



Unrepresented
Nations and Peoples
Organization

OFFICE OF THE GENERAL SECRETARY

Drs. Slava Chirikba
Boerhaavelaan 266
2334 AZ Leiden

The Hague, 8 July 1997

Dear Slava,

Here is a copy of the final version of the Legal Opinion on the Validity and Interpretation of the 4 April 1994 Georgian-Abkhazian Agreements, prepared by Mr. Bart Driessen. I also included a copy of the letter I sent to His Excellency President V. Ardzinba. I would be grateful if you could forward this also to President Ardzinba.

With kind regards,

M.C. van Walt van Praag
General Secretary

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Unrepresented
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OFFICE OF THE GENERAL SECRETARY

His Excellency President V. Ardzinba
Sukhum,
Republic of Abkhazia

The Hague, 3 July 1997

Your Excellency,

The Unrepresented Nations and Peoples Organization presents its compliments to the Government and people of Abkhazia. I have the honour to send herewith to Your Excellency the legal opinion which you requested concerning the validity and possible interpretation of the April 4, 1994 Agreements signed in Moscow by Abkhazia and Georgia. I am also writing this letter to express our regrets that due to the pressure of work in preparing for and organizing the Vth General Assembly of UNPO, I and my colleagues are not able to participate in the conference organized by *Glasnost* in Abkhazia. I would very much have liked to participate and to take the opportunity to meet with you and my Abkhazian friends again. I hope there will soon be a new opportunity for me to travel to your country.

This opinion was prepared for UNPO by an independent international lawyer in Brussels, Dr. Bart Driessen, and was circulated for comment to four other international lawyers (of the University of Leiden, the University of Glasgow, and to Lord Avebury). The comments have been incorporated in the opinion, so that the legal opinion can be regarded as an accurate reflection of current international law on the subject of the Georgian-Abkhazian Agreements.

I hope that this opinion will be of use in your efforts to advance the peace process through negotiations. I would like to request that if you have the opinion translated in Russian you would be so kind as to send us an original copy. Please let us know if you have any objection to UNPO publishing the legal opinion.

UNPO avails itself of this opportunity to reiterate its sentiments of the highest consideration,

Yours sincerely,

Dr. M.C. van Walt van Praag
General Secretary

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**LEGAL OPINION
ON**

**The Validity and Interpretation of the 4 April
1994 Georgian-Abkhazian Agreements**

prepared by

Dr. Bart Driessen

at the request of

the Unrepresented Nations and Peoples Organization (UNPO)

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LEGAL OPINION ON THE VALIDITY AND INTERPRETATION OF THE 1994 AGREEMENTS

We have been asked by the Unrepresented Nations and Peoples Organization to prepare an independent legal opinion on certain aspects relating to the agreements signed by the Abkhazian and Georgian delegations on 4 April 1994 [hereinafter: 'the 1994 Agreements']. The package then agreed to consists of two instruments: the *Declaration on measures for a political settlement of the Georgian/Abkhaz conflict* (hereinafter: the '1994 Declaration') and the *Quadripartite Agreement on voluntary return of refugees and displaced persons* (hereinafter: 'Quadripartite Agreement').

The issues concerned are the following:

1. What is the legal validity of the 1994 Agreements?
2. What are their possible legal interpretations?

Before discussing these questions, it should be observed that this memorandum does not intend to provide an opinion on other aspects relating to the Abkhaz-Georgian conflict than those touched upon by these two questions. In preparing this opinion I wish to thank a number of other international jurists who provided their comments.

1. THE LEGAL VALIDITY OF THE 1994 AGREEMENTS

No formal, specific ground for nullity of the 1994 Agreements has been raised by any of the Parties. This legal opinion will therefore consider the most likely courses which such an argument, if made, would take, and the proper responses to it.

The first issue is to what extent the 1994 Declaration is an agreement binding in international law; second, the question is discussed to what extent the Government of Abkhazia has the capacity to conclude an agreement with the Government of Georgia *under international law*. The acceptance of the Agreement by Abkhazia and Georgia under their respective internal laws is a separate (although not unconnected) matter. This question bears upon the issue to the international status of Abkhazia in 1994, during and in the period following the signing of the Agreement. The issue of ratification, and the possible argument that the 1994 Agreements were concluded by a party under coercion will also be discussed.

1.1 To what extent is the 1994 Declaration a binding agreement?

In customary international law the particular designation of an international agreement is not decisive for determining its validity.⁰ The name of a text is no more than refutable evidence. It follows that the 1994 Declaration, even though termed 'declaration' by the Parties, can constitute an international agreement. In order to assess whether the 1994 Declaration constitutes an agreement in international law, the intention of the parties to be bound by the agreement is of paramount importance.¹

The Declaration is signed by official Abkhaz, Georgian, and Russian representatives, as well as by the Ambassador Brunner, Special Envoy of the Secretary-General on behalf of the United Nations and Ambassador Manno for the

⁰. See Article 2(1)(a) of the 1969 *Vienna Convention on the law of treaties*, which reflects in this respect customary international law, and the ILC's Commentary in YBILC 1966 II at 188.

