American University in Central Asia
Department of International and Business Law

THESIS PAPER

Russia vs. Georgia - conflict 2008:
Legal analysis of the use of force of Russian Federation

Vasilina Haritonova
Elida K. Nogoibaeva

Accepted for Defense: _____

Head of International and Business Law department_____

Bishkek 2010

Abstract

Since there are so many conflicts happening in the world nowadays and International Humanitarian Law (IHL) develops every day, it is very essential that all the conflicts are studied carefully and the wrongful acts are punished, or at least revealed. Russian-Georgian conflict 2008 is a relevantly new conflict which will be a very essential precedent for deciding on future cases.

It might be impossible to prevent use of force at all, however it is possible to make States think how to justify their actions in case if it decides to use force no matter what. So, the main aspects on which this paper will concentrate are the justifications of the conflict. Present paper will give the qualification to the use of force and provide with the legal analysis of the Russian Federation's use of force against and on the territory of Georgia.

The present paper also seeks to draw general conclusions and provide with recommendations about the exceptions of the use of force with regard to modern armed conflicts.

Content:

The conflict which occurred between Russia and Georgia in 2008 was chosen for the present paper because in future this case will be an important precedent and some of the rules that will be taken from the case may as well become part of customary law. Therefore the legal analysis of issues such as use of force arising from the case Russia vs. Georgia should be studied carefully from many perspectives, different sides and different people, not only from the Georgian or Russian sides, or other benefiting parties.

The conflict is relatively new and had not been studied a lot yet. Half a year ago we could say that there was almost no information on the conflict at all, or to be more exact no objective information, since all that one could find was either information provided from the Russian or from the Georgian sources. Therefore it was impossible to even understand what actually happened and who did what, since even the facts were written differently and each country was trying to justify itself, their actions. However from September of 2009 the Report of European Union has been issued, which for today may be called the most objective source where one can find very detailed and pretty objective information on the Russian-Georgian conflict of August, 2008. However one thing that should be noticed is that this document does not have any legal force, it is just an objective report of a specially appointed mission.

But even having such a detailed report, reports from other organizations and many articles on the present conflict (most of which are subjective), still each conflict should be studied for many years and the more objective works people can find about it, the more may be understood from the conflict, the more mistakes could have been prevented in future.

The following research methods will be used in this paper: first of all analysis will be provided for the use of force of Russian Federation, and further the analysis will be as well provided for the possible justifications or exceptions. Comparisons will be as well provided to contrast the present conflict with the other conflicts. Comparisons are a very essential part of the paper because precedents also form a part of customary law, therefore even when the exceptions are not codified, they are still exceptions that have been practiced over years in accordance with certain criteria of past cases.

Various sources are going to be used for the paper. They will include reports of different organizations, such as International Committee of the Red Cross, United Nations, European Union and others; works of scholars considering the conflict of Russia vs. Georgia; news articles

and different other articles, most of which are pretty subjective; official legal documents, such as treaties, conventions, bilateral agreements, protocols.

However there are certain problems in writing the legal analysis of the use of force by Russian Federation. First of all, as it was mentioned before, it was pretty difficult to choose the source from which to take the facts of the case, since in different sources the facts contradicted each other. Even though a pretty objective document was used to get the basic information from, still no one knows how objective it is, and even if the Mission itself was trying to be objective, it is not known how truthful the information that they found out from the primary sources was. Another problem, and not only of this paper, I would rather say that it is a problem of international law – purported justifications are not codified in any legal documents. They had their existence from the state practice over years. So it is pretty difficult as well to find the right criteria that should be satisfied in order to prove or disprove a certain justification, since sometimes criteria differ, so it is necessary to go through many cases-precedents in order to choose the right ones.

The present paper will provide for legal analysis of the use of force by Russian Federation against Georgia. Content will be the following: the brief facts will be provided for a reader to get more knowledge and details about the conflict and the qualification to the use of force will be given. Then the paper will look separately at each of the exceptions (justifications) that exist in International Humanitarian Law in order to come to a certain conclusion on whether such actions of Russia may be justified or not. Recommendations will be given at the end concerning the exceptions in present conflict and in IHL in general.

First of all it should be noticed that there are no objective facts on the present case. As I studied different relevant documents I found that the facts from Russian side differ from those of Georgian, and vice versa. So, the present paper will be based on the facts taken from the Brussels Report, 2009 – which is the work of the European Union states that have established an independent international fact-finding mission on the conflict in Georgia.

On December, 2 2008 the Council of the European Union has established an Independent International Fact-Finding Mission on the Conflict in Georgia. The Mission was strictly limited to establishing facts. The members of the Mission used all the available resources for investigation of the conflict, some sources were provided to them from such neutral organizations as OSCE, the Council of Europe and the International Committee of the Red Cross (ICRC), NATO. Also members of the mission had a chance to travel to Tbilisi, Moscow, Tskhinvali and Sukhumi as well as they have visited such important places as Roki Tunnel, the Akhalgori region and the Kodori Valley. Many research methods were used by the Mission, for instance different meetings with political leaders or diplomats, personal talks and interviews with the witnesses of the events and even the victims.

Facts: On the night of 7 to 8 August 2008, a sustained Georgian artillery attack struck the town of Tskhinvali. Other movements of the Georgian armed forces targeting Tskhinvali and the surrounding areas were under way, and soon the fighting involved Russian, South Ossetian and Abkhaz military units and armed elements. It did not take long, however, before the Georgian advance into South Ossetia was stopped. In a counter-movement, Russian armed forces, covered by air strikes and by elements of its Black Sea fleet, penetrated deep into Georgia, cutting across the country's main east-west road, reaching the port of Poti and stopping short of Georgia's capital city, Tbilisi. The confrontation developed into a combined inter-state and intra-state conflict, opposing Georgian and Russian forces at one level of confrontation as well as South Ossetians together with Abkhaz fighters and the Georgians at another. Such a combination of conflicts going on at different levels is particularly prone to violations of International Humanitarian Law and Human Rights Law. This is indeed what happened, and many of these instances were due to the action of irregular armed groups on the South Ossetian side that would not or could not be adequately controlled by regular Russian armed forces. Then another theatre of hostility opened on the western flank, where Abkhaz forces supported by Russian forces took the upper Kodori Valley, meeting with little Georgian resistance. After five days of fighting, a

ceasefire agreement was negotiated on 12 August 2008 between Russian President Dmitry Medvedev, Georgian President Mikheil Saakashvili and French President Nicolas Sarkozy, the latter acting on behalf of the European Union. An implementation agreement followed on 8 September 2008, again largely due to the persistent efforts of the French President. This successful political action stood in contrast to the failure of the international community, including the UN Security Council, to act swiftly and resolutely enough in order to control the ever-mounting tensions prior the outbreak of armed conflict.[1] These are the general facts of the conflict in order to draw a picture of what has happened, but also it is necessary to consider the more detailed facts on the use of force from both sides.

Use of force by Georgia against Tskhinvali, South Ossetia: "the Georgian armed forces started an armed offensive in South Ossetia on the basis of President Saakashvili's order given on 7 August 2008. It is uncontested that this offensive was directed – at least among other aims – against South Ossetian militia. Finally, it is also uncontested that as a result of this attack both civilians and South Ossetian militiamen died, and that a considerable number of buildings were destroyed in Tskhinvali and in the surrounding villages."[2]

Use of force by Russian Federation against Georgia: 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.[3]

Legal qualification of the use of force: Use of force by Russia against Georgia violates Article 2(4) of the United Nations Charter which reads as follows:

"All Members shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any state, or in any other manner inconsistent with the purposes of the United Nations".

[1] Brussels Report, Independent International Fact Finding Mission on the Conflict in Georgia, September 2009. http://www.ceiig.ch/Report.html. Accessed 27/10/2009
[2] Ibid
[3] Ibid

Russian Federation is in violation of the principle of non-use of force. However in some cases the use of force may be justified. As Kenneth Roth, an executive director of Human Rights Watch has stated "We are different from a pacifist organization, which might oppose going to war in any circumstance. We believe that there are times when war is necessary. Particularly if you are facing genocide or comparable mass slaughter, there is a duty to go to war to stop that. At Human Rights Watch we have advocated military intervention to stop such slaughter in a number of cases, perhaps most prominently the case of Rwanda, to try to stop the genocide of 10 years ago. More successful was our advocacy of humanitarian intervention in the case of Bosnia, again to try to stop the genocide that reached its climax in the massacre of 7,000 Bosnian men at Srebrenica. So there are times when we have indeed called on the international community to act militarily to try to save lives".[4]

There are two types of justifications: existing exceptions and purported exceptions. Existing exceptions include collective authorization, self-defense and consent; and the purported exceptions include humanitarian intervention, protection of nationals and protection of peace-keepers.[5] Now each one of the above mentioned justifications should be analyzed separately.

Whether the use of force by Russian Federation may be justified under Collective Authorization (Chapter VII of the UN Charter)?

Collective authorization is an exception codified in Chapter VII of the UN Charter. Collective authorization gives the power to Security Council to intervene in the internal affairs of a particular state if there exists a threat to international peace and security, since the main purpose of UN is to maintain international peace and security.

