

**Question #5: Please give legal and other reasons for the Russian recognition of the territories of Tskhinvali region/South Ossetia and Abkhazia, Georgia. Please qualify the legal status and the objectives of the friendship treaties concluded respectively between the Russian Federation and the Tskhinvali Region/South Ossetia and with Abkhazia respectively on September 17, 2008.**

On August 26, 2008 the President of the Russian Federation signed Decrees No. 1260 and 1261 recognizing Abkhazia and South Ossetia as independent states<sup>1</sup>. Both Decrees stressed the free will of the Abkhaz and South Ossetian people for recognition as sovereign and independent states. The Decree instructed the Ministry of Foreign Affairs of the Russian Federation to initiate diplomatic relations with the Abkhazian/South Ossetian sides and to prepare a draft treaty on friendship, cooperation and mutual assistance; in addition, it determined the appeal of the Abkhazian/South Ossetian “Presidents” as legal grounds on which the presence of the Russian forces on the respective territories could be “justified” until signature of the aforementioned treaties<sup>2</sup>.

The President of the Russian Federation based its decision on the results of the referendums conducted and on the decisions taken by the Parliaments of the two republics, which appealed to the Russian Federation and have been supported by the Federation Council and State Duma<sup>3</sup>. It is noteworthy that the request for recognition had been made several times before 2008. However, at that time the executive branch of the Russian government refrained from the approval of the request. Decision on illegal unilateral recognition of these regions by the Russian Federation has only been taken after the invasion and occupation of Georgian territories in August 2008.

The President of the Russian Federation has substantiated two major “justifications” for recognition: a) the will of the Abkhaz and Ossetian people as expressed in the referendums; b) the violation of international agreements by Georgia and disruption of the peacemaking process and peace negotiations<sup>4</sup>. A similar line of argumentation can be traced in the Statement of the Ministry of Foreign Affairs which added a slight emphasis on the ‘right to self-determination of Abkhazian and South Ossetian people’<sup>5</sup>.

The recognition, followed by the conclusion of the treaties should be viewed as violation of the territorial integrity and sovereignty, as well as the principle of non-interference into internal

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<sup>1</sup> The original versions of the decrees available on internet are at [http://en.wikipedia.org/wiki/File:Decree\\_recognising\\_Abkhazian\\_independence.png#file](http://en.wikipedia.org/wiki/File:Decree_recognising_Abkhazian_independence.png#file) and [http://en.wikipedia.org/wiki/File:Decree\\_recognising\\_South\\_Ossetia\\_independence.png](http://en.wikipedia.org/wiki/File:Decree_recognising_South_Ossetia_independence.png)

<sup>2</sup> See Security Council Meeting 5969, 28 August 2008 available at [http://www.undemocracy.com/securitycouncil/meeting\\_5969](http://www.undemocracy.com/securitycouncil/meeting_5969)

<sup>3</sup> Statement by President of Russia Dmitry Medvedev of 26 August 2008 available at [http://www.kremlin.ru/eng/speeches/2008/08/26/1543\\_type82912\\_205752.shtml](http://www.kremlin.ru/eng/speeches/2008/08/26/1543_type82912_205752.shtml)

<sup>4</sup> Ibid;

<sup>5</sup> [http://www.mid.ru/brp\\_4.nsf/0/FF61E0682D1506E1C3257523003F9DD6](http://www.mid.ru/brp_4.nsf/0/FF61E0682D1506E1C3257523003F9DD6)

affairs of Georgia<sup>6</sup>. Arguments provided by the Russian Federation as a legal justification for recognition do not find support in modern international law. In essence recognition of these regions represents a direct attempt of the Russian Federation to change borders of a neighboring sovereign state as a result of its military invasion and occupation.