¹. See the *Aegean Sea Case*, ICJ Rep. 1978 at 39.

CSCE. It contains obligations and rights for the Parties in the conflict. In this context it is useful to recall that the signing of the 1994 Agreements was witnessed by the Secretary-General of the United Nations. It is further noted that the President of the Security Council, in response to the signing of the 1994 Agreements noted that

'[t]he Council considers the signing in Moscow on 4 April 1994 of the "Declaration on measures for a political settlement of the Georgian/Abkhaz conflict" (S/1994/397, annex I) and the "Quadripartite Agreement on voluntary return of refugees and displaced persons" (S/1994/397, annex II) as an encouraging event, laying the basis for further progress towards the settlement of the conflict.

The Council calls upon both parties [*i.e.*, Abkhazia and Georgia] to observe strictly the cease-fire and other *commitments under the agreements* and to use the atmosphere of constructive cooperation, which has emerged during the negotiations, for the solution of other key issues of the settlement.' (Emphasis added)²

These facts indicate that the United Nations consider the 1994 Declaration and the Quadripartite Agreement to be binding in international law, especially in view of the fact that the international community apparently considered the signing of these two acts to be one event.

In fact, if the 1994 Declaration was intended to be non-binding, it *ipso facto* follows that the cease-fire arrangements, which are an integral part of it, would also be non-binding. It cannot be accepted that the Georgian and Abkhazian parties, or the United Nations or the Russian Government would have intended to conclude such a 'non-binding cease-fire'.

In summary, the nature and circumstances of the signing of the agreements indicate that the 1994 Declaration was intended by the signatory Parties to be a binding instrument.³

The proviso in § 7 of the 1994 Declaration that

'[t]he parties held discussion on distribution of powers on the understanding that any agreement on this issue is part of a comprehensive settlement and will be reached only once a final solution to the conflict has been found'

does not alter this conclusion in view of the fact that none of the Parties may act before the adoption of a comprehensive settlement in a way that would frustrate the object of the 1994 Declaration.

1.2 The capacity of Abkhazia to conclude the 1994 Agreements

The matters discussed in this section are highly debated in international law; and it seems therefore safest to take a conservative view of the part of the law concerned.

1.2.1 The legal status of Abkhazia in the eyes of the United Nations

². S/PRST/1994/17 of 8 April 1994.

³. The fact that the cease-fire aspects of the 1994 Declaration were elaborated in a later *Agreement on a Cease-Fire and Separation of Forces* of 14 May 1994 (S/1994/583 of 17 May 1994) does not alter this conclusion.

It would seem uncontested that the United Nations, before and after conclusion of the 1994 Agreements, considered and continues to consider Abkhazia to be part of Georgia.⁴ In this sense the Note of the President of the Security Council of 8 October 1992 must be interpreted, in which he calls 'on all the parties . . . to observe the terms of the agreement concluded on 3 September 1992 in Moscow which affirms that the territorial integrity of Georgia shall be assured.'⁵ It would seem equally certain that neither the Security Council, nor the international community formally recognised the independence of Abkhazia in the time before the conclusion of the 1994 Agreement.

After the 1994 Agreement the United Nations continued to consider Abkhazia a part of the Republic of Georgia. The President of the Security Council issued a statement on 2 December 1994 that

'The Security Council . . . believes that any unilateral act purporting to establish a sovereign Abkhaz entity would violate the commitments assumed by the Abkhaz side to seek a comprehensive political settlement of the Georgian-Abkhaz conflict. The Security Council reaffirms its commitment to the sovereignty and territorial integrity of the Republic of Georgia.'⁶

As a matter of UN practice, states are recognised upon gaining independence within the borders they possessed prior to obtaining independence (*uti possidetis*). This principle has been applied invariably by the international community in the context of decolonisation. It has been recognised as equally important in the context of general international law.⁷ It thus appears that, at least up till now, Abkhazia has not been recognised *formally* as a state by the international community in view of the United Nations' support for the statehood of Georgia within its previous borders.

1.2.2 Abkhazia's capacity to conclude the 1994 Agreements

The non-recognition of Abkhazia by the Security Council⁸ does not *ipso facto* imply that Abkhazia has no status in international law, or that it would be unable to conclude legally binding agreements. There are several different arguments here. First, it would seem that Abkhazia has sufficient attributes of statehood to warrant a certain *de facto* recognition. Second, even if Abkhazia were not a state, then President

⁴. Compare SC res. 896 of 31 January 1994: 'Calls upon all concerned to respect the sovereignty and territorial integrity of the Republic of Georgia and stresses the importance it attaches to such respect.' This has been a continuous line in SC resolutions (see, e.g., 906 of 25 March 1994).

