

*An analysis of the choice and use of weapons by Russia and Georgia in  
the 2008 South Ossetia conflict*

**By:** Annatina Watzlawick (WTZANN001)

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**Supervisor:** Cathleen Powell

**University:** University of Cape Town

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*Annatina Watzlawick*

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## **Introduction**

In this minor dissertation, the use and choice of weapons employed during the armed conflict between Georgia and Russia in 2008 over South Ossetia will be analysed. Due to the fact that cluster munitions were used by both parties, and that they are a controversial weapon with regard the principles regulating the use and choice of weapons, section I of this dissertation will focus on them and their regulation in international law. Section II will focus on the facts concerning the 2008 conflict over and South Ossetia. Section III will look at the international humanitarian laws applicable and relevant to this dissertation. In sections IV, V, and VI arguments will be raised in order to attribute violations of international humanitarian law to Georgia, while countering foreseeable arguments which could be invoked against Russia. This dissertation will therefore only analyse the provisions when they are pertinent to that aim. The desired outcome of proceeding in such a manner is that since both the viewpoints of the claimant and the defendant will be analysed, an extended and well-rounded view on the law, its interpretation, controversies, opinions of established scholars and jurisprudence, will be given. The relevant principles relating to the use and choice of weapons which will be analysed are: the principle of discrimination (section IV), the principle of proportionality (section V), as well as the prohibition to cause superfluous harm (section VI). Certain specific issues such as human shields will also be looked at in the analysis of a particular attack. In the analysis of this conflict, both well-established arguments, as well as controversial or disputed ones, will be presented in order to support either side. This analysis will argue that Georgia violated international humanitarian law, while defending Russia's conduct, however, the arguments presented will remain coherent and not contradict each other. This paper's scope will be limited to analysing attacks which are sufficiently documented and imply a problem of use and choice of weapons; as opposed to the ones which solely purport an issue of military objective and were hit by a precise missile. Indeed, this dissertation focuses more on controversial weapons and whether they violate international humanitarian law solely by their inherent nature, that is, the mere choice of using them would be in violation of the law; or by their specific use in the attack. The four attacks analysed will allow an in depth analysis of the different aspects that the use and choice of weapons can entail; the

dissertation will therefore be limited to them and any further attack which do not bring to light any new arguments will not be investigated. The attacks which will be examined in the context of the conflict over South Ossetia occurred both in South Ossetia as well as non-disputed Georgian territory. These are: the one launched by Georgia using BM-21 Grads multiple rocket launchers on Tskhinvali and surrounding villages lasting from the night of the 7th of August until some point during the day of the 8th of August;<sup>1</sup> the 9th of August attack where Georgia employed Mk-4 cluster munition rockets containing M85 submunitions over Gori district villages, the Roki tunnel and according to a witness, Dzara Road<sup>2</sup>; Russia's attack on Gori city on the 12th of August using an Iskander-M SS-26 cluster munition missile;<sup>3</sup> as well as the firing of a few missiles on a school in Gori city by the Russian air force on the 9th of August.<sup>4</sup> The entirety of the facts pertaining to the conflict are drawn from the report on the conflict carried out by Human Rights Watch entitled 'Up in Flames'.<sup>5</sup> The analysis of the relevant provisions will proceed as follows: the rules will be analysed one by one, following the general introduction to the rule, general statements regarding its interpretation and application, the law will then be applied to the different attacks, given that enough facts are provided and that it pertains to the aim of the dissertation. If there are specific interpretations or applications of the law which are only relevant to one attack, it will be mentioned directly under said attack.

## **SECTION I: CLUSTER MUNITION WEAPONS AND THEIR REGULATION IN INTERNATIONAL LAW**

This section will be developed in four parts. Firstly, the definition of cluster munitions, as well as their history and development will be discussed. Secondly, a few arguments militated by experts opposing a cluster munitions ban will be exposed.

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<sup>1</sup> Human Rights Watch *Up in Flames: Humanitarian Law Violations and Civilian Victims in the Conflict over South Ossetia* (2009) (hereafter 'Human Rights Watch *Up in Flames*') 23, available at <http://www.hrw.org/sites/default/files/reports/georgia0109web.pdf>, accessed on 10 December 2015.

<sup>2</sup> Ibid at 64-65.

<sup>3</sup> Ibid at 104.

<sup>4</sup> Ibid at 94.

<sup>5</sup> Ibid.

Thirdly, the different rules restricting and prohibiting the use of cluster munitions which exist alongside the Convention on Cluster Munitions of 30 May 2008, will be examined. Fourthly, this dissertation will look at the Convention on Cluster Munitions, the process it took for it to come to light, as well as its progress. Lastly, a brief overview of the international prosecution of countries and individuals using cluster munitions will be given.

#### **A. Cluster munitions, their history and their development**

Under the Convention on Cluster Munitions, a cluster munition is defined as ‘a conventional munition that is designed to disperse or release explosive submunitions, each weighing less than 20 kilograms, and includes those explosive submunitions’.<sup>6</sup> Different kinds of cluster munition weapons exist with different areas of impact and levels of precision. Cluster munitions were introduced in order to cope with new technologies in a way which would improve military efficacy without putting in peril the life of the military force handling the weapon.<sup>7</sup> In the Vietnam War, they were used in order to deal with the newly employed surface-to-air missiles and anti-aircraft artillery.<sup>8</sup> Due to new advances in military technology, aircraft had difficulty neutralising ‘air defences from altitudes that allowed using single bombs accurately and effectively.’<sup>9</sup> Cluster munitions provided them with the solution, allowing them to attack a certain area with a multitude of bomblets without having the need to succumb to the dangers of flying at low altitudes, or having to fly over the same target numerous times.<sup>10</sup> Cluster bomb technology progressed with the years, and by the mid-1960s submunitions were more accurate and could be delivered using artillery and surface-to-surface missiles.<sup>11</sup> The precision guided munitions which nowadays characterise most cluster munitions have increased the accuracy of the

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<sup>6</sup> Article 2(2) Convention on Cluster Munitions.

<sup>7</sup> E Prokosch *The Technology of Killing: A Military and Political History of Anti-Personnel Weapons* (1995) 83-84.

<sup>8</sup> TJ Herthel ‘On the chopping block: Cluster munitions and the law of war’ (2001) 51 *Air Force Law Review* 236-37.

<sup>9</sup> *Ibid* at 237.

<sup>10</sup> Prokosch *op cit* (n7) 83-84.

<sup>11</sup> Prokosch *op cit* (n7) 5; Herthel *op cit* (n8) 237.

bombing and its effectiveness.<sup>12</sup> 'Proliferation of cluster bomb technology was incremental following the conflict in Vietnam',<sup>13</sup> their numbers grew exponentially and by 1996 at least 24 countries were producers or users of cluster munitions.<sup>14</sup> According to experts, '[t]his recent growth [in production and usage] reflects cluster munitions' effectiveness on the modern battlefield.'<sup>15</sup> However, the extensive use of cluster munitions in the 1991 Operation Desert Storm in Iraq and Kuwait, as well as in the 1999 Operation Allied Force, with the involvement of NATO, created momentum for the campaign to ban or regulate cluster bombs.<sup>16</sup> The arguments brought forth were that they violate international humanitarian law - in particular the principles of the prohibition of indiscriminate attacks and the prohibition to cause superfluous harm.<sup>17</sup>

## **B. Arguments supporting the legality of cluster munitions**

As this dissertation will analyse at length the problems inherent in cluster munitions, it is worth noting arguments which experts opposed to a restriction on cluster munitions have put forward. Firstly, according to them, 'banning cluster munitions would require the military to use more high explosive ordnance to accomplish the same results over a wide area, potentially causing more damage and suffering than typically done by cluster bombs'<sup>18</sup> and 'creating the increased possibility of a weapon missing its target and causing unintended collateral damage.'<sup>19</sup> Cluster munitions could thus reduce civilian collateral damage and loss. Secondly, 'several types of other weapons have fragmentation effects, such as artillery shells, aircraft bombs, landmines, and hand grenades, and that the military needs these types of weapons, including cluster bombs, for defensive operations to

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<sup>12</sup> MO Lacey 'Cluster munitions: Wonder weapon or humanitarian horror?' (2009) 2009 *The Army Lawyer* 29.

<sup>13</sup> Prokosch op cit (n7) 177-178.

<sup>14</sup> Herthel op cit (n8) 238.

<sup>15</sup> Ibid.

<sup>16</sup> Ibid at 239.

<sup>17</sup> Ibid.

<sup>18</sup> Ibid at 251.

<sup>19</sup> Ibid at 259.

cover large areas and for attacking anti-aircraft emplacements.’<sup>20</sup> Lastly, they contend that ‘controlled cluster munitions caused less suffering than did random fragmentation weapons.’<sup>21</sup>

### C. Rules regulating Cluster Munitions

The conduct of military operations is governed by international humanitarian law. A cardinal principle underlying this body of law is that the right of the belligerent to adopt means of injuring the enemy is not unlimited.<sup>22</sup> Accordingly, ‘[h]arm to the enemy must be limited to what is militarily necessary’.<sup>23</sup> From this rule stems two other fundamental principles: the prohibition of indiscriminate means and methods of warfare, and the prohibition to choose a weapon or use it in a way which causes superfluous harm or uselessly aggravates suffering.<sup>24</sup> The former is aimed at the protection of civilians and stipulates that ‘[s]tates must never make civilians the object of attack’ and consequently that ‘weapons that are incapable of distinguishing between civilian and military targets’ are prohibited.<sup>25</sup> In 1868, before the Hague and Geneva Conventions, the Saint Petersburg Declaration Renouncing the Use, in Time of War, of Explosive Projectiles Under 400 Grammes Weight of 11 December 1868 condemned the use of weapons ‘which uselessly aggravate the suffering of disabled men or make their death inevitable’. This Declaration was the first ‘formal agreement prohibiting the use of certain weapons in war.’<sup>26</sup> This prohibition was codified in the Hague Regulations concerning the Laws and Customs of War on Land of 18 October 1907<sup>27</sup> and in the Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts of 8 June

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<sup>20</sup> Herthel op cit (n8) 252.

<sup>21</sup> Ibid.

<sup>22</sup> Article 22 Hague Regulations concerning the Laws and Customs of War on Land of 18 October 1907 (hereafter Hague Regulations).

<sup>23</sup> G Werle *Principles of International Criminal Law* 2ed (2009) 426.

<sup>24</sup> M Sassòli, AA Bouvier & A Quintin *How Does Law Protect in War? Volume 1: Outline of International Humanitarian Law* 3ed (2011) part 1 chap 9 at 33.

<sup>25</sup> International Court of Justice (hereafter ICJ) *Advisory Opinion on the Legality of the Threat or Use of Nuclear Weapons* (8 July 1996) at para 78.

<sup>26</sup> International Committee of the Red Cross, available at <https://www.icrc.org/ihl/INTRO/130?OpenDocument>, accessed on 25 August 2015.

<sup>27</sup> Article 23(e) Hague Regulations.

1977 (hereafter Protocol 1).<sup>28</sup> This Protocol also prohibits certain weapons which are inherently disproportionate,<sup>29</sup> and the indiscriminate or disproportionate use of otherwise ‘permitted’ weapons.<sup>30</sup> It is crucial to note that ‘these fundamental rules are to be observed by all [s]tates whether or not they have ratified the conventions that contain them, because they constitute intransgressible principles of international customary law.’<sup>31</sup> Additionally, for cases not covered by the texts of international humanitarian law, ‘civilians and combatants remain under the protection and authority of the principles of international law derived from established custom, from the principles of humanity and from the dictates of public conscience.’<sup>32</sup> This last statement is referred to as the Martens Clause and ‘has proved to be an effective means of addressing the rapid evolution of military technology.’<sup>33</sup> These rules, accompanied by the Martens Clause, have proved efficient in the prohibition of certain weapons and their use, but nonetheless ‘the appearance of new means of combat has - without calling into question the longstanding principles and rules of international law - rendered necessary some specific prohibitions of the use of certain weapons’.<sup>34</sup> These particular weapons consequently had specific conventions tailored around their prohibition and regulation. Such weapons include chemical and bacteriological weapons,<sup>35</sup> certain types of mines, booby traps and other similar devices,<sup>36</sup> weapons generating fragments which are not detectable by X-Ray,<sup>37</sup> incendiary weapons,<sup>38</sup> blinding laser weapons,<sup>39</sup> and cluster munitions.<sup>40</sup> These prohibitions were all founded on principles of international humanitarian law, such as

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<sup>28</sup> Article 35(2) Protocol 1.

<sup>29</sup> Article 51(4)(b) Protocol 1.

<sup>30</sup> Article 51(4)(a) and (b), art 51(5)(a) and (b), and art 57(2)(a)(ii) Protocol 1.

<sup>31</sup> *Advisory Opinion on the Legality of the Threat or Use of Nuclear Weapons* supra (n25) at para 79.

<sup>32</sup> Article 1(2) Protocol 1.

<sup>33</sup> *Advisory Opinion on the Legality of the Threat or Use of Nuclear Weapons* supra (n25) at para 78.

<sup>34</sup> *Ibid* para 76.

<sup>35</sup> Protocol for the Prohibition of the Use in War of Asphyxiating, Poisonous or other Gases, and of Bacteriological Methods of Warfare of 17 June 1925.

<sup>36</sup> Protocol II of 10 October 1980 on Prohibitions or Restrictions on the Use of Mines, Booby Traps and Other Devices to the Convention on Certain Conventional Weapons Which May Be Deemed to Be Excessively Injurious or to Have Indiscriminate Effects of 10 October 1980 (hereafter Convention on Certain Conventional Weapons).

<sup>37</sup> Protocol I of 10 October 1980 on Non-Detectable Fragments to the Convention on Certain Conventional Weapons.

<sup>38</sup> Protocol III of 10 October 1980 on Prohibitions or Restrictions on the Use of Incendiary Weapons to the Convention on Certain Conventional Weapons.

<sup>39</sup> Protocol IV of 13 October 1995 on Blinding Laser Weapons to the Convention on Certain Conventional Weapons.

<sup>40</sup> Convention on Cluster Munitions.

the prohibition of indiscriminate attacks, the prohibition of causing superfluous harm, and the principle of proportionality.<sup>41</sup> Even though these Conventions prohibiting specific weapons exist, the customary status of these principles remains crucial for two reasons. Firstly, not all states are parties to these conventions. Secondly, not all weapons which run a high risk of, or inherently do, violate these principles, are the subject of regulation. Therefore, the customary principles of international humanitarian law mentioned above will still apply in order to either prohibit certain weapons, or to limit their use. Nonetheless, controversies and debates still exist concerning certain weapons and whether they inherently violate these norms. Their explicit prohibition or restriction is therefore preferable.

#### **D. The Convention on Cluster Munitions**

Prior to the establishment of the Convention on Cluster Munitions, several unsuccessful attempts had been made in order to address the problem of cluster munitions.<sup>42</sup> During each of these attempts, states opted against imposing such restrictions, due to the inability to reach a consensus.<sup>43</sup> By way of example, in the 1974 Lucerne Conference concerning the formulation of the Convention on Certain Conventional Weapons, cluster munition weapons were examined but purposely left out of the convention, remaining unregulated.<sup>44</sup> In the 1976 Lugano Conference, which similarly regarded the Convention on Certain Conventional Weapons, little agreement on the issue could be found, and once more, proposals to outlaw cluster munitions failed.<sup>45</sup> Additionally, the signatories of the Protocol on Prohibitions or Restrictions on the Use of Mines, Booby Traps and Other Devices to the Convention on Certain Conventional Weapons purposely excluded cluster munitions from its scope.<sup>46</sup> The Ottawa treaty of 18 September 1997 concerning landmines also defined

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<sup>41</sup> *Advisory Opinion on the Legality of the Threat or Use of Nuclear Weapons* supra (n25) at para 78.

<sup>42</sup> Herthel op cit (n8) 251.

<sup>43</sup> Ibid.

<sup>44</sup> Ibid.

<sup>45</sup> Ibid.

<sup>46</sup> Prokosch op cit (n7) 163.

landmines in a way to exclude cluster munitions from the definition.<sup>47</sup> The attack by NATO in the Operation Allied Forces of 1999 led to another attempt at banning cluster munitions through the Convention on Certain Conventional Weapons.<sup>48</sup> While not completely unsuccessful, as it resulted in Protocol 5 on Explosive Remnants of War of 28 November 2003, which focuses on post conflict requirements, this Protocol left the use of cluster munitions in attacks un-regulated. However, in terms of the regulation concerning the after-effects of cluster munitions, this Protocol has the same outcome as the Convention on Cluster Munitions.<sup>49</sup>

In 2006, the atrocities of the Lebanon War resulted in a ‘real catalyst for the renewed emphasis to ban [cluster munitions].’<sup>50</sup> This led to the last unsuccessful attempt by NGOs and states (lead by Norway) to ban cluster munitions through a new protocol to the Convention on Certain Conventional Weapons in November 2006.<sup>51</sup> Once again, due to the objections of the major military powers blocking the process, the protocol did not see the light of day.<sup>52</sup> Anticipating this blockage and slow process, Norway declared its intention to organise a conference to ban cluster munitions outside of the Convention on Certain Conventional Weapons.<sup>53</sup> This conference was held in Oslo on the 22<sup>nd</sup> of February 2007 and led to the ‘Oslo Declaration of 23 February 2007’ where 46 nations, albeit excluding the ones most concerned, committed themselves to concluding a legally binding international instrument which prohibits the use and stockpiling of cluster munitions, by 2008. Eventually, the Diplomatic Conference for the Adoption of a Convention on Cluster Munitions succeeded in creating a Convention prohibiting the use of cluster munitions for the parties having ratified it. The formal adoption of the Convention on Cluster Munitions occurred on the 30th of May 2008 in Dublin, and it came into force the 1<sup>st</sup> of August 2010. In the context of this dissertation, it is worth mentioning that Human Rights Watch attributes, to some degree, the large number of state

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<sup>47</sup> Article 2 Convention on the Prohibition of the Use, Stockpiling, Production and Transfer of Anti-Personnel Mines and on their Destruction of 18 September 1997.

<sup>48</sup> E Agin ‘Cluster Munitions: Recent Developments’ (2013) 215 *Military Law Review* 115.

<sup>49</sup> DJ Raccuia ‘The Convention on Cluster Munitions: An incomplete solution to the cluster munition problem’ (2011) 44 *Vanderbilt Journal of Transnational Law* 485.

<sup>50</sup> Lacey op cit (n12) 29.