**Recognition of the entity created through the use of force and based on ethnic cleansing is a violation of international law:**

The Russian Federation has argued that its decision regarding the recognition of independence of Abkhazia and South Ossetia has been in line with the relevant rules of international law; in particular, President Medvedev argued that in his decision (recognition), he has been guided by provisions of the UN Charter, the 1970 Declaration on the Principles of International Law Governing Friendly Relations Between States, the OSCE Helsinki Final Act of 1975, and other fundamental international instruments. Quite the contrary, the recognition violates the above-mentioned and other norms of international law.

According to the general rules of international law, a state shall refrain from recognition of an entity created in violation of one or more of the fundamental norms of international law<sup>7</sup>. In this regard, Georgia considers that the Russian Federation had to withhold recognition based on *the obligation of non-recognition* of those act or act's results which are in conflict with the fundamental norms of international law<sup>8</sup>. The obligation of non-recognition is strongly linked to the principle of *ex injuria jus non oritur* according to which "acts contrary to international law cannot become a source of legal rights for a wrongdoer"<sup>9</sup>.

Unilateral Recognition of Independence by the Russian Federation of Abkhazia, Georgia and Tskinali Region/South Ossetia was a direct result of military intervention and the continued occupation of Georgian territories by the Russian Armed Forces, representing a violation of Article 2(4) of the United Nations Charter, as well as peremptory norm of international law - prohibition of aggression.

Set in this background, the Council of Europe considered the act of recognition by the Russian Federation itself as a violation of the relevant principles of international law:

"The [Parliamentary] Assembly condemns the recognition by Russia of the independence of South Ossetia and Abkhazia and considers it to be a violation of international law and of the Council of Europe's statutory principles. The Assembly reaffirms its attachment to the territorial integrity and sovereignty of Georgia and reiterates its call on Russia to

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<sup>6</sup> See Statement of the Ministry of Foreign Affairs of Georgia of 27 August 2008 available at [http://www.mfa.gov.ge/index.php?lang\\_id=ENG&sec\\_id=59&info\\_id=7769](http://www.mfa.gov.ge/index.php?lang_id=ENG&sec_id=59&info_id=7769)

<sup>7</sup> David Raic, *Statehood and the Law of Self-determination*, Kluwer Law International, pp. 105-113;

<sup>8</sup> Lauterpacht, *Recognition in International Law*, Cambridge 1947, p. 413;

<sup>9</sup> David Raic, *Statehood and the Law of Self-determination*, Kluwer Law International, p 109;

withdraw its recognition of the independence of South Ossetia and Abkhazia and to fully respect the sovereignty and territorial integrity of Georgia, as well as the inviolability of its borders.”<sup>10</sup>

Another relevant fundamental norm of international law to be considered in this context is the right of people to self-determination, which should be interpreted and applied in line with the relevant rules of international law. In this context in addition to the fundamental norm of international law - principle of territorial integrity of sovereign states, other norms of international law have also to be taken into account.<sup>11</sup> In this regard, the most profound norm of international law violated by unilateral declaration of independence by Abkhazian and South Ossetian proxy regimes, as well as unilateral recognition of their independence by Russian Federation is prohibition of ethnic cleansing.<sup>12</sup> It is noteworthy that Russia itself played a significant role in ethnic cleansing conducted in both regions (of the majority Georgian population and other ethnicities residing in both regions), through its representatives actively engaged in the ethnic cleansing and/or failing to prevent such actions conducted by representative of Abkhazian and South Ossetian militia falling under their control. Practice of the international community has always been consistent and firm in applying relevant norms of international law and not allowing any validation of violations of this nature including through recognition of such de facto regimes as states under international law<sup>13</sup>.

Apart from the substantive abuse of the right to self-determination, Georgia considers that the declaration of independence by Abkhazian and South Ossetian proxy regimes lacked legal validity as it was issued in violation of the relevant rules of international law governing the right to self-determination and secession<sup>14</sup>.