⁵. S/24637 of 8 October 1992.

⁶. S/PRST/1994/78 of 2 December 1994. See further SC res. 937 of 21 July 1994: '... respecting fully the sovereignty and territorial integrity of the Republic of Georgia . . .', SC res. 971 of 12 January 1995, SC res. 993 of 12 May 1995, SC res. 1036 of 12 January 1996, SC res. 1077 of 22 October 1996 and SC res. 1096 of 30 January 1997.

⁷. See in this context ICJ, *Frontier Dispute (Burkina Faso vs Mali)*, Rep. 1986 at 565:

'although there is no need, for the purposes of the present case, to show that [*uti possidetis*] is a firmly established principle of international law where decolonization is concerned, the Chamber nonetheless wishes to emphasize its general scope . . . [It] is a general principle, which is logically connected with the phenomenon of the obtaining of independence, wherever it occurs. Its obvious purpose is to prevent the independence and stability of new States being endangered by fratricidal struggles provoked by the challenging of frontiers.'

⁸. The matter of recognition of Abkhazia by Georgia is dealt with below.

Ardzinba's Government would be capable to conclude certain kinds of treaties, such as the 1994 Agreement. These arguments are explored below.

1.2.2.1 *Abkhazia's existence as a separate state; the recognition of its Government*

It is generally accepted that states have the capacity to conclude international agreements.⁹ The question thus arises, whether Abkhazia qualifies as a state in international law. It is assumed that if this question is answered positively, the Government of Abkhazia is the legitimate government to conclude treaties for Abkhazia. This question is unrelated to the one whether the existence of an independent Abkhazia is considered *desirable* by the international community or by Georgia.

In international law there are two different, opposing theories on the nature of recognition of states. The arguments may be summarised as follows: according to one school of thought, statehood comes into being through recognition by other states or the international community. This appears at first sight to be the implicit thinking behind the *Guidelines on the Recognition of New States in Eastern Europe and in the Soviet Union*.¹⁰ This theory is hard to justify with reality: there are examples of states which have existed for decades without being recognised by the majority of states. North Korea can be cited as one example; Communist Vietnam prior to the unification with South Vietnam as another.

The second - and better accepted - theory holds that the existence of states is a factual matter, and that recognition by other states or the international community can be no more than evidence of statehood or a display of willingness to establish a certain level of relations with the recognised state.

It is not necessary for the appreciation of the Abkhaz-Georgian situation to enter into an academic debate on the best view of this issue. It would seem certain that even entities aspiring to statehood which are not formally recognised by other states do have rights vis-à-vis other states. For example, during four decades the state of Israel was not formally recognised by many Arab states; still, these states recognised that the territory of Israel could not be invaded by them. When in 1949 British planes were downed by the Israel airforce, the United Kingdom at once informed the Israeli authorities that they would demand compensation. The fact that the United Kingdom had not recognised Israel at that time was not considered relevant. Last, before the Former Yugoslav Republic of Macedonia (FYROM) was recognised by Greece, that country did in fact recognise that de facto a state existed on the territory of (former) Yugoslav Macedonia; indeed, Greece even negotiated with FYROM in order to reach a settlement on the name and state symbols of that state.

Moreover, to some extent the *Tinoco Concessions* arbitration may serve as guidance. Arbitrator Taft observed in that case that:

'The non-recognition by other nations of a government claiming to be a national personality, is usually appropriate evidence that it has not attained the independence and control entitling it by international law to be classed as such. But when recognition *vel non* of a government is by such nations determined by

⁹. See Article 6 of the 1969 *Vienna Convention on the law of treaties*, which reflects in this respect customary international law.

¹⁰. 31 ILM (1992) at 1486.

inquiry, not into its *de facto* sovereignty and complete governmental control, but into its illegitimacy or irregularity or origin, their non-recognition loses something of evidential weight on the issue with which those applying the rules of international law are alone concerned. What is true of the non-recognition of the United States in its bearing upon the existence of a *de facto* government under Tinoco for thirty months is probably in a measure true of the non-recognition by her Allies in the European War. Such non-recognition for any reason, however, cannot outweigh the evidence disclosed by this record before me as to the *de facto* character of Tinoco's government, according to the standard set by international law."¹¹

It seems accepted that this conclusion is also valid for the recognition of states.