Military action should definitely be the *ultimum remedium* for the Security Council and force may be used only if all other attempts to bring peace and security are exhausted. And only in cases when there are no alternative ways, or when such alternative ways would not be effective, may the Security Council "take such action by air, sea or land forces as may be necessary to maintain or restore international peace and security. Such action may include

[4] "The War in Iraq: justified as humanitarian intervention?" Kenneth Roth , Kroc Institute Occasional Paper #25:OP:1 http://www.ciaonet.org/wps/rok01/rok01.pdf . Accessed 02/11/2009

[5] "Use of force issues arising out of the Russian Federation invasion of Georgia in August 2008". http://www.report.smr.gov.ge/PDF/english.pdf Accessed 27/10/2009

demonstrations, blockade, and other operations by air, sea, or land forces of Members of the United Nations".[6]

The instances of the Security Council actions undertaken under Chapter VII Resolutions include: UN intervention in Haiti, Somalia, Kosovo, Cote d'Ivoire, Afghanistan, Sierra Leone and many other ones. The following are some of these examples in more detail.

When there was chaos in Haiti because of governmental changes, Haiti was placed under the temporary supervision of the United Nations. The US was ready to send their marines to Haiti, and also such countries as France, Brazil and Canada were preparing to dispatch troops to the Caribbean nation. The Resolution allowing to intervene was based on Chapter VII of the UN Charter, since the Security Council found that there existed a threat to international peace and security.[7]

Another case of UN intervention was the case of Kosovo. United Nations has deployed two international operations: the civilian United Nations Interim Administration Mission in Kosovo (UNMIK) and the military NATO led Kosovo Force (KFOR) authorized by the Security Council Resolution 1244, which was again based on Chapter VII, however negotiated entirely outside the Council". The operations have in part achieved the goals, for example ended the cycle of violence, helped to return to refugees and established a structure for the transfer of administrative responsibilities to local authorities.[8]

The third example is Cote d'Ivoire case. Various external actors were involved in peacemaking and peacekeeping process at the time of the civil war in Cote d'Ivoire, one of which was the United Nations Operation (UNOCI). It was established in 2004 by the Security Council in accordance with Resolution under Chapter VII. "UNOCI is still on the ground in 2009. Since the signing of the Quagadougou Peace Agreement, the Council's resolutions, yet under Chapter VII, limited UNOCI's role to providing passive support to the implementation of the agreement depending of the goodwill of the president, the prime minister and to some extent the facilitator, the president of neighboring Burkina Faso".[9]

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[6] Charter of the United Nations, Article 42. http://www.un.org/en/documents/charter/ Accessed 20/10/2009

[7] Radio Nederland Wereldomroep: "UN intervenes in Haiti" by Security and Defense editor Hans de Vreij. March 1, 2004. http://static.rnw.nl/migratie/www.radionetherlands.nl/currentaffairs/region/southamerica/hai040301.html-redirected Accessed 07/03/2010

[8] Security Council Resolutions under Chapter VII. http://www.fride.org/uploads/Cap1_Excecutive_Summary.pdf. Accessed 22/03/2010

[9] Ibid

Making a conclusion from all these instances collective authorization is basically the intervention of the UN Security Council whenever needed to maintain or restore peace and security. The authorization, if it can be said so, is the UN SC resolution establishing some special operation for a certain country and allowing its forces to intervene. In case of Russian Georgian conflict no resolution for intervening was passed, therefore there was no authorization, allowing Russian Federation to use force.

The exception of collective authorization is not satisfied and is not applicable in the case.

Whether the use of force by Russian Federation could be justified under Article 51 of the United Nations Charter which allows use of force in cases of self-defense?

The right of self-defense is incorporated in Article 51 of the United Nations Charter. It reads as follows:

"Nothing in the present Charter shall impair the inherent right of individual or collective self-defense if an armed attack occurs against a Member of the United Nations, until the Security Council has taken measures necessary to maintain international peace and security."

Under Article 51, the triggering condition for the exercise of self-defense is the existence of an armed attack. "Self-defense is justified only when the necessity for action is "instant, overwhelming, and leaving no choice of means, and no moment for deliberation."[10] A modern version of this approach is found in Oppenheim's International Law[11]. The following criteria was also extracted from the case law:

(a) An armed attack should be launched, or immediately threatened, against a state's territory or forces (actual or imminent threat or danger);

(b) There is an urgent necessity for defensive action against that attack;

(c) There is no practicable alternative to action in self-defense, and in particular another state or other authority which has the legal powers to stop or prevent the infringement does not, or cannot, use them to that effect (force as the last resort);

[10] "The United Nations Charter and the Use of Force against Iraq" John Burroughs, Andrew Lichterman, Michael Ratner, Jules Lobel. October 2, 2002 - Letter from Daniel Webster, Secretary of State, to Lord Ashburton, August 6, 1842, reprinted in 2 John Bassett Moore, A Digest of International Law 409, 412 (1906). http://lcnp.org/global/iraqstatement3.htm. Accessed 07/03/2010

[11] Ibid

(d) The action taken by way of self-defense is limited to what is necessary to stop or prevent the infringement (proportionality)[12]

The aforementioned criteria should be as well applied for the case of Russia-Georgia.

(a)Actual or imminent threat or danger – in the present case there were both actual threat to use force and the actual use of force. "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. It is also uncontested that this offensive was directed – at least among other aims – against South Ossetian militia. Finally, it is also uncontested that as a result of this attack both civilians and South Ossetian militiamen died, and that a considerable number of buildings were destroyed in Tskhinvali and in the surrounding villages."[13] In accordance with its own data, the South Ossetia has lost 365 South Ossetian residents who were killed in the fighting between 7 and 12 August 2008, but it is unclear how many civilians and servicemen were among them. Taking into account all of the stated above it is evident that there was an actual danger, i.e. use of force from the side of Georgia against South Ossetia. So the first point is satisfied – there was an actual danger in South Ossetia, Georgia.

Actual or imminent threat or danger – satisfied.

(b)The necessity is the situation where there is no alternative way to establish peace and security, i.e. when the use of force is unavoidable. In its broader sense, necessary means something that is essential and important.[14] Was it unavoidable to use force from the side of Russian Federation? The answer to that question is most likely – yes. If Russia would not have interfered on time, then there would have been more victims among the Russian peacekeepers and the civilian population of South Ossetia. Such a conclusion may be made, because Georgian forces still continued to attack Tskhinvali city in South Ossetia at the time of Russian intervention. However when Russian Federation has intervened using force - while saving lives of many people it has left victims as well.

Maybe it would not be the best example here, but I would bring the case of Rwandan genocide just to emphasize the importance of some interventions. In case of Rwanda no country

[12] "The United Nations Charter and the Use of Force against Iraq" John Burroughs, Andrew Lichterman, Michael Ratner, Jules Lobel. October 2, 2002. http://lcnp.org/global/iraqstatement3.htm. Accessed 07/03/2010

[13] Brussels Report, Independent International Fact Finding Mission on the Conflict in Georgia, September 2009. http://www.ceiig.ch/Report.html. Accessed 27/10/2009

[14] Ibid

and not even Security Council have interfered from the beginning. Rwanda has lost over an estimated 800.000 to 1 million Tutsis and some moderate Hutus who were slaughtered in the Rwandan genocide.[15] Had the Security Council taken some actions on time, or had some other State interfered as Humanitarian intervention – many of those losses could have been prevented.

So, the criterion of necessity is satisfied.

(c)Force as the last resort - no doubt that this is one of the factors that is pretty hard to define, since to one's mind it would be the last resort, while to someone else it would seem that some other peaceful ways were possible to prevent or restore peace. The recent case of NATO intervention in Kosovo has proved that States often disagree on what is to be counted as the last resort. Russian Federation has never agreed on the lawfulness of Kosovo intervention, while many other countries expressed their support that force was the last resort in the situation.

However for deciding such a factor this paper will bring, analyze and compare several cases and at the end draw the conclusions on whether in situation of Russia-Georgia the use of force was the last resort to protect Russian nationals, peace-keepers and other population of South Ossetia.

According to Ken Roth in his article, where he tries to analyze whether invasion in Iraq was humanitarian intervention, he also clashes with such a factor as "last resort". The author states that in case of Iraq "There was no guarantee that prosecution would have worked, and one might have justified skipping it had large-scale slaughter been underway. But in the face of the Iraqi government's more routine abuses, this alternative to military action should have been tried."[16] What the author tried to say here is that in Iraq the slaughter was not actual or imminent, it was rather routine and therefore force was not the last resort.

According to his article there were alternative ways to fight against Saddam Hussein's tyranny. Ken Roth suggests that first of all there should have been an indictment for arrest, and only then in case of disobedience should there have been invasion for arrest, trial and punishment. "A mere piece of paper will not stop mass slaughter. But as a long-term approach to Iraq, justice held some promise. The experiences of former Yugoslav President Slobodan Milosevic and former Liberian President Charles Taylor suggest that an international indictment profoundly discredits even a ruthless, dictatorial leader. That enormous stigma tends to

[15]"Rwanda: how the genocide happened". BBC news. http://news.bbc.co.uk/2/hi/1288230.stm Accessed 22/11/2009
[16] "War in Iraq: Not a Humanitarian Intervention". Ken Roth, Human Rights Watch. January,2004. http://www.hrw.org/wr2k4/3.htm Accessed 20/03/2010

undermine support for the leader, both at home and abroad, often in unexpected ways. By allowing Saddam Hussein to rule without the stigma of an indictment for genocide and crimes against humanity, the international community never tried a step that might have contributed to his removal and a parallel reduction in government abuses."[17] Making conclusion out of the case of Iraq – no, use of force was not the last resort to fight with Saddam's regime and to restore peace in the country.