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<sup>10</sup> Parliamentary Assembly, Resolution 1647 (2009). The implementation of Resolution 1633 (2008) on the consequences of the war between Georgia and Russia, available at <http://assembly.coe.int/Mainf.asp?link=/Documents/AdoptedText/ta09/ERES1647.htm>

<sup>11</sup> The right to self-determination has to be balanced against the principle of “territorial integrity”, as argued in 1970 Declaration on Friendly Relations:

“Nothing in the foregoing paragraphs shall be construed as authorizing or encouraging any action which would dismember or impair, totally or in part, the territorial integrity or political unity of sovereign and independent States conducting themselves in compliance with the principle of equal rights and self-determination of peoples as described above and thus possessed of a government representing the whole people belonging to the territory without distinction as to race, creed or colour.”

<sup>12</sup> See *Application on International Convention on the Elimination of All Forms of Discrimination*, Georgia v. Russian Federation, International Court of Justice, Request for the indication of the Provisional Measures, available at <http://www.icj-cij.org/docket/index.php?p1=3&p2=3&code=GR&case=140&k=4d>

<sup>13</sup> The instance of South African Homeland Territories and South Rhodesia, found in Raic, *Statehood and the Law of Self-determination*, pp. 128-140;

<sup>14</sup> See Crawford, *The Creation of State in International Law*, 2<sup>nd</sup> edition, pp. 376-415;

### **Georgia's alleged refusal to peacefully resolve conflicts:**

One of the arguments used by the Russian Federation for the justification of its illegal unilateral recognition of Tskinali Region/South Osetia and Abkhazia that it was prompted by Georgia's alleged disruption of negotiating process has no standing in international law. However for better understanding of the context in which illegal unilateral recognition of these regions had been exercised by the Russian Federation short analysis of relevant information could be useful.

The policy of the Republic of Georgia has always been to support a peaceful resolution of territorial disputes. The current government of Georgia has, since 2004, adopted a policy in which the greatest possible autonomy and constitutional rights should have been granted to the territories of Abkhazia and South Ossetia, within the framework of Georgia's sovereign territory. Georgia has on numerous occasions presented proposals that would have advanced a peaceful resolution of the disputes. In doing so, Georgia sought to respect the existing diplomatic processes created and hoped that the Russian Federation would start to respects its formal role of the peace-keeper.

Throughout this period, it should be noted that the Government of Georgia exercised no economic or security control in the territories. Moreover, it was and remains a core belief of the Government of Georgia that its own political and economic reforms, initiated after the political changes of November 2003, should be viewed as the basis for a liberal, humane, tolerant and peaceful re-unification of the country.

All Georgian proposals were based on certain principles:

- the territorial integrity of Georgia should be respected,
- the right of return for those displaced by conflict in the regions should be applied,
- the reincorporation of Abkhazia and South Ossetia into Georgian sovereign political life should be carried out gradually to build confidence of both sides,
- Both territories should and could enjoy the widest possible constitutional autonomy,
- peace-keepers should exercise full neutrality,
- negotiating formats should be brought up to date
- direct negotiation with proxy authorities

These proposals did not result in any positive progress and the principles outlined above were never reciprocated. Repeatedly, Georgian proposals were met with diplomatic obstruction by the Russian Federation or by actions on the ground by the Russian Federation and proxy authorities that further separated the territories from the Republic of Georgia.

The evidence indicates that, with the passage of time, steps were taken by Russia and proxy leadership in the territories, both on the ground and diplomatically, to:

- deepen the separation from Georgia,
- prevent the return of the displaced,
- limit confidence-building measures
- reinforce the grip of the Russian Federation over the de facto leadership

- enhance the presence of Russian security personnel in the territories,
- legalize Russia's political and economic presence in the territories,
- ignore Georgia's direct approaches for resolution,
- prevent the full participation of proxy authorities in fora designed to negotiate settlement.