The question thus becomes what the criteria are under which Abkhazia would become a state. The best view appears to be that a state exist if, factually, it fulfils the following conditions:

'The State as a person of international law should possess the following qualifications: (a) a permanent population; (b) a defined territory; (c) government; and (d) capacity to enter into relations with other States.'¹²

As a factual matter, it would seem that these conditions are generally fulfilled by the Republic of Abkhazia. Objectively, Abkhazia exists as a polity; the Government of the Republic of Abkhazia has been in control of all of Abkhazia's territory¹³ from the Autumn of 1993 onwards. It has had a reasonably stable Government throughout the time. It is admitted that a large number of Abkhazia's residents have fled the country pursuant to the war activities; but this does not mean that the population of Abkhazia is not broadly determinable.

The last criterion, (d), refers to the constitutional law of the (purported) state concerned, and it would seem that the Abkhaz Constitution indeed empowers the republic to conduct international relations and to conclude treaties (see, e.g., Articles 47(8) and 53(4) of the Abkhaz Constitution).

The recognition of a state by other states would seem to be no more than evidence that the four above-mentioned criteria are fulfilled; formal recognition by the Government of Georgia, the United Nations, or third states would not *create* the state of Abkhazia. At the same time non-recognition may be an expression of disapproval with some aspect pertaining to the new state.

¹¹. 1923 RIAA i. 369, 381.

¹². Article 1 of the *Montevideo Convention on Rights and Duties of States 1933*, which is generally accepted as an expression of customary international law. Further Opinion 1 of the Badinter Commission (31 ILM 1488 (1992)):

'the existence or disappearance of the State is a question of fact; that the effects of recognition by other States are purely declaratory;

... the State is commonly defined as a community which consists of a territory and a population subject to an organized political authority; that such a State is characterized by sovereignty.'

¹³. Although it is admitted that in some smaller regions, such as the Gali region, effective control seems shaky. In general, however, it seems uncontested that the Abkhazian Government controls a more or less stable territory.

Even if one would not follow the evidence that Abkhazia exists as *de facto* state, then it could still be argued that President Ardzinba's Government was competent to conclude the 1994 Agreements.

The 1994 Agreements are no ordinary agreements. They were drafted in the context of United Nations-sponsored negotiations as part of a comprehensive settlement. Quite apart from the question whether President Ardzinba represents the *state Abkhazia* (a question addressed above), the question arises whether the Government of Georgia acquiesced to the capacity of the Government of Abkhazia¹⁴ to conclude international agreements. In short, the following factors would seem relevant as evidence for such recognition:

1) Notwithstanding its claim that Abkhazia is a part of it, Georgia has in practice not treated the Abkhaz-Georgian conflict as an internal matter. It may be noted that the Abkhaz-Georgian conflict was brought to the attention of the United Nations by the Georgian government itself.¹⁵ In order to construe some international aspect on the issue, the Georgian government has in the beginning of the conflict maintained that the conflict in Abkhazia was an 'undeclared war with the mercenaries, launched from the territory of a neighbouring country';¹⁶ it would seem that subsequently this allegation was not insisted upon. It is Georgia that appealed to the United Nations to intervene in order to end the war.

2) There are many more types of entities in international law other than states and international organisations and it could be argued that it is not even necessary for Abkhazia to be a 'formally recognised' state. In this respect it must be noted that international agreements are concluded by entities as diverse as the Sovereign Military Order of St John of Malta, insurgent governments and by the Holy See. In New Zealand and Australia the authorities are beginning to accept the validity of agreements concluded between the British Empire and the indigenous populations in the last century.¹⁷ All these entities are capable of concluding agreements valid in international law. Since this opinion is merely concerned with the two questions defined in the introduction, the question whether such treaty-making power is as extensive as that of states is left aside. There are, moreover, ample examples of non-state entities and states, concluding cease-fire and other binding agreements.

By signing them, the Government of Georgia has implicitly recognised that the Government of President Ardzinba has at least the competence to conclude the 1994 Agreements. The fact that Georgia has refused to refer to 'the Government of Abkhazia' but merely to 'the Abkhaz side' is of no relevance; the signature of the Georgian Government is much stronger evidence for the capacity of President Ardzinba's Government to conclude the 1994 Agreements than any formal non-recognition of that Government by Georgia could ever be.

3) The third point is linked with the previous one. The 1994 Declaration is part of a package which is based on an cease-fire between the Georgian and Abkhazian

¹⁴. Or, in UN parlance, 'the Abkhaz side.'

¹⁵. See for instance S/24632 of 7 October 1992.

¹⁶. Ibid. at 4.