In the conflict of Israel and Hezbollah, Israel has used force against the country of Lebanon, justifying their actions as self-defense. On July,12 2006, a dispute between the Israeli army and the armed group of Hezbollah has developed into a large-scale armed conflict. Aftermath – hundreds of civilians dead. According to Israel, "the casus belli was a cross-border attack by Hezbollah which led to the capture of two Israeli soldiers and the deaths of eight others. Israel responded to Hezbollah 'provocation' by threatening to "turn back the clock in Lebanon by twenty years", as Israel's Chief of Staff Dan Halutz put it, to the dark days of the civil war, when Israel is alleged to have killed 20.000 civilians. In a fortnight, Israeli missiles and shells caused the deaths of approximately 400 people, mostly civilians, many of them children, and displaced 700.000. The Israeli Air Force – which according to British Middle East Minister Kim Howells has up to 600 jets flying over Lebanon at any time, dropping incendiary devices – has caused massive infrastructural damage to Lebanon. Nothing has been spared: ports, bridges, motorways, power stations, whole neighborhoods, mosques, churches, the airport, a lighthouse, hospitals and people fleeing in their cars."[18]

However, the author of the article suggests that the use of force is only one option out of many other possible how Israel could respond to terrorism. Israel could have responded by sending its special forces to get two Hezbollah guerillas as bargaining chips, police action could have been taken, or negotiating process could take a place over the release of prisoners. According to the author: "Ideally, Israel should have asked the Lebanese government to take steps in its own territory to free the captured soldiers before resorting to the use of force, which should always be a measure of last resort. If the Lebanese government then failed to act, Israel would be justified in taking proportionate measures to free its soldiers."[19]

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[17] Ibid
[18] "Israel, Hezbollah, and the use and abuse of self-defense in international law" Arab Media Watch. http://www.arabmediawatch.com/amw/Default.aspx?tabid=324 Accessed on 20/03/2010
[19] Ibid

How was the situation escalating in case of Russia? Were any other attempts made before using force in order to restore and bring peace to Georgia, if such attempts could be made at all?

"Replying to a question about the Russian President's assertion that efforts to end the conflict peacefully had been opposed at the United Nations, Mr. Churkin said he would not conjecture about the reasons, but in the Security Council, for weeks before the Georgian aggression, the Russian delegation had tried to work out a presidential statement calling for the signing of a legally binding agreement between Georgia and Abkhazia and Georgia and South Ossetia on the non-use of force. However, "our western colleagues" in those negotiations had constantly tried to attach other issues. For example, they had tried to emphasize the return of refugees. While valid, that was not a priority issue. Now, developments showed that the Russian side was right in having tried to do everything possible to prevent the possible use of force."[20]

So, the attempt to sign an agreement on the non-use of force was the only attempt of Russian Federation and it was even before the actual conflict has begun. Concerning the after-use of force – there were no attempts of negotiations or other peaceful means. But still the use of force was the last resort and the last option to stop the aggression from the side of Georgia and stop the mass killings and slaughters. If Russia would wait until the negotiations would come to some conclusion – many more people would have been dead. Again the case of Rwanda, already mentioned above could be brought as one good example, where everyone failed to intervene and stop the massacre.

The third criteria, use of force as the last resort is satisfied.

(d)Proportionality - The doctrine of proportionality originated with the 1907 Hague Conventions, which regulate the laws of war. Later proportionality was codified in Article 49 of the International Law Commission's 1980 Draft Articles on State Responsibility. Also the doctrine was incorporated into both Additional Protocols to the Geneva Conventions. Also the principle of proportionality is a very basic principle underlined in many cases and it became part of customary international law.

[20] Press Conference by Russian Federation. United Nations, Department of public information, New York. August 26, 2008. http://www.reliefweb.int/rw/rwb.nsf/db900SID/MYAI-7HW4T3?OpenDocument Accessed 03/14/2010

The Hague Regulations adopted the principle of proportionality as the basic rule of principle of distinction that forbids the direct attacks against non-military targets.[21] Also the principle was incorporated as prohibiting employing "arms, projectiles, or material calculated to cause unnecessary suffering"[22].

Article 51(5) of the Additional Protocol I also embodies the principle of proportionality. It reads as follows: "Among others, the following types of attacks are to be considered as indiscriminate:

- An attack by bombardment by any methods 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, and
- An 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."[23]

In the present case "the aim of the reaction of Russian Federation must only be to halt an attack, and to eliminate the threat, but it must not go further than that. The requirement of proportionality thus very importantly functions as a barrier against retaliatory or punitive actions that are meant to be a sanction or to teach the attacker a "lesson".[24]

Applying proportionality to the Russian-Georgian case: "Russian forces engaged in the armed conflict, including ground and air forces as well as the Black Sea Fleet, also attacking targets on Georgian territory outside South Ossetia. In the morning of 8 August, Russian air forces reportedly started their attacks in central Georgia (Variani, Gori), gradually extending

[21] 1907 Hague Regulations, Article 25. http://www.icrc.org/ihl.nsf/385ec082b509e76c41256739003e636d/1d1726425f6955aec125641e0038bfd6. Accessed 27/10/2009

[22] 1907 Hague Regulations, Article 23. http://www.icrc.org/ihl.nsf/385ec082b509e76c41256739003e636d/1d1726425f6955aec125641e0038bfd6. Accessed 27/10/2009

[23] "Proportionality in the Modern Law of War: An Unenforceable Norm, or the Answer to our Dilimma?" Amichai Cohen. Perspectives Paper # 20, August 15, 2006. http://www.biu.ac.il/SOC/besa/perspectives20.pdf . Accessed: 07/03/2010

[24] Brussels Report, Independent International Fact Finding Mission on the Conflict in Georgia, September 2009. http://www.ceiig.ch/Report.html. Accessed 27/10/2009

them to other parts of Georgia including the Senaki military base (9 August), military targets in the port of Poti and the capital of Tbilisi. Some civilian targets were also damaged".[25]

Although there are always civilian casualties in such conflicts, I would say that the use of force of Russia was not proportionate, because as it was described above, Georgia has used force against the South Ossetia, and that is the place where, if for self-defense, the Russian troops should have been. However, they went further, not only to Abkhazia, where, according to Russian side another attack from Georgia could be expected, but also they reached the capital of Georgia, Tbilisi. There were neither Russian citizens, nor Russian peacekeepers in Tbilisi, therefore I believe that there was no need to go that deep into Georgia.

Also, in accordance with Brussels Report data "the means employed by Russia were not in a reasonable relationship to the only permissible objective"[26], which was to eliminate the threat for Russian nationals and peacekeepers.

Proportionality is NOT satisfied.

Russia has also submitted a report to the Security Council that it has used force against Georgia in accordance with Article 51 of UN Charter right after it has conducted its military operations in Georgia.

Even though Russian Federation was close to justifying its use of force by self-defense, it has failed to meet the principle of proportionality. Other than that it has done everything else to protect its own citizens and peacekeepers, which in my opinion is sometimes necessary in order for other states not to discriminate the rights of minorities.

Conclusion: The use of force by Russian Federation may not be justified under the exception of Self-defense, Article 51 of UN Charter.

Whether the use of force by Russian Federation is justified under the exception of consent?

The use of force may be justified if the victim state gives its consent for the intervention or if the victim state itself invites for help. However, in the case Russia-Georgia the following question arises: which of the two governments: Georgian or South Ossetian may give its consent or invite a third state? In accordance with ICJ – Nicaragua (Merits) case, which states the

[25] Ibid
[26] Ibid

following: "only the established and internationally recognized government can pronounce an invitation with legal effect"[27] we can see that only the official government of the country may decide on such issues.

The established government in our case is Georgian government headed by the President M. Saakashvili. The South Ossetia is internationally and officially considered to be part of Georgia, therefore its government, even though permanent, may not give consent to third parties' interventions. Georgia never gave its consent for Russian intervention; therefore the exception is not justified and is inapplicable.

There is also the Sochi Agreement of Principle of the Resolution of the Georgian-Ossetian Conflict, signed by three parties: Georgia, South Ossetia and Russian Federation. The Agreement established the right of Russian peacekeepers to be on the territory of Georgia for peaceful purposes. So, even though the Sochi Agreement of 1992 authorized Russian peacekeepers, it never permitted Russia to use force in whatever circumstances.

Conclusion: The use of force by Russian Federation may not be justified under the exception of consent.

Whether the use of force by Russian Federation is justified under humanitarian intervention?

Humanitarian intervention is a purported justification that has no support in treaty law, for this reason it is necessary to see whether there is state practice that supports humanitarian intervention as such. So if we look at the history of interventions and violations of state's sovereignty, the following cases may be brought as an example: French intervention in Syria 1860; France's Intervention in Central Africa 1979; Vietnam's intervention in Cambodia 1978; United States' intervention in the Dominican Republic 1965; Indian intervention in East Pakistan 1971; United States' intervention in Grenada 1983; United States' intervention in Panama 1989; NATO's intervention in Kosovo 1999. The first two humanitarian interventions listed above

[27] Brussels Report, Independent International Fact Finding Mission on the Conflict in Georgia, September 2009. http://www.ceiig.ch/Report.html . Accessed 27/10/2009 - Initial sources: ICJ, *Nicaragua* (*Merits*) (above note 7), para. 246. See in scholarship: Georg Nolte, *Eingreifen auf Einladung: Zur völkerrechtlichen Zulässigkeit des Einsatzes fremder Truppen im internen Konflikt auf Einladung der Regierung* (Berlin: Springer 1999), pp. 219 and 604-5; *ibid*., "Secession and External Intervention", in Marcelo Kohen (ed) *Secession – International Law Perspectives* (Cambridge University Press 2006), 65-93.

would be discussed in more detail to bring an example of humanitarian interventions from history.

