USE OF FORCE ISSUES ARISING OUT OF THE RUSSIAN FEDERATION INVASION OF GEORGIA IN AUGUST 2008

EXECUTIVE SUMMARY

On August 7th 2008, The Russian Federation launched a large-scale invasion of Georgia's sovereign territory. This use of force was illegal and unjustified under international law. It constituted an egregious breach of Georgia's political sovereignty and territorial integrity contrary to Article 2(4) of the UN Charter and customary international law. It violated also the key principle of non-intervention in international law and relations, and its magnitude and scale made it an act of aggression.

None of the existing (collective authorization, self-defense, consent) or purported (humanitarian intervention, protection of nationals, and protection of peacekeepers) exceptions to this general prohibition justify or render lawful the Russian invasion.

There was no Security Council resolution authorizing such action (indeed many members of the Council deplored the invasion) nor was there an armed attack or "imminent threat" of armed attack by Georgia against the Russian Federation capable of activating a right to exercise force in self-defense nor was Russian invited by the Georgian State to use force on Georgian territory.

As for the purported exceptions to the prohibition on force, this memorandum has shown that there is no right under international law to use unilateral, unauthorized force for humanitarian purposes. No such right has been articulated in state practice or in institutional settings, and there

are powerful policy arguments against supporting such a right. The Responsibility to Protect is concerned with the duties of sovereign states towards their own populations and with the role of the Security Council where such sovereign states fail these duties. It does *not* envisage unilateral and vigilante uses of force. Along with the absence of legal ground of this nature, there is not even factual ground capable of justifying Russia's use of force against Georgia in August 2008 even within the frames of this purported right for humanitarian intervention. Despite the significant escalation of the situation in Tskhinvali region/South Ossetia, the constant attacks on Georgian villages, and the casualties among Georgian peacekeepers, police and civilians, Georgia employed the utmost restraint and resorted to all available diplomatic measures to avoid use of force. Russian claim about genocide committed by Georgians against ethnic Ossetians proved to be propaganda aimed at justification of Russia's illegal activities and encouragement of Ossetian proxy militants and other armed formations to commit brutalities against ethnic Georgians in revenge for the "genocide and mass killings."

The so-called right to protection of nationals abroad lacks status under international law. Invasions, sought to be justified on these grounds, have generally been criticized by most members of the international community. Moreover Russia fails to meet the international legal test of nationality with respect to the civilian population resident in Tskhinvali region/South Ossetia and Abkhazia as developed by the International Court of Justice in the *Nottebom* case. After the ethnic cleansing of Georgians in these two regions in early 1990s, *en masse* distribution of Russian passports to the remaining civilian population represented a deliberate and well-constructed policy aimed at establishing a pretext of the military intervention of the Russian federation on the territory of Georgia.

There is no general right to use force to protect peacekeepers operating in foreign states nor do any of the agreements entered into between Georgia and the Russian Federation provide for such uses of force. Peacekeeping is aimed *not* at offering a pretext for aggression but at preventing the sort of war that Russia engaged in August. The Russian attempt to justify its use of force as a means of protection of peacekeepers is legally and factually ungrounded. Georgia's defense operation started hours after the Russian invasion and no military clash between Georgian forces and peacekeepers had occurred before this. The first military clash between Russian peacekeepers and Georgian forces occurred at about 6 a.m. on August 8, while the large scale military deployment of the Russian troops started in the early morning of August 7. Moreover, the Russian peacekeeping base attacked by Georgian forces was directly participating in the hostilities and they no longer enjoyed the protection normally accorded to them under international law. It must once again be noted that *only* those peacekeeping regiments and infrastructure have been attacked by the Georgian forces, which directly participated in hostilities, whereas other Russian Peacekeeping posts continued to function throughout the hostilities and have never been subject to attack. It needs to be noted that the first casualties in the peace keeping contingents were incurred from the side of Georgian peacekeepers. Two Georgian peacekeepers Shalva Trapaidze and Vitali Takadze were killed and five wounded on August 7 at around 14:00 as a Georgian peacekeepers checkpoint was shelled with 100 and 120mm artillery from the proxy regime-controlled village Khetagurovo. A proxy militant reported to superiors the fact of killing Georgian peacekeepers in a telephone conversation also intercepted by the Georgian Ministry of Internal Affairs on 07.08.2008[1].

[1] The Ministry of Internal Affairs owns the relevant evidentiary transcript of telephone conversations

Finally, the Georgian response to the Russian armed attack was confined entirely to its own sovereign territory, was reluctantly undertaken, and was a proportionate, necessary and wholly justified exercise of its customary and Charter right to use force in self-defense.