¹⁷. See also the Opinion of the International Court of Justice in the *Western Sahara* Case, ICJ Rep. 1975 at 12, where the Court accepted that agreements concluded by African tribes with Spain could count as evidence that the Western Sahara was not *terra nullius*.

sides. The package signed on 4 April 1994 further included, next to clauses on the principles for a political agreement of Georgian-Abkhazian relations, the *Quadripartite agreement on voluntary return of refugees and displaced persons*.¹⁸ The political clauses in the 4 April 1994 Agreements cannot be taken out of that package without the other agreements belonging to the same package losing their validity and essential features: A reading of the agreements of April 4 indicate that the agreement on the cease-fire and on the return of displaced persons and refugees depend, or at least are tied to, the agreement on principles for a political settlement of Georgian-Abkhaz relations.

A claim that President Ardzinba's Government was incapable of concluding the 1994 Agreements would by necessity imply that it was incapable to conclude the cease-fire — a point of view which is absurd and, if seriously maintained, highly dangerous for the peace process.

It follows that, even if one would deny that Abkhazia is a state, still President Ardzinba's Government would be competent to conclude certain types of international agreements, such as cease-fire agreements and other agreements for the settlement of the war. Since the political declaration in the 1994 Agreements are part of a package of agreements including the cease-fire, by necessity President Ardzinba's Government was capable to conclude a valid international agreement on these matters as well.

It follows from the nature of the 1994 Agreements and from Georgia's willingness to sign them that the Abkhazian side was capable to conclude them.

1.2.3 Georgia is bound vis-à-vis Russia and the United Nations

As stated above, the 1994 Agreements were also signed by the Government of Russia and the United Nations.¹⁹ It follows that, in any event, Georgia is bound by the 1994 Agreements vis-à-vis Russia and the United Nations. In this context it is again recalled that the President of the Security Council stated in this context that '[t]he Council calls upon both parties [i.e., Abkhazia and Georgia] to observe strictly the cease-fire and other commitments under the agreements ...'²⁰

1.2.4 Conclusion: the Abkhaz Government was capable to conclude the 1994 Agreements

The evidence that the Government of Abkhazia was capable to conclude the 1994 Agreements with Georgia validly in international law is clearly established:

- because Abkhazia factually is a state, notwithstanding UN Security Council resolutions not recognising it as an independent state;
- and, regardless of the status of Abkhazia, because President Ardzinba's Government was capable to conclude cease-fire and other agreements with the Georgian Government, and that this capability was recognised by the Georgian Government and by the United Nations, Russia and the CSCE.

¹⁸. Annex II of S/1994/397 at 4. It is noted that the 1994 Declaration in § 4 thereof explicitly refers to the Quadripartite Agreement. In this context also the Communiqué of the Parties of 13 January 1994, points 2 and 5, seems relevant.

¹⁹. The 1994 Declaration was also signed by the CSCE.

²⁰. S/PRST/1994/17 of 8 April 1994.

It should be emphasised again that relevant to the analysis of the agreements is also the process by which the parties negotiated and reached agreement on the terms. It was Georgia which requested the United Nations Secretary General and Security Council to intervene in order to end the war between the Abkhazian and Georgian sides.²¹ Negotiations took place under the chairmanship of the United Nations, in the person of the Special Envoy of the Secretary General, Ambassador E. Brunner. The Russian government played an additional facilitating role, and the CSCE (later OSCE) took part in an observer capacity. The formal negotiations, which took place primarily in Geneva (at the UN) and in Moscow (at the Russian Foreign Ministry) took many months. Several memoranda of understanding and joint declarations were signed by the parties at the end of each negotiation session. The Georgian side as well as the Abkhazian side, but also the UN and Russia, considered both parties to be bound to those agreements, which the plenipotentiaries of each side signed. The agreements signed in Moscow on 4 April 1994, was the culmination of months of work and negotiation in which each side was very careful to secure their interests and see them reflected in the memoranda of understanding and other agreements signed.

At all phases, the principal political agreements mentioned above were co-signed by the representatives of the United Nations, Russia and the CSCE. The April 4 Agreements, because of their significance, in that they were viewed as basic agreements on which future negotiations and agreements would be based, were ceremoniously signed in the presence of the Secretary General of the United Nations himself and the Foreign Minister of the Russian Federation, in addition to being countersigned by the representative of the UN, Russia and the CSCE.

On a number of occasions following the signing of the agreements, the UN Secretary General and the UN Security Council made reference to the need to adhere to those agreements and to observe their terms.

1.3 Entry into force of the 4 April 1994 Agreements

In general terms, if it is the clear intention of Parties that an agreement enters into effect by their mere signing it, ratification of the agreement is not necessary.²²

In cases of cease-fire agreements such is generally the case. It is clear from the text of the 1994 Declaration that indeed such was the intention of the Parties: Article 3 states: " By signing this declaration, the parties hereby commit themselves to a strict formal cease-fire from this date . . . ' Similarly, the very last clause of the Quadripartite Agreement provides that '[t]his agreement shall enter into force with immediate effect . . . '.

