might be qualified as an "armed attack" under Art. 51 of the UN Charter. Third, the same might be true for Russia's support for South Ossetian militia and irregulars from the North Caucasus and the South of Russia involved in the conflict already before 8 August 2008.

1. The requirement of an armed attack by Russia
a) The entry of Russian troops into Georgia was not a prior armed attack
b) Possible Russian preparations were not an imminent armed attack
2. Breach of stationing agreements by Russia as an "armed attack"?
3. Support of armed formations and militias, especially from North and South Ossetia, as an "armed attack" by Russia?
... The pre-conditions for an armed attack by Russia through the "sending" of North Caucasian and other fighters in the sense of Art. 3 (g) Resolution 3314 are not fulfilled.
It does not seem that the armed attack by South Ossetia on Georgia could be imputed to Russia under any other type of "effective control" of South Ossetian militia. Yet, even if Russia had effective control over South Ossetian forces, self-defence by Georgia would have been allowed only within the narrow limitations described above.

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Part 3: Use of force by South Ossetia against Georgia – ab Seite 262

I. Facts
As explained above, the South Ossetian militia were involved in shooting at Georgian villages, police and peacekeepers before the outbreak of the armed conflict. After the air and ground offensive by the Georgian army the South Ossetian militia probably tried to defend their positions.

II. Legal qualification: use of force, but partly justified as self-defence
To the extent that South Ossetian militia initiated the shooting on Georgian villages, police and peacekeepers before the outbreak of the armed conflict, South Ossetia violated the prohibition of the use of force, which was applicable to the conflict.
South Ossetian use of force could have been justified as self-defence only in the event of an armed attack by Georgia on South Ossetia. ... Use of force by South Ossetia after 12 August 2008 is not justifiable as self-defence, because there was no longer any on-going attack by Georgia. A ceasefire agreement had been concluded. The Georgian army had by that time retreated from the territory of South Ossetia. Use of force was therefore illegal from the ius ad bellum perspective. ...

Part 4: Use of force by Russia against Georgia

I. Facts
Russia was involved in the conflict in several ways. First, Russian peacekeepers who were stationed in South Ossetia on the basis of the Sochi Agreement were involved in the fighting in Tskhinvali. Second, Russian regular troops were fighting in South Ossetia, Abkhazia and deeper in Georgian territory. Third, North Caucasian irregulars took part in the fighting. Finally, Russia supported Abkhaz and South Ossetian forces in many ways, especially by training, arming, equipping, financing and supporting them.

II. Legal qualification of the Russian involvement in the conflict
Under Art. 2(4) of the UN Charter and the parallel customary law, the military operations of the Russian army as described in Chapter 5 "Military Events of 2008"130 in the territory of Georgia (including South Ossetia and Abkhazia and elsewhere in Georgia) in August 2008 constituted a violation of the fundamental international legal prohibition of the use of force. The main legal issue is whether these activities could be justified as legally recognized exceptions.

III. No justification of the use of force as self-defence

... The means employed by Russia were not in a reasonable relationship to the only permissible objective, which was to eliminate the threat for Russian peacekeepers. In any case, much of the destruction (see Chapter 5 "Military Events in 2008") after the conclusion of the ceasefire agreement is not justifiable by any means. According to international law, the Russian military action taken as a whole was therefore neither necessary nor proportionate to protect Russian peacekeepers in South Ossetia.

IV. No justification of Russian use of force as fulfilment of the peacekeeping mission
… Conclusion: Russia could not justify its use of force as a mere reinforcement and fulfilment of its peacekeeping mission.

V. No justification of the use of force by invitation of the South Ossetian authorities
… To conclude, both under the doctrine of asymmetry and under the new doctrine of negative equality concerning intervention in a civil war, the South Ossetian authorities could not validly invite Russia to support them by military means.

VI. No justification of the use of force by collective self-defence
… Russian military activities against the Georgian military forces were not justified as collective self-defence under international law.

VII. No justification of the use of force as "humanitarian intervention"
To conclude, the Russian use of force cannot be justified as a humanitarian intervention.

VIII. No justification of the use of force as action to rescue and protect nationals abroad
In conclusion, the Russian intervention in Georgia cannot be justified as a rescue operation for Russian nationals in Georgia.

Part 5: Use of force in Abkhazia

II. Legal qualification of the Abkhaz and Russian offensive: violation of the prohibition

of the use of force and armed attack on Georgia
III. Legal qualification of the Georgian operation: self-defence
The military operation in the upper Kodori Valley was, for the reasons just explained, an armed attack on Georgia. The use of force by Georgia was justified as self-defence.

IV. No justification of the Abkhaz and Russian use of force against Georgia
... All these arguments can constitute a legally permissible justification only to the extent that they point to an armed attack by Georgia on Abkhazia. Only in the event of an armed attack by Georgia (which was not present, as will be shown), could Abkhazia have relied on selfdefence. Russian involvement could not be justified as collective self-defence in favour of Abkhazia, because third-party involvement in an internal military conflict in support of the seceding party is not allowed for the reasons explained above. ...

2. No previous "armed attack" by Georgia
a) No Georgian military operation in the Kodori Valley by Georgia
b) No preceding terrorist attacks sponsored by Georgiab) No preceding terrorist attacks sponsored by Georgia
c) No imminent armed attack on Abkhazia as a whole by Georgia

4. Conclusion
The use of force by Abkhazia was not justified under international law and was thus illegal. The same applies to the Russian support for Abkhaz use of force.