

# “Don’t Mess with Moscow”— Legal Aspects of the 2008 Caucasus Conflict

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## I. INTRODUCTION

On August 8, 2008, millions of people were sitting in front of their TV waiting for the opening ceremony of the Olympic Games. Instead of a peaceful opening ceremony, the news started with a very different headline: “War in the Caucasus!”<sup>1</sup>

What had happened? Following a series of minor skirmishes between South Ossetian militias and Georgian troops in July 2008, President Mikheil Saakashvili decided to “pacify” the region once and for all. Hence, he sent three brigades into South Ossetia, the country’s breakaway region.<sup>2</sup> This in turn triggered the intervention of Russia, which claimed, *inter alia*, to have acted in defense of its citizens—90% of South Ossetians were given Russian passports in the last decade—and its peacekeepers stationed there.<sup>3</sup>

The Caucasus conflict of August 2008 illustrates “how international law has become one of the arenas in which contemporary wars are fought.”<sup>4</sup> Both Georgia and Russia claimed the mantle of legitimacy in an effort to shape international perceptions of the conflict.”<sup>5</sup> But which party to the conflict really acted in accordance with international law?

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1. See Michel Chossudovsky, *War in the Caucasus: Towards a Broader Russia-US Military Confrontation?*, GLOBALRESEARCH.CA (Aug. 10, 2008), <http://www.globalresearch.ca/index.php?context=va&aid=9788>.

2. See *infra* notes 7–10 and accompanying text.

3. See *id.*

4. Most international observers were quick to condemn Russia’s ‘illegal intervention’. Sympathy thus quickly sided with little ‘David’ (Georgia), fighting the evil imperialist giant ‘Goliath’ (Russia).

5. Anthony Dworkin, *The Georgia Conflict and International Law*, CRIMES OF WAR PROJECT (Aug. 26, 2008), <http://www.crimesofwar.org/onnews/news-georgia.html>.

In order to answer this complex question, this paper will proceed as follows:

In Part II, it will first reconstruct the course of events that led to the outbreak of war. Having done so, it will then analyze in Part III the legality of Georgia’s military action, paying particular attention to the legal status of South Ossetia—is it a state, a de facto regime or still part of Georgia proper? In Part IV, it will proceed to examine Russia’s military intervention from a jus ad bellum perspective. Finally, in Part V, the author’s conclusions are summarized.

## II. A BRIEF CHRONOLOGY OF EVENTS

Reconstructing the course of events that led to the outbreak of the 2008 Caucasus War is highly important—both from a legal and political perspective. Hence, on September 6, 2008 the European Union (E.U.), acting in its role as mediator, decided to set up a committee to investigate the course of events. Yet, one year later its report still has not been published. This is hardly surprising, given the difficulties in ascertaining what had actually happened—contradictory accounts of events by the conflicting parties, and lack of access to certain parts of the country as well as to witnesses all render the committee’s task a Sisyphean one.<sup>6</sup> The following section will nevertheless attempt to reconstruct at least the basic contours of what happened.

Since April 2008, the number of skirmishes between Georgians and South Ossetians has increased dramatically. Hence, Georgia decided to deploy three brigades close to South Ossetia. The objective of this measure was twofold: to prevent South Ossetian attacks against Central Georgia and—should the opportunity arise—“to restore constitutional order” in this breakaway region.<sup>7</sup>

Following an escalation of violence on August 7, 2008, Georgian troops launched an artillery assault on villages close to Tskhinvali, from where South Ossetian militias had attacked the Georgian enclave of

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6. See Alice Bota, *Russland darf alles*, DIE ZEIT (Aug. 06, 2009), <http://www.zeit.de/2009/33/01-Georgien>.

7. See *Georgia Decided to Restore Constitutional Order in South Ossetia*. MoD Official, CIVIL.GE: DAILY NEWS ONLINE (Aug. 08, 2008), <http://www.civil.ge/eng/article.php?id=18941>.

Tamarasheni.<sup>8</sup> At 7:00 p.m., President Saakashvili announced a three hour cease-fire and offered both South Ossetia and Russia negotiations without any preconditions. Despite significant communication problems, the Georgian minister responsible for South Ossetia and the Russian special envoy, Jurij Popov agreed to meet the next day to discuss a solution to the conflict. However, this meeting never took place. After the ceasefire had expired at 10:00 p.m., President Saakashvili ordered a large scale attack on Tskhinvali, the South Ossetian capital.<sup>9</sup> Assaults by Georgian ground and air forces followed.<sup>10</sup> The Georgian Government justified the attack in the following terms:

Over the last several hours, separatist rebels in South Ossetia have undertaken a series of military attacks against unarmed civilians and peacekeeping forces in several villages near Tskhinvali. . . . To protect peaceful civilian populations and to prevent further military attacks, the Government of Georgia has been forced to take adequate measures.<sup>11</sup>

Moscow's "military response began the next day, with the declared purpose of protecting Russian peacekeepers stationed in South Ossetia and residents who had become Russian citizens in recent years. Beginning on August 8, Russian ground forces from the 58th Army crossed into South Ossetia and Russian artillery and aircraft hit targets in South Ossetia and undisputed Georgian territory."<sup>12</sup> Faced with Russia's overwhelming military might, Georgia ordered its troops "to withdraw from South Ossetia on August 10 and two days later Russian forces moved into and occupied undisputed Georgian territory south of the administrative border with South Ossetia, including the city of Gori. In a separate operation from the west, moving through the breakaway region of Abkhazia, Russian forces also occupied the strategically important city of Poti in western Georgia."<sup>13</sup>

Both Georgia and Russia claimed "the mantle of legitimacy in an effort to shape international perceptions of the conflict."<sup>14</sup> But which party to the conflict really acted in accordance with international law?

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8. See *Day-by-Day: Georgia-Russia Crisis*, BBC ONLINE (Aug. 21, 2008), <http://news.bbc.co.uk/2/hi/europe/7551576.stm>.

9. See *id.*

10. Jenny Norton, *The Ossetian Crisis: Who Started It?*, BBC ONLINE (Aug. 19, 2008), <http://news.bbc.co.uk/2/hi/europe/7571096.stm>.

11. *Statement of the Government of Georgia Regarding the Situation in the South Ossetia Region of Georgia*, EMBASSY OF GEOR. TO THE U.S. & CAN. (Aug. 8, 2008), [http://usa.mfa.gov.ge/index.php?lang\\_id=ENG&sec\\_id=142&info\\_id3941](http://usa.mfa.gov.ge/index.php?lang_id=ENG&sec_id=142&info_id3941).

12. *Up in Flames*, HUMAN RIGHTS WATCH, 5 (Jan. 23, 2009), <http://www.hrw.org/en/reports/2009/01/22/flames-0>.

13. *Id.*

14. Dworkin, *supra* note 5, at 1.

In order to answer this complex question, this paper will first analyze the legality of Georgia’s military action. Having done so, it will then examine Russia’s military intervention from a jus ad bellum perspective.