I. INTRODUCTION

In August 2008, the international community witnessed an unprecedented attack on the foundations of the international legal order. After many months of provocations and threats from the Russian Federation, Russian Federation military forces crossed the Georgian–Russian border and used military force against Georgia on Georgian territory.[2] This use of force was illegal and unjustified under contemporary international law. It constituted an egregious breach of Georgia's political sovereignty and territorial integrity contrary to Article 2(4) of the UN Charter and customary international law.[3] It violated also the key principle of non-intervention in international law and relations, and its magnitude and scale made it an act of aggression.[4]

2 For background historical and legal detail see Rein Mullerson, 'Precedents in the Mountains: On the Parallels and Uniqueness of the Cases of Kosovo, South Ossetia and Abkhazia' (2009) 8 *Chinese Journal of International Law* 2–25; Michael Emerson, 'PostMortem on Europe's First War of the 21st Century' (2008) 167 *CEPS Policy Briefs* 1 (http://www.ceps.eu) at 17 June 2009; Nicholas Lemay-Herbert, 'Zone of Conflict; Clash of Paradigms in South Ossetia' (2009) 2 *USAK Yearbook of International Politics and Law* 251-264; Derek Averre, "From Pristina to Tskhinvali: the Legacy of Operation Allied Force in Russia's Relations with the West' (2009) 85 *International Affairs* 575–591; Marc Weller, 'Settling Self-determination Conflicts: Recent Developments' (2009) 20 *European Journal of International Law* 111, 133; Noelle M. Shanahan Cutts, "Enemies through the Gates: Russian Violations of International Law in the Georgia/Abkhazia Conflict" (2008) 40 *Case Western Reserve Journal of International Law* 281; Robert J. Delahunty and Antonio F. Perez, "The Kosovo Crisis: a Dostoievskian Dialogue on International Law, Statecraft, and Soulcraft" (2009) 42 *Vanderbilt Journal of Transnational Law* 15, 21-22. Note that reference to these background readings does not, in any way, imply endorsement of the position taken therein.

3 Article 2(4) states that '[a]ll Members shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any State'. On customary international law see See, eg, *Declaration on the Inadmissibility of Intervention in the Domestic Affairs of States and the Protection of Their Independence and Sovereignty*, GA Res 2131, UN GAOR, 1st Comm, 20th sess, 1408th plen mtg, UN Doc A/RES/2131 (21 December 1965); *Declaration on Principles of International Law concerning Friendly Relations and Cooperation among States in accordance with the Charter of the United Nations*, GA Res 2625, UN GAOR, 6th Comm, 25th sess, 1883rd plen mtg, UN Doc A/RES/2625 (24 October 1970); *Resolution on the Definition of Aggression*, GA Res 3314, UN GAOR, 6th Comm, 29th sess, 2319th plen mtg, UN Doc A/RES/3314 (14 December 1974); International Law Commission, *Draft Code of Crimes against the Peace and Security of Mankind*, as

The Russian use of force cannot be justified as an exercise of self-defence under Article 51 of the UN Charter or as a collective security action authorized by the UNSC under Chapter VII of the Charter or as a use of force by invitation on the territory of a consenting state. Non-defensive or uninvited armed force always depends on the prior authorization from the UNSC without exception.[5] Other possible justifications, relying on doctrines such as protection of its nationals abroad or humanitarian intervention or implied authorization arising from peace-keeping operations have no foundation in international law and, in any event, would not apply in this case even if they were found to possess validity under international law.[6] For example, even if there was a right to humanitarian intervention, as a minority of scholars has argued, the Russian intervention was not an exercise of this so-called right.[7] Indeed, the whole thrust of the *UN Charter* is in favour of resolving disputes using peaceful means and in promoting cooperation.[8] This paper will show that Georgia's use of force against the Russian forces penetrating into Georgian territory was justified both under Article 51 of the UN Charter as an act of self-defense

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contained in Report of the International Law Commission on the Work of its 48th Session, 6 May – 26 July 1996, UN Doc A/51/10 (1996).

[4] *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v US)* (Merits) [1986] ICJ Rep 14 (intervention); *International Military Tribunal, Trial of the Major War Criminals before the International Military Tribunal*, Nuremberg, 14 November 1945 – 1 October 1946 (1947) vol 1, 186 (the crime of aggression).

[5] T Gazzini, "The Rules on the Use of Force at the Beginning of the XXI Century, *Journal of Conflict and Security* Law" 11 (319) (2006).

[6] Brownlie & Apperley, 'Kosovo Crisis Inquiry: Memorandum on the International Law Aspects' (2000) 49 *ICLQ*, 878.

[7] Even where scholars approve of some form of humanitarian intervention they require a degree of community endorsement or pre-approval entirely lacking in this case; see e.g. Antonio Cassese, 'Ex Iniuria Ius Oritur: Are We Moving towards International Legitimation of Forcible Humanitarian Countermeasures in the World Community?' (1999) 10 *European Journal of International Law* 23. For recent views on humanitarian intervention, see especially Nicholas Wheeler, *Saving Strangers: Humanitarian Intervention in International Society* (2000); Anne Orford, 'Muscular Humanitarianism: Reading the Narratives of the New Interventionism' (1999) 10 *European Journal of International Law* 679. The most important period, prior to this, followed the Israeli raid on Entebbe (not a humanitarian intervention in the strict sense) and the Tanzanian invasion of Uganda: Ian Brownlie, 'Humanitarian Intervention' in John Norton Moore (ed), *Law and Civil War in the Modern World* (1974) 217; Wil Verwey, 'Humanitarian Intervention under International Law' (1985) 32 *Netherlands International Law Review* 357; Jean-Pierre Fonteyne, 'The Customary International Law Doctrine of Humanitarian Intervention: Its Current Validity under the UN Charter' (1974) 4 *California Western International Law Journal* 203.