It therefore follows that ratification of the 1994 Agreements was not necessary for their entry into force, and that Georgia is bound in international law by the 1994 Agreements. The question whether Georgian internal law prescribes ratification is a matter of Georgian domestic law and would not affect the obligations of Georgia under international law.

²¹ It should be noted that the Abkhazian government also appealed to the United Nations and to UNPO even before the armed conflict broke out. It received no response from the UN, but UNPO took action.

²² See in this respect Article 12(1)(b) of the 1969 *Vienna Convention on the law of treaties*.

1.4 The argument that the 1994 Agreements were concluded under coercion

First, the fact pattern, including the behaviour of Parties and their role in precipitating the Abkhaz-Georgian conflict, itself stops any claim by either Party that it was 'coerced' into signing the 1994 Agreements.

Second, such coercion — if it were to exist — could only be a ground for the 1994 Agreements to be void if the coercion was aimed at forcing the conclusion of those Agreements.²³ An agreement is void if signed under force or threat of force against a Party and is violable if the representatives of a Party are themselves put under duress. Neither of these situations existed in regard to the signing of the April 4 1994 Agreements. It would seem beyond doubt that, in this case, neither Abkhazia, nor Georgia, nor the United Nations, nor Russia forced one of the Parties to accept the terms of the 1994 Agreements. Indeed, the 1994 Agreements are by no means biased towards the interest of one side; there are many aspects in the Agreements which are considered by each Party as less than their optimal outcome.

It should be noted in particular that both Abkhazia and Georgia have on many occasions insisted on the prompt execution of the 1994 Agreements and especially of the clauses thereof which best fitted their respective political positions. It follows that, even if Abkhazia or Georgia would have acted under coercion when they concluded the 1994 Agreements —which does not appear to be the case — they can no longer rely on that argument since both of them have since 1994 acquiesced in the legal validity of the 1994 Agreements.

In summary, it would seem that any claim based on coercion cannot succeed.

2. POSSIBLE LEGAL INTERPRETATIONS OF THE 1994 DECLARATION

For the sake of brevity this section of this memorandum will concentrate on the institutional aspects of the 1994 Declaration and will make some general observations on the remaining issues. Consequently, this memorandum cannot endeavour to be exhaustive.

The institutional provisions in the 1994 Agreements are laid down in §§ 5-8 of the 1994 Declaration, as follows:

§ 5. The Parties reaffirm their request for the early deployment of a peace-keeping operation and for the participation of a Russian military contingent in the United Nations peace-keeping force, as stated in the Memorandum of Understanding of 1 December 1993 (S/26875, annex) and the communiqué of 13 January 1994. The plan for carrying out the peace-keeping operation will be agreed upon with the parties to the conflict. The realisation of the peace-keeping operation should also promote the safe return of refugees/displaced persons. The parties again appeal to the United Nations Security Council to expand the mandate of the United Nations Observer Mission in Georgia (UNOMIG).

§ 6. Abkhazia shall have its own Constitution and legislation and appropriate State

²³ See Article 52 of the 1969 Vienna Convention on the law of treaties.

symbols, such as anthem, emblem and flag.

§ 7. The parties held discussion on distribution of powers on the understanding that any agreement on this issue is part of a comprehensive settlement and will be reached only once a final solution to the conflict has been found. At this stage, the parties have reached a mutual understanding regarding powers for joint action in the following fields:

- (a) Foreign policy and foreign economic ties;
- (b) Border guard arrangements;
- (c) Customs;
- (d) Energy, transport and communications;
- (e) Ecology and elimination of consequences of natural disasters;
- (f) Ensuring human and civic rights and freedoms and the rights of national minorities.

§ 8. The parties agree to continue energetic efforts to achieve a comprehensive settlement. The Parties will set up an appropriate committee, which will work on a standing basis, taking into account the decisions of the Security Council, under the chairmanship of the United Nations with participation of representatives of CSCE and the Russian Federation and with the involvement of international experts. This body will meet alternatively in Moscow and Geneva. Its first meeting will be held in Geneva on 19 April 1994. A phased action programme will be worked out and proposals on the re-establishment of State and legal relations will be elaborated.'

2.1 The rights and obligations flowing from the 1994 Declaration

As a first general point, it seems safe to adopt a cautious interpretation of the 1994 Agreements.

As a second point, it must be noted that all Parties to the 1994 Agreements are under an obligation not to act in such a way as to frustrate the purpose of the agreements. Since Georgia and Abkhazia concluded the 1994 Agreements, they are under an obligation to execute them in good faith.

The 1994 Declaration contains only few specific obligations and rights. The clauses dealing with the future political relations set out principles rather than detailed obligations. This is due precisely to the continuing disagreement between the Governments of Abkhazia and Georgia on the some fundamental aspects of a political solution of the conflict. As a result, care is needed to construe the interpretation of the 1994 Declaration.