### III. THE LEGALITY OF GEORGIA’S ACTION

#### A. *The Prohibition on the Use of Force*

##### 1. *Historical Background*

Until the beginning of the twentieth century, the use of military force by states was regarded as an essential and appropriate instrument of international politics. In *The Elements of International Law*, American jurist Henry Wheaton provided the legal basis for this view:

[S]tates acknowledge no common arbiter or judge, except such as are constituted by special compact. The law by which they are governed, or profess to be governed, is deficient in those positive sanctions which are annexed to the municipal code of each distinct society. Every State has therefore a *right to resort to force*, as the only means of redress for injuries inflicted upon it by others, in the same manner as individuals would be entitled to that remedy were they not subject to the laws of civil society. Each state is also entitled to judge for itself, what are the nature and extent of the injuries which will justify such a means of redress.<sup>15</sup>

The first steps designed to curtail the right of a sovereign state to resort to war were taken at the beginning of the 20th century.<sup>16</sup> The unprecedented destruction and human suffering during the First World War prompted states to establish the League of Nations.<sup>17</sup> Although the Covenant of the League of Nations, signed in 1919, imposed some limitations upon the resort to war, it was not until the General Treaty for the Renunciation of War (*Kellogg-Briand Pact*) in 1928 that a comprehensive prohibition of war as an instrument of national policy was achieved. According to Article 1 of this Treaty, the contracting parties “condemned recourse to war for the solution of international controversies and renounced it as an instrument of national policy in

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15. HENRY WHEATON, *ELEMENTS OF INTERNATIONAL LAW* § 290 (George Grafton Wilson, ed., Oxford: Clarendon Press 1936) (1866).

16. *See, e.g.*, Hague Convention for the Pacific Settlement of International Disputes, Oct. 18, 1907, 1 Bevens 577; Hague Convention for the Pacific Settlement of International Disputes, July 19, 1899, 1 Bevens 230.

17. *See* MATHIAS HERDEGEN, *VÖLKERRECHT* 226 (2005).

their relations with one another.”<sup>18</sup> However, like the League Covenant, the Kellogg-Briand Pact<sup>19</sup> lacked an enforcement mechanism and therefore had little practical effect. Guaranteeing such practical effectiveness was the aim of the next attempt to limit the resort to force, the United Nations (U.N.) Charter, whose provisions will be discussed in the next section.

## 2. Article 2(4) of the U.N. Charter

The U.N. Charter imposed an almost absolute prohibition on the use of force. Article 2(4) of the Charter provides that “all member states shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any state, or in any manner inconsistent with the purposes of the United Nations”<sup>20</sup> Several aspects of this prohibition require closer examination in the case under consideration. First, the military attacks by Georgian troops against South Ossetian towns—in particular the bombing of Tskhinvali<sup>21</sup>—constitute a *use of force* within the meaning of Article 2(4). Georgia is also a U.N. member state.

Moreover, Article 2(4) requires the use of force by Georgia against the territorial integrity or political independence of *another state*. This requirement raises complex questions with regard to South Ossetia. In particular, its legal status seems unclear. Is South Ossetia a state, a stabilized *de facto* regime, or still part of Georgia (proper)?

Until the outbreak of hostilities, South Ossetia was regarded as an integral part of Georgia by the international community of states, including Russia. Georgia’s territorial sovereignty over South Ossetia was thus generally recognized by the international community. Hence, Georgia’s military action against South Ossetian villages seems to constitute an *internal* affair. International law, including Article 2(4), would not be applicable at all. Rather, the measures referred to would have to be seen and evaluated in the light of national constitutional law.

However, things are a bit more complex. South Ossetia might also be regarded as a *stabilized de facto regime*. As such, it would enjoy at least

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18. YORAM DINSTEIN, *WAR, AGGRESSION AND SELF-DEFENCE* 83 (2005). The League Covenant (1919) did not abolish the right of states to resort to force altogether. War was still lawful, if the procedural safeguards laid down in Articles 10 to 16 of the Covenant were observed. *See id.* at 80–82.

19. The Kellogg-Briand Pact provided the legal basis for various bilateral and multilateral non-aggression pacts, for example the non-aggression pact between Germany and the Soviet Union. *See* WILLIAM KEYLOR, *THE TWENTIETH CENTURY WORLD—AN INTERNATIONAL HISTORY* 120–23 (2001).

20. U.N. Charter Art.2, para. 4.

21. On August 7–8, 2008.

partial international personality. De facto regimes are territorial entities which control a more or less clearly defined territory without being recognized as a state.<sup>22</sup>

They are regarded as “stabilized” if they exercise effective and permanent sovereignty over their territory—they must be *de facto* independent from their “paternal” state which is only left with formal territorial sovereignty.<sup>23</sup> Hence, *de facto* regimes fulfill the three constituent criteria for statehood: (1) a defined territory, (2) a people, and (3) an effective government.<sup>24</sup> What they lack, however, is international recognition as a state.<sup>25</sup>

*Prima facie*, South Ossetia fulfills all the criteria outlined above, and therefore qualifies as a stabilized de facto regime: (1) it has a population; (2) a defined territory over which it exercises effective and permanent control; and (3) it has a state-like structure, based on a constitution, a parliament, a president, a cabinet, local authorities, courts, and has its own armed forces. Since 1992, it has held elections on a regular basis.<sup>26</sup> Moreover, South Ossetia has also concluded international treaties with Russia and Georgia, for instance the peace agreement of 1992.<sup>27</sup>

Yet, qualifying South Ossetia as a stabilized de facto regime is problematic for two reasons. First, its government does not exercise effective control over the whole territory of South Ossetia. And second, South Ossetia is fundamentally dependent on Russia, and hence not truly sovereign. I will deal with both aspects in turn.

Before hostilities broke out in August 2008, the South Ossetian government only exercised effective control over some 60–70% of the former autonomous region. The rest of the territory was still under the control of the Georgian government. Yet, from a legal perspective, it is not necessary to establish effective control over 100% of a formally

22. Jochen Frowein, *De facto regime*, in 1 ENCYCLOPAEDIA OF INTERNATIONAL LAW 966–68, (Peter MacAlister-Smith ed., 1992).

23. See TORSTEN STEIN & CHRISTIAN V. BUTTLAR, *VÖLKERRECHT* 166 (2009).

24. See, e.g., JAMES CRAWFORD, *THE CREATION OF STATES IN INTERNATIONAL LAW* (2006).

25. See STEIN & BUTTLAR, *supra* note 23.

26. See, e.g., *Referendum über Südossetiens Unabhängigkeit von Georgien* NEUE ZÜRCHER ZEITUNG, Nov. 13, 2006, at 3 (Switz.).

27. It has also repeatedly declared itself independent based on the results of popular referenda. See, e.g., *South Ossetia Votes for Independence*, BBC ONLINE (Nov. 13, 2006), <http://news.bbc.co.uk/2/hi/europe/6140448.stm>.

defined territory. It is sufficient to have exclusive control of a larger, not completely insignificant territory.<sup>28</sup>

Secondly, does it matter that South Ossetia is fundamentally dependent on Russia, and hence not really sovereign? Admittedly, South Ossetia's geographic position makes it highly dependent on Russian supplies, particularly through its main lifeline—the Roki Tunnel. In addition, Russians have held many key positions in the South Ossetian government. For instance, the Prime Minister, the Defense Secretary, and the Home Secretary were all Russian by birth. Yet, does this affect qualifying South Ossetia as a *de facto* regime? The answer to this question must be in the negative. Qualifying an entity as a *de facto* regime does not require evidence of its sovereignty.<sup>29</sup> History shows that without the support of a strong background state, a *de facto* regime cannot become stabilized and permanent.<sup>30</sup>

In conclusion, it can therefore be argued that South Ossetia constitutes a stabilized *de facto* regime. As such, it is granted partial international personality. But what does this mean for the case under consideration? In particular, does the prohibition of the use of force also apply to *de facto* regimes?