France vs. Syria: From the sixteenth century Syria, an area which now includes Lebanon, Jordan, Israel, Syria, the West Bank and Gaza, was an integral part of the Ottoman Empire. It was inhabited mainly by Druze and Maronite peoples. The Druze were Muslim, and they have constituted the largest community in the south of Mount Lebanon. But the constant fights between the rival Druze leaders have led many of their co-religionists to emigrate. However by the nineteenth century the Maronite Christians expanded south from their strongholds in the north of Mount Lebanon and have outran the Druze Muslims in numbers.

There started to be conflicts and tensions between Druze Muslims and Maronite Christians, which have resulted in the disturbances. "Prior to the outbreak of fighting on 27 May, both sides had conducted lengthy preparations for the impending hostilities. Amongst the Maronites, there had been calls for the extermination of the Druzes. Despite their numerical inferiority, the Druzes rapidly gained the ascendancy in the conflict. During some four weeks of bloody fighting, 11.000 Christians were killed, while a further 100.000 were made homeless."[28]

But the order was restored pretty quickly, in the beginning of July. "The disorders in Syria led the ottoman Sultan to dispatch his Foreign Minister, Fuad Pasha, to Syria, together with a military force. Arriving in Beirut on 17 July, Fuad Pasha reassured the Christians and distributed funds amongst the homeless. Travelling overland to Damascus the Foreign Minister supervised the restitution of property to Christians, and the punishment of Muslims who had been implicated in the riots."[29]

Due to this a conference took place in Paris organized by European States and after signing a protocol a French forces under General de Beaufort was dispatched. However, after French authorities have found out that the peace was already restored, they have occupied the French troops with many other humanitarian tasks, including rebuilding the homes of Christian villagers.

[28] Istvan Pogany "Humanitarian Intervention in International Law: French intervention in Syria re-examined". The International and Comparative Law Quarterly, Vol. 35, No. 1 (Jan., 1986), pp. 182- 190. Published by : Cambridge University Press on behalf of the British Institute of International and Comparative Law. Accessed: 02/04/2010 05:16. http://www.jstor.org/stable/759100

[29] Ibid

In his article Istvan Pogany analyzed the situation of French intervention in Syria: whether it was humanitarian intervention. For his analysis he gave the following criteria to humanitarian intervention:

1. "The existence of a gross violation of human rights and the inability of the local government to take the necessary corrective measures.
2. The use of armed force by a third party to protect the endangered persons.
3. Any use of force by a third party must be contrary to, or without regard to, the wishes of the local government, so as to amount to "dictatorial interference" in its internal affairs."

The author came to a conclusion that there definitely were major violations of human rights, however the disturbances were over and peace was already restored by the time French forces intervened. So, the first criterion was not satisfied and the author did not go further analyzing. He believed that it could not be called humanitarian intervention. Moreover, he noticed that France was always interested in Syria economically, so as Pogany stated "it would be naïve to view the object of French intervention as wholly humanitarian".[30]

Intervention in Rwanda: The case of Rwanda could have been a great example of humanitarian intervention, and it actually was humanitarian intervention, however the mission was considered to be a failure by some states.

When it became evident that there was a genocide in Rwanda: Tutsi against Hutu, the United Nations has established UNAMIR (United Nations Assistance Mission for Rwanda) on October 5, 1993 by Security Council Resolution 872. The mission was meant to help restore the peace between the Hutu-dominated Rwandese government and the Tutsi-dominated rebel RPF (Rwandan Patriotic Front). The Mission had been adjusted several times, and on June 20, 1994 France said that it was prepared to send their troops to Rwanda in order to stop large scale slaughters and massacres.[31]

The SC Resolution 929 authorized France to conduct an operation and control to improve security and protect displaced persons, refugees, and civilians at risk. Even though some states believed that the intervention of France was not "humanitarian" but rather it was conducted in order to secure their own interests. But even if France had their own interests partially, it still has

[30] Ibid
[31] Past humanitarian interventions. http://www.iciss.ca/pdf/Supplementary%20Volume,%20Section%20B.pdf. Accessed 20/11/2009

intervened for humanitarian purposes as well, because France seems to have fulfilled all the criteria needed for humanitarian intervention.[32]

There was a large scale slaughter – genocide in Rwanda. Force was definitely used as a last resort – because by the time of French intervention there had been many victims already. The principle of proportionality was observed. Moreover France was authorized to use all necessary means to achieve their objectives of protecting civilians and refugees. Considering the intention – of course France could have its own interests as well, but it still did preserve or at least tried to preserve peace in the region, helping the situation.

"While expressing its strong opposition, the RPF did not seek a confrontation with French forces, and on July 18 the RPF unilaterally declared a cease-fire, which effectively ended the civil war. The presence of the French seemed to have two results. It slowed the advance of the RPF and thereby permitted the former government forces to escape, and it helped to avert a massive outflow of refugees into Zaire, which many had predicted might rival the earlier flood of almost 1 million to the camps in Goma."[33]

Even Kofi Annan, in the situation of Kosovo, has acknowledged that "the NATO action was legitimate, and has gone so far as to say that a new norm of intervention was now emerging – for cases involving the violent repression of minorities – that will and must take precedence over the other concerns of the law of States. Thus any flagrant violation of humanitarian law, be it crimes against humanity, violations of humanitarian law, violations of human rights or the Geneva Conventions, or ethnic cleansing, may provide a legitimate basis for action on the part of the international community because all these issues have international consequences and go well beyond the sacrosanct principle of the domestic jurisdiction of States".[34]

Now if customary law supports humanitarian intervention, then what should be the criteria for legitimate intervention? Here there is a "gap" in international humanitarian law of not having the certain criteria for humanitarian intervention that need to be justified, since humanitarian intervention itself has not yet been codified.

Different scholars and authors in their articles bring up almost the same criteria to determine whether a certain action can be qualified as humanitarian intervention. For this issue,

[32] Ibid
[33] Ibid
[34] "NATO intervention in Kosovo: Legal context" Albert Legault. Canadian Military Journal. Spring 2000. http://www.journal.forces.gc.ca/vo1/no1/doc/63-66-eng.pdf . Accessed 27/10/2009

some of the articles were read and analyzed, for instance: **"Legitimating Humanitarian Intervention: Principles and Procedure"**[35] where Nicholas J. Wheeler defines certain principles or criteria for legitimate humanitarian intervention. The principles include:

1. Just cause;
2. Last resort;
3. Good over harm;
4. Proportionality;
5. Right intention;
6. Reasonable prospect

For the "just cause" the author brings up the words of Indian Ambassador Sen, who referred to the level of suffering of people inflicted by the Pakistani Government on the Bengali people, which he described as a "shock to the conscience of mankind".[36] The principle of "last resort" means that before a State may use force it should run out of any other possibilities to resolve the conflict.

However in the present article the author shows the problem of the last resort. The problem is who should decide whether force is the last resort? For that he brings up the case of Kosovo, saying that Russia never agreed with NATO with the use of force by NATO, since Russia believed that more could have been done after the negotiations at Rambouillet to prevent the use of force. States always argue and disagree on what else could be done before use of force, and whether something else could be done at all? The principle of "good over harm" basically states that "decision-makers must be reasonably satisfied that the use of force will produce a surplus of good over harm."[37]

The principle of "proportionality" means that the intervening states must ensure that civilians are differentiated from combatants and are protected against any casualties of war. Also the principle of proportionality supposes that more lives would be saved by intervening than would be lost if a particular state would not intervene.

Further the principle of "right intention" means that an intervening state must not act in any self-interest, but only for the protection and interest of the suffering. And the last principle

[35] "Legitimating Humanitarian Intervention: Principles and Procedure", Nicholas J Wheeler, Melbourne Journal of International Law, volume II. http://www.austlii.edu.au/au/journals/MelbJIL/2001/21.html Accessed 03.11.2009
[36] Ibid
[37] Ibid

that the article provides for is "reasonable prospect", which supposes that "An intervention must have a reasonable chance of ending the human rights abuses."[38]

Another author in his article called "The war in Iraq: justified as humanitarian intervention?"[39] brings up his criteria, which are basically the same. In accordance with this author the following should be taken into consideration:

1. whether there is a large-scale slaughter;
2. whether force is the last resort;
3. the motive of intervention;
4. whether international law is respected;
5. whether people in peril will be better off;
6. whether there is multinational support for a certain intervention

The dominant criterion is whether the situation turns into a large-scale slaughter, which should be either ongoing or imminent. Usually, as state practice shows, interventions mostly happen when there is either genocide or crimes against humanity going on in some state, in rare cases other constant human rights violations in states, which fail to protect its own citizens. For example, there was an intervention by NATO into Kosovo when there was ethnic cleansing against Albanian Kosovars. Another intervention was in Rwanda in case of genocide. Or, for instance, in Uganda – there was a humanitarian intervention from the side of Tanzania due to constant gross violations on the territory of the country.