2.2 The cease-fire: Parties should desist from deploying irregular units under their control

The first point of importance concerns § 3 of the 1994 Declaration. The 'non-use of force or threat of the use of force' includes, apart from the obligation not to breach the cease-fire by actions from the regular armed forces or irregular forces of either side, also the obligation not to condone such actions.²⁴ In so far as irregular units effectively under control of the Parties are still operating in Abkhazia, either Party is

²⁴. This is also embodied in Article 2(f) of the *Agreement on a Cease-Fire and Separation of Forces* of 14 May 1994 (S/1994/583).

under an obligation to desist from supporting them. The threat of the use of force can take the form of declarations or official government statements, the holding of military manoeuvres clearly intended as a threat of force and actual troop movements in the direction of the opposing party, which show a readiness for combat.

2.3 The political clauses

The paragraphs of the 1994 Declaration concerning the political settlement of the conflict are §§ 6, 7 and 8. The agreed text is detailed on some points, but vague on others. This reflects the points of agreement and disagreement between the two Parties. As argued above, one must be careful not to read too specific legal interpretations from the text. Notwithstanding that, some conclusions may be drawn.

The 1994 Déclaration does not clearly pronounce on the question of the independent or other status for Abkhazia. Section 6 does state that "Abkhazia shall have its own Constitution and legislation and appropriate State symbols, such as anthem, emblem and flag." This means the Parties agreed on the *statehood* of Abkhazia. The precise extent of the powers of that state, or its international status is not mentioned in the section.

Section 7 refers to the future distribution of powers between Abkhazia and Georgia. Since Section 6 recognises the statehood of Abkhazia, this clause refers to the distribution of powers between states. What this section does not do, is qualify whether the status of the states is equal, nor what the nature of their relationship is to be. From the history of the negotiations and the statements made by both sides, it can be presumed that there was no agreement on this point: Georgia insisted on recognition of the territorial integrity of Georgia (including Abkhazia), while Abkhazia insisted on any agreement between the two Parties to be that between two states of equal status. Be that as it may, the parties did agree that in certain defined areas each would delegate powers for joint action. These areas are listed in Section 7 (a) to (f), as follows:

- (a) Foreign policy and foreign economic ties;
- (b) Border guard arrangements;
- (c) Customs;
- (d) Energy, transport and communications;
- (e) Ecology and elimination of consequences of natural disasters;
- (f) Ensuring human and civic rights and freedoms and the rights of national minorities.

Other than suggesting that there will be certain links between Abkhazia and Georgia; this section fails to specify whether the final political settlement will be 'federal' or 'confederal', or otherwise. This was one of the issues where Abkhazia and Georgia have been unable to reach agreement. It should be noted that, in practice, such terms have limited concrete meaning and that the actual level of self-government of Abkhazia will depend on the details of the arrangements and the spirit in which they are implemented: throughout history there have been confederations where one dominant partner effectively controlled the confederation (e.g. the Habsburg Empire), while there have been federated states which guaranteed extensive sovereignty to its component entities.

It is relevant that § 8 provides that 'proposals on the re-establishment of *State and legal relations* will be elaborated' (emphasis added). The italicised terminology must be interpreted in the context of institutional law in the (former) Soviet Union since both Abkhazia and Georgia interpreted the text as such. This means, in essence, a recognition of the sovereignty of Abkhazia but one which does not *ipso facto* exclude the recognition of the territorial integrity of Georgia.

In the 1994 Declaration some areas of competence have been listed where 'powers for joint action' will be recognised. § 7 does not lay down who will be (ultimately) competent in the fields not listed for 'joint action' or how this arrangement is to work in practice; however, it appears to have been understood during the negotiations by both Parties that the competences *not* listed in § 7 fall exclusively to the Abkhazian Institutions, and not to Georgia.

Indeed, for the provision of § 6 to be meaningful, the Constitution must be determined by the population of Abkhazia without interference from Georgia. The term 'its own legislation' is problematic: it does not explicitly say who is to draft such legislation (presumably the Abkhaz legislator), nor does it clarify the relation to Georgian legislation. It would seem to signify that the Abkhaz legislation concerned must rest on the Abkhaz Constitution.

Sections 6 and 7 should be read in conjunction. An 'own Constitution and legislation', with no further limitation than that imposed by § 7, would seem to imply that:

- the Abkhaz legislature and authorities will be competent in all fields not listed in § 7;
- that Georgia will not be competent to act for Abkhazia in those fields; and
- that Abkhazia and Georgia will be jointly responsible for the fields listed in § 7.

It seems an implicit necessity that a procedure be worked out for the settlement of differences of competence between Abkhazia and Georgia.