[8] See, e.g., UN Charter arts 2(3), 33.

in response to the Russian aggression, and as an aspect of Georgia's sovereign prerogative to use force within its own sovereign territory. Russia's use of force against Georgia, on the other hand, is a non-authorized use of force – an act of aggression - prohibited by UN Charter and customary international law as well as being breach of the customary and Charter-based duty to resolve disputes peacefully.[9]

II. INTERNATIONAL LAW ON USE OF FORCE

The UN Charter limits the right of states to use force internationally to cases of individual or collective self defense[10], to assistance in UN authorized or controlled military operations and to invitation.[11] Therefore, any state seeking to justify the use of force has to locate its use of force within one of these three exceptions.

Sovereignty, the use of force and non-intervention.

As a general matter, this overarching prohibition goes back to the principle of sovereignty and sovereign equality found in international law from the time of the Peace of Westphalia through to the UN Charter.[12] A sovereign state's borders are inviolable and a state has the right to decide the form and substance of its political institutions or, as the *Declaration on Friendly Relations* (1970) states:

[9] See, e.g., UN Charter arts 2(3), 33.
[10] Article 51 of the UN Charter.
[11] Article 53 of the UN Charter.
[12] Article 2(1), UN Charter.

"…armed intervention and all other forms of interference or attempted threats against the personality of the State or against its political, economic and cultural elements are a violation of international law".[13]

Respect for territorial sovereignty, then, is an essential foundation of international relations.[14] Russia repeatedly recognized Georgia's territorial integrity in Resolutions before the war.[15] No state or group of states has the right to intervene, directly or indirectly, for any reason, in the internal or external affairs of any other state.[16] The principle of non-intervention is part of customary international law and is closely allied to the prohibition on the use of force.[17]

The unauthorized, non-defensive and uninvited use of military force by one state in another state's territory is the most obvious breach of this bundle of norms that lie at the heart of the international legal and political order. In the absence of strict adherence to these norms, the international order would become violent, chaotic and war-torn.

The blanket condemnation of intervention is embodied in article 2(4) of UN Charter:

[13] GA Res. 2625 (1970).
[14] *Corfu Channel Case (United Kingdom v. Albania*), ICJ Reports 1949, p. 35 (Corfu Channel Case).
[15] Roy Allison, "Russia resurgent?: Moscow's Campaign to 'Coerce Georgia to Peace'' (2008) 84 *International Affairs* 1145–1171; P. Worsnip, "U.N. Council Still Divided on Georgia Resolution", Reuters, August 21st, 2008.
[16] Declaration on the inadmissibility of Intervention in the Domestic Affairs of States and the Protection of their Independence and Sovereignty, Annexed to General Assembly Res. 2131 (XX) of 21 December 1965, 20 Sess., Suppl. No. 14 at 12, U.N. Doc. A/6220; Declaration on Principles in International Law, G.A. Res. 2625(XXV).
[17] Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States), ICJ Reports, 1986, p.14, 106 (Nicaragua Case); 1 *Oppenheim's International Law* 334, Jennings & Watts eds., 1999, p. 385; M. Shaw, *International Law*, Cambridge University Press, 6th ed., p. 1039 (Shaw); A. Cassese, *International Law*, 2nd ed., p. 54, 111.

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

The prohibition of use of force in Article 2(4) of UN Charter is a rule of universal validity.[18] It exists in customary international law and has been qualified by the International Court of Justice as norm of *jus cogens*.[19] This means that it is a norm of exceptionally high standing concerning which there is universal agreement in the international community. The relevant General Assembly resolutions reaffirmed the Charter dictum and restated that the "use of force to violate the existing international boundaries […] or as a means of solving international disputes"[20] is contrary to the international legal order and that "[n]o consideration of whatever nature may be invoked to warrant resorting to the threat or use of force".[21] The prohibition was designed to be absolute, and was concluded to give guarantees to smaller states and to have an unrestricted effect[22].