State practice shows that “the prohibition of the use of force applies irrespective of recognition to all independent *de facto* regimes.”<sup>31</sup> The Friendly Relations Declaration of 1970 explicitly states:

Every State likewise has the duty to refrain from the threat or use of force to violate international lines of demarcation, such as armistice lines, established by or pursuant to an international agreement to which it is a party or which it is otherwise bound to respect.<sup>32</sup>

This includes the borders of so called “*de facto* regimes. Article 1 of the Definition of Aggression—adopted by the United Nations General Assembly in Resolution 3314—contains an explanatory note according to which the term State”<sup>33</sup> is employed “without prejudice to questions of recognition or to whether a State is a member of the United Nations.”<sup>34</sup> In other words, it also applies to *de facto* regimes. Support

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28. See Frowein, *supra* note 22.

29. See MATHIAS HERDEGEN, *VÖLKERRECHT* 101 (2005).

30. See *id.*

31. Frowein, *supra* note 22.

32. G.A. Res. 2625 (XXV), U.N. GAOR, 25th Sess., Supp. No. 28, U.N. Doc. A/8028, at 122 (Oct. 24, 1970).

33. See Frowein, *supra* note 22.

34. G.A. Res. 3314 (XXIX), U.N. GAOR, 29th Sess., Supp. No. 31, U.N. Doc. A/PV.2319, at 143 (Dec. 14, 1974).



for this view can also be found in the practice of states.<sup>35</sup> For instance, during the Vietnam War many governments argued that non-recognition of a certain part of a “divided country could not affect the applicability of Article 2(4) [U.N.] Charter in that respect.”<sup>36</sup> In short, *de facto* regimes enjoy the protection offered by Article 2(4). At the same time however, they are obliged under Article 2(4) not to use force against another state.<sup>37</sup>

Thus, when bombing South Ossetian villages, Georgia used force in violation of Article 2(4). This use of force is prohibited under international law, unless a specific charter provision, such as Articles 39–42 or 51, says otherwise.

### *B. Exceptions to the Prohibition on the Use of Force*

There are basically two exceptions<sup>38</sup> in the U.N. Charter to the prohibition on the use of force contained in Article 2(4).<sup>39</sup> First, states may use force when so authorized by the U.N. Security Council pursuant to its powers under Chapter VII of the Charter. Second, and perhaps even more important in the given context, states may use force in self-defense. Both exceptions will be addressed in turn.

#### *1. Authorization by the Security Council*

The U.N. Charter’s procedure for authorizing the use of force is relatively straightforward. According to Article 39 of the U.N. Charter, the Security Council must first “determine the existence of any threat to the peace, breach of the peace, or act of aggression.”<sup>40</sup> Once the Council has made such a determination, it may “make recommendations or

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35. See Frowein, *supra* note 22.

36. *Id.*

37. See also HERDEGEN, *supra* note 29.

38. There is also a third exception which is of hardly any importance today: Action against former “enemy states” of World War II. See U.N. Charter art. 53, para 1. See also *id.* art. 107.

39. And customary rules. For details on the customary law prohibition on the use of force, in particular its character as a rule of *jus cogens*, see DINSTEIN, *supra* note 18, at 99–112.

40. U.N. Charter art. 39.

decide what others measures shall be taken to maintain or restore international peace and security.”<sup>41</sup>

Pursuant to Article 41 of the U.N. Charter, the Council should first consider calling on member states to apply “measures not involving the use of armed force. . . . These may include complete or partial interruption of economic relations and of rail, sea, air, postal, telegraphic, radio and other means of communication, and the severance of diplomatic relations.”<sup>42</sup> However, should these non-military measures prove inadequate, the Security Council may then “take such action by air, sea or land forces as may be necessary to maintain or restore international peace and security”<sup>43</sup> pursuant to Article 42—the Council may then authorize the use of military force.

However, in the given case, no U.N. Security Council authorization was granted. Hence, Georgia can only invoke the second exception to the prohibition on the use of force—self-defense.

## 2. *Self-defense*

The second exception to the prohibition on the use of force is self-defense. Article 51 of the U.N. Charter<sup>44</sup> sets forth the standard requiring:

Nothing in the present Charter shall impair the inherent right of individual or collective self-defense if an *armed attack* occurs against a Member of the United Nations, until the Security Council has taken measures necessary to maintain international peace and security. Measures taken by the Members in the exercise of this right of self-defense shall be immediately reported to the Security Council and shall not in any way affect the authority and responsibility of the Security Council under the present Charter to take at any time such action as it deems necessary in order to maintain or restore international peace and security.<sup>45</sup>

### a. *Armed Attack*

For the use of force in self-defense to be legitimate, an armed attack against a member state of the U.N. must occur. The term “armed attack,” however, is neither defined in the U.N. Charter, nor does any detailed discussion of the term appear in the records of the San Francisco

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41. *See id.*

42. U.N. Charter art. 41.

43. U.N. Charter art. 42.

44. It must be emphasized that Article 51 also applies to de facto regimes. If de facto regimes enjoy the protection offered by the prohibition on the use of force, they must also accept the concomitant obligations, i.e., not to use force themselves and to refrain from committing armed attacks.

45. U.N. Charter art. 51.

Conference.<sup>46</sup> Hence, the meaning of this phrase has generated a vast literature with little consensus on its definition.<sup>47</sup> The test eventually accepted by states was that adopted by the General Assembly in Resolution 3314,<sup>48</sup> taken by the International Court of Justice (ICJ) in the Nicaragua case as applicable to the concept of armed attack.<sup>49</sup> In that case, the ICJ argued that an armed attack includes:

[A]ction by regular armed forces<sup>50</sup> or ‘the sending by or on behalf of a State of armed bands, groups, irregulars or mercenaries, which carry out acts of armed force against another state of such gravity as to amount to acts of aggression.’<sup>51</sup>

Did the South Ossetian attacks against Georgia amount to an armed attack within the meaning of Article 51? The shelling of the Georgian enclave of Tamarasheni by South Ossetian forces on August 7, 2008 may constitute such an armed attack. However, in the Nicaragua case,<sup>52</sup> and later in the Oil Platforms case,<sup>53</sup> the ICJ also emphasized a further element—*gravity*. Not every frontier incident amounts to an armed attack. Only action of certain gravity—actions of certain *scale* and *effects* qualify as an armed attack. I will deal with both criteria in turn.