<sup>51</sup> Agin op cit (n48) 116.

<sup>52</sup> Ibid.

<sup>53</sup> L Maresca ‘Introductory note to the Convention on Cluster Munitions’ (2009) 48 *International Legal Materials* 354.

signatories<sup>54</sup> to this Convention in December 2008 as a reaction to the use and impact of cluster munitions on civilians in the 2008 conflict over South Ossetia.<sup>55</sup>

The Convention on Cluster Munitions's objective is to prohibit, restrict or suspend the use, stockpiling, production and transfer of cluster munitions, while also prohibiting the state parties from assisting, encouraging or inducing other states or individuals to act in a way which is prohibited by the treaty.<sup>56</sup> This prohibition binds the state even when it is engaging with a state not party to this convention which itself might be using cluster munitions.<sup>57</sup> Worth acknowledging is that this Convention is hindered by the fact that it is not customary international law.<sup>58</sup> Thus, there exists no customary ban on the use of cluster munitions.<sup>59</sup> This is due to a few factors. Firstly, only practices followed from a sense of legal obligation can count in establishing rules of a customary status.<sup>60</sup> The non-usage of a weapon can consequently only be taken into consideration if the state willingly abstained from using it in order to respect international humanitarian law, and not simply because circumstances calling for their use never arose.<sup>61</sup> Secondly, and perhaps the most persuasive argument in this case, key users and producers of cluster munitions, including Russia, China, the United States of America, Israel, Pakistan, Brazil as well as India do not agree on the ban.<sup>62</sup> Indeed, for a rule to become customary, state practice must include the one's of states whose interests are particularly affected.<sup>63</sup> Furthermore, the refusal by these states to ratify the treaty is an exceedingly large drawback to the success of the Convention, as it has been advanced that 'unless you get all the major producers and users of these weapons to agree on how they're going to regulate them, you're not going to meet your goal of addressing [their] humanitarian impact'.<sup>64</sup> Adding to the hindrance of its success, approximately 50 per

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<sup>54</sup> 94 States.

<sup>55</sup> Human Rights Watch *Up in Flames* op cit (n1) 3.

<sup>56</sup> Article 1(1) Convention on Cluster Munitions.

<sup>57</sup> Article 21(3) *cum* art 21(4)(c) Convention on Cluster Munitions.

<sup>58</sup> Herthel op cit (n8) 269.

<sup>59</sup> *Ibid.*

<sup>60</sup> TW Bennett & J Strug *Introduction to International Law* (2013) 14.

<sup>61</sup> *Advisory Opinion on the Legality of the Threat or Use of Nuclear Weapons* supra (n25) at para 67.

<sup>62</sup> Lacey op cit (n12) 31.

<sup>63</sup> ICJ *North Sea Continental Shelf Cases* (20 February 1969) at para 73.

<sup>64</sup> SD Mull, Acting Assistant Secretary for Political-Military Affairs, On-the-record-briefing on U.S. Cluster Munition Policy, Washington D.C. (21 May 2008), transcript available at <http://2001-2009.state.gov/t/pm/rls/rm/105111.htm>, accessed on 3 December 2015.

cent of countries have not signed this Convention.<sup>65</sup> Nonetheless, it can still be considered an achievement towards the prohibition of cluster munitions, as it has, to date, already been ratified by 98 states.<sup>66</sup>

### **E. International prosecution of the use of cluster munitions**

Both individuals and states have been successfully prosecuted by international tribunals for their use of cluster munitions in a way not compatible with international humanitarian law.<sup>67</sup> However, these tribunals have not claimed that choosing to use cluster munitions violates international humanitarian law *per se*.<sup>68</sup> Furthermore, in the same way the Convention on Cluster Munition suffers from a lack of participation of crucial players in the field of cluster munitions, these same states have not accepted the jurisdiction of the International Criminal Court (hereafter ICC).<sup>69</sup>

## **SECTION II: FACTS**

South Ossetia is and has been a disputed region bordering Russia. It is regarded by the international community as an autonomous breakaway region, but nevertheless *de jure* region of Georgia,<sup>70</sup> even though its declared statehood has been recognised by a few states (Nicaragua, Venezuela, Nauru, and Russia (after the 2008 conflict)).<sup>71</sup> Since this dissertation focuses on the use and choice of weapons by Georgia and Russia, without a particular focus on the statehood or legal status of

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<sup>65</sup> Raccuia op cit (n49) 479.

<sup>66</sup> The United Nations Office at Geneva, available at [http://www.unog.ch/80256EE600585943/\(httpPages\)/67DC5063EB530E02C12574F8002E9E49?OpenDocument](http://www.unog.ch/80256EE600585943/(httpPages)/67DC5063EB530E02C12574F8002E9E49?OpenDocument), accessed on 23 January 2016.

<sup>67</sup> Raccuia op cit (n49) 473; for example: International Criminal Tribunal for the former Yugoslavia (hereafter ICTY) *Prosecutor v Milan Martić*, Trial Chamber I (12 June 2007) at para 478; ICTY *Prosecutor v Stanislav Galić*, Trial Chamber I (5 December 2003) at para 751.

<sup>68</sup> Raccuia op cit (n49) 473.

<sup>69</sup> ICC, available at [https://www.icc-cpi.int/en\\_menus/asp/states%20parties/Pages/the%20states%20parties%20to%20the%20rome%20statute.aspx](https://www.icc-cpi.int/en_menus/asp/states%20parties/Pages/the%20states%20parties%20to%20the%20rome%20statute.aspx), accessed on 23 January 2016.

<sup>70</sup> Human Rights Watch *Up in Flames* op cit (n1) 2 and 9.

<sup>71</sup> Oxford Public International Law, available at <http://opil.ouplaw.com/view/10.1093/law:epil/9780199231690/law-9780199231690-e2068>, accessed on 25 February 2016; Human Rights Watch *Up in Flames* op cit (n1) 26.

South Ossetia, this dissertation will not go into further detail concerning this dispute. Furthermore, its legal classification, for reasons established in section III.D, would not change the conclusions that will be made.

The armed conflict was the result of years of escalating tensions between Russia, Georgia and South Ossetian forces.<sup>72</sup> South Ossetia's struggle for independence and statehood, combined with Georgia's attempts at restoring Georgian territorial integrity caused tensions<sup>73</sup>. These were felt not only between different ethnic groups, but also between South Ossetian separatists, Georgian forces, and Russian forces, who considered themselves the guarantors of stability in the region.<sup>74</sup>

Adding to the already bleak conditions, the emergence of two competing governments in South Ossetia, comprised of the secessionist de facto government and a pro-Tbilisi government, created difficulties.<sup>75</sup> This separated even further the ethnic Georgians from the rest and created an ever-increasing tangible tension and instability in South Ossetia.<sup>76</sup> Tensions rose in September 2006 when Russia, in response to the detention by Georgia of four alleged Russian spies, halted all air, land and sea traffic with Georgia and expelled more than 2300 Georgians from Russia.<sup>77</sup> Furthermore, in 2008 Georgia's efforts to join NATO angered Russia which triggered it to 'deepen its cooperation with the breakaway administration in Abkhazia and South Ossetia.'<sup>78</sup> The sum of the above resulted in increased hostility, regardless of the presence of peacekeeping forces present in South Ossetia.<sup>79</sup>

In July 2008, the situation had climaxed within South Ossetia. Georgian and South Ossetian forces were engaged in brutal artillery attacks.<sup>80</sup> Furthermore, military exercises conducted by Russia and Georgia, as well as Russia's involvement by conducting overflights over Tskhinvali in violation of Georgia's airspace, intensified

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<sup>72</sup> Human Rights Watch *Up in Flames* op cit (n1) 5.

<sup>73</sup> Ibid at 17-18.

<sup>74</sup> Ibid at 20.

<sup>75</sup> Ibid at 19.

<sup>76</sup> Ibid.

<sup>77</sup> Ibid at 20.

<sup>78</sup> Ibid.

<sup>79</sup> Ibid at 23.

<sup>80</sup> Ibid at 21.

the animosity.<sup>81</sup> By the end of July, Georgian and South Ossetian forces had engaged in more frequent and violent fights.<sup>82</sup> Throughout the few days preceding the armed conflict, both sides exchanged fire, causing no casualties, but by the morning of the armed conflict, there were 12000 members of the Georgian armed forces and 75 Georgian tanks gathered close to the South Ossetian border.<sup>83</sup>

The 2008 armed conflict was initiated on the 7<sup>th</sup> of August by Georgia's artillery assault in Tskhinvali and other surrounding villages in South Ossetia.<sup>84</sup> This was followed by attacks from Georgia's ground and air forces, by using, among other means of warfare, BM-21 Grad multiple rocket launchers.<sup>85</sup> The next day, alongside the continuation of the shelling, Georgian troops, as well as Russian troops (without the consent of Georgia),<sup>86</sup> advanced towards Tskhinvali and other towns in South Ossetia, where, despite the fighting with South Ossetian militias, Georgian forces took control.<sup>87</sup> From the 8<sup>th</sup> of August until the 12<sup>th</sup>, Russian air and ground forces hit several targets in South Ossetia, and different parts of undisputed Georgia territory, such as Gori city, Gori district and Tbilisi.<sup>88</sup> During those attacks, a school in Gori city was hit on the 9<sup>th</sup> of August.<sup>89</sup> Eventually, Russia deployed its army in the outskirts of Tskhinvali.<sup>90</sup> Its fire, combined with that of the South Ossetian forces, forced the Georgian Defense Minister, on the 10<sup>th</sup> of August, to order his troops to withdraw from Tskhinvali and retreat to Gori city.<sup>91</sup> On the 12<sup>th</sup> of August, Russia moved towards Gori city and eventually occupied it, as well as other strategic towns around it.<sup>92</sup>

At some stage in the armed conflict, both Georgia and Russia used cluster munitions.<sup>93</sup> Georgia used M85 submunitions carried by Mk-4 rockets and fired from

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<sup>81</sup> Human Rights Watch *Up in Flames* op cit (n1) 21.

<sup>82</sup> Ibid.

<sup>83</sup> Ibid at 22.

<sup>84</sup> Ibid at 5.

<sup>85</sup> Ibid at 5 and 21.

<sup>86</sup> Ibid at 9.

<sup>87</sup> Ibid at 23.

<sup>88</sup> Ibid at 24.

<sup>89</sup> Ibid at 24 and 94.

<sup>90</sup> Ibid at 24.

<sup>91</sup> Ibid.

<sup>92</sup> Ibid at 25.

<sup>93</sup> Ibid at 10.

a Gradlar 160 multiple rocket launcher, on the 9<sup>th</sup> of August, on nine villages in undisputed Georgian territory, as well as towards the Roki tunnel and possibly Dzara road.<sup>94</sup> As for Russia, during its attack on the 12<sup>th</sup> of August on Gori city, a town in undisputed Georgian territory, it used an Iskander SS-26 cluster munition missile, with an unknown type of submunitions.<sup>95</sup>

The armed conflict concluded on the 16<sup>th</sup> of August, after a ceasefire was declared, with ‘Georgian forces in retreat and Russian forces occupying South Ossetia and, temporarily, undisputed parts of Georgia.’<sup>96</sup> Russian troops withdrew from the latter, including Gori, by the end of August.<sup>97</sup> This conflict caused the death of hundreds of civilians, the displacement of tens of thousands, and significantly damaged civilian property.<sup>98</sup> Furthermore, South Ossetian forces attempted to ethnically cleanse ethnic villages in undisputed Georgian territory by systematically destroying, pillaging and burning these villages.<sup>99</sup> They also killed, raped, tortured, and injured ethnic Georgian civilians and detained them in inhumane and degrading conditions, forcing the ones who remained to leave and never return.<sup>100</sup> It is important to note that, as the South Ossetian forces (which included volunteer militias) were not under the overall or effective control of Georgia or Russia, their actions could therefore not be attributed to either.<sup>101</sup>

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<sup>94</sup> Human Rights Watch *Up in Flames* op cit (n1) 64-65.

<sup>95</sup> Human Rights Watch *Up in Flames* op cit (n1) 111; Human Rights Watch *A Dying Practice: Use of Cluster Munitions by Russia and Georgia in August 2008* (2009) 2, available at [www.hrw.org/sites/default/files/reports/georgia0409webwcover\\_0.pdf](http://www.hrw.org/sites/default/files/reports/georgia0409webwcover_0.pdf), accessed on 12 February 2016.

<sup>96</sup> Human Rights Watch *Up in Flames* op cit (n1) 2.

<sup>97</sup> *Ibid* at 25.

<sup>98</sup> *Ibid* at 2.

<sup>99</sup> *Ibid* at 9-10.

<sup>100</sup> *Ibid* at 3 and 9-10.

<sup>101</sup> Human Rights Watch *Up in Flames* op cit (n1); the fact that they were not under the effective or overall control of Russia is crucial, as it indicates that acts committed by these non-state forces are not attributable to Russia. Jurisprudence confirming this can be found in ICTY *Prosecutor v Duško Tadić*, Appeals Chamber (15 July 1999) (hereafter *Tadić Appeal*) at para 131 (where the Court sets the threshold of ‘overall control’ which demands of the state for which the actions of another non-state actor may be attributed to wield ‘overall control over the group, not only by equipping and financing the group, but also by coordinating or helping in the general planning of its military activity’ and in ICJ *Nicaragua v United States of America* (27 June 1986) at para 115, with an even more stringent criterion of ‘effective control’.

## SECTION III: APPLICABLE LAW

### A. 'Armed conflict'

In order for international humanitarian law to apply to a conflict, the threshold of an 'armed conflict' needs to be reached.<sup>102</sup> This threshold varies depending on whether the conflict is international or not.<sup>103</sup> In the conflict in question, as a result of the involvement of the Russian state armed forces, South Ossetian non-state forces as well as Georgian state armed forces, the qualification of the conflict as international or not is rather complex and can differ depending on the approach taken. Firstly, according to the jurisprudence of the ICTY, it is possible for a conflict to be characterised 'at different times and places as either internal or international armed conflicts, or as a mixed internal-international armed conflict'; a non-international armed conflict (hereafter NIAC) could therefore exist alongside an international one.<sup>104</sup> The effect of a 'mixed approach' is that an act of internationalisation of another state 'only renders international the conflict between the parties belonging to [s]tates rather than all conflicts in the territory.'<sup>105</sup> This approach is also one which is justified by the strict reading of the Geneva Conventions.<sup>106</sup> After a thorough analysis of the situation in South Ossetia, Human Rights Watch chose this approach.<sup>107</sup> The second approach is aimed at ensuring a greater respect of international humanitarian law due to the problems the lack of clarity of the first approach causes. Indeed, it is claimed that the first method results in artificially differentiating internal aspects of the conflict and that it is impractical, due to the fact that combatants would need to classify the conflict before attacking in order to know which rules apply to him or her.<sup>108</sup> As a result, 'a number of authorities have preferred to apply the full body of international humanitarian law to an entire territory that contains multiple conflicts of

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<sup>102</sup> Sassòli, Bouvier & Quintin op cit (n24) part 1 chap 2 at 21-22.

<sup>103</sup> Ibid part 1 chap 2 at 21-22.

<sup>104</sup> ICTY *Prosecutor v Duško Tadić*, Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, Appeals Chamber (2 October 1995) (hereafter *Tadić Jurisdiction*) at para 72.

<sup>105</sup> JG Stewart 'Towards a single definition of armed conflict in international humanitarian law: A critique of internationalized armed conflict' (2003) 85 *International Review of the Red Cross* 333.

<sup>106</sup> Ibid.

<sup>107</sup> Human Rights Watch *Up in Flames* op cit (n1) 27.

<sup>108</sup> Stewart op cit (n105) 333-334.

international and internal origin.’<sup>109</sup> They all advocate for a ‘blanket classification of [s]tate territories containing international and internal armed conflict.’<sup>110</sup> This dissertation focuses on violations of the rules of international humanitarian law, and since the rules which are the object of this dissertation exist for both conflicts (as can be seen in section III.D), and that therefore the classification will not affect the conclusions made, this dissertation will not delve further on this point. Nonetheless, the threshold to satisfy the requirements of an armed conflict in both international armed conflicts (IACs) and NIACs will be examined. This way, the dissertation will show that regardless of the approach taken, international humanitarian law applies.

According to the Geneva Conventions and Protocol 1,<sup>111</sup> an IAC exists where: there is a case of declared war; there is a resort to armed forces between two States (or more); there is a partial or total occupation of a state;<sup>112</sup> or ‘peoples are fighting against colonial domination and alien occupation and against racist régimes in the exercise of their right of self-determination’.<sup>113</sup> Furthermore, according to established jurisprudence ‘it may become international (or, depending upon the [approach taken] be international in character alongside a [NIAC]) if [...] another [s]tate intervenes in that conflict through its troops, or alternatively if [...] some of the participants in the internal armed conflict act on behalf of that other [s]tate.’<sup>114</sup> In the case of NIACs, the threshold is much higher and varies depending on whether the rules one is trying to apply are customary or not. For rules of a customary nature, the accepted threshold set out by established jurisprudence<sup>115</sup>, is one of ‘protracted armed violence between governmental authorities and organized armed groups or between such groups within a [s]tate’.<sup>116</sup> The threshold to apply in situations where the rules applied are not customary, is slightly higher still.<sup>117</sup> However, since all of the rules which will be

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<sup>109</sup> Stewart op cit (n105) 334.

<sup>110</sup> Ibid.

<sup>111</sup> Both Georgia and Russia are parties to these Conventions.

<sup>112</sup> Article 2 common Geneva Conventions of 12 August 1949.

<sup>113</sup> Article 1 and 96(3) Protocol 1.

<sup>114</sup> *Tadić Appeal* supra (n101) at para 84; C Byron ‘Armed conflicts: International or non-international’ (2001) 6 *Journal of Conflict and Security Law* 81.

<sup>115</sup> Sassòli, Bouvier & Quintin op cit (n24) part 1 chap 2 at 22.

<sup>116</sup> *Tadić jurisdiction* supra (n104) at para 70; Sassòli, Bouvier & Quintin op cit (n24) part 1 chap 2 at 22.

<sup>117</sup> According to art 1 Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of Non-International Armed Conflicts of 8 June 1977 (hereafter Protocol 2): The armed violence must ‘take place in the territory of a High Contracting Party between its armed

analysed are also part of customary international humanitarian law (as will be established in section III.D), the customary threshold will be the only one pertinent in this dissertation.