[18] P. Malanchuk, Akehurst's *Modern Introduction to International Law*, 7th ed., 1997, p.309.
[19] *Nicaragua Case* at para. 190.
[20] Declaration on the Principles of International Law Concerning Friendly Relations and Co-Operation Among States In Accordance With the Charter of the United Nations, G.A. Resolution 2625(XXV), Supp. No.28, U.N. Doc. A/8028 (1970) [Friendly Relations Declaration].
[21] Declaration on the Enhancement of the Effectiveness of the Principle of Refraining from the Threat or Use of Force in International Relations, G.A. Resolution 42/22, Supp. No.41, U.N. Doc. A/42/766 (1987), art.3.
[22] In the travaux préparatoires of the Charter, it seems that the phrase "against the territorial integrity or political independence of any state" was inserted in response to the desire of smaller States to emphasise their protection (see Amendments to the Dumbarton Oaks Proposals submitted on behalf of Australia, 3 U.N.C.I.O. 543 (5 May 1945)). There was a concern to ensure that there were no potential loopholes (see e.g. Summary Report of the 11th Meeting of Committee I/1, 6 U.N.C.I.O. 335 (4 June 1945)); BROWNLIE, INTERNATIONAL LAW AND THE USE OF FORCE BY STATES 267-8 (1963); Brownlie and Apperley, 'Kosovo Crisis Inquiry: Memorandum on the International Law Aspects', 49 I.C.L.Q. 878 (2000), p.885; AKEHURST, A MODERN INTRODUCTION TO INTERNATIONAL LAW 309-11 (7th edn., by Malanczuk, 1997); CHESTERMAN, JUST WAR OR JUST PEACE? HUMANITARIAN INTERVENTION AND INTERNATIONAL LAW 48-52 (2001).

The UN has expressly stated that such policies of intervention endanger the political independence of states and freedom of peoples thereby adversely affecting the maintenance of international peace and security.[23]

Allied to this norm is a general norm of non-intervention.

The 1965 Declaration on the Inadmissibility of Intervention in the Domestic Affairs of States emphasized this latter principle:

> [n]o state has the right to intervene, directly or indirectly, for any reason whatsoever, in the internal or external affairs of any other state. Consequently armed intervention and all other forms of interference or attempted threats against the personality of the state or against its political, economic and cultural elements are condemned.

The ICJ explicitly held it as a violation that "cannot … find a place in international law"[24].

Importantly, it is generally acknowledged that an incursion into the territory of another state constitutes an infringement of Article 2(4), even if it is not intended to deprive that state of part of its territory and if the invading troops are meant to withdraw immediately after completing a temporary and limited operation ("in-and-out operations").[25]

[23] UNGA 2131 (XX) (21 December 1965).
[24] Corfu Channel Case, ICJ Reports, 1949, pp. 4, 35
[25] B. Simma ed., *The Charter of the United Nations: A Commentary*, Oxford University Press 2002, p. 123 (Simma, Commentary).

Acts of aggression

The threat or use of force against the territorial integrity or political independence of any state is prohibited under the UN Charter and customary international law.[26] In addition, any coercive incursion of armed troops into a foreign State without its consent or without the authorisation of the UNSC impairs that State's territorial integrity and can amount to an act of aggression.[27] The crime of aggression is one of the most serious crimes in international law. Its existence dates back to the International Military Tribunal Charter of 1945 ("the Nuremberg Charter") where Article 6 gave the Tribunal jurisdiction over crimes against peace including the following:

> "planning, preparation, initiation and waging of a war of aggression or a war in violation of international treaties, agreements, or assurances…"

The Nuremberg Principles became part of general international law in 1946 with their universal endorsement by the UN General Assembly in Resolution 95(1) and have subsequently been reaffirmed at least three times by the Assembly in Resolution 2131 (1965), Resolution 2625 (1970) and, most importantly, in the authoritative Definition of Aggression Resolution 3314 (1974) where the General Assembly enumerated the acts that constituted acts of aggression. These included:

> "The invasion or attack by the armed forces of a State of the territory of another State, or any military occupation, however temporary, resulting from such invasion or attack…"

[26] UN Charter art 2(4).
[27] SCHACHTER, INTERNATIONAL LAW IN THEORY AND PRACTICE 113 (1991).

The Russian invasion of Georgia in August 2008 falls squarely within this definition and therefore meets the requirements of the crime of aggression for which there is individual criminal responsibility.[28]

The right of self-defense

Article 51 of the UN Charter reserves the 'inherent right' of self-defence as an exception to the prohibition of the use of force.[29] In relation to the scope of the self-defense all states agree that the existence of an armed attack against a state triggers the right to self-defence of that state[30]. What, though, constitutes an armed attack?

As the International Court of Justice observed in the *Nicaragua Case*: "action by regular armed forces across international border" is a form of an armed attack when the scale is greater than a mere frontier incident[31].

The target state of the armed attack in such cases has the inalienable and "inherent" (Article 51, UNC) right to use force in self-defence. However, under international law the exercise of self-defence must be necessary and proportionate to the armed attack. The requirements of necessity and proportionality, though not mentioned in the UN Charter, represent part of customary

[28] See e.g. *R v Jones* [2006] UKHL 16.
[29] UN Charter, Art.51.
[30] Gray, P. 108
[31] Ibid; see, too, The 1974 Resolution on the Definition of Aggression, Article 3(a) (ibid).

international law[32]. In the *Nuclear Weapons Case*, the International Court of Justice considered necessity and proportionality to be applicable to all use of forces including that under Article 51 of the Charter[33].