It must be noted that this interpretation is not inconsistent with the relevant part of the (unadopted) *Proposals for political and legal elements for a comprehensive settlement of the Georgian / Abkhaz conflict*.²⁵

2.4 The role of the peace keeping forces

At the time of the negotiations leading to the 1994 Agreements there was a difference of opinion relating to the precise task of the peace keeping forces. On the one hand, the Georgian view could be summarised that the peace keeping forces were to police the whole territory of Abkhazia, whereas the Abkhazian Government favoured these troops to act as a buffer to separate the Parties.

The 1994 Agreements, as well as the *Agreement on a Cease-Fire and Separation of Forces* were based on a compromise of these views and consequently, any interpretation ignoring that fact would not seem to reflect the will of the Parties.

2.5 The return of refugees

One reason why the return of refugees to Abkhazia has been delayed is the concern of the Abkhazian Government that among such refugees may be destabilising elements. An other reason is the fear for the safety of some of the returning refugees who are thought to have been involved in acts of violence and brutality against

²⁵ S/1994/529 of 3 May 1994 at 11.

Abkhazians. That raises the issue to what extent the Government of Abkhazia is entitled to refuse access to Abkhazia to such persons.

Article 3(c) of the Quadripartite Agreement provides in this respect that:

'[d]isplaced persons/refugees shall have the right to return peacefully without risk of arrest, detention, imprisonment or legal criminal proceedings.

Such immunity shall not apply to persons where there are serious evidences that they have committed war crimes and crimes against humanity as defined in international instruments and international practice as well as serious non-political crimes committed in the context of the conflict. Such immunity shall also not apply to persons who have previously taken part in the hostilities and are currently serving in the armed formations, preparing to fight in Abkhazia.

Persons falling into these categories should be informed through appropriate channels of the possible consequences they may face upon return.'

This provision lays down several guidelines. First, a person will only fall under this exception if he has committed one of the following crimes or falls in the third category:

1) *war crimes and crimes against humanity as defined in international instruments and international practice*: several international agreements define such crimes. The definition in Article 6 of the Charter annexed to the *Agreement for the Establishment of an International Military Tribunal 1945* is one of the most authoritative. Under it, 'war crimes' are defined as 'violations of the laws or customs of war. Such violations shall include, but not be limited to, murder, ill-treatment or deportation to slave labour or for any other purpose of civilian population of or in occupied territory, murder or ill-treatment of prisoners of war . . . killing of hostages, plunder of public or private property, wanton destruction of cities, towns or villages, or devastation not justified by military necessity.' 'Crimes against humanity' are defined as 'murder, extermination, enslavement, deportation, and other inhumane acts committed against any civilian population, before or during the war, or persecutions on political, racial, or religious grounds in execution of or in connection with any crime . . . whether or not in violation of the domestic law of the country where perpetrated.'

2) *serious non-political crimes committed in the context of the conflict*: there appears to be no agreed definition of this term. To a large extent it will cover the crimes defined under 1), with the exception that no political element is required.

3) *refugees/displaced persons previously taking part in the hostilities who are currently serving in armed formations, preparing to fight in Abkhazia*. It is important to note that all these conditions must be fulfilled.

It is not enough for mere suspicions to exist against persons that they have committed one of the crimes above; the Quadripartite Agreement requires that 'serious evidences' exist, and that the persons concerned are informed of the charges against them through the 'appropriate channels' (i.e., for instance, through UNHCR officials).

It appears that the exceptions allowed under this provision may not be interpreted too broadly.

3. CONCLUSIONS

The 1994 Agreements have established legal obligations for the Parties. In other words, Georgia and Abkhazia are legally bound to execute the 1994 Declaration and the Quadripartite Agreement in good faith.

It should be noted that any revocation of the 1994 Agreements by either Party, on whatever ground, would imply that the cease-fire itself is revoked. That would mean that Georgia and Abkhazia would revert to a factual state of war.

Both Parties are under an obligation not to support or condone acts of war against the other by military or irregular units. And both parties are under an obligation not to threaten with the use of force against the other Party.

Although the 1994 Agreements certainly are no more than the first building stones of a comprehensive solution of the Abkhaz-Georgian conflict, they do lay down certain principles which should be the basis for a future organisation of the political relations between Abkhazia and Georgia:

- Abkhazia must be involved in policy-making and legislation in the following fields:
 - (a) foreign policy and foreign economic ties;
 - (b) border guard arrangements;
 - (c) customs;
 - (d) energy, transport and communications;
 - (e) ecology and elimination of consequences of natural disasters;
 - (f) ensuring human and civic rights and freedoms and the rights of national minorities.
- the Abkhaz institutions should be responsible for policy-making and legislation in all other policy domains.

Brussels, 4 July 1997.