This dissertation will first look at the outcome of the first approach mentioned above. In the conflict over South Ossetia, different attacks took place, some between Russian and Georgian state armed forces; as well as others between Georgian state armed forces and South-Ossetian non-state forces, including militia.<sup>118</sup> It is important to assert that according to Human Rights Watch's investigations, these non-state actors fulfil the criteria set out by the International Committee of the Red Cross (hereafter ICRC) commentary of the Geneva Conventions in order to be considered a belligerent in an NIAC and to therefore be bound by international humanitarian law; namely to possess 'an organized military force, an authority responsible for its acts, acting within a determinate territory and having the means of respecting and ensuring respect for the Convention.'<sup>119</sup> It is undeniable that the hostilities analysed in this case study fulfil both thresholds of armed conflicts. Indeed, it is clear from the facts mentioned in section II that in the case of attacks between Russian and Georgian state forces, there was clearly a resort to armed forces between two states; and that with regard to attacks involving Georgian forces and South Ossetian non-state forces, the threshold of protracted armed violence is also met.<sup>120</sup> This was also the conclusion of the report conducted under Human Rights Watch.<sup>121</sup> Consequently, according to the first method of classification, attacks between the Russian and Georgian armed forces should be regulated by international humanitarian law regarding IACs; while the law governing NIACs should apply to the hostilities between Georgian state armed forces and South-Ossetian non-state forces, since South Ossetia is recognised as part of Georgia.<sup>122</sup> On the other hand, if the second approach is to be implemented, the

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forces and dissident armed forces or other organized armed groups which, under responsible command, exercise such control over a part of its territory as to enable them to carry out sustained and concerted military operations and to implement this Protocol'. Riots, sporadic acts of violence, as well as armed conflicts conducted between non-state actors are also excluded from its material field of application.

<sup>118</sup> Human Rights Watch *Up in Flames* op cit (n1).

<sup>119</sup> JS Pictet (gen ed) *Commentary: IV Geneva Convention Relative to the Protection of Civilian Persons in Time of War* (1958) 35; Human Rights Watch *Up in Flames* op cit (n1) 28.

<sup>120</sup> Human Rights Watch *Up in Flames* op cit (n1) 5-11.

<sup>121</sup> *Ibid* at 27-28.

<sup>122</sup> *Ibid* at 2 and 9.

involvement of the Russian troops would have sufficed to classify the conflict as international and for the rules governing IACs to apply to all the attacks occurring in South Ossetia and Georgia, regardless of whether Russian forces were involved in the particular attack.<sup>123</sup>

## **B. National liberation conflicts**

There are also arguments to classify this armed conflict as one of national liberation. Reasonings include the fact that South Ossetians, with the help of Russia, were trying to emancipate themselves from Georgia, using their right of self-determination, while Georgia was wishing to keep its territorial integrity.<sup>124</sup> This desire to emancipate is evidenced by South Ossetia's declaration of independence in 1992.<sup>125</sup> It is also undeniable that the hostilities were strongly based on ethnicity.<sup>126</sup> These considerations are also relevant in *jus in bello*, as conflicts of national liberation are classified as IACs.<sup>127</sup> However, according to the textual interpretation of this provision, as well as the commentary of Protocol 1, this article limits its application to scenarios of 'colonial domination', 'alien occupation' and 'racist régimes'.<sup>128</sup> 'Alien occupation' denotes 'cases of partial or total occupation of a territory which has not yet been fully formed as a [s]tate', and does not include situations when a part of a territory is occupied by another state.<sup>129</sup> It is therefore difficult to classify the conflict over South Ossetia into this category. Furthermore, according to Aldrich, the polemical terms in this article render the provision practically a dead letter in our day and age.<sup>130</sup> He emphasises the fact that Protocol 1 'never has been, and most certainly never will be, applicable to a war of national

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<sup>123</sup> *Tadić Appeal* supra (n101) at para 84; Human Rights Watch *Up in Flames* op cit (n1) 5.

<sup>124</sup> Human Rights Watch *Up in Flames* op cit (n1) 16-20.

<sup>125</sup> Oxford Public International Law, available at <http://opil.ouplaw.com/view/10.1093/law:epil/9780199231690/law-9780199231690-e2068>, accessed on 25 February 2016.

<sup>126</sup> Human Rights Watch *Up in Flames* op cit (n1) 3 and 16-22.

<sup>127</sup> Article 1(4) Protocol 1; GH Aldrich 'The laws of war on land' (2000) 94 *American Journal of International Law* 45.

<sup>128</sup> Article 1(4) Protocol 1; Aldrich op cit (n127) 45; Y Sandoz, C Swinarski & B Zimmermann *Commentary on the Additional Protocols of 8 June 1977 to the Geneva Conventions of 12 August 1949* (1987) (hereafter *Commentary Additional Protocols*) 54-55.

<sup>129</sup> *Commentary Additional Protocols* op cit (n128) 54.

<sup>130</sup> Aldrich op cit (n127) 45.

liberation' through the application of art 1(4) Protocol 1.<sup>131</sup> Furthermore, as will be elucidated below in section III.D, the potential classification of this conflict as one of national liberation is rather obsolete *in casu* due to the fact that the rules which will be analysed, apply equally to both IACs and NIACs.

### C. Occupied territories

Moreover, Russian troops entered, placed under their authority, and exercised effective control over certain areas of South Ossetia and Georgia without the consent of Georgia.<sup>132</sup> Consequently, international humanitarian rules concerning occupied territory will apply for those areas.<sup>133</sup> In the context of this dissertation the fact that certain areas were occupied is of little importance for three reasons. Firstly and most importantly, the attacks analysed in this dissertation occurred in cities and villages that had not yet been occupied.<sup>134</sup> Secondly, this dissertation focuses on the use and choice of weapons, and the violations of humanitarian law which these aspects entail, namely the principles of discrimination and proportionality, and the prohibition on superfluous harm. The rules which concern exclusively situations of occupation<sup>135</sup> are consequently not covered by the scope of this dissertation. Thirdly, the threshold of 'partial or total occupation of the territory' mentioned in art 2 common Geneva Conventions whose effect is to make the rules governing IACs applicable, only refers to cases where 'the occupation has taken place [...] without hostilities'.<sup>136</sup> It does not refer to situations like the one *in casu* where the threshold which elevates hostilities

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<sup>131</sup> Aldrich op cit (n127) 45-46.

<sup>132</sup> Human Rights Watch *Up in Flames* op cit (n1) 9, 25 and 123.

<sup>133</sup> Article 42 Hague Regulations; Section 3 Geneva Convention IV Relative to the Protection of Civilian Persons in Time of War of 12 August 1949 (hereafter Geneva Convention IV).

<sup>134</sup> Human Rights Watch *Up in Flames* op cit (n1) 9, 23, 25, 66, 94, 111 and 123: Russian forces moved towards Gori city and started occupying it, as well as the surrounding villages, on the 12th of August. The exact time of its occupation is contested. It is therefore likely that the attacks on Gori city by Russia using the Iskander-M SS-26 which occurred in the morning of the 12th of August, took place in a non-occupied territory. Concerning the attack on the school in Gori city by Russia on the morning of the 9th of August, it clearly did not occur in an occupied territory. Similarly, the attack by Georgia using M85 submunitions in Gori district villages was launched in the afternoon of the 9th of August. As for the attacks by Georgia using BM-21 Grads during the night between the 7th and 8th of August on Tskhinvali, this area only became occupied the 10th of August.

<sup>135</sup> Section 3 Geneva Convention IV.

<sup>136</sup> *Commentary IV Geneva Convention* op cit (n119) 21.

to the status of an IAC have already been reached due to a resort to armed forces.<sup>137</sup> Even if one is to apply the first approach to classifying a conflict mentioned in section III.A which states that in one conflict, different laws can apply to different attacks, the provisions analysed in this dissertation, which cover the principles aforementioned, apply equally to both types of conflicts (as will be seen further in section III.D).

#### **D. International humanitarian law, and its regulation of the choice and use of weapons**

As a result of the thresholds of an ‘armed conflict’ being met, international humanitarian law applies. It will bind state armed forces and non-state actors such as rebel groups and militias (given certain conditions are fulfilled, which are *in casu* fulfilled as mentioned above in section III.A).<sup>138</sup> This law can be found in established customary international law, in the texts of the Geneva Conventions as well as its Additional Protocols, the Hague Conventions and Regulations, and several other specific conventions. The laws concerning the means and methods of warfare have historically been regulated by Hague Law.<sup>139</sup> The Geneva Conventions were themselves more focused on the protection of combatants which have been put *hors de combat*, and civilians. This being said, with the introduction of Protocol 1, means and methods of warfare were also treated in Geneva Law. Besides from the rudimentary obligations found in art 3 common Geneva Conventions and Protocol 2 (only 15 articles which actually regulate the conduct of hostilities in NIACs), all of these rules predominantly concern IACs. Treaty law regarding NIACs is therefore skeletal as opposed to the detailed body of law governing IACs.

Georgia and Russia are both parties to Protocol 1. This Protocol regulates an ample part of the problems relating to the use and choice of weapons in IACs. It is also important to note that who started, the conflict and the reasoning behind it, has

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<sup>137</sup> *Commentary IV Geneva Convention* op cit (n119) 21.

<sup>138</sup> JM Henckaerts & L Doswald-Beck *Customary International Humanitarian Law* v1 (2005) 497-498.

<sup>139</sup> *Advisory Opinion on the Legality of the Threat or Use of Nuclear Weapons* supra (n25) at para 75.

no bearing on each party's obligation to respect norms of international humanitarian law.<sup>140</sup> These norms are not concerned with the *jus ad bellum* and apply equally to both parties.<sup>141</sup>

As seen above, a different set of rules applies to IACs and NIACs, and this is therefore another critical reason to classify the conflict before analysing potential violations of humanitarian law. However, this significance has been diminished, particularly in cases which involve violations akin to the ones *in casu*. Indeed, according to a comprehensive study conducted by the ICRC based on ten years of research,<sup>142</sup> 'most of the rules on the conduct of hostilities – initially designed to apply solely to [IACs] – are also applicable as customary rules in [NIACs]'.<sup>143</sup> Furthermore, jurisprudence as well as leading publicists also recognise that customary international humanitarian rules governing NIACs include the protection of civilians against indiscriminate attacks as well as the 'prohibition of means of warfare proscribed in [IACs] and ban of certain methods of conducting hostilities'.<sup>144</sup> As a result, the provisions of Protocol 1 are now widely accepted to be reflective of customary international law applicable to both conflicts.<sup>145</sup> The same can unfortunately not be said of the rules contained only in Hague law. A large part remains only applicable to IACs and has not yet become customary.<sup>146</sup> In the examination of the choice and use of weapons by Georgia and Russia in the conflict over South Ossetia, the rules of international humanitarian law which are relevant are the ones concerning the prohibition of indiscriminate attacks, the principle of proportionality and the prohibition of causing superfluous harm.<sup>147</sup> All of these rules which will be analysed in this dissertation are simultaneously also a rule of customary

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<sup>140</sup> Sassòli, Bouvier & Quintin op cit (n24) part 1 chap 2 at 14.

<sup>141</sup> Ibid.

<sup>142</sup> Henckaerts & Doswald-Beck op cit (n138) .

<sup>143</sup> Sassòli, Bouvier & Quintin op cit (n24) part 1 chap 1 at 13.

<sup>144</sup> *Tadić Jurisdiction* supra (n104) at para 127; Byron op cit (n114) 64; D Akande 'Classification of armed conflicts: Relevant legal aspects' in Elizabeth Wilmshurst (ed) *International Law and the Classification of Conflicts* (2012) 35; R Kolb & R Hyde *An Introduction to the International Law of Armed Conflicts* (2008) 69.

<sup>145</sup> Henckaerts & Doswald-Beck op cit (n138) ; Aldrich op cit (n127) 53; *Tadić jurisdiction* supra (n104) at para 127.

<sup>146</sup> The difference of the rules applicable in IACs and NIACs in Hague Law can be seen in the specific weapons proscribed and the different lists of what constitutes war crimes in each conflict according to art 8(2) Rome Statute of the International Criminal Court of 17 July 1998. There are far fewer Hague law crimes for NIACs.

<sup>147</sup> Article 35(2), 51(4), 51(5) and 57(2)(a)(ii) Protocol 1.

international humanitarian law that applies to IACs and NIACs;<sup>148</sup> the classification of the conflict and the difference in treaty law will therefore not have an impact in their analyses. In order to give the most compelling case for each provision, the international customary rule counterpart, as codified by the ICRC, will also be presented.

Prior to the analysis of the rules governing the choice and use of weapons, it is important to note that weapons only become illegal once they are: prohibited by conventions that bind the parties, by international customary law, or if their use violates the principles of international humanitarian law. *In casu*, there is no convention applicable which prohibits the weapons which were employed. The Convention on Cluster Munitions is still not ratified by Georgia nor Russia. As mentioned in section I.D, this convention does not codify customary international law, nor have the provisions contained in it, including the one prohibiting the use of cluster munitions, become customary.<sup>149</sup> These rules therefore do not bind Georgia nor Russia. Additionally, Protocol 5 on Explosive Remnants of War is solely aimed at the precautions needed to be undertaken by the parties following the attacks. As for Protocol 1 on Non-Detectable Fragments by X Rays, it targets glass or plastic fragments.<sup>150</sup> The fragments produced by the weapons which will be analysed are made from metal and are big enough to be detected by the naked eye.<sup>151</sup> These two Protocols will therefore not find an application *in casu*.

## SECTION IV: PRINCIPLE OF DISCRIMINATION

### A. Violation concerning the choice of the weapon:

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<sup>148</sup> Henckaerts & Doswald-Beck op cit (n138) 37-50, 56-58, 237-244, 568-603.

<sup>149</sup> Herthel op cit (n8) 269.

<sup>150</sup> U.C. Jha 'Prohibited weapons in armed conflicts' (2004) 4 *Indian Society of International Law Year Book of International Humanitarian and Refugee Law* 62.

<sup>151</sup> Human Rights Watch *A Dying Practice: Use of Cluster Munitions by Russia and Georgia in August 2008* op cit (n95) 26 and 42.

1. *Article 51(4)(b) Protocol 1 and rule 11 and 12 of the ICRC's codification of customary international humanitarian law, applicable to both IACs and NIACs:*<sup>152</sup> *'Indiscriminate attacks are prohibited. Indiscriminate attacks are: [...] (b) those which employ a [...] means of combat which cannot be directed at a specific military objective'.*

It is important to note, as a preliminary remark, that the term 'means of combat' used throughout Protocol 1 signifies 'weapons'.<sup>153</sup> The existence of weapons that are, by their nature, inherently indiscriminate is recognised by some academic scholars and by some countries.<sup>154</sup> An example of this can be found in the Military Manual of Germany, which states that the use of flying bombs (for example rockets) is not admissible when they cannot be aimed precisely enough and that consequently the total effect of the weapon reaches the civilian population.<sup>155</sup> According to Aldrich, examples of such weapons include 'recent missiles like the Iraqi SCUDs that could be aimed at a very large area of land but not at any specific target within that area'.<sup>156</sup> It is also important to note that according to the delegates in charge of drafting Protocol 1, the weapons primarily prohibited by this provision are missiles with no accurate aim.<sup>157</sup> Conversely, another stance is the one of Blix, who supports the less nuanced claim that no weapon can be inherently indiscriminate.<sup>158</sup> The jurisprudence of the ICJ supports this point of view. In its Advisory Opinion on the Legality of the Threat or Use of Nuclear Weapons, the Court refused to concede that nuclear weapons were inherently indiscriminate.<sup>159</sup> It declared that 'the Court considers that it does not have sufficient elements to enable it to conclude with certainty that the use of nuclear weapons would necessarily be at variance with the principles and rules of law applicable in armed conflict in any circumstance'.<sup>160</sup> Similarly, it could not claim that 'the recourse to nuclear weapons would be illegal in

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<sup>152</sup> Henckaerts & Doswald-Beck op cit (n138) 37-43.

<sup>153</sup> *Commentary Additional Protocols* op cit (n128) 621.

<sup>154</sup> A Breitegger *Cluster Munitions and International Law: Disarmament with a Human Face* (2012) 43.

<sup>155</sup> H Blix 'Moyens et méthodes de combat' in Institut Henry Dunant (eds) *Les Dimensions Internationales du Droit Humanitaire* (1986) 175.

<sup>156</sup> Aldrich op cit (n127) 51.

<sup>157</sup> *Commentary Additional Protocols* op cit (n128) 621.

<sup>158</sup> Blix op cit (n155) 175.

<sup>159</sup> *Advisory Opinion on the Legality of the Threat or Use of Nuclear Weapons* supra (n25) at para 95.

<sup>160</sup> *Ibid.*

any circumstance owing to their inherent and total incompatibility with the law applicable in armed conflict.’<sup>161</sup> If one is to follow this stance, it emanates from this reasoning that if this conclusion can be drawn for nuclear weapons, which have a much wider impact, both in time and space than multiple rocket-launchers, cluster munitions and rockets; and are much harder, and almost impossible to use in a discriminate manner, this conclusion can *a fortiori* also apply to these weapons.

While according to Blix and the ICJ the weapons analysed in this dissertation would not be inherently indiscriminate, those are opinions and are not binding when applying the law.<sup>162</sup> Furthermore, they have been heavily contested. While these interpretations are to be kept in mind, in the next following part of this dissertation, conclusions to the other convincing arguments will be presented. They also require a more thorough analysis of the case in question. These are also the arguments made by the majority of scholars, and their interpretations are also ones which are coherent with the text and commentary of Protocol 1, which refers to weapons which are inherently indiscriminate.<sup>163</sup>

#### **α. Georgia’s attack using BM-21 Grad multiple rocket launchers on Tskhinvali and surrounding villages on the 7th and 8th of August**

In addition to the more general statements mentioned above with regard to this provision, it is of great importance to state that according to the jurisprudence of the European Court of Human Rights (hereafter ECtHR) in the case of *Isayeva v Russia*, the multiple rocket launcher BM-21 Grad, is an inherently indiscriminate weapon.<sup>164</sup>

In the case in question, Georgia used truck-mounted BM-21 Grad multiple rocket launchers.<sup>165</sup> However, the exact type of the rockets put inside the launchers is

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<sup>161</sup> *Advisory Opinion on the Legality of the Threat or Use of Nuclear Weapons* supra (n25) at para 95.

<sup>162</sup> Bennett & Strug op cit (n60) 23; art 59 Statute of the International Court of Justice of 18 April 1946.

<sup>163</sup> *Commentary Additional Protocols* op cit (n128) 621.