Necessity and proportionality are to be evaluated in relation to a particular case. Having said this, there are some fundamental underpinnings. In general the following applies:

- defensive force ought not to be retaliatory or punitive;
- The aim of such defensive force should be to halt or repel the attack (so that the actions taken in self-defence do not amount in fact to reprisals).[34]
- The need for action in self –defence must be "overwhelming" (*Caroline Incident*).[35]
- There ought to be no practical alternative that would render a use of force unnecessary.

In its decision in the *Case Concerning Oil Platforms (Islamic Republic of Iran v. United States of America)* [36], the ICJ held that "the requirement of international law that measures taken avowedly in self-defence must have been necessary for that purpose is strict and objective, leaving no room for any "measure of discretion"".[37]

[32]*Oil Platforms Case*, para. 43, 73 and 74; Gray, p. 121; The Caroline Case: "[i]t will be for … [Her Majesty's] Government to show a necessity of self-defence, instant, overwhelming, leaving no choice of means, and no moment of deliberation" and the action must not be "unreasonable or excessive, since the act, justified by the necessity of self-defense, must be limited by that necessity, and kept clearly within it."
[33] *Legality of the Threat or use of force of nuclear weapons, advisory opinion* 1997, para. 41; The ICJ held in the Nicaragua case too that "the specific rule whereby self-defence would warrant only measures which are proportional to the armed attack and necessary to respond to it" was "a rule well established under customary international law".
[34] Gray
[35] 29 B.F.S.P. 1137-1138; 30 B.F.S.P. 195-196
[36] *Case Concerning Oil Platforms* (Islamic Republic of Iran v. United States of America), (2003) ICJ.
[37] Ibid. at para. 73.

Necessity and proportionality will not redeem an otherwise illegal use of force. There is no need to examine the necessity and proportionality of force when that force is clearly illegal on other grounds.[38]

Other justifications for the use of force

UNSC authorization

The use of force is permissible when that force has been authorized or mandated by the Security Council acting under Chapter VII of the UN Charter. There has been no such authorization in this case.

Protection of nationals abroad

Before the UN Charter era, the use of force for the protection of nationals and property abroad had been regarded as lawful[39]. With the adoption of the UN Charter the position has changed. It seems clear now that protective action would directly infringe the "territorial integrity and political independence" of the state in question[40]. The two most famous examples of a use of force in purported exercise of the right to protect nationals abroad occurred at Entebbe Airport, Uganda, in 1976 and in Grenada in 1983. In these cases, the

[38] See mutatis mutandis Nicaragua case; Similarly, in Oil Platforms Case, the Court did not engage in detailed discussion of the issue, with the exception of one aspect – nature of targets selected by the US for attacks while claiming the right to self-defense.
[39] Brownlie, *Use of Force*, p. 289
[40] This context excludes discussion when the state targeted has given explicit consent for the present of thirds state on its soil. Shaw, p. 1143

use of force by the intervening states (Israel and the United States respectively) was not widely endorsed in the international community. In the latter case, the use of force was condemned by the General Assembly and only a U.S. veto prevented a similar resolution from being passed in the Security Council.[41] Christine Gray has engaged in a comprehensive analysis of state practice in relation to the so-called protection of nationals doctrine. She concludes that very few states support such a right.[42] This position was endorsed by Ian Brownlie in his *Principles of Public International Law* (6th ed).[43] It is clear that the *Asylum Case* requirements for the formation of custom have not been met:

> "The party which relies on custom…must prove that this custom is established…in accordance with a constant and uniform usage practiced by the States in question…."[44]

In the case of the protection of nationals abroad doctrine, usage or, better, acquiescence, has been neither uniform or constant. Indeed, the opposite is the case.

Another argument sometimes advanced in favor of the right to protect nationals abroad would seem to be based on the right to self-defence (Ronzitti, (1985)). According to this view, an attack on a state's citizens is equivalent or analogous to an attack on that state's territory and is therefore an attack on the state itself. There is some support for this position

[41] C. Gray, "The Use of Force and the International Legal Order" in M. Evans, *International Law* (2003), 602-603; see, too, on Grenada: *United Nations Yearbook* 1983, 211 and on Entebbe, *United Nations Yearbook* 1976, 315. See, too, M.B. Akehurst, "Use of Force to Protection National abroad", 5 *international relations*, 1977, p. 3; discussion of The Entebbe Incident, the USA interventions in the Dominican Republic (1965), Grenada (1983) and Panama (1989) and the UK in Suez (1956) is found, also, in Harris, pp. 909-912.
[42] C. Gray, *Use of Force*, 2000, 108.
[43] I. Brownlie, *Principles* at 705.
[44] *Asylum Case*, ICJ Reports (1950) at 276-7.

among scholars (though the scholarship is divided on the question) but there is an absence of state practice and *opinio juris* supporting the right and the textual material is equivocal.[45] It is clear that "armed attack" primarily has been understood to mean an attack on a state's territory.