The next criteria is whether force is the only way left to help situation. Here the question that needs to be asked is whether there are any alternative ways to stop the lawlessness and if there are, those should be tried first before using force.

The motive should explain whether there are any reasons except for humanitarian for a state to intervene and help another state. In case if a state may have any self-interest then the intervention may not be justified as humanitarian. Besides that, there is no doubt that international law should be respected and the casualties, which always happen during hostilities, should be minimized as much as can be.

One more criteria and, we can say, one more question to ask when intervening is – will people be better off? As the author stated in his paper "If you are going to justify killing people,

[38] Ibid
[39] "The War in Iraq: justified as humanitarian intervention?" Kenneth Roth , Kroc Institute Occasional Paper #25:OP:1 http://www.ciaonet.org/wps/rok01/rok01.pdf . Accessed 02/11/2009

one can only justify that by preventing a potentially larger loss of life".[40] And one more criteria that the author highly encourages to be present is the multilateral support of humanitarian intervention, meaning that if there exists a multilateral body with moral authority, then it would be good to ask for its advice as well. According to the author "in the best of cases this would be the UN Security Council, but in theory it could be other bodies as well. You can imagine the Organization of American States speaking for Latin America or the African Union speaking for Africa, etc."[41]

Since there are no codified criteria for humanitarian intervention, it differs from author to author and from organization to organization, however the meaning and the sole purpose is the same. For the present paper, after reading several articles and going through cases, the following criteria have been chosen to see whether the use of force by Russian Federation may be justified under humanitarian intervention:

- A large-scale slaughter (genocide or crimes against humanity)
- Force as a last resort
- Intention
- Proportionality

Such criteria as "good over harm" or "will people be better off" as in the articles mentioned above were not considered separately, because I believe that all those factors should be reflected in proportionality.

A large-scale slaughter (genocide or crimes against humanity): First of all it would be reasonable to observe the casualties arising out of use of force from the Georgian side against South Ossetia. According to a Russian official agency, 162 South Ossetian civilians were killed and 255 wounded in the armed conflict of 7-12 August 2008.[42] The Russian agency did not refer to 224 South Ossetian non-civilian casualties. The Russian press assessed that about 150 South Ossetian military and paramilitary personnel (including volunteers from North Ossetia) were

[40] Ibid
[41] Ibid
[42] Brussels Report, Independent International Fact Finding Mission on the Conflict in Georgia, September 2009 – initial source: http://lenta.ru/news/2009/08/07/losses . According to the Russian side, this number may increase. See also: http://sledcomproc.ru/news/6967 .

killed.[43] The South Ossetian side presented a list of 365 South Ossetian residents killed in the fighting between 7 and 12 August 2008, but it is unclear how many civilians and servicemen were among them.[44]

South Ossetia, as well as Russian Federation claim that there was genocide of South Ossetian population, many of whom were Russian citizens. However, the Brussels Report[45] fact finding commission made it clear, that "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".[46] Investigations by Human Rights Watch also came to conclusion that there was no act of genocide, however there were many grave human rights violations.[47]

So can the use of force of Georgia against South Ossetia be recognized as genocide? Genocide, as defined in the Convention on the Prevention and Punishment of the Crime of Genocide[48] is "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

The documentation provided by the side of Russian Federation to the Fact Finding Commission reported many cases of maltreatment and killing.[49] So, 162 civilians of South

[43] Brussels Report, Independent International Fact Finding Mission on the Conflict in Georgia, September 2009 – initial source: "Moscow Defense Brief" (September 2008, http://www.mdb.cast.ru/mdb/3-2008/item3/article1).
[44] Brussels Report, Independent International Fact Finding Mission on the Conflict in Georgia, September 2009 – initial source: http://osetinfo.ru/spisok
[45] Brussels Report, Independent International Fact Finding Mission on the Conflict in Georgia, September 2009 - http://www.ceiig.ch/Report.html. Accessed 27/10/2009
[46] Ibid
[47] "Up in flames. Humanitarian Law Violations and Civilian Victims in the Conflict over South Ossetia.", 23 January 2009, available at http://www.hrw.org/reports/2009/01/22/flames-0 Accessed: 20/11/2009
[48] Convention on the Prevention and Punishment of the Crime of Genocide, New York, 9 December 1948. http://www.un.org/millennium/law/iv-1.htm
[49] Brussels Report, Independent International Fact Finding Mission on the Conflict in Georgia, September 2009. http://www.ceiig.ch/Report.html. Accessed 27/10/2009

Ossetia killed and 255 wounded; 224 non-civilian casualties and about 150 South Ossetian military and paramilitary personnel killed. Can such numbers be amounted to genocide and was there really an intention to destroy in whole or in part, in the present case a national group, in particular South Ossetians? In order to answer such questions, this paper will provide for several cases, which were admitted and amounted to be cases of genocide.

The most famous cases of genocide will be discussed in this paper, which are: genocide in Rwanda in 1994, Bosnia and Herzegovina vs. Serbia and Montenegro in 1995-1999, Kosovo in 1998-1999 and the comparisons will be brought in contrast to the case of Russia vs. Georgia of 2008.

The case of Rwanda was no doubt a genocide. The genocide happened on the basis of ethnicity. Basically there were two similar ethnicities living in Rwanda: Tutsi and Hutu. Hutu was slaughtering Tutsi, moreover the genocide was basically organized by the official government of the President Habyarimana. “In the first days of killing in Kigali, assailants sought out and murdered targeted individuals and also went systematically from house to house in certain neighborhoods, killing Tutsi and Hutu opposed to Habyarimana. Administrative officials, like the prefect of the city of Kigali, ordered local people to establish barriers to catch Tutsi trying to flee and to organize search patrols to discover those trying to hide.

By the middle of the first week of the genocide, organizers began implementing a different strategy: driving Tutsi out of their homes to government offices, churches, schools or other public sites, where they would subsequently be massacred in large-scale operations.

Towards the end of April, authorities declared a campaign of “pacification,” which meant not an end to killing, but greater control over killing. By mid-May, the authorities ordered the final phase, that of tracking down the last surviving Tutsi. They sought to exterminate both those who had hidden successfully and those who had been spared thus far—like women and children—or protected by their status in the community, like priests and medical workers.”

As we can see from the facts – there was no doubt that in case of Rwanda there was an intent to destroy in whole an ethnical group, by killing its members, by causing serious bodily and mental harm to members of the group (raping, mutilation) etc. And if we look at the number of the victims of that genocide, even though the number may not always matter – it is 800.000 in

accordance with the data of United Nations and 1.071.000 in accordance with the Rwandan Government.[50]

Another genocide happened in case of Bosnia and Herzegovina vs. Serbia and Montenegro. People, or to be more exact Muslim people tried to destroy in part, and attempted to destroy in whole a religious Christian group within the territory of Bosnia and Herzegovina by killing members of the group, causing deliberate bodily and mental harm to members of the group.

In this situation it was pretty easy to recognize the genocide, because public calls for the execution of Serbs were made on the local radio by the officials. Moreover, in its decision International Court of Justice decided it was a genocide "because it has incited acts of genocide by the 'Islamic Declaration', and in particular by the position contained in it that 'there can be no peace or coexistence between "Islamic faith" and "non-Islamic" social and political institutions'; because it has incited acts of genocide by the *Novi Vox*, paper of the Muslim youth; because it has incited acts of genocide by the paper *Zmaj od Bosne*, and in particular by the sentence in an article published in it that 'Each Muslim must name a Serb and take oath to kill him'".[51]

From the facts and comparisons with the other genocides it is obvious that what happened in Georgia cannot be called genocide. There was no clear intention of killing South Ossetian people: neither those holding Russian passports nor the ones of different ethnic background (e.g. South Ossetian people), since not only Ossetians themselves, but also some people of Georgian nationality and Georgian ethnic background lived in South Ossetia as well. Moreover, in its use of force Georgia has used indiscriminate weapons, which means that it would be very difficult to destroy a particular group.[52] Looking at the facts, it does not seem that there was an intention to destroy a particular group. And as it was mentioned in case of Serbia and Montenegro vs. Belgium and stressed by ICJ, "a bombardment in itself is not sufficient to prove the specific intent".[53]

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[50] Genocide statistics: http://www.democraticcentral.com/showDiary.do?diaryId=1862 Accessed 20/11/2009
[51] International Court of Justice Judgement "Bosnia and Herzegovina vs. Serbia and Montenegro" February, 26 2007
[52] Brussels Report, Independent International Fact Finding Mission on the Conflict in Georgia, September 2009. http://www.ceiig.ch/Report.html. Accessed 27/10/2009
[53] Brussels Report, Independent International Fact Finding Mission on the Conflict in Georgia, September 2009. http://www.ceiig.ch/Report.html. Accessed 27/10/2009. Initial source - Legality of Use of Force (Serbia and Montenegro v. Belgium), Request for the Indication of Provisional Measures, Order, 2 June 1999, para. 40.

So the events happening on the night from 7th to 8th August in South Ossetia **cannot be called genocide** as in accordance with its definition from the convention.