The shelling of Tamarasheni alone was arguably not of a sufficient *scale* to amount to an armed attack. The bombing of this village was limited both in time and space, there were no aircraft or heavy artillery involved in the attack, and the death toll was also low. One could argue though, that the action, when considered in the context of prior South Ossetian attacks, may amount to a single “ongoing armed attack” —so-called “*accumulation of events theory*.”<sup>54</sup> This theory has been advanced both by the United States in the Oil Platforms case<sup>55</sup> and by Israel to

46. See Mark B. Baker, *Terrorism and the Inherent Right of Self-Defense*, 10 HOUS. J. INT’L L. 25, 33 (1987).

47. See CHRISTINE GRAY, INTERNATIONAL LAW AND THE USE OF FORCE 114–25 (3d ed. 2008).

48. See G.A. Res. 3314, *supra* note 34.

49. See GRAY, *supra* note 47, at 172.

50. Military and Paramilitary Activities in and Against Nicaragua (Nicar. v. U.S.) 1986 I.C.J. 14, 103, ¶ 195 (June 27).

51. “[Or] [other] substantial involvement therein.” *Id.* The I.C.J. later clarified that the gravity criterion is also applicable in traditional inter-state conflicts. See *generally* Oil Platforms Case (Iran v. US), 2003 I.C.J. 161 (Nov. 6).

52. See Nicaragua v. U.S., 1986 I.C.J. 14.

53. See Iran v. U.S., 2003 I.C.J. 161.

54. See, e.g., Norman Feder, *Reading the UN Charter Connotatively: Toward a New Definition of Armed Attack*, 19 N.Y.U. J. INT’L L. & POL. 395 (1987).

55. See Iran v. U.S., 2003 I.C.J. 161, ¶¶ 51, 62.

justify military strikes against the Palestinian Liberation Organization (PLO) in Lebanon.<sup>56</sup> Both countries argued that a deliberate strategy of inflicting a series of small scale attacks on another state amounted—when considered cumulatively—to one grave ongoing armed attack.<sup>57</sup> However, this theory is not convincing. When accepting the fiction that a number of small attacks amount to one ongoing grave attack, it would be impossible to determine whether the ensuing response constitutes lawful self-defense or an unlawful reprisal. The Security Council therefore rightly rejected this theory.<sup>58</sup> Hence, Georgia would be ill-advised to invoke the accumulation of events theory to argue that the attack was of a sufficient scale.

Turning now to the *effects* of the attack, it will be equally difficult for Georgia to argue that the attack on Tamarasheni had significant effects. Some scholars interpret the term “effects” as meaning the loss of political independence.<sup>59</sup> However, this seems to be going too far. Yet, even when applying a lower threshold, it seems difficult to find evidence for such effects. The effects of the South Ossetian attacks were only of a limited nature. They led to the destruction of a number of buildings in villages inhabited mainly by ethnic Georgians. The death toll was also low.

In summary, it seems very difficult to argue that the South Ossetian attacks were of such a scale and effect as to amount to an armed attack within the meaning of Article 51.

#### *b. Proportionality*

Even assuming *argendo* that an armed attack had occurred, the Georgian response would not have been proportional.

This requirement is derived from customary international law,<sup>60</sup> in particular the Caroline case of 1837.<sup>61</sup> According to this case, for self-

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56. See GRAY, *supra* note 47, at 125.

57. See *id.*

58. See, e.g., S.C. Res 490, ¶ 1, U.N. Doc. S/RES/490 (July 21,1981). See also, S.C. Res. 501, ¶ 1–2, U.N. Doc. S/RES/501 (Feb. 25,1982); S.C. Res. 509, ¶ 1, U.N. Doc. S/RES/509 (June 6,1982); Oil Platforms Case (Iran v. U.S.), Judgment, 2003 I.C.J. 161, 33 (Nov. 6) (separate opinion of Judge Simma, para. 14). Judge Simma also rejected the “accumulation of events” theory in his separate opinion in the Oil Platforms case: “[T]here is in international law on the use of force no ‘qualitative jump’ from iterative activities remaining below the threshold of Article 51 of the Charter to the type of ‘armed attack’ envisaged there.”

59. See, e.g., Kirsten Schmalenbach, *Die Beurteilung von grenzüberschreitenden Militäreinsätzen gegen den internationalen Terrorismus aus völkerrechtlicher Sicht*, 42 NEUE ZEITSCHRIFT FÜR WEHRRECHT 177, 180 (2000) (Ger.).

60. Its origins date back to just war theory.

defense to be legitimate, it has to be established that the armed forces “did nothing unreasonable or excessive; since the act justified by the necessity of self-defense must be limited by that necessity and kept clearly within it.”<sup>62</sup> In other words, the proportionality requirement means that the amount of force used must be proportional in terms of intensity. The intervening state must plan and carry out the military action carefully so as not to inflict more damage and deaths than necessary.

The large scale shelling of the South Ossetian capital Tskhinvali<sup>63</sup> by Georgian armed forces, which left many parts of the city destroyed, was clearly disproportionate. The scale of the attacks was indicative of the fact that the Georgian government intended not only to repel the attacks of South Ossetia but also to restore full sovereignty over the whole territory of South Ossetia and to teach the rebels a lesson.<sup>64</sup> Such far-reaching measures are not covered by Article 51.

The Georgian government, therefore, cannot invoke Article 51 to justify its intervention in South Ossetia. Even when assuming that South Ossetia had committed an armed attack, which is more than questionable, Georgia’s response would have been clearly disproportionate.

#### IV. THE LEGALITY OF RUSSIA’S ACTION

##### *A. The Prohibition on the Use of Force*

###### *1. Article 2(4) of the U.N. Charter*

Article 2(4) of the U.N. Charter imposes an almost absolute prohibition on the use of force. It provides that “all member states shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any state, or in any manner inconsistent with the purposes of the United Nations.”<sup>65</sup>

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61. LETTER FROM DANIEL WEBSTER, U.S. SECRETARY OF STATE, TO HENRY FOX, BRITISH MINISTER IN WASHINGTON (Apr. 27, 1841), *reprinted in* 29 BRITISH & FOREIGN STATES PAPERS 1840-1841, 1129, 1137–38 (London, James Ridgway and Sons, Piccadilly 1857).

62. *Id.* at 1138.

63. On August 7–8, 2008.

64. See *Georgien marschiert in Südossetien ein*, NEUE ZÜRCHER ZEITUNG, Aug. 8, 2008, at 2 (Switz.).

65. U.N. Charter art. 2, para. 4.

Several aspects of this prohibition require closer examination in the given context.

First, Article 2(4) prohibits the use of force<sup>66</sup> “in any manner inconsistent with the purposes of the United Nations.”<sup>67</sup> The use of force to prevent large-scale human rights violations—“humanitarian intervention”—has been claimed as legitimate on the ground that it is not only consistent with the principles of the U.N. Charter, but also furthers them.<sup>68</sup>

Russia claimed that the purpose of its intervention was the prevention of genocide.<sup>69</sup> In other words, it invoked a right to unilateral humanitarian intervention—a right to intervene for humanitarian purposes, here the prevention of genocide, without the authorization of the Security Council. This claim raises a number of questions: (1) First, does a right to unilateral humanitarian intervention exist at all? And if so, (2) are its conditions met in the case under consideration? I will deal with both questions in turn.