The facts, as viewed in Tbilisi, pointed to a deliberate dual strategy of non-engagement in substantive negotiation by proxy authorities and the Russian Federation and a parallel deepening of Russia's engagement in and control of the politics, economy and security of the two regions.

Unwilling, and unable, to challenge by force this attritional policy of substantive non-engagement in negotiation by Russia and the proxy leadership in the territories, the Government of Georgia escalated its public objections to the facts that were unfolding on the ground, intensified the frequency with which it presented its proposals for a peaceful resolution and appealed for direct involvement of third parties to offer their good offices to intercede with the Russian Federation.

The need for international intercession and mediation became acute during 2008. The escalation of the Russian Federation's activities in the territories, notably in Abkhazia, from March 2008, became a source of deep concern to the Government of Georgia. The timing of these Russian activities leads the Government of Georgia to conclude that they were related to decisions regarding the status of Kosovo (the Unilateral Declaration of Independence by Kosovo on February 17 and its subsequent recognition by a number of states) and the March 2008 decisions of the NATO Summit.

By May 2008, the situation on the ground had altered dramatically. The Russian Federation appeared to have opted for a path that would result in either occupation or annexation and had moved far beyond the pretense of being an impartial mediator. Confronted by this reality, the Georgian Government sought international mediation and also approached the Russian Federation directly to promote negotiations.

It is not for the Republic of Georgia to comment on why increasingly intense public and private appeals by the Government of Georgia to the international community to intercede in a worsening situation, especially during 2008, failed to translate into effective mediation and to prevent a conflict. The answer to that lies in other capitals. However, Georgia can assert and attest to the fact that it was ready to be present at any time, in any form, anywhere and without precondition to engage in negotiation should that occasion arise.

Throughout this process, the Government of Georgia was engaged in a historically unprecedented program of internal reform, opening the economy, building democratic institutions and enforcing the rule of law. To do so, the government created an entirely new police system and reformed the armed forces. It did so with direct assistance from a variety of friendly partner nations and within the context of Georgia's policy to deepen its ties with the European Union and NATO.

This point concerning the internal evolution of Georgia since November 2003 is central to both the facts and the narrative leading to conflict in August 2008. Georgia's reforms may have strengthened the economy but they also rendered the country vulnerable to any neighbor who would want to influence negatively the economic growth of the country. It is no coincidence that the Russian Federation imposed unilateral economic sanctions on Georgia in 2006. To restore a semblance of order to the functioning of the state, Georgia had to establish a new revitalized form of order in both police and armed forces. This process established order in Georgia for the first time in the post-soviet era. However, it also was used by Russian propaganda to claim falsely that Georgia was arming itself for conflict in the region. Moreover, Georgia's choice of international partners was and remains a sovereign right of any nation, in this instance democratically supported by the population in elections and referenda. The alternative to the pursuit of these policies, in the view of the government of Georgia, would have been continuing chaos, disorder, poverty and isolation.

The remainder of this note draws attention to some of the initiatives taken by Georgia to initiate a peaceful resolution to the territorial disputes of South Ossetia and Abkhazia.

Georgia was not only actively engaged in the peace process but on various occasions proactively proposed serious peace process initiatives. Below we enclose an illustrative list of some of the major peace initiatives that were proposed by the Government of Georgia or representatives of the international community since 2004. Unfortunately, the aforementioned initiatives mainly failed due to rejection from the Abkhazian/South Ossetian sides, backed by the Russian authorities and/or due to direct rejection of the Russian Federation. For more details of negotiations between Georgia and Russia on the peaceful solution of the conflicts, the chart depicting the process in detail is attached.<sup>15</sup>

With regard to the Tskhinvali region/South Ossetia, Georgia, some of the recent peace proposals included:

- Protocol of Commitments signed on 24 January 2005 in Tskhinvali<sup>16</sup>;
- Initiatives of the Georgian Government with respect to Peaceful Resolution of the Conflict in South Ossetia of 24 March 2005, including political status, language and education, social and economic rehabilitation<sup>17</sup>;
- Memorandum on the Agreement of Further Activities aimed at the Final Settlement of the Conflict in Tskhinvali Region/South Ossetia, Georgia<sup>18</sup>;
- The Georgian- South Ossetian Peace Plan developed by the Government of Georgia dated 8 November 2005<sup>19</sup>; Supported by OSCE on 6 December 2005 in Ljubljana (statement on Georgia,

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<sup>15</sup> See Reference 15;

<sup>16</sup> [http://www.rrc.ge/law/Protoc\\_2005\\_01\\_24\\_e.htm?lawid=1349&lng\\_3=en](http://www.rrc.ge/law/Protoc_2005_01_24_e.htm?lawid=1349&lng_3=en)

<sup>17</sup> [http://www.rrc.ge/law/tsinad\\_2006\\_24\\_03%20\\_E.htm?lawid=1684&lng\\_3=en](http://www.rrc.ge/law/tsinad_2006_24_03%20_E.htm?lawid=1684&lng_3=en)

<sup>18</sup> See Reference 18;

<sup>19</sup> [http://www.rrc.ge/law/oseti\\_2005\\_11\\_08\\_e.htm?lawid=1496&lng\\_3=en](http://www.rrc.ge/law/oseti_2005_11_08_e.htm?lawid=1496&lng_3=en)

Second day of the Thirteenth Meeting, MC(13) Journal No. 2) initially supported and then rejected by Russia<sup>20</sup>;

- OSCE proposed peace talks in late July 2008 were rejected by South Ossetian, proxy government. OSCE Chairman in Office, Finnish Foreign Minister Alexander Stubb, proposed organization of talks in Helsinki in early August between South Ossetian proxy regime and the Georgian Government. Proxy government rejects the proposal.

Increasing the number of OSCE military monitoring officers in the Tskhinvali Region/South Ossetia was high on the OSCE's agenda at different forums throughout 2006, 2007 and 2008. Such a step would have contributed to the higher degree of transparency over the security situation in Tskhinvali Region/South Ossetia, as well as contributed to the confidence building measures. Possibility of increased number of monitors was discussed at length on numerous occasions under OSCE framework: Informal Group of Friends of Georgia, Advisory Committee of Management and Finance, Preparatory Committee of the Permanent Council, Permanent Council and Ministerial Council.

An overwhelming majority of the OSCE Participating States supported the idea. However, Russia persistently opposed this possibility. One of the examples of Russian opposition to this important possibility initiated and supported by the OSCE Chairmanship together with other OSCE Participating States took place during the Preparatory Committee meeting on 20 September, 2007. The Spanish Chairmanship, after long discussions and deliberations distributed a "Draft Decision on Increasing the Number of Mission Monitoring Officers". At the meeting this draft was supported by the overwhelming majority of OSCE Participating States. Georgia as a host country of the OSCE Mission in Georgia strongly supported the draft. However, the Russian Federation once again rejected the proposal, and did not join consensus and blocked the draft.

With regard to Abkhazia, Georgia, some of the recent peace proposals included:

- The "Road Map" of 2006 document prepared by the Georgian Government and aimed at the conflict resolution in Abkhazia, Georgia<sup>21</sup>.
- The President of Georgia initiated a proposal regarding the resolution of the conflict in Abkhazia, Georgia on 28 March 2008<sup>22</sup>, including:
  - o *Broad political representation for the Abkhaz, including the new post of Vice President of Georgia to be occupied by an Abkhazian.*

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<sup>20</sup> See Reference 20 (both Document and PDF files);

<sup>21</sup> See Reference 21;

<sup>22</sup> See Reference 22;

- *The right to veto legislation related to the constitutional status of Abkhazia, and to issues related to Abkhaz culture, language, and ethnicity.*
- *The establishment of a joint Free Economic Zone in the Gali region, including the sea port of Ochamchire.*
- *International guarantees of Abkhaz autonomy and an offer to Russia to help mediate a peaceful resolution of the conflict.*