If there was no genocide in South Ossetia, it is now necessary to see whether the use of force by Georgian side against people of South Ossetia may be qualified as crimes against humanity. As it was defined by the International Criminal Court crimes against humanity are considered any of the following acts when committed as part of a widespread or systematic attack directed against any civilian population:

(a) Murder
(b) Extermination
(c) Enslavement
(d) Deportation or forcible transfer of the population
(e) Imprisonment or other severe deprivation of physical liberty in violation of fundamental rules of international law
(f) Torture
(g) Rape, sexual slavery, enforced prostitution, forced pregnancy, enforced sterilization, or any other form of sexual violence of comparable gravity
(h) Persecution against any identifiable group or collectivity on political, racial, national, ethnic, cultural, religious, gender or other grounds
(i) Enforced disappearance of persons
(j) The crime of apartheid
(k) Other inhumane acts of a similar character intentionally causing great suffering, or serious injury to body or to mental or physical health.

What is different about the crimes against humanity is that the attack should be directed against civilian population, possibly of different nationalities, from different social and financial backgrounds et cetera. For instance, the Darfur atrocities in Sudan, including killings, rapes have been defined by an expert from the UN Commission of Inquiry more as crimes against humanity

rather than genocide. The experts thought that there was no genocidal intent to destruct a particular group as such. The victims were different people – villagers.[54]

In her article Patricia Wald noticed that "For crimes against humanity the chapeau requirement that the charged acts be part of a "widespread or systematic attack on a civilian population" has been on the whole liberally interpreted to qualify a wide variety of acts of violence of different scopes that do not necessarily rise to the level of an armed conflict for this background predicate. For instance, the territory on which the attack is carried out need not be very large in order for it to be "widespread". In one case the attack took place over an area of 20 kilometers; in others, three municipalities, three prefectures or two communes sufficed. Even a single prison camp qualified."[55]

In case of Russia-Georgia there indeed was an attack on civilian population, but the question that needs to be asked is whether the attacks on civilian populations were widespread and systematic, as mentioned above?

To define whether an attack is widespread the scale of the attack and the number of targeted persons need to be considered.[56] Systematic "refers to the organized nature of the acts of violence and the improbability of their random occurrence. Patterns of crimes, in the sense of non-accidental repetition of similar criminal conduct on a regular basis are a common expression of such systematic occurrence."[57]

From the case Russia – Georgia it may be implied that the Georgian attack on Tskhinvali was widespread and systematic – since it covered vast territory and there was a great number of targeted persons. According to a Russian official agency, 162 South Ossetian civilians were killed and 255 wounded.[58] South Ossetia presented a list of 365 South Ossetian residents killed

[54] William A. Schabas, "Genocide, Crimes against Humanity, and Darfur: The Commission of Inquiry's Findings on Genocide" 27 CARDOZO L. REV. 1703.
http://www.cardozolawreview.com/content/274/SCHABAS.WEBSITE.pdf Accessed 07/03/2010
[55] "Genocide and Crimes against Humanity" Patricia M. Wald.
http://law.wustl.edu/WUGSLR/Issues/Volume6_3/wald.pdf Accessed 07/03/2010
[56] *Kordic and Cerkez* Appeal Judgment, 17 Dec. 2004, para. 94.
http://www.icty.org/x/cases/kordic_cerkez/cis/en/cis_kordic_cerkez_en.pdf Accessed 07/03/2010
[57] *Ibid*
[58] Brussels Report, Independent International Fact Finding Mission on the Conflict in Georgia, September 2009. Initial source - Official Russian data, see: http://lenta.ru/news/2009/08/07/losses/ ; accessed on 21.08.2009. According to the Russian side, this number may increase.

during the conflict.[59] The attacks of Georgia on South Ossetia was also systematic because it was not just random in character, rather it was organized and ordered by the President of Georgia Mihail Saakashvili.

It is still unknown for what reasons Georgia has used force against its own population – since it did not look like they really wanted to destroy the whole South Ossetian population – but it may be implied that the force was used against civilian population, since it was an indiscriminate attack, i.e. an attack without any precautionary measures.

The prohibition of directing attacks against civilian populations is laid down in several documents, including Protocol I Additional to Geneva Conventions (further Protocol I), Protocol II Additional to Geneva Conventions (further Protocol II) and Protocol III Additional to Geneva Conventions (further Protocol III). Moreover, when attacking all the precautionary measures should have been taken by Georgia in order to avoid so many losses of civilians. Article 57 of Protocol I states that "those who plan or decide upon an attack shall:

- 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 …;
- 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 or civilian life, injury to civilians and damage to civilian objects;
- 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

Point (b) of the same Article states that "an attack shall be cancelled or suspended if it becomes apparent that the objective is not a military one or is subject to special protection or that the attack 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".

[59] Brussels Report, Independent International Fact Finding Mission on the Conflict in Georgia, September 2009. Initial source - http://osetinfo.ru/spisok.

When Georgia used force against its own region of South Ossetia, it has directed some of its forces against the civilian population. As statistics already mentioned above showed there were many losses of civilian population. The United Nations Inter-agency Humanitarian Assessment Mission to South Ossetia reported 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". The Mission as well noted that the use of force caused the widespread displacement of civilians in the capital of South Ossetia and the close-situated villages.[60]

The first criterion - "crimes against humanity" is satisfied.

The second criterion for humanitarian intervention is that force can be used only as a last resort, i.e. if there are no alternative ways to protect people. Since the criterion "force as a last resort" was already analyzed previously[61] it will not be repeated again. The conclusion of the use of force as a last resort in case of Russia-Georgia was that Russian Federation indeed had no alternative ways to protect its nationals, peacekeepers and people of South Ossetia, since every minute there were new victims and the situation demanded an urgent help.

Conclusion: the second criterion "force as a last resort" is satisfied.

The third criterion for justification of humanitarian intervention is the intention. It is, of course, difficult and sometimes almost impossible to find out the real intention of the country protecting their nationals abroad. But let us see what actually Russia's intentions could be.

As Russia itself claims, the force was used solely with one purpose – to protect nationals and their peacekeepers, who at that time were on the territory of Georgia in accordance with Sochi agreement from the Georgian aggression and to prevent such armed attacks in future. "The aim of that operation is to ensure that we protect Russian citizens who are in that region, to provide support to the Russian peacekeeping contingent if there should be a military attack against them, and also to provide humanitarian assistance to the civilian population who are in the zone of the conflict. With the aim of preventing incidents in the area patrolled by Russian

[60] Brussels Report, Independent International Fact Finding Mission on the Conflict in Georgia, September 2009. http://www.ceiig.ch/Report.html. Accessed 27/10/2009. Initial source - United Nations Inter-agency Humanitarian Assessment Mission to South Ossetia, para. 5.7.

[61] "Force as a last resort" was previously analyzed in Self-defense exception – Chapter II, Paragraph 2.2. p.

ships, we have established a security zone. These actions do not seek to establish a maritime blockade of Georgia."[62]

As the Russian side states they never attacked local civilian population or any civilian facilities during their conduct of hostilities. "We warned Mr. Saakashvili a number of times that any attempt to resort to a forceful solution would inevitably undermine the process of negotiations and lead to Russia's recognition of Abkhazia's and South Ossetia's independence. He was aware of what was at stake as well as the risks involved. However, the Saakashvili regime favoured the aggressive bloodthirsty approach, which from the very outset was doomed to fail. The Georgian Government bears the full brunt of responsibility for what happened."[63]

While Russian Federation contends that the only purpose of it to interfere and use force against Georgia was protection of peacekeepers and their nationals, another question arises: how come so many Russian citizens live on the territory of South Ossetia? How and why did they all get passports of Russian Federation?

Many various sources show that the overwhelming majority of the residents of South Ossetia have acquired Russian nationality through naturalization.[64] Georgia considers the policy as "a significant component of Russia's creeping annexation of the Tskhinvali Region/South Ossetia and Abkhazia, Georgia." To the view of Georgia, the "Passportisation" policy is a violation of the "principles of territorial integrity and sovereignty of Georgia, noninterference in internal affairs of sovereign states and the principle of resolving disputes through peaceful means."[65]

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[62] Statement of the Russian representative in the Security Council debate of 10 August 2008 (UN Doc. S/PV.5953), p. 9.

[63] Brussels Report, Independent International Fact Finding Mission on the Conflict in Georgia, September 2009. http://www.ceiig.ch/Report.html. Accessed 27/10/2009

[64] Brussels Report, Independent International Fact Finding Mission on the Conflict in Georgia, September 2009. Initial source – The sources mentioned in the text are the following: PC.DEL/52/03 of 24 January 2003 (Georgian statement to the Permanent Council of the OSCE), quoted in Victor-Ives Ghebali, "The OSCE Mission to Georgia (1992-2004): The Failing art of Half-hearted Measures", *Helsinki monitor* 2004, no. 3, 280-292, at 285. Also Thomas Kunze, Krieg um Südossetien, Länderbericht der Konrad Adenauer Stiftung vom 12 August 2008, at 2-3 (http://www.kas.de/proj/home/pub/83/1/year- 2008/dokument_id-14356/index.html); Igor Zevelev, Russia's Policy Towards Compatriots in the Former Soviet Union, Russia in Global Affairs No. 1, January-March 2008, at 4. According to the *de facto* Deputy Minister of Foreign Affairs of Abkhazia, Maksim Gvindzhia, roughly 80% of the population hold dual Abkhaz-Russian citizenship (statement of 6 Sept. 2006). See Pal Kolsto/Helge Blakkisrud, "Living with Nonrecognition: State- and Nation-Building in South Caucasian Quasi-states", *Europa-Asia Studies* 60 (2008), 483-509, at 494. The authors note that if this figure is correct, it would necessarily include some ethnic Georgians as well

[65] Ibid

Russian view on the present issue is that "nothing that would warrant criticism for granting Russian citizenship to the aforementioned persons who were entitled to it in accordance with legislation of the Russian Federation."[66]

From certain facts it is evident that the Russian citizens have a pretty close link to Russia, despite the Nottebohm case, in which the Court has stated that there should be "genuine link".[67] For example, "the Russian legislation on health insurance or pensions can directly impact on the lives of its citizens living in South Ossetia. On the basis of the Russian Constitution, Russian citizens have many rights and obligations, among them the right to vote and the right to actively participate in the management of the state, as well as the obligation to pay taxes and the obligation to perform military service. From the point of view of Russian constitutional law, the legal position of Russian citizens living in South Ossetia is basically the same as the legal position of Russian citizens living in Russia.[68]

Article 61 of the Constitution of Russian Federation provides that "the Russian Federation guarantees its citizens defense and patronage beyond its boundaries."[69] So, the intention of Russian Federation indeed could be to protect their nationals abroad, as well as to protect their peacekeepers, because by the end of the conflict Russian Federation did not touch anything in the country, maybe only it had political reasons to interfere.