<sup>164</sup> ECtHR *Isayeva v Russia* (24 February 2005) at para 191.

<sup>165</sup> Human Rights Watch *Up in Flames* op cit (n1) 23.

not mentioned in the report by Human Rights Watch. In any case, it is clear that it did not have cluster, incendiary or chemical warheads, but were most likely 122-mm standard Grad rockets.<sup>166</sup> These rocket launchers are designed to propel 40 rockets in 20 seconds.<sup>167</sup> The margin of error probable for this type of weapon is greater than 90 meters.<sup>168</sup> The consequences of this margin of error are amplified by the fact that once those rockets are launched, they cover anywhere from 0.8 to 1 hectare.<sup>169</sup> Additionally, the Independent Fact-Finding Mission on the Conflict in Georgia (hereafter IFFMCG), established by the Council of the European Union, has found these weapons to have ‘uncontrollable effects’.<sup>170</sup> These elements combined lead to the conclusion that this weapon was designed to cover large surfaces, without concerns regarding precision. Accordingly, the weapon destroyed many civilian buildings as well as entire streets and killed 34 people, a majority of them being civilians.<sup>171</sup>

In conclusion, the multiple rocket launcher BM-21 Grad is a weapon which cannot be directed at a specific military objective. Therefore by choosing this weapon, Georgia violated this aspect of the principle of discrimination concerning the choice of the weapon.

## **β. Cluster munitions**

Accruing to what has already been stated concerning this article, it is argued that cluster munitions leaving fields of duds ‘incapable of distinguishing between combatants and noncombatants’ are, similarly to landmines, indiscriminate.<sup>172</sup>

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<sup>166</sup> Military Today, available at [http://www.military-today.com/artillery/bm21u\\_grad.htm](http://www.military-today.com/artillery/bm21u_grad.htm), accessed on 10 September 2015; Human Rights Watch *Up in Flames* op cit (n1) 24 and 42-46.

<sup>167</sup> Human Rights Watch *Up in Flames* op cit (n1) 23.

<sup>168</sup> Military Today, available at [http://www.military-today.com/artillery/bm21u\\_grad.htm](http://www.military-today.com/artillery/bm21u_grad.htm), accessed on 10 September 2015.

<sup>169</sup> Military Today, available at <http://www.military-today.com/artillery/grad.htm>, accessed on 20 June 2015.

<sup>170</sup> IFFMCG *Report v1* (2009) 28, available at [http://news.bbc.co.uk/2/shared/bsp/hi/pdfs/30\\_09\\_09\\_iffmhc\\_report.pdf](http://news.bbc.co.uk/2/shared/bsp/hi/pdfs/30_09_09_iffmhc_report.pdf), accessed on 13 July 2015.

<sup>171</sup> Human Rights Watch *Up in Flames* op cit (n1) 41-50; Public Commission for Investigating War Crimes in South Ossetia ‘List of the killed residents of South Ossetia’, available at <http://www.osetinfo.ru/spisok>, accessed on 10 August 2015.

<sup>172</sup> Herthel op cit (n8) 249.

Additionally, the ICTY judged that the cluster munition missile M-87 Orkan was an inherently indiscriminate weapon.<sup>173</sup> The characteristics of the M-87s, which the Tribunal considered in order to come to this conclusion are: not only that they are unguided and non-precise missiles with a margin of error of 80m to 100m, but the area of the dispersion of the submunitions is approximately 2 hectares.<sup>174</sup> Authors supporting the legality of cluster munitions suggest that they are not all *a priori* inherently indiscriminate.<sup>175</sup> Accordingly, in the past it has been proven that it is possible for cluster munitions to be used precisely in order to destroy small, determined and specific military targets.<sup>176</sup> Additionally, it has been argued that Military planners are able to, and have in the past, directed certain cluster munitions at military objectives.<sup>177</sup> This argument is strengthened by the fact that ‘improvements in technology are making cluster munitions even more accurate’ thus reducing the possibility of them accidentally hitting civilians.<sup>178</sup> Advocates of this school of thought firmly assert that ‘it is impossible to objectively state that [all] cluster munitions are incapable of being directed at a military objective.’<sup>179</sup>

**γ. Attacks by Georgia on August 9th using M85 submunitions carried by Mk-4 cluster munition rockets**

While the focus of the analysis of this attack is on the cluster munitions and not the multiple rocket launcher (as a similar analysis has been carried out in section IV.A.1.α for the use of the BM-21s), in order for the examination of the provisions to be complete, the fact that these weapons were propelled by a multiple rocket launcher will be taken into consideration. *In casu*, the cluster munitions were fired by a multiple rocket launcher Gradlar 160<sup>180</sup> capable of firing 26 non-guided Mk-4 cluster

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<sup>173</sup> *Prosecutor v Milan Martić* supra (n67) at para 463.

<sup>174</sup> *Ibid* para 462.

<sup>175</sup> Breitegger op cit (n154) 44. An example of this is their use during the Allied Forces Operation in 1999.

<sup>176</sup> *Ibid*.

<sup>177</sup> Herthel op cit (n8) 264.

<sup>178</sup> *Ibid*.

<sup>179</sup> *Ibid*.

<sup>180</sup> Human Rights Watch *Up in Flames* op cit (n1) 26.

munition rockets, each containing 104 M85 submunitions in less than a minute.<sup>181</sup> It can therefore be inferred that each individual cluster munition rocket was therefore not precise or accurate and could not be aimed at a specific military target, but simply towards a large surface area. Those weapons with no accurate aim are exactly the ones which are, according to the delegates in charge of drafting Protocol 1, targeted by this provision.<sup>182</sup> Moreover, the argument that Georgia is advocating, that the villages in the surroundings of Gori district were not supposed to be hit,<sup>183</sup> can be used against them in order to show that the weapon they used has a high margin of error. Combining this with the fact that M85 submunitions have an area of impact which can vary from 100m radius to 3 hectares<sup>184</sup> and was therefore designed to affect large areas, one can conclude that the Mk-4s containing M85 submunitions fired by a multiple rocket launcher are inherently indiscriminate. This reasoning agrees with the jurisprudence of the ICTY.<sup>185</sup> Additionally, these submunitions have some of the highest dud rates.<sup>186</sup> Over 10 per cent of the submunitions do not explode straight away.<sup>187</sup> As a result of this weapon with indiscriminate effects, entire towns and fields were bombed, causing at least 6 civilian deaths and more injured.<sup>188</sup> Fields of duds were also left after the attack in such a way that at least 3 civilians were killed by them and 6 wounded.<sup>189</sup>

When applying these facts to the interpretation and application given to the provision, it is clear that Georgia violated this provision.

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<sup>181</sup> Human Rights Watch *A Dying Practice: Use of Cluster Munitions by Russia and Georgia in August 2008* op cit (n95) 26; Army Guide, available at <http://www.army-guide.com/eng/product3280.html>, accessed on 23 January 2016.

<sup>182</sup> *Commentary Additional Protocols* op cit (n128) 621.

<sup>183</sup> Human Rights Watch *Up in Flames* op cit (n1) 66.

<sup>184</sup> C King Associates Ltd, Norwegian Defence Research Establishment & Norwegian People's Aid *M85: An Analysis of Reliability* (2007) 11, available at [www.npaid.org/content/download/1142/10896/file/m85.pdf](http://www.npaid.org/content/download/1142/10896/file/m85.pdf), accessed on 1 September 2015.

<sup>185</sup> *Prosecutor v Milan Martić* supra (n67) at para 463.

<sup>186</sup> C King Associates Ltd, Norwegian Defence Research Establishment & Norwegian People's Aid op cit (n184) 15.

<sup>187</sup> *Ibid.*

<sup>188</sup> Human Rights Watch *Up in Flames* op cit (n1) 64-67.

<sup>189</sup> *Ibid* at 67-69.

#### δ. Russia's attack on August 12th on Gori city with an Iskander-M SS-26 cluster munition missile

It is important to note that it is unknown by Human Rights Watch which submunitions were used in this missile.<sup>190</sup> Conclusions can therefore be drawn about submunitions in general, about the missile that was carrying them and about their use, but not specifically about the submunitions used.

The cluster munition weapon used was an Iskander-M SS-26.<sup>191</sup> This is a short-range missile which is fired from a truck.<sup>192</sup> It was conceived in order to improve the precision of missiles containing cluster munitions and is recognised as the 'most advanced missile of its kind.'<sup>193</sup> This missile is guided, and 'targets can be found not only by satellite and aircraft but also by a conventional intelligence centre.'<sup>194</sup> Adding to the precision of the missile, the margin of error that it allows is only one of 5 to 7 meters.<sup>195</sup> Moreover, this missile was designed to hit precise targets, of small sizes, as well as the ones in movement.<sup>196</sup> Additionally, this weapon has been created in order to allow the least possible malfunctions, this includes a limitation to the existence of explosive remains as a result of the missile (the fact that no duds were reported by Human Rights Watch demonstrates that this weapon has a seemingly low dud rate).<sup>197</sup> All of these elements lead to the conclusion that the Iskander-M SS-26 used in Gori city is a weapon which can be used in a way that the civilian population isn't reached, and that it is designed to be directed towards specific military objectives and to limit itself to their destruction. In this attack, while

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<sup>190</sup> Human Rights Watch *A Dying Practice* op cit (n95) 2.

<sup>191</sup> Human Rights Watch *Up in Flames* op cit (n1) 111.

<sup>192</sup> Military Today, available at <http://www.military-today.com/missiles/iskander.htm>, accessed on 12 January 2016.

<sup>193</sup> Military Today, available at <http://www.military-today.com/missiles/iskander.htm>, accessed on 12 January 2016.

<sup>194</sup> J Deák 'Technical parameters of the 9K720 Iskander (SS-26 Stone)' (2008) 7 *Academic and Applied Research in Military Science* 708-709.

<sup>195</sup> Military Today, available at <http://www.military-today.com/missiles/iskander.htm>, accessed on 12 January 2016.

<sup>196</sup> Deák op cit (n194) 708; Army Technology, available at <http://www.army-technology.com/projects/iksander-system/>, accessed on 26 January 2015.

<sup>197</sup> Deák op cit (n194) 708; Human Rights Watch *Up in Flames* op cit (n1) 111-113.

unfortunately hitting some civilians, the weapon hit the principal command center for Georgian military operation was present.<sup>198</sup>

To conclude, due to the characteristic of the Iskander-M SS-26, by choosing this weapon, Russia did not violate this provision.

**2. Article 51(4)(c) Protocol 1 and rule 11 and 12 of the ICRC's codification of customary international humanitarian law, applicable to both IACs and NIACs:<sup>199</sup>**  
**'Indiscriminate attacks are prohibited. Indiscriminate attacks are: [...] (c) those which employ a [...] means of combat the effects of which cannot be limited as required by this Protocol; and consequently, in each such case, are of a nature to strike military objectives and civilians or civilian objects without distinction.'**

In the opinion of respected scholars, including Breitegger, this prohibition addresses weapons and means of war, which, even if their conception allows them in principle to be directed at a specific military objective, become uncontrollable in time or in space, such as biological weapons.<sup>200</sup> According to the commentary of Protocol 1, this prohibition refers, *inter alia*, to anti-personnel mines that, in times of conflict and even once the hostilities are terminated, kill and injure human beings, regardless of their combatant or civilian status.<sup>201</sup> An inherent problem with cluster munition weapons is the probability that some submunitions do not explode immediately, and thus kill after the attack has ceased. However, it has been argued that this prohibition is not violated in situations where a weapon, even if it ends up having indiscriminate effects, was designed in order to be able to be discriminate.<sup>202</sup>

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<sup>198</sup> Human Rights Watch *Up in Flames* op cit (n1) 104, 111-113; CNN, available at <http://ireport.cnn.com/docs/DOC-8342>, accessed on 12 December 2015.

<sup>199</sup> Henckaerts & Doswald-Beck op cit (n138) 37-43.

<sup>200</sup> Breitegger op cit (n154) 45.

<sup>201</sup> *Commentary Additional Protocols* op cit (n128) 622.

<sup>202</sup> Breitegger op cit (n154) 46.

**α. Russia's attack on August 12th on Gori city with an Iskander-M SS-26 cluster munition missile**

The weapon used by Russia was a cluster munition missile Iskander-M SS-26.<sup>203</sup> The submunitions contained in the missile were therefore designed to explode during the attack.<sup>204</sup> In that way, they cannot be compared to landmines, who do not have the functionality to explode straight away but can remain unexploded for a significant amount of time. Moreover, this weapon was designed in a way to reduce the risk of explosive remains and therefore limits the damage inherent to cluster munitions.<sup>205</sup> Factual elements, such as the fact that their presence was not reported,<sup>206</sup> support the argument that the weapon is not one which is inherently indiscriminate in the sense of this provision.

Thus, the choice of this weapon by Russia does not violate this prohibition.

**B. Violations concerning the use made of the weapon:**

**1. *Article 51(4)(a) Protocol 1 and rule 11 and 12 of the ICRC's codification of customary international humanitarian law, applicable to both IACs and NIACs:*<sup>207</sup> *'Indiscriminate attacks are prohibited. Indiscriminate attacks are: (a) those which are not directed at a specific military objective'.***

As opposed to the previous provisions analysed which concerned the choice of the weapon, this provision refers to the intentional use made of the weapon. By prohibiting attacks not directed at a specific military objective, art 51(4)(a) Protocol 1 refers to a notion defined in art 52(2) Protocol 1. This same definition has also been established in customary international humanitarian law applicable to both IACs and NIACs.<sup>208</sup> According to this article, military objectives are defined as 'objects which

<sup>203</sup> Human Rights Watch *Up in Flames* op cit (n1) 111.

<sup>204</sup> Deák op cit (n194) 705.

<sup>205</sup> Ibid at 708.

<sup>206</sup> Human Rights Watch *Up in Flames* op cit (n1) 111-113.

<sup>207</sup> Henckaerts & Doswald-Beck op cit (n138) 37-43.

<sup>208</sup> Ibid at 29-32.

by their nature, location, purpose or use make an effective contribution to military action and whose total or partial destruction, capture or neutralization, in the circumstances ruling at the time, offers a definite military advantage'.<sup>209</sup> According to the writing of leading publicists, 'location' acknowledges that 'an object may be a military objective simply because it is situated in an area that is a legitimate target', and as long as the second condition is also fulfilled.<sup>210</sup> Concerning the word 'use', it alludes to 'the current function of the object.'<sup>211</sup> As for an object whose 'nature' confers on it the status of a military objective, this pertains to an object's 'intrinsic character'.<sup>212</sup> It is also critical to emphasise that these conditions must be fulfilled 'in the circumstances ruling at the time'. The *ratio legis* behind this condition is to avoid a conclusion that each object, could, *in abstracto*, 'in the wake of possible future developments, e.g., if used by enemy troops, become a military objective.'<sup>213</sup> An exception to this condition is made for objects which by their 'purpose' contribute to military action. Indeed, this notion refers to the future use of the object that the enemy envisages to make, basing himself or herself on a reasonable presumption.<sup>214</sup> Worth noting is that even though the definition of a military objective provided by art 52(2) is limited to objects, combatants are also clearly military objectives.<sup>215</sup> The commentary of art 51 Protocol 1 specifies that the principal military objectives are: 'the armed forces, their members, installations, equipment and transports.'<sup>216</sup> Additionally, if an attack which was directed at a military objective, unfortunately causes casualties, it does not automatically make it indiscriminate and illegal.<sup>217</sup> However, the attack will have to respect the principle of proportionality. Furthermore, in case of doubt, an object which is usually dedicated to civilian purposes, are presumed not to be used in order to convey an effective contribution to military action.<sup>218</sup>

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<sup>209</sup> Article 52(2) Protocol 1.

<sup>210</sup> Sassòli, Bouvier & Quintin op cit (n24) part 1 chap 9 at 5.

<sup>211</sup> Ibid.

<sup>212</sup> Ibid part 1 chap 9 at 4.

<sup>213</sup> Ibid part 1 chap 9 at 5.

<sup>214</sup> Ibid.

<sup>215</sup> *Commentary Additional Protocols* op cit (n128) 635.

<sup>216</sup> Ibid at 620.

<sup>217</sup> Werle op cit (n23) 246.

<sup>218</sup> Article 52(3) Protocol 1; Henckaerts & Doswald-Beck op cit (n138) 34-36.

**α. Georgia's attack using BM-21 Grad multiple rocket launchers on Tskhinvali and surrounding villages on the 7th and 8th of August**

While it is true that there were several military objectives in these villages such as South Ossetian forces, their firing positions in Khetagurovo, and their general quarters installed in a few houses in Tskhinvali and neighbouring villages,<sup>219</sup> Georgia still had to respect the principle of discrimination. During the attack, Georgia shelled in an incessant manner the town of Tskhinvali and the surrounding villages with BM-21 Grads.<sup>220</sup> Moreover, it did so in an all-inclusive and extended manner which was not restricted to military objectives.<sup>221</sup> Furthermore, there was a significant loss in civilian lives,<sup>222</sup> and a large number of houses in the area were destroyed in consequence of the use of BM-21 Grads.<sup>223</sup> It is therefore undeniable that these attacks were not directed at specific military objectives, but in the contrary, against entire villages without making distinctions.

Therefore, it must be concluded that Georgia violated this provision.

**β. Attacks by Georgia on August 9th using M85 submunitions carried by Mk-4 cluster munition rockets:**

While Russian troops, equipment and armament by the Roki tunnel were bombarded, 9 villages in Gori district, where there were no Russian troops, were also hit by M85 submunitions contained in the 312 cluster munitions fired.<sup>224</sup> Furthermore, a large number of submunitions were found in crop fields with no military purpose.<sup>225</sup> The fact that Georgia argued (with no probative evidence) that

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<sup>219</sup> Human Rights Watch *Up in Flames* op cit (n1) 50.

<sup>220</sup> Ibid at 23, 41-46.

<sup>221</sup> Ibid at 41-46.

<sup>222</sup> It is established that during this attack, 34 people were killed and even more injured, a significant amount of them being civilians: Public Commission for Investigating War Crimes in South Ossetia 'List of the killed residents of South Ossetia', available at <http://www.osetinfo.ru/spisok>, accessed on 10 August 2015; Human Rights Watch *Up in Flames* op cit (n1) 46.

<sup>223</sup> Human Rights Watch *Up in Flames* op cit (n1) 41-50.

<sup>224</sup> Ibid at 64-66.

<sup>225</sup> Ibid at 64.

the towns surrounding Gori district were hit by accident<sup>226</sup> does not alter the reality that Georgia used this weapon in mass, and due to their large area of dispersion, over an extended territory.<sup>227</sup> This leads to the irrefutable assertion that these weapons were not directed at a specific and determined military objective.