However, even if such a right were to come into existence, it would have to be exercised in conformity with the background principles of self-defence (e.g. proportionality and necessity).

Ultimately, there are very good policy reasons for treating this so-called doctrine with great caution. As Christine Gray has noted:

> "All too often the protection of nationals is a mere pretext to mask the real intent of over-throwing the government".[46]

Use of force on humanitarian grounds (humanitarian intervention)

As has been stated, the UN Charter acknowledges a limited number of exceptions to the prohibition on the use of force. Some scholars and, to a much lesser extent, states have suggested supplementing the exceptions based on Security Council authorization and self-defence with a justification grounded in the right to protect vulnerable or abuse populations abroad. This doctrine, often termed humanitarian intervention, has many adherents but suffers from three very

[45] Gillian Triggs, International Law (2006) at 588. See, too, I. Brownlie, *International Law and the Use of Force*, 301; Derek Bowett, *Self-defence in International Law*, 87.
[46] Ibid.

signal flaws. First, it has *never* been incorporated into any universal international treaty. Second, there is only negligible support for the doctrine in state practice. Third, it clashes with an existing *jus cogens* norm prohibiting the use of force, and given the *jus cogens* character of the prohibition of use of force, it would take a new norm of that quality to override it.[47] Hence a norm "accepted and recognised by the international community of States as a whole"[48] would be required. Such recognition has not been forthcoming.

On the second point, although some States have invoked the doctrine of 'humanitarian intervention' as a justification for the use of force;[49] these interventions have gained very little support from the wider community with the majority of interventions receiving condemnation rather than approval.[50] In any event, most so-called "humanitarian interventions" were not justified on humanitarian grounds in the first place. The Tanzanian invasion of Uganda, the Vietnamese intervention in Cambodia and the Indian action in East Pakistan were all either exclusively or primarily justified as acts of self-defence.

Furthermore, even where there have been interventions inconsistent with a given rule, these acts, according to the ICJ, should be treated as breaches of that rule, not as indications of the recognition of a new rule.[51] As Professor Brownlie states: " [T]he partisans of humanitarian

[47] Charney, 'NATO's Kosovo Intervention: Anticipatory Humanitarian Intervention in Kosovo', 93 *A.J.I.L.* 834 (1999), p.837.
[48] V.C.L.T., art.53
[49] Christine Gray, *International Law and the Use of Force*, 2nd ed. (Oxford University Press, 2004) at 35.
[50] Ministerial Declaration of the 23rd Annual Meeting of the Ministers for Foreign Affairs of the Group of 77 (24 September 1999), ¶69, at http://www.g77.org/doc/Decl1999.html.
[51] *Nicaragua*, p.98, ¶186.

intervention either ignore the conditions for the formation of new principles of customary law or, on occasion, propose that the requirement of *opinio juris* be relaxed."[52]

In recent years, there have been efforts to re-establish a principle or doctrine of humanitarian intervention. These efforts have taken three forms. In the first case, scholars have appealed to the UN Charter or international human rights law to assert a right to intervene for humanitarian purposes. They argue that because human rights obligations lie at the heart of the UN system and the international Bill of Rights, intervention in support of these obligations must be lawful. While the first part of this argument may be accurate, it is not at all clear that it leads to the conclusion sought by its proponents. The human rights system is designed to encourage and persuade states to improve their treatment of nationals and non-nationals but nowhere in this body of law is there even an implied right to unilaterally use force to enforce such obligations. Meanwhile, though it is true that respect for human rights constitutes one of the main goals of the UN, the maintenance of peace and security and the prohibition of unilateral, unauthorised force is as great, if not greater, a value.[53]

In the second case, some commentators have argued that the NATO intervention in Kosovo represents the establishment of a new norm of humanitarian intervention. This example, though, must be approached with caution. Most NATO states did *not* argue that the intervention was justified on humanitarian grounds. Instead, they relied on the existence of several Security Council Resolutions characterising the situation as a "threat to the peace" to argue for an implied right to use force. Scholars, meanwhile, were equivocal in their approach to the intervention.

[52] Brownlie, *Principles*, supra note 43 at 712.
[53] CHESTERMAN, supra note 22, p.45; DINSTEIN, WAR, AGGRESSION AND SELF-DEFENCE 89 (1988); CASSESE, INTERNATIONAL LAW 373 (2nd edn., 2005).

Professor (now Judge) Simma's position in the *European Journal of International Law* was representative. For him, the intervention was unlawful (even if morally or politically desirable).[54] Its legitimacy (outside law), in any case, was grounded in its multilateral nature and (qualified) institutional authority and not on any freestanding right of humanitarian intervention.[55] This distinguishes it from the Russian invasion of Georgia.