Conclusion: the intention of Russian Federation was to protect its own citizens and peacekeepers, since there is no one else to protect them on the territory of Georgia.

Intention – satisfied.

The fourth and the last criterion for humanitarian intervention is proportionality. The issue of proportionality had been analyzed before and the conclusion that I arrived at is "No, the use of force by Russian Federation was not proportionate.

Conclusion: the use of force by Russian Federation is not justified under Humanitarian Intervention.

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[66] Brussels Report, Independent International Fact Finding Mission on the Conflict in Georgia, September 2009. http://www.ceiig.ch/Report.html. Accessed 27/10/2009 – Official Russian answer

[67] Nottebohm Case. International Court of Justice. http://www.icj-cij.org/docket/files/18/2676.pdf Accessed 20/11/2009

[68] Brussels Report, Independent International Fact Finding Mission on the Conflict in Georgia, September 2009. http://www.ceiig.ch/Report.html. Accessed 27/10/2009

[69] Constitution of the Russian Federation. http://www.constitution.ru/en/10003000-01.htm Accessed 07/03/2010

Whether the use of force by Russian Federation could be justified under protection of nationals.

The term protection of nationals lacks codification, therefore status under international law. Most of the scholars believe that there should not be used such notion as "protection of nationals abroad", since territorial integrity is at stake and if we allow such a notion in international law, it would be very easy to bring up such justification for many future unneeded interventions.

"However, it cannot be denied that at a certain point the interest of a state in exercising protection over its nationals and their property can take precedence over territorial sovereignty, despite the absence of any conventional provisions. This right of intervention has been claimed by all states; only its limits are disputed."[70]

Indeed if we look at the history, there are many examples on protection of nationals abroad. One of the countries that has used the notion protection of nationals abroad most often is the United States. Many of the actions were undertaken by that country to protect its nationals abroad. The Supreme Court of the US observed in *United States v. Verdugo-Urquidez* that "the United States frequently employs armed forces outside this country – over 200 times in our history – for the protection of American citizens or national security".[71]

For instance, in 1992 the US deployed its armed forces to Somalia to protect American citizens, who were involved in the relief operations.[72] Another case was in Haiti, when the US sent naval ships to Haiti to protect their nationals. The legal advisors decided that the President could make an order to use force against Haiti, since he could conclude that many US citizens in Haiti were in danger, because of the lawlessness inside the country.[73] Another example from history is year 1965, when President Johnson ordered military intervention in the Dominican Republic "to preserve the lives of American citizens."[74]

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[70] "The Use of Force in the Protection of Nationals" D. W. Bowett. Transactions of the Grotius Society, Vol. 43, Problems of Public and Private International Law, Transactions for the Year 1957 (1957), pp. 111-126. Cambridge University Press on behalf of the British Institute of International and Comparative Law. Available at: http://www.jstor.org/stable/743146. Accessed 20/03/2010

[71] "Deployment of United States armed forces to Haiti", Memorandum Opinion for the Counsel to the President, March 17, 2004. http://www.justice.gov/olc/warpowers925.htm . Accessed 20/11/2009

[72] Authority to Use United States Military Forces in Somalia, 16 Op. O.L.C. 6, 10 (1992). http://www.justice.gov/olc/presiden.8.htm . Accessed 23/11/2009

[73] "Deployment of United States armed forces to Haiti", Memorandum Opinion for the Counsel to the President, March 17, 2004. http://www.justice.gov/olc/warpowers925.htm . Accessed 20/11/2009

[74] Authority to Use United States Military Forces in Somalia, 16 Op. O.L.C. 6, 10 (1992). http://www.justice.gov/olc/presiden.8.htm . Accessed 23/11/2009

So, as history shows there are many precedents on protection of nationals abroad. However the disadvantage of the justification is that it is not codified, therefore has no legal status in international law. While protection of nationals itself as a justification may not have any legal basis, i.e. is not codified, some States and scholars have adopted the view that the right to protect nationals is an integral part of self-defense, however not within the meaning of Article 51 of UN Charter, but in the broader notion of self-defense – self-defense in customary law. "Injuries to a state's nationals have been regarded as an injury to the state itself".[75]

The relationship between protection of nationals and self-defense was mentioned, for instance, in the Regulations for the Government of the Navy of the United States. The Regulations state the following concerning the use of force for protection of nationals: "The right of self-preservation, however, is a right that belongs to states as well as to individuals, and it includes the protection of the state, its honor and possessions, and the lives and property of its citizens against arbitrary violence, actual or impending, whereby the state or its citizens may suffer irreparable injury… It (the use of force in time of peace) must only be used as a last resort, and then only to the extent which is absolutely necessary to accomplish the end required. It can never be exercised with a view to inflicting punishment for acts already committed."[76]

In his article, Bowett states that the conditions for exercising right of self-defense should as well be counted as conditions for protection of nationals. So, for exercising a right of self-defense, in accordance with Article 51 of UN Charter, the following criteria should be satisfied:

- There should be an actual or imminent threat or danger
- The absence of alternative ways of protection, i.e. force as a last resort
- Proportionality and necessity

These same conditions should be applicable for the exercise of the right of nationals' protection. The sole justification for the exercise of the right of protection is that the territorial state is unable or unwilling to protect aliens within its territory from arbitrary violence. In most cases the right of protection arises directly from the territorial state's own breach of duty, its failure to use diligence to guarantee the treatment of aliens according to the minimum standards of international law. Even in those exceptional cases where the territorial states is not in breach,

[75] Vattel, Droit des Gens, Bk. II, Ch. VI. sec. 71; see Borchard, op. cit., p. 31.

[76] "The Use of Force in the Protection of Nationals" D. W. Bowett. Transactions of the Grotius Society, Vol. 43, Problems of Public and Private International Law, Transactions for the Year 1957 (1957), pp. 111-126. Cambridge University Press on behalf of the British Institute of International and Comparative Law. Available at: http://www.jstor.org/stable/743146. Accessed 20/03/2010

but despite its exercise of due diligence a threat to aliens arises from persons within its territory, the territorial state is still legally bound to submit to the exercise of the right of protection, for, as a last resort, the right of protection takes precedence over the right of territorial integrity."[77]

So, if we apply the same conditions for protection of nationals as for self-defense to Russian use of force against Georgia, we will be able to see whether Russian Federation may justify its use of force as protection of nationals on the grounds of self-defense combined with protection of nationals. That way the justification would be stronger and would have legal basis than just protection of nationals.

First of all it is necessary to determine **whether there was an actual or imminent threat or danger**. Definitely, there was. As it was mentioned in the facts, the Georgian armed forces started an armed offensive in South Ossetia on the basis of President Saakashvili's order. As a result of this attack both civilians and South Ossetian militiamen died, including civilians who held Russian passports, and a considerable number of buildings were destroyed in Tskhinvali and in the surrounding villages.

The next criterion to apply is there should be **no alternative way to protect nationals other than to use force, i.e. force must be the last resort**. As it was already mentioned above in the section of "force as the last resort" Ken Roth in his article, where he tries to analyze whether invasion in Iraq was humanitarian intervention, he also clashes with such a factor as "last resort". The author states that in case of Iraq the slaughter was not imminent and therefore force was not the last resort. The author suggests that there were alternative ways to fight Saddam Hussein's regime and as an example of such an alternative way there could be an indictment for arrest first, and only then in case of disobedience should there have been invasion for arrest, trial and punishment. So force was not the last resort to restore peace in the country.

One more case, which also was already brought above is that of Israel-Lebanon. Here the author of the article as well suggests that the use of force was only one option out of many other possible how Israel could respond to terrorism. Israel could have responded by sending its special forces to get two Hezbollah guerillas as bargaining chips, police action could have been taken, or negotiating process could take a place over the release of prisoners. According to the author: "Ideally, Israel should have asked the Lebanese government to take steps in its own territory to free the captured soldiers before resorting to the use of force, which should always be

[77] Ibid

a measure of last resort. If the Lebanese government then failed to act, Israel would be justified in taking proportionate measures to free its soldiers."[78]

What did Russia do before resorting to force if it could do anything else at all? As it was already analyzed before I would say that force was the only means left to help the situation. Had they waited for peaceful or diplomatic ways of conflict resolution – there would have been more victims among the civilian population and peacekeepers.