Consequently, Georgia violated this facet of the principle of discrimination.

**γ. Russia's attack on August 12th on Gori city with an Iskander-M SS-26 cluster munition missile**

In the case of the attack by Russia on Gori city, it is true that 6 civilians were killed and approximately 24 were injured.<sup>228</sup> That being said, they were located by the principal command center for the Georgian military operation which was hit by the sole Iskander-M SS-26 missile fired.<sup>229</sup> There is no doubt that this command center falls under the definition of an object which by its nature and purpose conveys an effective contribution to the military action of the enemy, and whose destruction clearly offers a definite military advantage. Thus, by hitting the command center, Russia was targeting a military objective. However, it so happened that, according to witnesses, the last Georgian soldiers had left the city the previous night.<sup>230</sup> Nonetheless, it is likely that Russia was not aware of their departure. Arguments supporting the lack of awareness of Russia concerning the absence of the troops include: the fact that the attack took place in the morning<sup>231</sup>, and therefore just a few hours after the last soldiers had left the city; the military importance of Gori city; the presence of the principal command center<sup>232</sup>; and the fact that the Georgian Defense Minister had previously ordered the Georgian troops to withdraw themselves to the

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<sup>226</sup> Human Rights Watch *Up in Flames* op cit (n1) 66.

<sup>227</sup> C King Associates Ltd, Norwegian Defence Research Establishment & Norwegian People's Aid op cit (n184) 11.

<sup>228</sup> Human Rights Watch *Up in Flames* op cit (n1) 111.

<sup>229</sup> Human Rights Watch *A Dying Practice: Use of Cluster Munitions by Russia and Georgia in August 2008* op cit (n95) 25; CNN, available at <http://ireport.cnn.com/docs/DOC-83424>, accessed on 10 January 2016.

<sup>230</sup> Human Rights Watch *Up in Flames* op cit (n1) 112.

<sup>231</sup> *Ibid* at 111.

<sup>232</sup> *Ibid* at 112.

town of Gori.<sup>233</sup> Furthermore, even if Russia was aware that nobody had remained in the command center, its destruction remains *in casu* a concrete and precise military objective for Russia. It is in fact a reasonable assumption to make, given the nature of the object, that Georgia had the intention of using it to its military advantage in the near future. This defines an object that is by its ‘purpose’ a military objective. This ‘object’, by its nature and ‘envisaged future purpose’, therefore remains a military objective. The *ratio legis* behind this provision supports this statement. Accordingly, the principal center of command of the Georgian military operation is, by nature, the military objective *par excellence*.<sup>234</sup> The limitation covered by the terms ‘in the circumstances ruling at the time’ was not envisaged for this type of military objective, but for objects that are not usually associated with a military advantage.<sup>235</sup>

It can be concluded from the elements above that even though the attack unfortunately resulted in civilian casualties, by attacking the principal Georgian command center of military operations, Russia attacked a specific military objective. There is therefore no violation of this article.

#### **δ. Attack by Russia on August 9th on the school in Gori city:**

In addition to what has already been mentioned with regard to this provision, in the context of this specific attack it is crucial to note that even in situations where civilians or civilian objects are used to shield military objectives (which includes combatants), the latter will keep their status of ‘military objective’.<sup>236</sup> The same logic is also applied in scenarios where there is no intention from the shields or the party to protect the military objectives, but military objectives are nonetheless located in the midst of civilians, or close to a civilian object.<sup>237</sup> However, while in both situations their status allows for them to be legitimately attacked, the principle of proportionality will still need to be respected. There are, however, debates on how

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<sup>233</sup> Human Rights Watch *Up in Flames* op cit (n1) 24.

<sup>234</sup> *Commentary Additional Protocols* op cit (n128) 620.

<sup>235</sup> Sassòli, Bouvier & Quintin op cit (n24) part 1 chap 9 at 5.

<sup>236</sup> *Ibid* at part 1 chap 9 at 17.

<sup>237</sup> *Ibid* at part 1 chap 9 at 8.

this principle should apply in situations of human shields, this will be discussed in section V.A.1.ε.

The school in Gori city as well as the two buildings directly adjacent were hit by individual missiles fired by a plane, on the morning of the 9th of August.<sup>238</sup> Both buildings by the school were hit by one missile each, and it is unclear whether just one or a few missiles hit the school itself.<sup>239</sup> This dissertation will focus on the attack on the school as the other few strikes using seemingly precise missiles which hit other buildings were fired individually and they solely represent a problem of military objective and not one which requires an in depth analysis of the choice or use of weapons with regard to the principles of proportionality and discrimination. In this dissertation, it is inferred that the strikes fired were seemingly precise; this conclusion emanates from the fact that the military objective and the two buildings directly adjacent to it were hit.<sup>240</sup> Furthermore, the fact that the two buildings were hit could have also been due to recklessness on the part of the attacker and not due to the characteristics of the weapon. It is also deduced that the weapons have an apparently small area of coverage. This conclusion stems from the fact that although more than a hundred people were located at the school and its yard, none were killed by the strike which landed on it, and that the damage was limited to the buildings hit.<sup>241</sup> At the end of this section, after a thorough analysis of the attack directed solely on the school, I will conduct a brief analysis (due to the disparity of facts) on whether the conclusions are altered, if the strikes on the school and the two adjacent buildings are to be considered as a whole.

Approximately 100 Georgian military reservists were located inside the school or on its yard at the time of the attack.<sup>242</sup> These combatants constitute evidently legitimate military objectives. According to Human Rights Watch, it is additionally possible that the school was used for military purposes.<sup>243</sup> It would therefore become a legitimate military objective if Russia was aware of that fact.

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<sup>238</sup> Human Rights Watch *Up in Flames* op cit (n1) 94.

<sup>239</sup> Ibid.

<sup>240</sup> Ibid.

<sup>241</sup> Ibid.

<sup>242</sup> Ibid.

<sup>243</sup> Ibid.

Furthermore, as stated above in section IV.B.1.δ, the presence of the civilians does not make the school or the combatants located there lose their status of military objectives.

There was therefore at least one military objective, and conceivably two, one of which located inside the other. The attack by Russia was therefore aimed at a military objective, and therefore respected this provision.

**2. *Article 51(4)(b) Protocol I and rule 11 and 12 of the ICRC's codification of international humanitarian law applicable to both IACs and NIACs:*<sup>244</sup> *'Indiscriminate attacks are prohibited. Indiscriminate attacks are: [...] (b) those which employ a method [...] of combat which cannot be directed at a specific military objective'.***

This prohibition is aimed at methods of combat which have no regard towards the respect of the principle of discrimination and where the weapons are used in such a way that the principle could not be respected.<sup>245</sup> Looking at jurisprudence on the matter, a judgment from the ICTY affirmed that the fact of throwing a few shells randomly in an inhabited zone, without taking 'feasible precautions to verify the target of the attack', equated to a method of attack which cannot be directed at a specific military objective.<sup>246</sup> Agreeing with this jurisprudence, Breitegger asserts that the elements to take into consideration in order to analyse whether the use made of a weapon could not have been aimed at a determined military objective are: the population in the town or village, the number of missiles fired, their precision, and the surface which they cover.<sup>247</sup> Typical scenarios which would violate this prohibition are therefore attacks in populated towns with weapons which have a high margin of error and/or an important surface of impact; and that are either fired without targeting a specific place or used in high numbers.<sup>248</sup>

<sup>244</sup> Henckaerts & Doswald-Beck op cit (n138) 37-43.

<sup>245</sup> *Commentary Additional Protocols* op cit (n128) 620-621.

<sup>246</sup> *Prosecutor v Stanislav Galić* supra (n67) at para 387.

<sup>247</sup> Breitegger op cit (n154) 43.

<sup>248</sup> *Ibid.*

**α. Georgia's attack using BM-21 Grad multiple rocket launchers on Tskhinvali and surrounding villages on the 7th and 8th of August**

In this attack, from the night of the 7<sup>th</sup> of August until the 8<sup>th</sup> of August 2008 at some point during the day, the town of Tskhinvali and the surrounding villages were subjected to heavy shelling, in main part by the use of multiple rocket launchers BM-21 Grad.<sup>249</sup> Many buildings and streets were completely destroyed by the shelling and 32 people were killed, a majority of them being civilians.<sup>250</sup> There are a significant amount of elements which together create a powerful argument that Georgia violated the prohibition illustrated in art 51(4)(b) Protocol 1. Firstly, it is practically impossible to be able to limit an attack to a specific military objective when incessantly and heavily shelling multiple villages in their entirety. Secondly, this conclusion must be retained, *a fortiori*, due to characteristics of the BM-21 Grad mentioned in section IV.A.1.α. Thirdly, Tskhinvali was a populated town, in which the number of civilians was increased as a direct consequence of an announcement made by Georgia of a ceasefire, an announcement which enticed certain people to remain in the town.<sup>251</sup> This consequently renders it even harder to distinguish between what is a military objective and what is not, and this *a fortiori* when weapons with these characteristics are used. The amount of civilian lives lost and damages to civilian objects lends credence to this conclusion. Given all the elements mentioned above, it is clear that attacking in such a method leads to an attack which could not have been discriminate.

To conclude, the heavy shelling and bombarding effectuated with BM-21 Grads was incompatible with the prohibition of attacks that cannot be aimed towards a specific military objective.

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<sup>249</sup> Human Rights Watch *Up in Flames* op cit (n1) 23, 41-45.

<sup>250</sup> Human Rights Watch *Up in Flames* op cit (n1) 42-45; Public Commission for Investigating War Crimes in South Ossetia 'List of the killed residents of South Ossetia', available at <http://www.osetinfo.ru/spisok>, accessed on 10 August 2015.

<sup>251</sup> Human Rights Watch *Up in Flames* op cit (n1) 49-50.

**β. Attacks by Georgia on August 9th using M85 submunitions carried by Mk-4 cluster munition rockets**

In addition to the general statements which have been established with regard to this provision, the report issued by Landmine Action has stated that due to their inherent characteristics, attacks with submunitions M85 are almost always indiscriminate when carried out close to civilians.<sup>252</sup>

*In casu*, Georgia fired 312 Mk-4 cluster munition rockets in the direction of 9 inhabited towns as well as the Roki tunnel, and according to a witness Dzara road (a road which leads towns in South Ossetia to the Roki tunnel)<sup>253</sup>, using a Gladlar 160 multiple rocket launcher<sup>254</sup> which fires 26 rockets in less than 1 minute,<sup>255</sup> each rocket containing a multitude of M85 submunitions that can reach a surface of impact of up to 3 hectares.<sup>256</sup> The firing was therefore abundant, and due to the fact that the missiles were non-guided and fired by a multiple rocket launcher, they were not precise and not targeted at a specific military objective.<sup>257</sup> On the contrary, the bombing was aimed at covering large areas. If Georgia was able to prove that those villages were never supposed to be hit,<sup>258</sup> this would not affect the conclusion. Accordingly, this fact does not alter the way they were used, and the fact that the weapons were nonetheless directed in that general direction. Additionally, the tunnel and Dzara road were also filled by civilians fleeing conflict zones.<sup>259</sup>

This leads to the conclusion that Georgia's use of the M85 submunitions could not be aimed at a specific military objective. This method of warfare therefore constitutes a violation by Georgia of art 51(4)(b) Protocol 1.

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<sup>252</sup> Landmine Action, available at

[http://www.landmineaction.org/resources/ActionPacks/m85\\_factsheet.pdf](http://www.landmineaction.org/resources/ActionPacks/m85_factsheet.pdf), accessed on 25 May 2015.

<sup>253</sup> Human Rights Watch *Up in Flames* op cit (n1) 64-65.

<sup>254</sup> *Ibid* at 65.

<sup>255</sup> Army Guide, available at <http://www.army-guide.com/eng/product3280.html>, accessed on 23 January 2016.

<sup>256</sup> C King Associates Ltd, Norwegian Defence Research Establishment & Norwegian People's Aid op cit (n184) 11.

<sup>257</sup> Human Rights Watch *A Dying Practice: Use of Cluster Munitions by Russia and Georgia in August 2008* op cit (n95) 26.

<sup>258</sup> Human Rights Watch *Up in Flames* op cit (n1) 66.

<sup>259</sup> *Ibid* at 55-56.

**γ. Russia's attack on August 12th on Gori city with an Iskander-M SS-26 cluster munition missile**

In the case of this attack, only one missile Iskander-M SS-26 was fired.<sup>260</sup> Furthermore, a large part of the population had already fled the town.<sup>261</sup> Additionally, as established previously in section IV.A.1.δ, this missile can very well be used in a discriminate manner. This is due to the fact that it is guided, very precise and able to hit small and even moving targets.<sup>262</sup> A conclusion can therefore be drawn that the problem as for the use of certain weapons in inhabited areas is not as prevalent in this specific case. Lastly, and perhaps amounts to the most convincing argument, is the fact that the only missile fired hit the Georgian command center of military operations.<sup>263</sup>

Consideration given to all these elements, the use made of the Iskander-M SS-26 cannot be equated with one which cannot be directed at a specific military objective.

**3. Article 51(4)(c) Protocol 1 and rule 11 and 12 of the ICRC's codification of international humanitarian law applicable to both IACs and NIACs<sup>264</sup>: 'Indiscriminate attacks are prohibited. Indiscriminate attacks are: [...] (c) those which employ a method [...] of combat the effects of which cannot be limited as required by this Protocol; and consequently, in each such case, are of a nature to strike military objectives and civilians or civilian objects without distinction.'**

<sup>260</sup> Human Rights Watch *Up in Flames* op cit (n1) 104; Human Rights Watch *A Dying Practice: Use of Cluster Munitions by Russia and Georgia in August 2008* op cit (n95) 25.

<sup>261</sup> Human Rights Watch *Up in Flames* op cit (n1) 293.

<sup>262</sup> Deák op cit (n194) 708; Army Technology, available at <http://www.army-technology.com/projects/iksander-system/>, accessed on 26 January 2015; Military Today, available at <http://www.military-today.com/missiles/iskander.htm>, accessed on 12 January 2016.

<sup>263</sup> Human Rights Watch *A Dying Practice: Use of Cluster Munitions by Russia and Georgia in August 2008* op cit (n95) 25; CNN, available at <http://ireport.cnn.com/docs/DOC-8342>, accessed on 12 December 2015.

<sup>264</sup> Henckaerts & Doswald-Beck op cit (n138) 37-43.

The commentary on this provision by the ICRC stipulates that the *ratio legis* behind this provision is to target cases in which the use of certain means of combat can create a situation where they become ‘completely out of the control of those using them, causing significant losses among the civilian population and extensive damage to civilian objects’ such as an unlawful use of fire or poison.<sup>265</sup> This interpretation has also received scholarly support.<sup>266</sup>

**a. Russia’s attack on August 12th on Gori city with an Iskander-M SS-26 cluster munition missile**

The weapon used was a submunitions missile.<sup>267</sup> Its use is therefore not especially targeted by this article. Moreover, it is hard to see how its use could escape the control of Russia in a way similar to fire or poison, especially given the characteristics of the weapon mentioned in section IV.A.1.δ. While it is true that submunitions explode in all directions in a given area, the state using them is aware of the area of impact they will cover. Accordingly, the result and the outcome expected will not tend to vary much. The same can be said of the duds resulting from the attack. It cannot therefore be concluded that they lose complete control over it.

To conclude, Russia did not violate this prohibition by using a missile Iskander-M SS-26.

**4. Article 51(5)(a) Protocol I and rule 13 of the ICRC’s codification of international humanitarian law applicable to both IACs and NIACs:<sup>268</sup> ‘Among others, the following types of attacks are to be considered as indiscriminate: (a) 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**

<sup>265</sup> *Commentary Additional Protocols* op cit (n128) 623.

<sup>266</sup> Breitegger op cit (n154) 45.

<sup>267</sup> Human Rights Watch *Up in Flames* op cit (n1)

<sup>268</sup> Henckaerts & Doswald-Beck op cit (n138) 43-45.

*city, town, village or other area containing a similar concentration of civilians or civilian objects*’.

The commentary of the ICRC elucidates that the words ‘clearly separated and distinct’ signify that this rule finds its full application when the distance separating two military objectives is sufficient to allow individual attacks.<sup>269</sup> Furthermore, it also stipulates that the *ratio legis* behind this provision is to proscribe area bombardments, which have for objective to destroy ‘all life in a specific area and [raze] to the ground all buildings situated there.’<sup>270</sup>

**α. Georgia’s attack using BM-21 Grad multiple rocket launchers on Tskhinvali and surrounding villages on the 7th and 8th of August**

*In casu*, the bombardment by BM-21 Grads was incessant during the entire night over the town of Tskhinvali and surrounding villages, without distinctions having been made between military objectives and civilians or civilian objects.<sup>271</sup> Indeed, while there was some military objectives in these towns such as South Ossetian forces, their defensive positions and general quarters installed in some civilian buildings in Tskhinvali and neighbouring villages,<sup>272</sup> as well as their firing positions in Khetagurovo,<sup>273</sup> they were separated enough that they could have been the subject of separate attacks. Indeed, some of them were even located in different villages. Furthermore, civilian buildings were often hit by many rockets fired by the BM-21 Grads, and certain areas of towns were completely destroyed.<sup>274</sup> Additionally, 34 deaths were counted during this attack, resulting on the most part from the use of Grad rockets, a significant part being civilian lives.<sup>275</sup> Survivors only managed to

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<sup>269</sup> *Commentary Additional Protocols* op cit (n128) 625.

<sup>270</sup> *Ibid* at 624.

<sup>271</sup> Human Rights Watch *Up in Flames* op cit (n1) 23, 41-45.

<sup>272</sup> *Ibid* at 50.

<sup>273</sup> *Ibid* at 46.

<sup>274</sup> *Ibid* at 42-45.

<sup>275</sup> Human Rights Watch *Up in Flames* op cit (n1) 46; Public Commission for Investigating War Crimes in South Ossetia ‘List of the killed residents of South Ossetia’, available at <http://www.osetinfo.ru/spisok>, accessed on 10 August 2015.

survive by hiding in basements.<sup>276</sup> The IFFMCG also used the terminology of ‘massive area bombardment’ to describe this attack.<sup>277</sup>

This type of bombardment can therefore be qualified as an area bombardment; and in any case Georgia made no efforts to attack the military objectives in Tskhinvali and surrounding villages separately. This constitutes a violation of this article.