*a. Does a Right to Unilateral Humanitarian Intervention Exist?*

The existence of a right to unilateral humanitarian intervention is one of the most controversial issues in international law. Supporters of such a right point to a number of potential precedents, including India’s intervention in East Pakistan, Vietnam’s intervention in Cambodia, Tanzania’s invasion of Idi Amin’s Uganda, and the joint U.S.–British<sup>70</sup> operation in Northern Iraq to protect Kurdish civilians. A closer analysis of these incidents however, reveals that none of the intervening states—except for the United Kingdom (U.K.) in 1991—“advanced an argument of humanitarian intervention. Even then, the U.K. quickly abandoned its claim in favor of arguing that it had the implied authorization of the U.N. Security Council. Overall, this near absence of *opinio juris* deprived the

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66. The military attacks by Russian armed forces against Georgian cities and villages—in particular the bombing and ensuing invasion of Gor—undoubtedly constitute a *use of force* within the meaning of Article 2(4). *See id.*

67. U.N. Charter, *supra* note 65.

68. *See, e.g.,* Michael Reisman, *Humanitarian intervention to protect the Ibos*, HUMANITARIAN INTERVENTION AND THE UNITED NATIONS 167, 177 (Richard Lillich ed., 1973).

69. *See, e.g.,* Statements of Russian President Medwedew and Prime Minister Putin, *quoted in Georgien ruft den Waffenstillstand aus: Abchasien mischt sich in den Konflikt ein*, NEUE ZÜRCHER ZEITUNG, Aug. 11, 2008, at 2 (Switz.).

70. *See* MICHAEL BYERS, *WAR LAW* 92 (London: Atlantic, 2005) (showing Britain, France, Italy and the United States intervention in Northern Iraq).

state practice of any capacity to change international law to allow a right of unilateral humanitarian intervention.”<sup>71</sup>

The Kosovo conflict is often regarded as “having changed this calculus in favor of a new rule.”<sup>72</sup> This argument is not convincing though. Despite much talk about the humanitarian dimension of the Kosovo conflict, in the end only two states—the U.K. and Belgium—justified the air strikes on the basis of a legal right to humanitarian intervention.<sup>73</sup> There was thus a notable absence of *opinio juris*. In addition, China, Russia, and most developing countries strongly condemned the intervention. Their continuing opposition means that the doctrine is far from firmly established in international law.<sup>74</sup>

In conclusion, the better approach is to deny, at least as yet, the existence of a unilateral right to humanitarian intervention. This view appears to be confirmed by post-Kosovo state practice, in particular, the reaction of the international community towards the crisis in Darfur.<sup>75</sup>

*b. Would the Criteria for Humanitarian Intervention be Met in the Given Case?*

Even assuming *argendo*, that a unilateral right to humanitarian intervention exists, this would be of little use to Russia for the following reason: the conditions for its exercise would not be met in the case under consideration. Despite some uncertainty regarding the exact conditions for the exercise of this right, most scholars<sup>76</sup> agree that the use of armed force is only lawful (1) in cases of extreme deprivation of fundamental

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71. *Id.*

72. *Id.*

73. *Id.*

74. See also DINSTEIN, *supra* note 18, at 71.

75. This trend also seems to be confirmed by the UN Secretary General’s 2005 Report ‘*In larger freedom: towards development, security and human rights for all*’ as well as the 2005 World Summit Outcome document. Both documents leave open the question as to whether there is a right of *unilateral* humanitarian intervention absent any Security Council authorization. See CHRISTINE GRAY, *INTERNATIONAL LAW AND THE USE OF FORCE* 52 (Oxford: Oxford University Press, 2008).

76. At least those who support this doctrine. See, e.g., STEIN & BUTTLAR, *supra* note 23, at 293.

human rights, and (2) only as a last resort.<sup>77</sup> In the case under consideration both criteria are not met.

The human rights violations by Georgia—while undoubtedly serious—did not amount to an extreme deprivation of fundamental rights. In comparison with Cambodia, where Pol Pot killed approximately 25% of the Cambodian population,<sup>78</sup> and Uganda, where Idi Amin's regime had killed an estimated 500,000 people, the atrocities committed in South Ossetia pale—according to Russian officials, 133 South Ossetians<sup>79</sup> were killed during the conflict.<sup>80</sup> These figures hardly support Moscow's claim that a humanitarian intervention was necessary to stop an ongoing genocide. Moreover, force should have been employed as *ultima ratio*—after all peaceful means have been exhausted. Yet, Russia did not even attempt to seek a U.N. Security Council meeting in order to solve the situation.<sup>81</sup>

### c. Summary

Russia cannot invoke a right to unilateral humanitarian intervention to justify its attack for a number of reasons. First, the doctrine itself is not firmly established in international law. Second, even assuming *argendo* that a humanitarian emergency constitutes a lawful ground for the use of force, this would still be of little help to Russia for a simple reason: the conditions for the exercise of this right would not be met in the case under consideration.<sup>82</sup> Russia thus used force in violation of Article

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77. Further conditions include: The state targeted by the intervention must be unwilling or unable to act and the intervention must be limited in time and scope. *See* Resolution on the Right of Humanitarian Intervention, 1994 O.J. (C 128) 225, 227 (EC).

78. *See Pol Pot: Life of a Tyrant*, BBC NEWS (Apr. 14, 2000), <http://news.bbc.co.uk/2/hi/asia-pacific/78988.stm>.

79. As well as sixty-four Russian soldiers.

80. *See* Christos Pourgourides, *The Consequences of the War Between Georgia and Russia*, Parliamentary Assembly of the Council of Europe, Committee on Legal Affairs and Human Rights, Doc. 11732 rev. (Oct. 8, 2008), available at <http://assembly.coe.int/documents/workingdocs/doc08/EDOC11732.htm>.

81. The Security Council meeting on the evening of 7 August 2008 cannot be taken into consideration here as the military conflict had already started. *See* Press Release, Security Council, Security Council Hears Conflicting Russian, Georgian Views of Worsening Crisis as Members Seek End to Violence in Day's Second Meeting on South Ossetia, U.N. Press Release SC/9418 (Aug. 8, 2008), <http://www.un.org/news/press/docs/2008/sc9418.doc.htm>.

82. On a final note, it seems quite ironic that Russia which used to deny the existence of such a right (particularly during the Kosovo conflict) now all of a sudden became one of its strongest supporters. Yet, a state which persistently objected to the formation of a new rule, cannot all of a sudden invoke this new rule now that it suits its own interests.



2(4).<sup>83</sup> This use of force is prohibited under international law, unless a specific Charter provision, such as Articles 39–42 or 51, says otherwise.

### *B. Exceptions to the Prohibition on the Use of Force*

There are basically two exceptions<sup>84</sup> to the prohibition on the use of force<sup>85</sup>: authorization by the Security Council and self-defense. In the absence of any Security Council authorization, Russia could only invoke self-defense. The Russian government has therefore claimed that it intervened in defense of (1) its peacekeepers stationed in South Ossetia,<sup>86</sup> (2) its citizens living in South Ossetia,<sup>87</sup> and (3) in collective self-defense of South Ossetia. All three arguments will be examined in the next section.

#### *1. Self-defense (Peacekeeping Forces)*

According to Article 51 of the U.N. Charter, “nothing in the present Charter shall impair the inherent right of individual or collective self-defense if an armed attack occurs against a Member of the United Nations, until the Security Council has taken measures necessary to maintain international peace and security.”<sup>88</sup>

##### *a. Armed Attack*

For the use of force in self-defense to be legitimate, an armed attack against a member state of the U.N. must occur. The term “armed attack,” however, is neither defined in the U.N. Charter, nor does any detailed discussion of the term appear in the records of the San Francisco Conference.<sup>89</sup> Hence the meaning of this phrase has generated a vast

83. And its customary law equivalent.

84. There is also a third exception which is of hardly any importance today: Action against former ‘enemy states’ of World War II. *See* U.N. Charter arts. 53, 107.