Force as the last resort – Satisfied.

However, again, Russian Federation fails to meet the requirement of proportionality, therefore they may not be justified under the present exception.

Conclusion: The use of force by Russian Federation could not be justified under protection of nationals.

Whether the use of force by Russian Federation could be justified under protection of its peacekeepers?

Just like protection of nationals abroad, protection of peacekeepers lacks the status in international law, since the exception is not codified; it has derived from state practice. Moreover, since the peacekeepers were on the territory of Georgia, may an attack be considered as an attack against the Russian Federation? In accordance with Brussels Report the Georgian attack on peacekeepers on the territory of Georgia may be equal as if an attack was carried out on the Russian territory. As provided in the Report "…the Georgian attack on the peacekeeping bases must nevertheless be considered as an armed attack on Russia under Article 51 of the UN Charter".[79]

First of all because the peacekeeping mission was not some general mission from the United Nations but the peacekeepers were established and controlled by the Sochi agreement of 1992, the commander of which always had to be from the Russian side. Second, as it was contracted between the parties, the international responsibility for any violations of the Sochi agreement should be on the Russian Federation.[80]

[78] Ibid
[79] Brussels Report, Independent International Fact Finding Mission on the Conflict in Georgia, September 2009. http://www.ceiig.ch/Report.html. Accessed 27/10/2009
[80] Brussels Report, Independent International Fact Finding Mission on the Conflict in Georgia, September 2009 – Initial source: Annex 1 to Protocol No. 3 of the JCC Session of 12 July 1992, provision on joint peacekeeping forces

So the Russian Federation is supposed to bear the responsibility for its troops, i.e. Russian peacekeeper's actions are attributable to Russia State. Therefore the peacekeepers may be an object of the "armed attack" provided for in Article 51 of UN Charter. So again, like in protection of nationals abroad we see the link that connects the term self-defense and protection of peacekeepers. That way the exception would have the legal basis.

On the assumption of self-defense relationship with protection of peacekeepers, the criteria for the lawful conduct of self-defense, mentioned above, should be applied once again to the particular case: Russian Federation protecting its peacekeepers abroad.

The criteria were the following:

(e) An armed attack should be launched, or immediately threatened, against a state's territory or forces (actual or imminent threat or danger);

(f) There is an urgent necessity for defensive action against that attack;

(g) There is no practicable alternative to action in self-defense, and in particular another state or other authority which has the legal powers to stop or prevent the infringement does not, or cannot, use them to that effect (force as the last resort);

(h) The action taken by way of self-defense is limited to what is necessary to stop or prevent the infringement (proportionality)[81]

(a)There existed **an actual danger and imminent threat** to Russian peacekeepers. The Russian side claimed that ten Russian peacekeepers had been killed because of Georgian use of force.[82] Even though from the side of Georgia it was stated that peacekeepers were no targeted

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(JPKF) and Law and Order Keeping Forces (LOKPF) in the Zone of Conflict, Article 2: "The joint forces shall subordinate to the joint military command and the JCC." Article 6: "The joint forces, in their daily activities, shall be guided by the requirements of this Provision, as well as decisions of the JCC and the joint military command." Regulation concerning the basic principles of operations of the military contingents and of the groups of military observers designated for the normalization of the situation in the zone of the Georgian-Ossetian conflict of 6 Dec. 1994, Article 2: "The military contingents and the military observers are subordinate to the united military command which consists of the representatives of Russian, Georgian, and Ossetian sides. *The united military command is headed by a commander from the Russian side*. A decision on the use of military contingents and military observers in case the conditions of the ceasefire are violated by one of the sides will be taken by the commander of the JPKF with the aim of restoring peace; and the JCC will be notified." Article 6: "In their daily activity, the military contingents and the military observers will be guided by the requirements of the present Decision, by the decisions of the JCC, and by the orders and directives of the united military command." (Emphasis added). http://rrc.ge/admn/url12subpirx.php?idstruc=89&idcat=6&lng_3=en.

[81] "The United Nations Charter and the Use of Force against Iraq" John Burroughs, Andrew Lichterman, Michael Ratner, Jules Lobel. October 2, 2002. http://lcnp.org/global/iraqstatement3.htm. Accessed 07/03/2010

[82] Brussels Report, Independent International Fact Finding Mission on the Conflict in Georgia, September 2009 – Initial source: Meeting with the representatives of the Investigative Committee of the General Prosecutor's Office of Russia, Moscow, 29 July 2009.

during the conflict, and those who were targeted were the mercenaries from Russia. While the Russian side stated that the attacks were directly aimed at Russian peacekeepers. "In the statements addressed to the IIFFMCG both conflicting parties admitted that Russian peacekeepers were involved in the shooting from the very beginning. Yet, Russia argued that the Russian peacekeepers were attacked and responded to the fire".[83]

It is now almost impossible to know who is right and who attacked whom, however the fact is the fact – there is the data that ten Russian peacekeepers had been killed in the conflict, therefore I should proceed with the analysis.

(b)**Necessity** – the criterion of necessity has been analyzed above, and was satisfied in the justification of self-defense. However, was it necessary to interfere to protect peace-keepers? The answer would be yes again. I will just repeat myself on the present issue - if Russia would not have interfered on time, then there would have been more victims among the Russian peacekeepers and the civilian population of South Ossetia. Such a conclusion may be made, because Georgian forces continued to attack Tskhinvali city in South Ossetia at the time of Russian intervention.

(c)**Force as a last resort** – here I would disagree with the results of the same criterion in case of Self-defense and in case of Humanitarian Intervention, where force as the last resort was satisfied. On the basis of the analysis provided before, it is possible to make a conclusion that force was not the last resort in the protection of peace-keepers.

There were alternative ways for Russian Federation to save the lives of their peacekeepers by simply evacuating them. The peacekeeping bases were situated in certain specific parts of the country; therefore all that could have been done is their immediate evacuation – not the use of force. If it would be very hard and time consuming to evacuate all the nationals of Russian Federation – because they are living in different places, maybe some of them do not have any communications at home, such a problem should not exist with peacekeepers. Moreover, since peacekeepers are not allowed to participate in hostilities, cannot take any party's side, rescuing them and getting out of the country in conflict would be the most optimal way of protecting them, in my opinion.

[83] Brussels Report, Independent International Fact Finding Mission on the Conflict in Georgia, September 2009. http://www.ceiig.ch/Report.html. Accessed 27/10/2009

Conclusion: the criterion "force as a last resort" in protection of peace-keepers is NOT satisfied. If at least one criterion has failed to be satisfied then the use of force may not be justified by a particular exception. Therefore I will not proceed with the further analysis.

Conclusion: The use of force by Russian Federation is not justified under protection of peacekeepers.

Conclusion:

After having analyzed all the possible exceptions that would justify use of force in international humanitarian law I came to a conclusion that use of force by Russian Federation is not justified by any of them: neither existing nor purported ones. However, it has met almost all the requirements of self-defense, except for the requirement of proportionality.

The Russian-Georgian conflict is a good example of showing the strengths and weaknesses of today's exceptions (justifications) for the use of force. From one side – Russia tried to protect its own nationals, peacekeepers and in general people of South Ossetia. If Russia would not have intervened on time, who knows how many victims there would have been, and maybe even the actions of Georgia could have amounted to Genocide hadn't Russia stopped Georgia on time. Moreover, who else would have protected the nationals of Russian Federation and its peacekeepers?

From the other side – with its intervention by saving lives of many, Russian Federation has caused a lot of civilian deaths and it seriously damaged the economy of Georgia.

If the Russian Federation would have met the requirement of proportionality I would definitely have said that its use of force is absolutely justified and that in today's world sometimes we need such types of interventions in order to stop the abuses of rights of minorities or some other group. I strongly believe that such notions as "protection of nationals abroad" and "humanitarian intervention" should exist, and would be better if they would not only be derived from state practice, but codified someday in future.

Recommendations:

As it was mentioned above there are two types of justifications in international law: the existing and the purported ones. The existing justifications are the ones that are codified, include the special criteria and conditions in order to be legitimate. However, the purported ones lack the status under international law, since they are not written anywhere. Definitely there is state practice, which shows that the purported justifications, such as humanitarian intervention, protection of nationals or protection of peace-keepers are used in various situations, by various countries in various times. But since these exceptions are not codified, there are no definite conditions or criteria to be satisfied in order for justification to be legitimate. For these reasons the countries just "play" with criteria, justifying anything as humanitarian intervention or protection of nationals abroad. These two terms now are being very often abused.

Therefore, one of my long-term recommendations is that such purported exceptions as humanitarian intervention and protection of nationals abroad should be codified. A special criteria and conditions should be worked out in order for the countries, especially the Great Powers to stop abusing these terms.

However, understanding that codification in international law is a very difficult procedure and may take hundreds of years of practice, moreover, taking into account that it would be even more difficult for various countries to come to a mutual agreement of certain criteria – my short-term recommendations would be: the Modal Rules of the Draft Articles for both of the exceptions should be worked out, which would not be legally binding, however would be recommendatory in character.

For today the example may be the "Draft Articles on State Responsibility". That document does not have a binding legal nature, however the practice shows that it is widely used and actually followed upon by States. Therefore, even if there would be certain criteria and conditions for "humanitarian intervention" and "protection of nationals abroad", even being recommendatory in nature, I believe that the justifications of IHL would be far less abused in practice.

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