### **β. Attacks by Georgia on August 9th using M85 submunitions carried by Mk-4 cluster munition rockets**

In the conflict in question, the Human Rights Watch report claims that at least 4 civilians were killed and 8 injured in the 9 villages hit by the M85s.<sup>278</sup> However, the report states that it does not have any information about civilians killed elsewhere.<sup>279</sup> If this does not necessarily lead to the recognition of an area bombardment, in the sense of a bombardment which has for aim to destruct all life and construction<sup>280</sup>; the literal interpretation of this article leads nevertheless to the conclusion that Georgia violated this prohibition. This can be deduced from the fact that 312 cluster munitions rockets were fired by a multiple rocket launcher, and covered entire villages.<sup>281</sup> In these large bombarded surfaces, while the cluster munitions were also used on military objectives such as military equipment, personnel and armament by the Roki tunnel, its surroundings and possibly Dzara road, they also hit 9 inhabited villages, where they damaged buildings and fields.<sup>282</sup> Consequently, it can be inferred that by bombarding these villages and towns as well as the area of the Roki tunnel and possibly Dzara road in one attack, Georgia clearly treated several separate and distinct military objectives as one. Accordingly, it is

<sup>276</sup> Human Rights Watch *Up in Flames* op cit (n1) 49.

<sup>277</sup> IFFMCG *Report v1* op cit (n170) 28; IFFMCG *Report v2* (2009) 339, available at <http://www.refworld.org/cgi-bin/texis/vtx/rwmain/opendocpdf.pdf?reldoc=y&docid=4ac465202>, accessed on 1 September 2015.

<sup>278</sup> Human Rights Watch *Up in Flames* op cit (n1) 64-69.

<sup>279</sup> *Ibid* at 65.

<sup>280</sup> *Commentary Additional Protocols* op cit (n128) 624.

<sup>281</sup> Human Rights Watch *Up in Flames* op cit (n1) 64-65; Human Rights Watch *A Dying Practice: Use of Cluster Munitions by Russia and Georgia in August 2008* op cit (n95) 26.

<sup>282</sup> Human Rights Watch *Up in Flames* op cit (n1) 64-65.

undeniable that Georgia could have separately attacked the military objectives found by the Roki tunnel, and the few military advantages possibly present in the villages, since the area covered included 9 entire villages.

If Georgia were to prove that only the area of the Roki tunnel was their target and that their attack was limited to that, it is conceivable that this attack would not violate this aspect of the principle of discrimination. However, Human Rights Watch was only able to gather information regarding the villages. The disparity of facts concerning the effect of the attack on the area of the Roki tunnel and Dzara road therefore does not allow the drawing of a definitive conclusion. An argument supporting Georgia would be that the area of the Roki tunnel does not constitute ‘a city, town, village or other area containing a similar concentration of civilians or civilian objects’. However, an opposing argument is that it could be classified as one ‘containing a similar concentration of civilians or civilian objects’ as a village, due to the fact that this is the only road which leads out of South Ossetia to North Ossetia, and that hundreds of civilians which were fleeing their villages were using it on the day of the attack.<sup>283</sup> In any case, before one can conclude in favour of Georgia, two hurdles would need to be surpassed. Firstly, the troops, equipment and armament would need to be grouped together and not separated in a way to allow for distinct attacks. Secondly, it would be hard for Georgia to prove that the attack was solely directed at the troops, armament and equipment because nothing can change the fact that Georgia employed 312 cluster munition rockets which have a very high surface of dispersion and therefore bombed a significant area.<sup>284</sup>

According to the current situation and facts as they are shown, a violation by Georgia of this provision has been established. However, the conclusion could vary if Georgia proves that its attack was solely aimed towards the Roki tunnel.

#### **γ. Russia’s attack on August 12th on Gori city with an Iskander-M SS-26 cluster munition missile**

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<sup>283</sup> Human Rights Watch *Up in Flames* op cit (n1) 54-56.

<sup>284</sup> C King Associates Ltd, Norwegian Defence Research Establishment & Norwegian People’s Aid op cit (n184) 11; Human Rights Watch *Up in Flames* op cit (n1) 65.

The fact that only one Iskander-M SS-26 missile, was fired<sup>285</sup>; a missile which was conceived to be directed at small targets<sup>286</sup>, suggests that the attack was not aimed at several military objectives. Indeed, the principal command centre for Georgian military operations was the military objective hit.<sup>287</sup> This leads to the conclusion that according to the literal interpretation of this article, there is no violation. Moreover, on the total of inhabitants that were in the surroundings, including approximately forty civilians that were situated outside on the central square where the attack took place, 6 people were killed.<sup>288</sup> Even if some civilian buildings were damaged (which is not reported in the report, but is conceivable), it would be hard to describe that as a ‘razing to the ground of all buildings’. Therefore, the conclusion can be drawn that there was also no area bombardment committed by Russia by the use of the Iskander-M SS-26.

In conclusion, Russia did not violate the prohibition of this article concerning bombardments.

#### **δ. Attack by Russia on August 9th on the school in Gori city**

*In casu*, the bombardment took place on a restrained area, namely a school that likely had become a military objective due to its military purpose, and had approximately 100 Georgian military reservists in its yard; and not over an extended surface where several military objectives were located and separated by a distance sufficient enough to allow individual attacks.<sup>289</sup> Additionally, no casualties were reported from the attack on the school, and damages were only reported on the school and the two buildings adjacent to it.<sup>290</sup>

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<sup>285</sup> Human Rights Watch *Up in Flames* op cit (n1) 104; Human Rights Watch *A Dying Practice: Use of Cluster Munitions by Russia and Georgia in August 2008* op cit (n95) 25.

<sup>286</sup> Deák op cit (n194) 708.

<sup>287</sup> Human Rights Watch *A Dying Practice: Use of Cluster Munitions by Russia and Georgia in August 2008* op cit (n95) 25; CNN, available at <http://ireport.cnn.com/docs/DOC-83424>, accessed on 10 January 2016.

<sup>288</sup> Human Rights Watch *Up in Flames* op cit (n1) 111.

<sup>289</sup> *Ibid* at 94.

<sup>290</sup> *Ibid* at 94.

It emanates from these facts that the conditions in order to recognise a violation of this article according to its literal interpretation are not fulfilled, and are *a fortiori* not satisfied in order to recognise an area bombardment.

### **C. General comments concerning the principle of discrimination with regard to the attack on the school**

Provisions b and c of art 51(4) Protocol 1 are not analysed with regard to this attack. This is due to the fact that there is not enough information concerning the choice of the weapon and its use in order to be able to draw any conclusion as to these two aspects of the principle of discrimination. One can nonetheless imagine that the fact of firing a few strikes with seemingly precise missiles, and with an apparently small area of coverage, on a relatively small and specific surface,<sup>291</sup> cannot be considered as an attack in which means or methods of warfare that cannot be aimed towards specific military objectives or whose effects cannot be limited in respect with the provisions of the Protocol 1 are used. *In casu*, the school hosting the reservists was hit,<sup>292</sup> therefore supporting the argument that the weapon and the method used could be directed at a specific military objective.

## **SECTION V: PRINCIPLE OF PROPORTIONALITY**

### **A. Violations concerning the use made of the weapon**

1. *Article 51(5)(b) Protocol 1, or rule 14 of the ICRC's codification of customary international humanitarian law applicable to both IACs and NIACs:*<sup>293</sup>  
*'Among others, the following types of attacks are to be considered as indiscriminate: [...] (b) an attack which may be expected to cause incidental loss of*

<sup>291</sup> Human Rights Watch *Up in Flames* op cit (n1) 94.

<sup>292</sup> Ibid.

<sup>293</sup> Henckaerts & Doswald-Beck op cit (n138) 46-50.

*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.'*

This principle recognises that the loss of civilian lives and damages to civilian objects are results inherent to the reality of armed conflicts, and consequently that the existence of civilian collateral damage does not in every case result in an unlawful attack. It is crucial to emphasise the fact that the mere respect of the principle of proportionality does not by itself render the attack legal. The other principles of international law remain applicable and must equally be respected.<sup>294</sup> In the analysis of this provision, one must look at the expected military advantage as well as the anticipated civilian collateral damage at the point of launching of the attack from the view point of a reasonable military commander and taking into consideration the information available to him/her.<sup>295</sup> It cannot be done after the attack between the loss effectively caused and the military advantage effectively gained. It is therefore not an obligation of result. Furthermore, the ICRC adds that in case of uncertainty as to the element of proportionality of the attack, the interests of the civilian population must prevail.<sup>296</sup> When calculating the proportionality of an attack, the factors that must be taken into consideration include, *inter alia*, the location and number of civilians, the precision of the weapons and its area of dispersion.<sup>297</sup> Other factors which should be taken into consideration in the analysis of the proportionality, but that unfortunately cannot be accounted for in this analysis due to the disparity of facts include: 'the terrain (landslides, floods etc.), [...] weather conditions (visibility, wind etc.)' as well as the technical skill of the person carrying out the attack.<sup>298</sup> Moreover, art 50(3) Protocol 1 specifies that the fact that some non-civilians can be found amongst the civilian population does not deprive the latter of its protection. If the civilians are however intentionally used to shield the military objectives, this presents a different issue which is only relevant to the attack on the school and will therefore be mentioned in section V.A.1ε.

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<sup>294</sup> *Commentary Additional Protocols* op cit (n128) 625.

<sup>295</sup> Breitegger op cit (n154) 48.

<sup>296</sup> *Commentary Additional Protocols* op cit (n128) 626.

<sup>297</sup> *Ibid* at 684.

<sup>298</sup> *Ibid* at 684.

**α. Georgia's attack using BM-21 Grad multiple rocket launchers on Tskhinvali and surrounding villages on the 7th and 8th of August**

The military advantages that Georgia could have expected were mentioned in section IV.B.1.α. This being said, these military advantages can only be taken into consideration if Georgia was aware of their presence and their military use, which is not a given considering that a reason for choosing civilian buildings as general quarters could be to remain incognito. Furthermore, Human Rights Watch declared that '[i]t is also not clear [...] to what extent the Georgian command had the necessary intelligence to establish the exact location of the South Ossetian forces at any given moment, in part because the forces were very mobile.'<sup>299</sup> The exact extent of the military advantage which could have been anticipated by this attack is therefore unclear.

On the other hand, the amount of destruction of civilian objects and the loss in civilian lives which Georgia could have reasonably anticipated by using in an incessant manner means of war which are highly imprecise and affecting large areas which were populated,<sup>300</sup> is very significant and arguably exceeds the military advantages mentioned above. This statement is supported by the report of Human Rights Watch stating that 'Georgian military command was clearly aware of the presence of civilians in Tskhinvali and other areas subjected to artillery strikes'.<sup>301</sup> While it is true that the number of civilians at risk was lower due to the fact that some of them had been evacuated up to a few hours before the shelling,<sup>302</sup> this element can only be taken into consideration if Georgia was aware of this. This is unlikely, especially due to the fact that President Saakashvili had declared in a public statement that 'Georgia has unilaterally ceased fire in the current fighting with separatist rebels

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<sup>299</sup> Human Rights Watch *Up in Flames* op cit (n1) 51.

<sup>300</sup> Military Today, available at [http://www.military-today.com/artillery/bm21u\\_grad.htm](http://www.military-today.com/artillery/bm21u_grad.htm), accessed on 10 September 2015; Military Today, available at <http://www.military-today.com/artillery/grad.htm>, accessed on 20 June 2015; Human Rights Watch *Up in Flames* op cit (n1) 23, 41-45.

<sup>301</sup> Human Rights Watch *Up in Flames* op cit (n1) 51.

<sup>302</sup> *Ibid* at 49.

in the region of South Ossetia'.<sup>303</sup> Georgia could have reasonably expected that this statement would have influenced the civilians to remain, which was the case of a part of the civilian population.<sup>304</sup> Consequently, 34 people were killed and even more injured, a significant amount of them being civilians, predominantly by the use of BM-21 Grad multiple rocket launchers.<sup>305</sup>

In conclusion, there is not enough information concerning what was expected from the attack to draw a clear conclusion. However, there are strong arguments to declare that even if Georgia was expecting all of the military advantages mentioned above, the choice and use of weapons in this attack would result in an attack which is not proportionate. These arguments are strengthened if some of the military advantages are not to be considered in the proportionality equation.

## **β. Cluster munitions**

According to Breitegger, when examining the proportionality of an attack in which cluster munitions are used, it is important to look at their level of precision as well as their area of impact.<sup>306</sup> Cluster munitions and the effect of their unexploded submunitions in the analysis of proportionality has been a discussed topic and diverging opinions exist. On one side there are scholars which claim that the loss in civilian lives and damage to civilian objects that need to be taken into consideration are also the ones which are indirect and in the long term, as long as they are foreseeable.<sup>307</sup> Accordingly, scholars of this opinion, as well as several states, affirm that mission planners should consider in the analysis of proportionality, in light of known dud rates, 'the fact that additional collateral damage is likely to occur in the future'.<sup>308</sup> Furthermore, it is advanced that attacking parties should refrain from using

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<sup>303</sup> Human Rights Watch *Up in Flames* op cit (n1) 49-50.

<sup>304</sup> *Ibid* at 50.

<sup>305</sup> Public Commission for Investigating War Crimes in South Ossetia 'List of the killed residents of South Ossetia', available at <http://www.oseinfo.ru/spisok>, accessed on 10 August 2015; Human Rights Watch *Up in Flames* op cit (n1) 46.

<sup>306</sup> Breitegger op cit (n154) 48.

<sup>307</sup> J de Hemptinne 'Les principes de conduite des hostilités' in J de Hemptinne & J d'Aspremont *Droit International Humanitaire* (2012) 261; Kolb & Hyde op cit (n144) 69.

<sup>308</sup> Herthel op cit (n8) 268; De Hemptinne op cit (n307) 261; Breitegger op cit (n154) 52.

cluster munitions near populated areas unless the ‘direct military benefit clearly outweighs the likely collateral damage, both during and after the conflict.’<sup>309</sup> Opposing these views, Greenwood expressed the opinion that only the consequences on the civilian population in the short and middle term should be taken into consideration in the weighing of the proportionality; conversely, the consequences which develop in a further horizon, such as the effect of unexploded submunitions, should be dismissed from the calculation.<sup>310</sup> The reasoning behind this opinion is that there are too many factors which influence the importance of their danger in the long term.<sup>311</sup> These dangers can therefore not be reasonably examined and envisaged at the time of the attack.<sup>312</sup> Other writers, including McCormack and Mtharu, claim that the consequences in the long term must also be taken into account but only in situations where the user of cluster munitions intentionally used this weapon in order for the duds to impede the access for civilians to certain areas.<sup>313</sup>

#### **γ. Attacks by Georgia on August 9th using M85 submunitions carried by Mk-4 cluster munition rockets**

By firing 312 non-guided cluster munitions rockets with the characteristics mentioned in section IV.A.1.γ using a multiple rocket launcher<sup>314</sup> and therefore not assuring that each rocket was accurate and precise, but rather with the aim that they affect a large approximate area, *in casu* a surface including 9 villages,<sup>315</sup> it can be expected that there would be a significant loss and damage to civilian lives and objects. *In casu*, at least 4 civilians were killed and 8 wounded in those villages, civilian buildings were hit and serious damage was caused to fields used for harvest.<sup>316</sup> Additionally, Georgia was clearly aware of the mass movement of the population fleeing South Ossetia towards North Ossetia and that Dzara road, which leads to the Roki tunnel, was the only way there (an argument amongst others, which

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<sup>309</sup> Herthel op cit (n8) 268.

<sup>310</sup> Breitegger op cit (n154) 49.

<sup>311</sup> Ibid.

<sup>312</sup> Ibid.

<sup>313</sup> Ibid.

<sup>314</sup> Human Rights Watch *Up in Flames* op cit (n1) 65.

<sup>315</sup> Ibid at 64.

<sup>316</sup> Ibid at 64-69.

points to this conclusion, is that Georgian forces were present on that road).<sup>317</sup> By hitting those areas, Georgia could have therefore anticipated significant civilian collateral losses and damages. Human Rights Watch unfortunately has no information regarding civilians killed in those areas by M85s.<sup>318</sup>

With regard to the longer-term effects caused by duds, the fact that several submunitions would not explode and thus may cause damage in the future, was to be expected. *In casu*, duds caused the subsequent death of at least 3 civilians as well as injuring 6.<sup>319</sup> Furthermore, according to a study on locations of strife in Lebanon, weapon experts and United Nations deminers have determined that M85s have ‘unacceptably high dud rates’,<sup>320</sup> one that surpasses 10 per cent.<sup>321</sup> The probability of having unexploded submunitions is also heightened when the version of the M85 used, is the one without a self-destruct mechanism.<sup>322</sup> This was the case of the M85s used *in casu*.<sup>323</sup> Consequently, when this weapon is used in mass, as in this attack, the rate of explosive remains is significant. According to the opinion of some states as well respected scholars, this should be taken into consideration in the analysis of the proportionality. However, even if one is to adopt the opposite opinion of the other scholars concerning duds, the incidental civilian loss and damage to expect from such an attack would remain significant, and thus should not alter the conclusions made.

Expected military objectives mentioned in the report, include military troops, equipment and armament which were located by the Roki tunnel.<sup>324</sup> It must be noted that this attack had the effect of delaying the Russian advance into South Ossetia.<sup>325</sup> The information provided by the report is however limited to that, with no detailed facts regarding the attack, how many soldiers and equipment there were, and how many civilian casualties resulted from the M85s in South Ossetia (which includes

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<sup>317</sup> Human Rights Watch *Up in Flames* op cit (n1) 54.

<sup>318</sup> *Ibid* at 65.

<sup>319</sup> *Ibid* at 67.

<sup>320</sup> Human Rights Watch *A Dying Practice: Use of Cluster Munitions by Russia and Georgia in August 2008* op cit (n95) 26.

<sup>321</sup> C King Associates Ltd, Norwegian Defence Research Establishment & Norwegian People’s Aid op cit (n184) 15.

<sup>322</sup> Human Rights Watch *A Dying Practice: Use of Cluster Munitions by Russia and Georgia in August 2008* op cit (n95) 26.

<sup>323</sup> *Ibid*.

<sup>324</sup> Human Rights Watch *Up in Flames* op cit (n1) 65.

<sup>325</sup> *Ibid*.

Roki tunnel and Dzara road).<sup>326</sup> The report is also scanty with regard to the damage made in the towns in undisputed Georgian territory.