85. For details on the customary law prohibition on the use of force, in particular its character as a rule of *jus cogens*, see DINSTEIN, *supra* note 18, at 91–104.

86. “Last night, Georgian troops committed what amounts to an act of aggression against Russian peacekeepers and the civilian population in South Ossetia . . . Georgia’s acts have caused loss of life, including among Russian peacekeepers.” Dmitry Medvedev, President of Russ., Statement on the Situation in South Ossetia (Aug. 08, 2008), [http://president.kremlin.ru/eng/speeches/2008/08/08/1553\\_type82912type82913\\_205032.shtml](http://president.kremlin.ru/eng/speeches/2008/08/08/1553_type82912type82913_205032.shtml).

87. *See id.*

88. U.N. Charter art. 51.

89. *See* Baker, *supra* note 46, at 41–42.

literature with little consensus on its definition.<sup>90</sup> The test eventually accepted by states was that adopted by the General Assembly in Resolution 3314,<sup>91</sup> taken by the ICJ in the Nicaragua Case as applicable to the concept of armed attack.<sup>92</sup> In that case, the ICJ argued that an armed attack comprises:

‘[A]ction by regular armed forces across an international border’<sup>93</sup> or ‘the sending by or on behalf of a State of armed bands, groups, irregulars or mercenaries, which carry out acts of armed force against another state of such gravity as to amount to acts of aggression.’<sup>94</sup>

Georgian troops did not cross the border into Russia nor did Georgia send any armed bands into Russia. Prima facie, no armed attack thus seems to have occurred. Yet on either August 7 or 8, Georgian forces attacked Russian peacekeepers stationed in South Ossetia under the 1992 Peace Agreement, and killed more than a dozen of them during the ambush.<sup>95</sup> Such an attack on the armed forces of another state—even when they are deployed outside their national territory—constitutes an armed attack for the purposes of Article 51.<sup>96</sup> This view finds support in Article 3(d) of the Definition of Aggression which is widely relied on when interpreting Article 51. Article 3(d) provides that “an attack by the armed forces of a state on the land, sea or air forces, or marine and air fleets of another State” qualifies as an act of aggression.<sup>97</sup> Although the concept of aggression is broader than the term armed attack, “reliance on the Definition of Aggression to elucidate the meaning of armed attack seems justified in the light of state practice.”<sup>98</sup> The Georgian assault on Russian peacekeepers therefore amounted to an armed attack within the meaning of Article 51.

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90. See GRAY, *supra* note 47, at 108–20.

91. See G.A. Res. 3314, *supra* note 34.

92. See GRAY, *supra* note 47, at 165.

93. See *Military and Paramilitary Activities in and Against Nicaragua* (Nicar. v. U.S.) 1986 I.C.J. 14, 103, ¶ 195 (June 27).

94. “[O]r [other] substantial involvement therein.” *Id.* at 103. The I.C.J. later clarified that the gravity criterion is also applicable in traditional inter-state conflicts. See *Iran v. U.S.*, 2003 I.C.J. 161, at 146–47.

95. See *Day-by-Day: Georgia Russia Crisis*, BBC NEWS, (Aug. 21, 2008), <http://news.bbc.co.uk/2/hi/europe/7551576.stm>.

96. See DINSTEIN, *supra* note 18, at 200.

97. See G.A. Res. 3314, *supra* note 34, at art. 3(d).

98. See GRAY, *supra* note 47, 130.

*b. Proportionality*

It is, however, questionable whether the Russian response was proportional. This requirement is derived from customary international law, in particular the Caroline case of 1837.<sup>99</sup> According to this case, for self-defense to be legitimate, it has to be established that the armed forces “did nothing unreasonable or excessive; since the act justified by the necessity of self-defense must be limited by that necessity and kept clearly within it.”<sup>100</sup>

The proportionality requirement comprises two main conditions. First, the amount of force used must be proportional in terms of *intensity*. The intervening state must plan and carry out the military action carefully so as not to inflict more damage and deaths than necessary. Second, the *duration* of the military strike must be limited to the elimination of the threat. Self-defense must not serve as a pretext for territorial annexation or regime change. Russia’s response to the killing of its seventeen peacekeepers was neither proportional in terms of intensity nor in terms of duration. Following the attack on its peacekeepers, Russia launched a large scale military intervention. Russia sent more than 10,000 troops into South Ossetia and Georgia proper. Russian troops not only attacked the Georgian town of Gori from where the strikes against the peacekeepers were launched, but also parts of Georgia unrelated to the conflict, such as the oil-port of Poti. The objective of Russia’s large scale military intervention was not to repel the Georgian attack and to restore the “status quo ante,” but to significantly weaken Georgia’s military capacity.

In summary, Russia’s claim to have acted in defense of its peacekeepers is not convincing. While the Georgian attack on the peacekeeper’s headquarters in Tskhinvali constituted an armed attack within the meaning of Article 51, Russia’s response was clearly disproportional.

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99. For details on the Caroline case, see Webster, *supra* note 61.

100. *Id.* at 1138.

## 2. *Self-defense (Citizens Living in South Ossetia)*

Russia has also claimed to be acting in defense of its citizens living in South Ossetia. Whether this claim is more convincing from a legal perspective will be examined in the next section.

### *a. Article 51 and the “Protection of Nationals Abroad” Doctrine*

Article 51 of the U.N. Charter sets forth the standard for the use of force in self-defense. It provides:

Nothing in the present Charter shall impair the inherent right of individual or collective self-defense if an armed attack occurs against a Member of the United Nations, until the Security Council has taken measures necessary to maintain international peace and security. Measures taken by the Members in the exercise of this right of self-defense shall be immediately reported to the Security Council and shall not in any way affect the authority and responsibility of the Security Council under the present Charter to take at any time such action as it deems necessary in order to maintain or restore international peace and security.<sup>101</sup>

“Despite this careful attempt at definition, the content of Article 51 is greatly informed by customary international law, in part because of the explicit reference to the inherent character of the right of self-defense. And so, while the right is codified in an almost universally ratified treaty, its contours have gradually evolved—or at least become more easily discernible—as the result of state practice and expressions of *opinio juris* since 1945.”<sup>102</sup> For instance, it was not evident from the ordinary meaning<sup>103</sup> of Article 51 whether an attack against a state’s citizens *outside* its territory constitutes an armed attack against the state.<sup>104</sup> Precisely, this problem does arise in the case under consideration: Does the Georgian attack on Russian citizens living in South Ossetia constitute an armed attack against Russia?

#### *i. The Protection of Nationals Abroad Doctrine—Legal Evidence*

It can be argued that an attack on the state’s nationals abroad is an attack on the state itself—“Protection of Nationals Abroad Doctrine.” This argument would rest on the premise that the nationals would be the

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101. U.N. Charter Art. 51.