The third process that might be said to support some sort of developing right to humanitarian intervention is often described as R2P (the "Responsibility to Protect" doctrine) In 2000, the International Commission on State Sovereignty, a Canadian-sponsored group of elite policy-makers and lawyers, published a document outlining a "Responsibility to Protect" (ICISS, 2000). This idea received further elaboration and status at the Secretary-General's *High-Level Panel on Threats, Challenges and Change* in 2004 and was endorsed by Kofi Annan himself in his major reform statement, *In Larger Freedom* (2005). The doctrine is grounded in two propositions. Advocates of a responsibility to protect argue that sovereign states have a duty to protect the human rights of their own citizens on their own territory (this seems self-evident given the slew of human rights conventions to which states have signed up) and that the Security Council has a right to authorise humanitarian interventions to protect acutely vulnerable people (this, too, is unremarkable given the language of Chapter VII and, in particular, Article 39). These two norms, of course, offer no justification for unilateral interventions. Indeed, the idea of unilateral humanitarian intervention is not endorsed by the High-Level Panel or in the Secretary-General's reform proposal. In any case as Roy Allison puts it in *International Affairs*:

[54] Bruno Simma, 'NATO, the UN and the Use of Force: Legal Aspects', 10 *EJIL* (1999) 1.
[55] Gerry Simpson, *Great Powers and Outlaw States* (2004), Chapter Seven.

"Despite Russian claims of and considerable loss of life, there is no good evidence of mass atrocity crimes in the region or a realistic risk of them (a precautionary criterion for R2P)".[56]

It must be noted, too, that the Russian Federation constantly manipulated figures during the conflict as well as in its immediate aftermath.[57] The Russian authorities ,as early as August 9 and 10, 2008, were making inflated allegations of an egregious number of casualties, qualifying actions of the Georgian government as Genocide. It is clear that the numbers of deaths and injuries were grossly exaggerated in an effort to create a moral and legal justification for the intervention. Unfortunately and deplorably, according to some international human rights organizations (i.e. Human Rights Watch), these exaggerated claims may have had a direct and pernicious result in promoting revenge killings. Subsequently, even the special Investigative Committee (Sledstvennyi Komitet Prokuratury, or SKP) documented deaths of 162 individuals instead of inflated figures claimed earlier.[58]

To conclude, there is little support for a doctrine of humanitarian intervention in international law. The weight of scholarly opinion, state practice and institutional development strongly suggests that the norm has no existing basis. There are very good policy and juridical reasons for this. "Humanitarian intervention" clearly is open to abuse and so far has only been invoked against weaker states[59] and although the doctrine may have received support from dominant

[56] Roy Allison, "Russia resurgent?: Moscow's Campaign to 'Coerce Georgia to Peace'' (2008) 84 *International Affairs* 1145–1171 at 1153.
[57] For more information see Human Rights Watch Report, "Up in Flames", pp. 70-73.
[58] For more information see Human Rights Watch Report, "Up in Flames", p. 75
[59] Brownlie, Use of Force, supra note 22 at 340; Shaw, supra note 17 at 1046; Oppenheim, supra note 17 at 442-3.

States in pre-Charter law,[60] it is incompatible with the core principles of sovereign equality of States and non-intervention.[61]

Protection of peacekeepers

The discussion thus far has concentrated on the more familiar justifications for using force under international law (self-defence, collective security, humanitarian interventions). It has concluded that these exceptions to the *jus cogens* prohibition found in Article 2(4) of the UN Charter and in customary international law either have no application in the present circumstances (collective security, self-defence) or do not exist as exceptions in the first place (humanitarian intervention). There are two final, perhaps less orthodox, arguments that must be considered before moving onto the factual matrix. The first is the argument that a state has a right to use force in a foreign state's territory in cases where legitimate peacekeeping forces consisting of its own nationals are attacked by forces belonging to the host state.

This argument might be structured in three different (though intersecting) ways. First, it might be argued that action on behalf of national contingents is a genus of self-defence. Second, the sending state might argue that its action on behalf of threatened peacekeepers is justified by the consent of the host state to the initial peace-keeping operation. Third, a state might want to argue that the explicit institutional authorisation for the initial peace-keeping operation represents an implicit authorisation to use force in support of these peace-keeping units.

This part of the memorandum will consider each of these in turn.

[60] Shaw, supra note 17 at 1045.
[61] Brownlie, *Use of Force*, supra note 22 at 341.

Self-Defence and Peacekeeping

This question arising here is whether the peacekeepers deployed in the territory of a state based on bilateral agreement are considered as forces of the sending state in case of attack upon them and whether an attack on peacekeepers is considered as an attack on the sending state.

Are peacekeepers “forces of the sending state”? Much depends on the individual agreement or treaty or memorandum of understanding. In the case of the Sochi Agreement, there is a great deal of ambiguity. What is clear from the agreement is that the nature of the Russian Forces in Georgia underwent a transformation in 1992. The Agreement speaks of the “withdrawal of armed formations” from the relevant region and their replacement by forces attached to the Joint Control Commission. This might suggest that the Russian Forces can no longer be considered as “forces of the sending state”.