The lack of information therefore does not allow the drawing of a definitive conclusion with regard to whether the principle of proportionality was respected. That being said, the civilian collateral damage and loss that was to be anticipated when firing such a high number of cluster munition missiles over a large surface which included 9 villages, the area of the Roki tunnel, and plausibly Dzara road, is rather significant and it is likely that even if all of the military advantages mentioned in the report and above were anticipated, the attack would be disproportionate.

On the other hand, if Georgia could prove that it could not have reasonably expected that the submunitions would hit those villages,<sup>327</sup> the expected civilian casualties and damage would be less prevalent in the calculation of the proportionality. Nonetheless, the fact that Georgia was certainly aware that civilians were in the area of the Roki tunnel,<sup>328</sup> as well as the reality that a bombardment over a large surface area with little concern for precision was always the aim of the attack due to the way it was conducted and the weapons used, all support the notion that the the attack was disproportionate. Additionally, the large amount of duds capable of hitting civilians does not change in this scenario. However, due to the lack of information given by the report no clear conclusion can be drawn.

#### **δ. Russia's attack on August 12th on Gori city with an Iskander-M SS-26 cluster munition missile**

During the attack on Gori city, 6 civilians were killed, fewer than 24 were injured and certain buildings were damaged during the attack. However, the square which was affected by the cluster munition and where most of the victims were located was busier than it was supposed to be. This was due to a food distribution which was supposed to take place in the square where several citizens were waiting,

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<sup>326</sup> Human Rights Watch *Up in Flames* op cit (n1) 65.

<sup>327</sup> Ibid at 66.

<sup>328</sup> Ibid at 54.

as well as the fact that a car accident in the square had attracted even more civilians.<sup>329</sup> Russia could not have reasonably been aware of the latter, and was plausibly not aware of the former, and therefore, the analysis of proportionality must take into consideration the fact that fewer civilians should have been affected. Furthermore, the civilian population had already started to flee the city.<sup>330</sup> Considering the military importance of Gori city, Russia could have reasonably expected the city to have been vacated to a certain extent. Moreover, as indicated in section IV.B.1.γ, only one Iskander-M SS-26 was fired.<sup>331</sup> The damage expected was therefore limited, and this *a fortiori* due to the characteristics of this missile mentioned in section IV.A.1.δ. All of these elements limit the problem of proportionality linked with the use of this type of weapon.

On the other hand, the principal command center for the Georgian military operation constitutes an undeniably significant military advantage which must have a substantial weight in the examination of proportionality. If Russia was not aware of the absence of the troops in the town,<sup>332</sup> and reasonably expected their military presence in the center or in its immediate vicinity, this should also be taken into account in favour of Russia. As seen previously in section IV.B.1.γ, there are strong arguments militating for Russia's reasonable expectation of their presence. Nevertheless, even if Russia was not expecting their presence, the military advantage expected from this attack would still have a considerable weight in the analysis. As established in section IV.B.1.γ, this is due to the military importance of the command center as a military objective, even when empty.

In conclusion, if Greenwood's thesis is to be followed, and thus the effects of the duds are to be ignored in the equation, the respect for the principle of proportionality must be recognised, and this *a fortiori* due to the fact that only one missile was fired.<sup>333</sup> Supposing that McCormack and Mtharu's thesis is followed, and

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<sup>329</sup> Human Rights Watch *Up in Flames* op cit (n1) 111.

<sup>330</sup> *Ibid* at 293.

<sup>331</sup> Human Rights Watch *Up in Flames* op cit (n1) 104; Human Rights Watch *A Dying Practice: Use of Cluster Munitions by Russia and Georgia in August 2008* op cit (n95) 25.

<sup>332</sup> Human Rights Watch *Up in Flames* op cit (n1) 112.

<sup>333</sup> Human Rights Watch *A Dying Practice: Use of Cluster Munitions by Russia and Georgia in August 2008* op cit (n95) 25.

a special focus is put on the intention made behind the use of cluster munitions, the respect for this principle should equally be acknowledged. Indeed, Russia did not use the Iskander-M SS-26 purposely for the effect the duds would have on civilians. This affirmation is supported by the fact that, to the contrary, Russia chose a cluster munition weapon which was allegedly the most improved of its kind with low chances of malfunction, and therefore smaller chances of duds as a result of missile malfunction.<sup>334</sup> Furthermore, Russia used it in order to destroy the Georgian command center of the military operation.<sup>335</sup> Even if one is to adopt the opposite stance advocated by several scholars, that in any case, the foreseeable effects in the long run, such as duds are to be considered in the calculation of proportionality, the balance of interests would remain in favour of Russia. This argument is reinforced by the report which does not mention the existence of duds.<sup>336</sup> Furthermore, even if a few damages could have been expected from the duds, the destruction of the military objective remains such a big military advantage for Russia that the principle would still be respected. All of these elements support the claim that in this case, while it is true that attacks with cluster munitions should be avoided in towns, *in casu*, the expected military advantage of this attack distinctively outweighed the likely collateral damage both during and after the conflict.

Thus, Russia, did not violate this aspect of the principle of proportionality.

#### **ε. Attack by Russia on August 9th on the school in Gori city**

In situations where civilian objects are used to shield military objectives (which is prohibited by international humanitarian law),<sup>337</sup> as a corollary of their direct contribution to the defence of the target, they will be granted an analogous

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<sup>334</sup> Deák op cit (n194) 708; Military Today, available at <http://www.military-today.com/missiles/iskander.htm>, accessed on 12 January 2016.

<sup>335</sup> Human Rights Watch *A Dying Practice: Use of Cluster Munitions by Russia and Georgia in August 2008* op cit (n95) 25; CNN, available at <http://ireport.cnn.com/docs/DOC-83424>, accessed on 10 January 2016.

<sup>336</sup> Human Rights Watch *Up in Flames* op cit (n1) 111-113.

<sup>337</sup> Article 58(c) Protocol 1 and Rule 156 of the ICRC's codification of customary international humanitarian law, Henckaerts & Doswald-Beck op cit (n138) 568-603.

status to military objectives.<sup>338</sup> However, damage to them should not be included on either side of the proportionality equation, and unless they ‘physically impede attack on the “intended target”’, they should not be attacked directly.<sup>339</sup> However, human shields are treated differently. The use of human shields by a party is prohibited by art 51(8) Protocol 1 and rule 97 of the ICRC’s codification of customary international humanitarian law applicable to both IACs and NIACs,<sup>340</sup> which states that ‘[t]he presence or movements of the civilian population or individual civilians shall not be used to render certain points or areas immune from military operations, in particular in attempts to shield military objectives from attacks or to shield, favour or impede military operations. The [p]arties to the conflict shall not direct the movement of the civilian population or individual civilians in order to attempt to shield military objectives from attacks or to shield military operations.’ The determining factor in reaching a violation of the prohibition to use human shields by a party is whether the attacked party had the deliberate intent to use them in order to safeguard its military objects or forces.<sup>341</sup> The term ‘involuntary human shields’ covers situations in which the civilians used as shields are either unaware or not willing to actively frustrate enemy operations; this includes the two situations where the ‘use of human shields is passive, as when a party to the conflict takes advantage of their presence [...] or active for example when the party directs them to a location they will shield’.<sup>342</sup> In the case where the civilian has the intention to negatively impact the military effort of the enemy, they are categorised as voluntary human shields.<sup>343</sup> The latter category is treated differently, due to their involvement in the hostilities.<sup>344</sup> However, in the context of this dissertation, only regulations and scholarship debates concerning the former category are relevant. The following remarks will therefore refer to involuntary human shields. Unfortunately, while the law is clear on the obligations of the ‘attacked party’, the extent of the obligations of the ‘attacker’ when facing human

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<sup>338</sup> MN Schmitt ‘Targeting and humanitarian law: Current issues’ (2006) 80 *International Law Studies*. *US Naval War College* 175.

<sup>339</sup> *Ibid.*

<sup>340</sup> Henckaerts & Doswald-Beck *op cit* (n138) 337-340.

<sup>341</sup> Sassòli, Bouvier & Quintin *op cit* (n24) part 1 chap 9 at 17.

<sup>342</sup> MN Schmitt ‘Human shields in international humanitarian law’ (2009) 47 *Columbia Journal of Transnational Law* 302 and 316.

<sup>343</sup> *Ibid.*

<sup>344</sup> *Ibid* at 299-300.

shields is not addressed in *lex scripta* and has thus become a controversial topic.<sup>345</sup> In a current opposing prevailing practice,<sup>346</sup> respected publicists, including Dinstein, Quéguiner and Rogers, are of the opinion that while the obligation of the attacking party to respect the principle of proportionality remains,<sup>347</sup> it is necessary to take into consideration the fact that one of the parties has violated international humanitarian law by using human shields.<sup>348</sup> According to them, the consequence to this is that ‘the actual test of excessive injury to civilians must be relaxed, [t]hat is to say, the appraisal whether civilian casualties are excessive in relation to the military advantage anticipated must make allowances for the fact that [...] civilian casualties will be higher than usual.’<sup>349</sup> The reasoning behind this argument is twofold. Firstly, this relaxation of the principle is needed in order to redress the balance, otherwise it would be ‘tilted in favour of the unscrupulous’.<sup>350</sup> Secondly, it is argued that if this limitation to the equation of proportionality did not exist it would create a perverse incentive. Accordingly, it is possible that it could encourage a party to protect its military objects or forces with a high number of civilians with the objective that the attacking party will spare them, due to the fact that they would violate the principle of proportionality if they attack.<sup>351</sup> In situations where the attacker has no regard for the respect of the principle of proportionality, this scenario would result in a high number of civilian casualties. This perverse incentive goes against the *ratio legis* of international humanitarian law which is to protect civilians. Nevertheless, this approach also has its downfalls, for example in a scenario where a state with the principle of proportionality in mind is planning an attack and would normally desist due to the large number of human shields, may be lawfully able to attack if the principle is relaxed. Authors such as Schmitt, in unison with the current prevalent practice believe on the other hand that the principle of proportionality should not be relaxed as a consequence to the enemy’s violation of the prohibition to use human

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<sup>345</sup> Schmitt ‘Human shields in international humanitarian law’ op cit (n342) 299-300.

<sup>346</sup> Schmitt ‘Targeting and humanitarian law: Current issues’ op cit (n338) 173.

<sup>347</sup> The obligation to continue to respect the rules of international humanitarian law despite one party’s violation of the prohibition to use human shields can be found at art 51(8) Protocol 1.

<sup>348</sup> J-F Quéguiner ‘Precautions under the law governing the conduct of hostilities’ (2006) 88 *International Review of the Red Cross* 814; Y Dinstein *The Conduct of Hostilities under the Law of International Armed Conflicts* (2004) 131; A.P.V. Rogers *Law on the Battlefield* (1996) 37.

<sup>349</sup> Quéguiner op cit (n348) 814; Dinstein op cit (n348) 131.

<sup>350</sup> Rogers op cit (n348) 37.

<sup>351</sup> Schmitt ‘Targeting and humanitarian law: Current issues’ op cit (n338) 171.

shields.<sup>352</sup> They argue that ‘while humanitarian law takes account of the practicalities of warfare [...], it is not intended nor designed to ensure a “fair fight”’.<sup>353</sup> Interestingly, their second argument is one that is also of concern to the opposing school of thought. According to this school of thought, ‘relaxing the principle of proportionality would have for effect to be inconsistent with the underlying purpose of that body of law - protection of those who are not engaged in the conflict.’<sup>354</sup>

In the case of this attack, there were about 100 Georgian combatants in the school.<sup>355</sup> The presence of these combatants was most likely known by Russia, even more so due to the fact that they were in plain sight in the school yard, and the attack took place from an aircraft flying above, firing seemingly precise missiles.<sup>356</sup> The expected military advantage gained from attacking them must therefore be accounted for in the calculation of proportionality. With regard to the school itself, two possible scenarios can be envisioned. Firstly, it is possible that the school was used for military functions other than shielding the soldiers.<sup>357</sup> Its destruction would therefore offer Russia a definite military advantage. In this case it would be a military objective; and if Russia was aware of this status, it should be taken into account as ‘expected military advantage’. The fact that hundreds of visible soldiers were gathered at the school<sup>358</sup> creates a good argument that the school was used for military ends and that Russia was aware of it. However, Human Right Watch leaves this argument open and simply states that ‘it was possible that the school was deemed as being used for military purposes.’<sup>359</sup> The second scenario is that the school was solely used as a shield to ‘protect’ the soldiers. In this case, if Russia was aware of the presence of soldiers at the school, which is more than likely, as explained above, it was legitimately allowed to attack it. The principle of proportionality with regard to the civilians would also need to be respected, but this will be analysed in a paragraph below. Accordingly, as the Georgian reservists were located on the school grounds,<sup>360</sup>

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<sup>352</sup> Schmitt ‘Targeting and humanitarian law: Current issues’ op cit (n338) 171 and 173.

<sup>353</sup> Ibid at 173.

<sup>354</sup> Ibid at 173.

<sup>355</sup> Human Rights Watch *Up in Flames* op cit (n1) 94.

<sup>356</sup> Ibid.

<sup>357</sup> Ibid.

<sup>358</sup> Ibid.

<sup>359</sup> Ibid.

<sup>360</sup> Ibid.

Russia could not attack one without touching the other. However, in this scenario, the damages done to the school could not be taken into consideration in the analysis of the proportionality.

Furthermore, it is also more than likely that Russia was not expecting the presence of civilians inside the school. This conclusion can be drawn from the fact that the attack took place on a Saturday, on the 9<sup>th</sup> of August 2008.<sup>361</sup> This day was likely to have been a day of holiday for the school, or at least a day off, since it was the weekend. Russia could have therefore expected that students or staff were not attending the school. This hypothesis is supported by the report of Human Rights Watch which mentions solely the presence of civilians having taken refuge.<sup>362</sup> Moreover, if Russia was not anticipating the presence of the civilians taking refuge, which is very conceivable due to the fact that it is expected that civilians would not want to put themselves in danger by taking shelter in a place that is a military objective or that is in any case surrounded by soldiers which are legitimate targets, their presence could not be taken into consideration in the examination of proportionality. Additionally no civilian deaths were reported as a result of the missiles which hit the school.<sup>363</sup>

Moreover, it is highly likely that Georgia violated the prohibition to use civilians in order to create human shields with the aim of deterring Russia from firing on their military objectives. This conclusion stems from the fact that civilians were situated in the school because they had been told that they could find refuge there.<sup>364</sup> This information being so far from the truth (due to the school being a legitimate target and therefore an area where civilians are not safe), a simple error seems hard to admit. This misinformation is so blatant that Georgia's intent to protect the combatants situated in the school, as well as potentially the school from an attack, by creating a situation where civilians were drawn to the place, is highly likely. Furthermore, the information gathered by Human Rights Watch points to the absence of any intention from the civilians taking refuge into the school to endanger

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<sup>361</sup> Human Rights Watch *Up in Flames* op cit (n1) 94.

<sup>362</sup> Ibid at 94-95.

<sup>363</sup> Ibid.

<sup>364</sup> Ibid at 95.

themselves in order to frustrate the enemy's military actions.<sup>365</sup> The existence of these involuntary 'human shields' should, according to certain scholars,<sup>366</sup> relax the principle of proportionality in favour of Russia.

Given the above elements four conclusions can be drawn. Firstly, if Russia had been aware of the use of the school for military purposes as well as the presence of Georgian reservists in the school, and that according to the scanty facts, the few missiles fired seemed precise and with a relatively small surface of impact,<sup>367</sup> it is to be concluded that Russia did not violate the principle of proportionality. Secondly, this deduction should also be retained even if the school had no military purpose besides the shielding of the Georgian reservists. Thirdly, Russia would still be respecting the principle of proportionality even if it had been aware of the presence of certain civilians in the school surrounded by approximately 100 Georgian reservists.<sup>368</sup> Lastly, this conclusion should be accepted *a fortiori* if one is to follow the approach, albeit disputed, endorsed by Quéguiner, Dinstein and Rogers and that as a result of the violation of the prohibition of human shields by Georgia, the prohibition on human shields should be relaxed in favour of the Russia.

In conclusion, in all of these cases, partly due to the weapon used, its usage and the significant military advantage that could be expected, the balance of the military interest versus collateral damage leans in favour of Russia.

**2. Article 57(2)(a)(ii) Protocol I, or rule 17 of the ICRC's codification of customary international humanitarian law applicable to both IACs and NIACs:<sup>369</sup>**  
***'With respect to attacks, the following precautions shall be taken: (a) those who plan or decide upon an attack shall: [...] (ii) take all feasible precautions in the choice of means and methods of attack with a view to avoiding, and in any event to***

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<sup>365</sup> Human Rights Watch *Up in Flames* op cit (n1) 94-95.

<sup>366</sup> Quéguiner op cit (n348) 814; Dinstein op cit (n348) 131; Rogers op cit (n348) 37.

<sup>367</sup> Human Rights Watch *Up in Flames* op cit (n1) 94-95.

<sup>368</sup> *Ibid* 94.

<sup>369</sup> Henckaerts & Doswald-Beck op cit (n138) 56-58.

*minimizing, incidental loss of civilian life, injury to civilians and damage to civilian objects’.*

Even though this provision mentions the choice of the weapon as well as the methods of attack, it is clear from the wording and *ratio legis* of this provision that its analysis must be made in the context of the attack. This provision is not an obligation of result but a principle of precaution. ‘Feasible’ denotes ‘practically possible, taking into account all the circumstances at the time of the attack’.<sup>370</sup> The commentary of this rule gives an example of a violation of this article: where a well-placed rocket is adequate to render a military objective useless, the state should not use a series of rockets fired without sufficient accuracy.<sup>371</sup> The ICRC also indicates that the precision of the weapon must be taken into consideration.<sup>372</sup> The analysis of rule 17 of the ICRC’s codification of customary international humanitarian law applicable to both IACs and NIACs concretises this article somewhat by affirming that assailants must, *inter alia*, avoid attacks in populated areas if possible.<sup>373</sup> Additionally, according to the commentary of the ICRC on this article, as well as Quéguiner, this part of the provision is largely aimed at precautions taken during the time of the attack.<sup>374</sup> It therefore does not target, precautions which the party attacking must take prior to the attack, such as warning the population.

#### **a. Georgia’s attack using BM-21 Grad multiple rocket launchers on Tskhinvali and surrounding villages on the 7th and 8th of August**

As established in section IV.B.4.a, the military objectives situated in the area which was attacked could have been subject to unique attacks, by more precise weapons, thus reducing significantly the damage and loss caused to civilian objects and lives. This argument holds *a fortiori* due to the fact that the military objectives were situated in different towns.<sup>375</sup> *In casu*, Georgia used BM-21 Grad multiple

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<sup>370</sup> Aldrich op cit (n127) 52.