102. BYERS, *supra* note 70, at 56.

103. Or the context.

104. See BYERS, *supra* note 70, at 56–57.

“state” for the purpose of the actual or threatened armed attack. This interpretation finds support in the theory of the social contract: “[P]rotection, as the duty of the state, afforded the consideration of the *pactum subjectionis*, and the protection of the nationals of the state was, in effect, protection of the state itself. Within the definition of the state the requirement of a community is essential, and without nationals, without the community, the state ceases to exist.”<sup>105</sup> It thus seems “perfectly possible to treat an attack on a state’s nationals as an attack on the state, since population is an essential ingredient of the state.”<sup>106</sup>

This interpretation seems to find support in state practice, in particular the Entebbe incident of 1976. On June 27, 1976, an Air France aircraft bound for Paris from Tel Aviv was hijacked by pro-Palestinian terrorists. The aircraft, with mainly Israeli passengers on board, was then diverted to Entebbe airport in Uganda. The Ugandan Government under Idi Amin proved uncooperative and did not attempt to rescue the hostages. Hence, Israel decided to free the hostages itself. “Without notifying the Ugandan government, a small force landed at Entebbe airport, stormed the plane,”<sup>107</sup> and eliminated the terrorists. Several Ugandan soldiers were also killed during the operation. Before the U.N. Security Council, the Israeli ambassador claimed that the operation was an application of “the right of a state to take military action to protect its nationals.”<sup>108</sup> The United States explicitly supported Israel’s action, arguing:

[T]here is a well established right to use limited force for the protection of one’s own nationals from an imminent threat of injury or death in a situation where the state in whose territory they are located is either unwilling or unable to protect them. This right, flowing from the right of self-defense, is limited to such use of force as is necessary and appropriate to protect threatened nationals from injury.<sup>109</sup>

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105. DEREK W. BOWETT, *SELF-DEFENCE IN INTERNATIONAL LAW* 91 (1958).

106. Derek W. Bowett, *The Use of Force for the Protection of Nationals Abroad*, *THE CURRENT LEGAL REGULATION OF THE USE OF FORCE* 39, 40–41 (A. Cassese ed. 1986). See also Seventh International Conference of American States Held at Montevideo, Convention on Rights and Duties of States art. 1, Dec. 26, 1933 (listing as the essential criteria for statehood: (1) a permanent population. . .).

107. BYERS, *supra* note 70, at 57.

108. U.N. SCOR, 31st Sess., 1939th mtg. at 13, U.N. Doc. S/PV.1941 (July 9, 1976).

109. U.N. SCOR, 31st Sess., 1941st mtg. at 8, U.N. Doc. S/PV.1941 (July 12, 1976).

The Entebbe operation is widely regarded as having decisively contributed to the recognition of a right to protect nationals abroad.<sup>110</sup> When civil war threatens foreign nationals, “sending soldiers to rescue them has now become so commonplace that the issue of legality is rarely raised.”<sup>111</sup> The interventions in Haiti, Liberia, and Sierra Leone are case in point.<sup>112</sup>

Recent state practice thus seems to offer a “significant quantity of cases of military interventions aimed at rescuing foreigners abroad.”<sup>113</sup> According to Gazzini, most of “these interventions have gone entirely unchallenged.”<sup>114</sup> When controversy does occasionally arise, for instance when France intervened in the Chad in 1992<sup>115</sup> or the Central African Republic in 1996, “concerns usually focus on whether the intervening government has exceeded the criteria of necessity and proportionality—for example, by using the protection of nationals as a pretence for intervening in a civil war.”<sup>116</sup> The fundamental theory thus appears to be no longer disputed, only its application to the given facts. Some scholars, therefore, conclude that “after decades of opposition by the majority of the international community, the claim seems to have eventually overcome any resistance.”<sup>117</sup>

However, this conclusion is not convincing for a number of reasons. First, none of the incidents were addressed by the Security Council or the General Assembly, “or otherwise sparked an exchange of legal claims, implying that it is difficult to distill relevant *opinio juris*. Second, several of the cases listed concern operations that were actually approved by the territorial state, and which can therefore not be regarded as genuine examples of protection of nationals. In other cases, it remains unclear whether consent was given or not. Third, most of the precedents cited actually pre-date the U.N. General Assembly debate on diplomatic protection, during which many states denounced the protection of nationals doctrine, so that it is hard to regard these cases as the dominant trend in customary practice.”<sup>118</sup>

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110. BYERS, *supra* note 70, at 58.

111. *Id.*

112. For details of these interventions, see STEIN & BUTTLAR, *supra* note 23, at 289–94.

113. TARCISIO GAZZINI, THE CHANGING RULES ON THE USE OF FORCE IN INTERNATIONAL LAW 170 (2006).

114. *Id.*

115. Or in Gabon (1990).

116. BYERS, *supra* note 70, at 58.

117. GAZZINI, *supra* note 113, at 171–72.

118. Tom Ruys, *The Protection of Nationals Doctrine Revisited 28* (Leuven Centre for Global Governance, Working Paper No. 17, 2008).

In conclusion, state practice is not as unambiguous as claimed by advocates of the Protection of Nationals Abroad Doctrine. The better view seems to be that state practice has not yet contributed to a limited extension of the right of self-defense to include the protection of nationals abroad.

*ii. The Protection of Nationals Abroad Doctrine—The Criteria*

Assuming *argendo*, that Article 51 could be interpreted in such a way as to include a right to protect nationals abroad, this would still be of little help to Russia for the following reason: the conditions customary practice has identified for such intervention to be lawful were not met in the case under consideration. These conditions include:

- (a) the protecting state has failed to secure the safety of its nationals by peaceful means;
- (b) the injuring state is unwilling or unable to secure the safety of the nationals of the protecting state;
- (c) the nationals of the protecting state are exposed to immediate danger to their persons;
- (d) the use of force is proportionate in the circumstances of the situation;
- (e) the use of force is terminated, and the protecting state withdraws its forces, as soon as the nationals are rescued.<sup>119</sup>

While criteria (a) to (c) seem to be fulfilled in the case under consideration, Russia’s military intervention was clearly not proportionate. Following the attack on “its citizens,”<sup>120</sup> Russia launched a large scale military intervention—it sent more than 10,000 troops into South Ossetia and Georgia proper. Russian troops not only attacked the Georgian town of Gori from where the strikes against “its citizens” were launched, but also parts of Georgia unrelated to the conflict, such as the oil-port of Poti. Moreover, Russia did not withdraw its forces as soon as its nationals

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119. Special Rapporteur, *First Rep. on Diplomatic Protection*, Int’l Law Comm’n, U.N. Doc. A/CN.4/506 (Mar. 03, 2000) (By John Dougard). *See, e.g.*, U.N. Int’l L. Comm’n., Meeting, 52d Sess., 2617th mtg. at 36, U.N. Doc. A/CN.4/SER.A/2000 (May 09, 2000). Criteria (a) to (c) can be regarded as subcategories of the ‘necessity’ criterion, whereas criteria (d) to (e) can be regarded as subcategories of the ‘proportionality’ criterion.

120. Or rather on its ‘newly created’ citizens.

were rescued. Its troops remained in Georgia until October 2008. Hence, condition (e) was not met either.