[In 2001, the friends of the Un Secretary General started working on a document titled ***Basic Principles for the Distribution of Responsibilities between Tbilisi and Sukhumi***” The so called Boden document – named after the Secretary-General’s Special Representative for Georgia, Dieter Boden – establishes a division of powers between Georgian and Abkhazian authorities. The concrete wording of the document was held secret until January 2002. It is noteworthy, that earlier, in August 1, 2001 Abkhaz proxy Prime-minister A. Jergenia sent written statement to Secretary General K. Anan, reiterating the refusal of Abkhaz side to engage in any kind of negotiation regarding the “Boden Document”. The final version of the document was welcomed by the Un Security Council in resolution 1393 of January 31, 2002. Still, “Boden Document” was rejected by Abkhaz side, and as I. Menagarishvili (at that time Minister of Foreign Affairs of Georgia) noted in the interview – Russians played significant role urging Abkhazians not to consent to the document.] **See Annex I “Boden Document”**

- On June 23, 2008, the Deputy Minister of Foreign Affairs of Georgia, delivered a letter with additional details in line with the peace initiatives launched earlier by the President of Georgia to President Medvedev. Unfortunately, all were rebuffed in a response letter from President Medvedev on July 1<sup>t</sup>. **See Annex A Letters of President Saakashvili and President Medvedev**
- The European Union organized peace talks for July 22-24, 2008 at which the separatists fail to appear. On July 22-24, the EU tried to hold talks in Brussels between representatives of the Government of Georgia and the South Ossetian proxy regime with the participation of the Russian Federation. The separatists refused to participate, initially objecting to the title of Minister Yakobashvili – “Minister for Reintegration.” In response, the Georgian Government appointed Mr. Yakobashvili as a Special Envoy for Conflict resolution. The separatists once again refused to attend the talks on unspecified grounds.
- The Peace-Plan of the German Minister of Foreign Affairs “Steinmeier/German Plan” proposed in context of Group of Friends meeting in June 2008: On July 18, the Abkhaz proxy regime and Russia rejected a German-mediated peace plan and refused to attend peace talks scheduled in Berlin in early August<sup>23</sup>.

All the various peace proposals were designed in a way to ensure the full protection of the ethnic identity, human rights and self-preservation of all peoples residing or who had resided in these territories. These included a voluntary, secured and dignified return of all IDPs and refugees. The

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<sup>23</sup> See Reference 23;

regions were offered the broadest possible autonomy and representation at the central government level. Despite efforts of International Community and of Georgia, the position of Russia and its proxy regimes made adoption and further realization of these initiatives impossible.

### **Legal Status of Treaties of Friendship and Cooperation with Abkhazia and with South Ossetia Respectively**

The Treaties of Friendship and Cooperation, as well as subsequent agreement on Joint Actions for Protection of State Borders, concluded by Russia with Abkhazia and Tskinali Region/South Ossetia, do not have any legal significance whatsoever, as those treaties are per se illegal, and cannot be considered to be covered by international law.

According to the Vienna Convention on the Law of Treaties (1969), “treaty” means an international agreement concluded between *States* in written form and governed by international law. The cornerstone of the international law of treaties is the exclusive capacity of states (and other subjects of international law) to conclude treaties (Article 6 of the Vienna Convention). Since neither Abkhazia, nor Tskinali Region/South Ossetia constitutes independent subject of international law, any agreement concluded by them shall be deemed as null and void.

As those two regions form inseparable parts of the Georgian state, conclusion of the mentioned treaties with them constitute an encroachment upon Georgia’s sovereignty and territorial integrity. This constitutes additional ground for their invalidity under international law. According to Article 53 of the Vienna Convention “a treaty is void if, at the time of its conclusion, it conflicts with a peremptory norm of general international law.