<sup>371</sup> *Commentary Additional Protocols* op cit (n128) 681.

<sup>372</sup> *Ibid* at 682.

<sup>373</sup> Henckaerts & Doswald-Beck op cit (n138) 56-58.

<sup>374</sup> *Commentary Additional Protocols* op cit (n128) 682; Quéguiner op cit (n348) 379.

<sup>375</sup> Human Rights Watch *Up in Flames* op cit (n1) 46 and 50.

rocket launchers with the characteristics mentioned in section IV.A.1.α, firing a high number of rockets over a dozen hours.<sup>376</sup> These elements, fulfil the scenario mentioned above in section V.A.2 as an example of a violation of this provision, namely to ‘use a series of rockets fired without sufficient accuracy’.

In conclusion, by choosing this weapon and attacking these towns and villages incessantly and without aiming at specific military objectives, Georgia did not take precautions in the choice of means and methods of attack with a view to minimising incidental civilian loss, injury and damage. Consequently, Georgia violated this aspect of the principle of proportionality.

**β. Attacks by Georgia on August 9th using M85 submunitions carried by Mk-4 cluster munition rockets**

*In casu*, this obligation was violated due to several factors. Firstly, as mentioned in sections IV.A.1.γ and IV.B.1.β, imprecise cluster munition missiles with a large area of impact were used in towns and villages. Secondly, not only did Georgia use a weapon notorious for leaving an unacceptably high number of duds, but it used it in such a way that hundreds of explosive remnants would remain after the attack.<sup>377</sup> Thirdly, by firing 312 cluster munition rockets towards 9 villages, as well as the Roki tunnel, and potentially Dzara road,<sup>378</sup> and by not proceeding using single attacks targeting individual military objectives, it can be concluded that Georgia did not restrain itself to a limited damage, but attacked in a way that these cluster munitions would fall on civilians or civilian objects. This third point also holds even if Georgia manages to prove that those towns could not have reasonably been expected to be hit.<sup>379</sup> Accordingly, in both scenarios civilians were present and Georgia effectuated this attack through a mass bombardment over a large area

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<sup>376</sup> Human Rights Watch *Up in Flames* op cit (n1) 23.

<sup>377</sup> C King Associates Ltd, Norwegian Defence Research Establishment & Norwegian People’s Aid op cit (n184) 15; Landmine Action, available at [http://www.landmineaction.org/resources/ActionPacks/m85\\_factsheet.pdf](http://www.landmineaction.org/resources/ActionPacks/m85_factsheet.pdf), accessed on 25 May 2015; Human Rights Watch *Up in Flames* op cit (n1) 64-65.

<sup>378</sup> Ibid.

<sup>379</sup> Ibid.

without aiming with precision.<sup>380</sup> Worth acknowledging is that the scenario mentioned in section I.B in which the use of cluster munitions could actually reduce collateral damage does not apply to a situation like this one where a lot of missiles were fired and where precision was not their main concern.

While the arguments above are individually convincing grounds to condemn Georgia for violating the obligation to take precautions to limit to the minimum damages to civilian objects and loss in civilian lives; when combined together, they lead to the irrefutable conclusion that Georgia violated this provision.

**γ. Russia's attack on August 12th on Gori city with an Iskander-M SS-26 cluster munition missile**

It is important to note that the attack using the Iskander-M SS-26 corresponds exactly to the scenario mentioned in section I.B where cluster munitions may actually reduce collateral damage, namely situations where 1 precise missile is used to target a specific military objective. According to the commentary of the ICRC, the fact that only one missile was fired<sup>381</sup> also has significant weight on the analysis of this provision.<sup>382</sup> All of these elements, as well as the specific characteristics of this weapon mentioned in section IV.A.1.δ, suggest that Russia took precautions in the choice and use of the weapon in order to limit the civilian collateral loss and damage.

In conclusion, Russia respected this obligation relating to the principle of proportionality.

**δ. Attack by Russia on August 9th on the school in Gori city**

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<sup>380</sup> Report Human Rights Watch p.65

<sup>381</sup> Human Rights Watch *A Dying Practice: Use of Cluster Munitions by Russia and Georgia in August 2008* op cit (n95) 25; Human Rights Watch *Up in Flames* op cit (n1) 104.

<sup>382</sup> *Commentary Additional Protocols* op cit (n128) 682.

The use of seemingly precise missiles with a small area of impact<sup>383</sup> supports the claim that the choice of means and methods of attack are aligned with the aim to minimise incidental civilian loss of civilian life, injury to civilians and damage to civilian objects. This argument is supported by the fact that no casualties were reported by Human Rights Watch from the direct attack on the school.<sup>384</sup> Moreover, the fact that Russia attacked on that day (a Saturday)<sup>385</sup> further strengthens the argument that Russia respected the obligation to reduce to a minimum incidental civilian loss and damage.

### **3. Overall analysis of the previous provisions under the assumption that the attack on the school is to be examined looking at the several strikes as a whole**

First and foremost it is important to repeat what was mentioned in section IV.B.1.δ, namely that the strikes were fired individually and that from the scanty facts given by Human Rights Watch, they seemed precise and to affect a small area. While the information given by Human Rights Watch is not sufficient to draw conclusive deductions from a thorough analysis, this part will aim to show whether the conclusions drawn above will differ if these other strikes are to be included in the analysis of this attack. With regard to art 51(4)(a) Protocol 1, if the strikes were seen as individual attacks on the buildings then they would clearly violate this provision which states that an attack must be directed at a specific military objective. However, if they are to be seen as a whole it can indubitably be concluded that the attack was directed at a military objective (namely the school and the reservists located inside of it). Russia should not be held accountable for a violation of art 51(5)(a) Protocol 1 either, as in both scenarios there are no several military objectives clearly separated and distinct. Indeed, the two other buildings hit were directly adjacent to the school.<sup>386</sup> Additionally, an area bombardment cannot be retained when a few missiles with these characteristics are used. Pertaining to the first aspect of proportionality, namely the obligation set out in art 51(5)(b) Protocol 1, there are not enough details

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<sup>383</sup> These deductions were made in section IV.B.1.δ.

<sup>384</sup> Human Rights Watch *Up in Flames* op cit (n1) 94.

<sup>385</sup> Ibid.

<sup>386</sup> Ibid.

to decipher what was to be expected from the attack, and if it could have been envisaged that they would hit these two buildings. It is also plausible that Russia could have reasonably expected that some civilians would have left the city due to the military importance of Gori city, and therefore anticipated less civilian casualties as a result of those strikes. Taking this into consideration as well as the fact that at least 100 Georgian reservists were in the school yard and the possible military significance of the school,<sup>387</sup> the above-mentioned characteristics of the weapon, and according to certain scholars the fact that human shields were used leads to the conclusion that the attack respects the principle of proportionality. This conclusion should be retained even if Russia could have reasonably expected an outcome similar to the one which actually took place where 5 civilians were killed, 18 injured and two buildings were damaged.<sup>388</sup> Lastly, while the apparent characteristics of the weapon are inclined to minimise civilian collateral damage according to article 57(2)(a)(ii) Protocol 1, the pilot should have, if possible, been more careful to only aim the strikes at the school. If this was possible, Russia did not take all precautions in order to minimise the incidental civilian loss, injury and damage.

## **SECTION VI: SUPERFLUOUS HARM**

Article 35(2) Protocol 1 and rule 70 of the ICRC's codification of customary international humanitarian law applicable to both IACs and NIACs<sup>389</sup> set out the principle that all means and methods of combat 'of a nature to cause superfluous injury or unnecessary suffering' are prohibited. While it is true that this rule also makes reference to methods of combat, respected scholars place this prohibition fundamentally in the field of the restriction of certain weapons.<sup>390</sup> Superfluous harm can be defined as 'harm that would not be justified by military utility, either because of the lack of even the slightest utility or because utility is considerably outweighed

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<sup>387</sup> Human Rights Watch *Up in Flames* op cit (n1) 94.

<sup>388</sup> *Ibid.*

<sup>389</sup> Henckaerts & Doswald-Beck op cit (n138) 237-244.

<sup>390</sup> Blix op cit (n155) 166; S Bula-Bula *Droit International Humanitaire* (2010) 133; Jha op cit (n150) 57.

by the suffering caused'.<sup>391</sup> Consequently this harm would be 'greater than that unavoidable to achieve legitimate military objectives.'<sup>392</sup> A weapon which would provoke this type of harm would therefore be of nature to cause superfluous harm, as the sole legitimate objective in a war is to weaken the military forces of the other belligerent party.<sup>393</sup> This objective would also be exceeded by the use of weapons which aggravate unnecessarily the suffering of men or women who are *hors de combat*, render their death inevitable, or cause harm which exceeds what is needed in order to render the combatants incapable of taking part in the hostilities.<sup>394</sup> It follows that these means and methods of warfare that are prohibited against combatants are *a fortiori* prohibited against civilians.

According to the commentary of Protocol 1 by the ICRC, in order to determine whether there is a case of superfluous injury 'it is necessary to weigh up the nature of the injury or the intensity of suffering on the one hand, against the "military necessity", on the other hand'.<sup>395</sup> While the prohibition rests fundamentally on the prohibition of certain weapons, when examining a possible violation of this principle, the military necessity of the weapon must therefore be considered.<sup>396</sup> This necessarily implies an analysis of 'how and why this weapon is used'.<sup>397</sup> According to the leading publicist Blix, the incapacitating effect, the degree of harm the weapon inflicts, its probability of reaching the legitimate goal in war (which is to weaken the military advantage of the enemy), as well as its lethal capacity must be taken into consideration.<sup>398</sup>

Various legal sources and military manuals of different states mention as examples several weapons which have the effects prohibited by this principle. These include: projectiles which propel materials which are non-detectable by X-Ray, substances on projectiles which inflame injuries, bullets with irregular shapes that either flatten or spread once inside the body, laser weapons, poisoned projectiles,

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<sup>391</sup> Sassòli, Bouvier & Quintin op cit (n24) part 1 chap 9 at 36.

<sup>392</sup> *Advisory Opinion on the Legality of the Threat or Use of Nuclear Weapons* supra (n25) at para 78.

<sup>393</sup> Blix op cit (n155) 167.

<sup>394</sup> Ibid.

<sup>395</sup> *Commentary Additional Protocols* op cit (n128) 408.

<sup>396</sup> Herthel op cit (n8) 257.

<sup>397</sup> Ibid.

<sup>398</sup> Blix op cit (n155) 168.

flame throwers, chemical, biological, bacteriological and nuclear weapons.<sup>399</sup> However, they omit cluster munitions from the list.<sup>400</sup>

On the other hand, advocates of a cluster munitions ban claim that due to the multiplicity of the wounds that cluster munitions inflict on individuals, these weapons cause unnecessary suffering.<sup>401</sup> This being said, one cannot look at the effects of cluster munitions in isolation, the effects of other ‘comparable weapons’ need to also be taken into account.<sup>402</sup> Accordingly, according to Parks, an expert in the matter, ‘[w]ounding by more than one projectile is extremely common on the battlefield due to the various lawful fragmentation munitions in use’, which include among others hand or rifle grenades and automatic arms fire.<sup>403</sup> Furthermore, as mentioned in section I.B it has been argued that controlled cluster munitions induce less suffering than random fragmentation weapons.<sup>404</sup>

*In casu*, even if information is lacking in the report with regard to the missiles used on the school during the attack by Russia, it is clear that seemingly precise missiles that affect a limited surface<sup>405</sup> and that arguably have a minor lethal capacity (this argument stems from the fact that the strike on the school itself caused no casualties even though more than a hundred people were on site)<sup>406</sup> are not part of the list of weapons which cause superfluous harm. Their use is indeed justified by an important military utility and they do not cause unnecessary harm as opposed to the weapons mentioned in the writings of established scholars and military manuals.

The Iskander-M SS-26 should also not be recognised as a weapon causing superfluous harm for several reasons. Firstly, in order to violate the prohibition against superfluous harm, ‘the suffering inflicted by cluster munitions must outweigh the legitimate military necessity prompting their use.’<sup>407</sup> However, as seen in section

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<sup>399</sup> Jha op cit (n150) 57; Bula-Bula op cit (n390) 133.

<sup>400</sup> Jha op cit (n150) 57; Bula-Bula op cit (n390) 133.

<sup>401</sup> Herthel op cit (n8) 252.

<sup>402</sup> W Hays Parks ‘Joint service combat shotgun program’ (1977) 16 *The Army Lawyer* 19.

<sup>403</sup> *Ibid* at 21.

<sup>404</sup> Herthel op cit (n8) 252.

<sup>405</sup> These conclusions were drawn in section IV.B.1.δ.

<sup>406</sup> Human Rights Watch *Up in Flames* op cit (n1) 94.

<sup>407</sup> Herthel op cit (n8) 258.

I.A, cluster munition weapons have a significant military utility. Moreover, they are an excellent area weapon<sup>408</sup>, and ‘are perhaps the most effective weapons at stopping or slowing an enemy assault.’<sup>409</sup> Some scholars even go as far as stating that they are ‘one of the most effective and efficient weapons against a range of targets for armed forces.’<sup>410</sup> Thirdly, as mentioned in section I.B, they may actually reduce collateral damage. The Iskander-M SS-26 cluster munition can therefore not be compared with the other weapons mentioned above, that either aggravate the pain or causes it unnecessarily with no military purpose. This weapon injures or kills in a way that is commonplace to the hostilities and was created for its military efficacy. It is to be concluded from these arguments that properly employed, cluster munitions such as the Iskander-M SS-26 do not cause superfluous harm.<sup>411</sup> *In casu* only one cluster munition missile was fired and it hit a military objective.<sup>412</sup> The way it was used, and why it was used, therefore respects the principle of military necessity.

Some of the reasoning used to not classify the Iskander-M SS-26 as a weapon which causes unnecessary suffering can however be turned and used as arguments as to why the missiles carrying M85s should be classified as a weapon which causes superfluous harm and therefore be prohibited. Firstly, the M85s have an intolerable rate of unexploded remains, namely 10 per cent,<sup>413</sup> a portion of their suffering inflicted is therefore not justified by its military necessity. Secondly, the argument that they may reduce collateral damage applies to scenarios where just one cluster munition is fired accurately, like the Iskander-M SS-26, and not when they are employed in a way similar to the way Georgia used the M85s.<sup>414</sup> The way they were used by Georgia actually exacerbates the possible civilian collateral damage. Lastly, their use by Georgia described in section IV.B.1.β, is not reconcilable with the principle of military necessity.

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<sup>408</sup> Herthel op cit (n8) 258.

<sup>409</sup> Ibid at 258-259.

<sup>410</sup> Agin op cit (n48) 108.

<sup>411</sup> Herthel op cit (n8) 269.

<sup>412</sup> Human Rights Watch *Up in Flames* op cit (n1) 104; Human Rights Watch *A Dying Practice: Use of Cluster Munitions by Russia and Georgia in August 2008* op cit (n95) 25; CNN, available at <http://ireport.cnn.com/docs/DOC-83424>, accessed on 10 January 2016.

<sup>413</sup> Landmine Action, available at

[http://www.landmineaction.org/resources/ActionPacks/m85\\_factsheet.pdf](http://www.landmineaction.org/resources/ActionPacks/m85_factsheet.pdf), accessed on 25 May 2015.

<sup>414</sup> Herthel op cit (n8) 259.

As for the elements mentioned by certain scholars, such as the probability of reaching the military objective as well as lethal capacity; the fact that the particular cluster munition used by Russia was guided weapon with a very slim margin of error and designed to impact small targets, strengthens the conclusion that it did not violate this principle.<sup>415</sup> On the other hand, these arguments and elements do not favour Georgia's choice and use of weapons with regard to the respect of this provision. Indeed, the BM-21 Grads and the Mk-4 cluster munitions carrying M85 submunitions were weapons which, as seen in sections IV.A.1.α and IV.A.1.γ, are not accurate or precise. Moreover, they both have a wide surface of impact,<sup>416</sup> which results in exacerbating the unnecessary damage that is caused as an effect of their lack of precision. Lastly, the harm that these weapons caused due to their characteristics and the way they were used would be 'greater than that unavoidable to achieve legitimate military objectives'.

In conclusion, the use by Russia of a cluster munition missile of type Iskander-M SS-26 and the missile targeted at the school do not violate the prohibition to cause superfluous harm. On the other hand, arguments exist in disfavour of Georgia as for its use and choice of BM-21 Grad multiple rocket launchers and Mk-4 cluster munitions fired by a multiple rocket launcher.

## Conclusion

To conclude, there are arguments proving that Georgia had violated several rules on international humanitarian law. This state, through the choice of using BM-21 Grad multiple rocket launchers, and Mk-4 cluster munition rockets containing M85 submunitions and its use in high numbers, over large areas while not aiming at specific objectives, not only violated the principle of discrimination under many

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<sup>415</sup> Deák op cit (n194) 708-709; Military Today, available at <http://www.military-today.com/missiles/iskander.htm>, accessed on 12 January 2016; Army Technology, available at <http://www.army-technology.com/projects/iksander-system/>, accessed on 26 January 2015.

<sup>416</sup> Military Today, available at <http://www.military-today.com/artillery/grad.htm>, accessed on 10 September 2015; C King Associates Ltd, Norwegian Defence Research Establishment & Norwegian People's Aid op cit (n184) 11.

different aspects, but also the principle of proportionality. The analysis of these attacks also showed that, with regard to violations concerning the use and choice of weapons, the general principles of international humanitarian law were enough to prohibit Georgia from using these specific cluster munitions and to regulate its use. However, even with these prohibitions and regulations in place, Georgia did not respect them. It is possible that had Georgia been a party to the Convention on Cluster Munitions perhaps it would have created more incentive for it to respect those regulations. Additionally, certain arguments militate for the view that Georgia violated of the prohibition to use means and methods of warfare which cause superfluous harm. Concerning Russia, in its attacks in Gori city and on the school, it used either a precise missile containing cluster munitions or a precise rocket respectively. Furthermore, it used them in a restrained manner, in such a way that a violation of the principles of discrimination and proportionality must not be retained. The violation of the principle of the prohibition of superfluous harm must also not be reproached to Russia. The weapons used had a military necessity and did not exceed unnecessarily what was required in order to achieve it. However, in this scenario, the ratification of the Convention on Cluster Munition would have impacted the outcome as it prohibits the use of all cluster munitions.

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