Last, but not least, Russia's attempt at justifying its military action in Georgia as "defense of its nationals" is also questionable for another reason: the "mass naturalization" of South Ossetians which preceded Russia's intervention—was incompatible with principles of international law, in particular the non-intervention principle.<sup>121</sup> Invoking such an illegally effected situation to justify measures that further consolidate this illegal state of affairs constitutes an abuse of the law—"nullus commodum capere potest de sua propria iniuria."<sup>122</sup>

### *b. Summary*

Russia cannot invoke the protection of nationals abroad doctrine in order to justify its intervention for a number of reasons. First, the concept itself is not clearly established in international law. Indeed, the better view seems to be that state practice has not yet contributed to a limited extension of the right of self-defense to include the protection of nationals abroad.

Second, even assuming *argendo* that the protection of nationals abroad is a lawful ground for the use of force, this would still be of little help to Russia for the following reason: the conditions customary practice has identified would not be met in the case under consideration because Russia's military attack was clearly disproportionate.

Finally, Russia's attempt at justifying its military action in Georgia as "defense of its nationals" is also questionable for another reason: the "mass naturalization" of South Ossetians—which preceded Russia's intervention—was incompatible with principles of international law. Invoking such an illegally effected situation to justify measures that further consolidate this state of affairs constitutes an abuse of the law.

### *3. Collective Self-defense*

Last, Russia argued that its intervention was justified on the basis of "collective self-defense." Collective self-defense is explicitly sanctioned by Article 51, which provides that "[n]othing in the present Charter shall

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121. See, e.g., THEODOR SCHWEISFURTH, *Völkerrecht* 299 (2006).

122. 'No one may derive an advantage from his own unlawful acts' (Translation by author). See also Case Concerning Certain German Interests in Polish Upper Silesia (Ger. v. Pol.), 1923 P.C.I.J. (ser. A) No.1 at 30 (May 25), [http://www.worldcourts.com/pcij/eng/decisions/1926.02.05\\_silesia/](http://www.worldcourts.com/pcij/eng/decisions/1926.02.05_silesia/).



impair the inherent right of individual or *collective self-defense* if an armed attack occurs against a Member of the United Nations . . . .”<sup>123</sup>

The right to collective self-defense is a *jus accessum*—it is contingent on the existence of a South Ossetian right to defend itself. But did South Ossetia have such a right? Prima facie, this appears problematic because Article 51 only applies to “Members of the United Nations,” a status South Ossetia has not yet been granted. However, as outlined above,<sup>124</sup> South Ossetia is a stabilized de facto regime. As such, it enjoys the protection of Article 2(4): States may not use force against a de facto regime.<sup>125</sup> However, if states are not allowed to use force against a de facto regime, then it would be inconsequential to deny a de facto regime the right to use of force in self-defense should it actually become the target of an armed attack. Thus, Article 51 also applies to de facto regimes.

Having established that Article 51 is applicable in the given case, I will now turn to the specific criteria for collective self-defense. In the Nicaragua case, the ICJ put forward a two-fold test regarding the exercise of collective self-defense:<sup>126</sup> the State under attack must (1) have declared itself to be under attack and (2) must request the assistance of the third state.<sup>127</sup> In the case under consideration, both criteria are met: South Ossetia declared itself under attack by Georgia. Moreover, Russia

123. U.N. Charter art. 51.

124. *See supra* Part III.A.2.

125. And the de facto regime may not use force against other states.

126. *See Military and Paramilitary Activities in and Against Nicaragua (Nicar. v. U.S.)* 1986 I.C.J. 14, 104, ¶ 195 (June 27). (“[I]t is also clear that it is the State which is the victim of the armed attack which must form and *declare the view that it has been so attacked*. There is no rule in customary international law permitting another state to exercise the right of collective self-defence on the basis of its own assessment of the situation. Where collective self-defence is invoked, it is to be expected that the state for whose benefit this right is used will have *declared itself to be the victim of an armed attack*.”) (emphasis added). The Court then went on to argue that “there is no rule permitting the exercise of collective self-defence in the absence of a *request* by the State which regards itself as the victim of an armed attack.” *Id.* at ¶ 199.

127. This approach was questioned by Judges Schwebel and Jennings in their dissenting opinions. Both criticized the Court’s formalistic approach: For instance, Judge Schwebel asked: “Where is it written that a victim state may not informally and quietly seek foreign assistance?” *Id.* at 356, ¶ 191 (dissenting opinion of Judge Schwebel). Judge Jennings argued: “[I]t may be doubted whether it is helpful to suggest that the attacked state must in some more or less formal way have ‘declared’ itself the victim of an attack and then have as an additional requirement made a formal request to a particular third state for assistance.” *Id.* at 544.

only intervened after South Ossetia's parliament had requested its support on August 8, 2008.

Finally, any action taken in collective self-defense must also be proportional. As outlined above however, Russia's large-scale military intervention in Georgia fails to meet this requirement. As a result, it can be argued that Russia cannot invoke the right to collective self-defense to justify its military attack.

## V. CONCLUSION

The Caucasus conflict of August 2008 illustrates "how international law has become one of the arenas in which contemporary wars are fought. Both sides claimed the mantle of legitimacy in an effort to shape international perceptions of the conflict."<sup>128</sup> By and large, Russia failed to convince the international community of the lawfulness of its intervention. Moscow's arguments have rightly been rejected as this article has shown.

For instance, the Protection of Nationals Abroad Doctrine—which Russia invoked—is not clearly established in international law. Indeed, the better view seems to be that state practice has not yet contributed to a limited extension of the right of self-defense to include the protection of nationals abroad.

Moreover, Russia's claim to have acted in defense of its peacekeepers is not convincing either. While the Georgian attack on the peacekeeper's headquarters in Tskhinvali constituted an armed attack within the meaning of Article 51, Russia's response was clearly disproportional and hence, unlawful.

Finally, Russia's claim that its intervention was justified on the basis of collective self-defense is not persuasive either. Any action taken in collective self-defense must also be proportional. As outlined above, however, Russia's large scale military intervention in Georgia clearly fails to meet this requirement.

Small Georgia, fighting the evil giant Russia, managed to escape closer legal scrutiny. This article has however, tried to show that Georgia's military intervention in South Ossetia also constitutes a violation of international law. South Ossetia is a so-called "stabilized de facto regime" and as such enjoys the protection of Article 2(4). Georgia cannot justify its intervention as self-defense within the meaning of Article 51, because of its disproportional use of force.

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128. See Dworkin, *supra* note 5.

In short, both Georgia and Russia have violated norms of international law, despite the fact that their constitutions accord rules of international law the highest status within their legal hierarchy.<sup>129</sup> So is international law the biggest loser in this conflict? Prima facie, it may seem so. On closer examination, however, it turns out that this is not necessarily the case. Both parties claimed that their action was justified under international law, for instance as a humanitarian intervention to prevent genocide or as collective self-defense under Article 51. “This is not to say that these claims were made in good faith—some Russian claims in particular seemed wildly exaggerated and cynical—but the fact that they were made at all shows some recognition that compliance with international rules”<sup>130</sup> is regarded as important and helps determine a country’s global standing.

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129. See KONSTITUTSIIA ROSSIISKOI FEDERATSII [KONST. RF] [CONSTITUTION] art. 15(4) (Russ.); SAKARTVELOS K’ONSTITUTSIA [CONSTITUTION] Aug. 24, 1995, art. 6 (Geor.).

130. Dworkin, *supra* note 5.