But even if the remaining Russian forces are to be regarded as “forces of the sending state” there remain two further questions: is an attack on military personnel an attack on the sending state? And is an attack on such peace-keepers an attack on the sending state? There are many views. What is clear, though, is that Article 2(4) of the UN Charter makes illegal uses of force against the “territorial integrity and political independence” of a member state. This suggests that the UN system is concerned with breaches of territorial inviolability or political self-determination rather than attacks on a state’s interests generally. This would explain why the “protection of nationals abroad” doctrine has such an insecure basis under international law and it suggests a reading of

Article 51 that excludes attacks on military forces abroad. If this is the case with attacks on military personnel abroad, it applies with even greater force to attacks in peacekeepers whose attachment to the sending state is qualified or conditioned by their status under the terms of peacekeeping agreements.

Any exercise of self-defence, of course, must be necessary and proportionate. Even *if* it is accepted that Russian contingents in the peacekeeping force are "forces of the sending state" and even *if* an attack on these forces can be regarded as an attack on The Russian Federation and even *if* such an attack can give rise to a right to use force on behalf of those forces in a foreign territory, it remains the case that such force must not be disproportionate or unnecessary in order to meet requirements of Article 51 of the UN Charter. The Russian response to alleged attacks on peace-keepers was unnecessary (e.g. there was no effort to resolve the dispute by other means) and disproportionate (the large scale military invasion of a foreign state is not a proportionate response to an alleged attack on peacekeeping contingents of an unverified scale).[62]

In addition to legal analysis the facts of 7th and 8th of August provided below, clearly show that at the time when the Russian military invasion started *no* military encounter with Russian peacekeeping forces had taken place. The argument based on the protection of peacekeepers on the ground was a spurious pretext for the Russian invasion

Consent or Authorisation

[62] See Roy Allison, "Russia resurgent?: Moscow's Campaign to 'Coerce Georgia to Peace'' (2008) 84 *International Affairs* 1145–1171 at 1151 "…[protection] offers grounds for Russian emergency assistance or evacuation of its peacekeepers from foreign soil, *but not the scale of the Russian response, let alone the open-ended use of force*".

The Sochi Agreement on Principles of the Resolution of the Georgian-Ossetian Conflict signed on June 4th, 1992 permitted the deployment of Russian peace-keeping contingents on Georgian territory in South Ossetia. This Agreement was designed to prevent further conflict in South Ossetia but its ancillary purpose was to explicitly prohibit the deployment of Russian forces outside the conflict zone. Article 2 of the Agreement also provided for the withdrawal of all Russian troops *not* part of the peacekeeping force from the conflict zone itself. In other words, the Agreement did not provide for any use of force by regular Russian units in support of peacekeeping activities. Nor did the Sochi Agreement authorise a unilateral use of force by Russia on Georgian territory. Indeed, the Sochi Agreement, read in its proper context, places dispute resolution in relation to peace-keeping in the hands of the Joint Control Commission and not the individual states (Article 5). All of this makes the Russian argument rather hard to sustain.[63]

Equally, nothing in general international law suggests that contributing nations have a right to use force in self-defence when peace-keepers are attacked. The essence of peacekeeping lies in its consensual character; the deployment of peacekeeping forces on a host state is dependent on that state's consent. As Kirgis puts it:

> "It is a key principle that the operation must not interfere in the internal affairs of the host countries and must not in any way favour one party over another"[64]

[63] See, too, Roy Allison, "Russia resurgent?: Moscow's Campaign to 'Coerce Georgia to Peace'' (2008) 84 *International Affairs* 1145–1171 at 1152.
[64] F. Kirgis, *International Organizations* 1993, 717.

The specific agreement in this case does not envisage a use of force by the Russian military in such circumstances. Indeed, the whole thrust of the Sochi Agreement points in the other direction; the Agreement was specifically designed to prevent such escalations. There is nothing in the Agreement that would imply Georgian consent to such activities. In the absence of such agreement, there are general norms applying to peacekeeping, which make it clear that such force is not permitted. Yoram Dinstein makes the point succinctly:

> "The two special attributes of a peacekeeping force are that (i) it is established and maintained with the consent of all the states concerned; and (ii) it is *not authorized* to take military action against the state." (*inserted italics*)[65]

The limits on peacekeeping are further elaborated in the *Certain Expenses* Case, the first ICJ judgment to consider the nature of peacekeeping. Here, the ICJ, in a judgement concerning the first peacekeeping mission in Egypt, clarified the role of peacekeepers:

> "…nor, moreover, should the Force have military functions exceeding those necessary to secure peaceful conditions…".[66]

Of course, this was an opinion concerning a specific operation at a particular time. Nevertheless, it sets the terms for peacekeeping as a general concept. Such terms and the whole *raison d'être* of peacekeeping operations, as well as the individual terms of the Sochi Agreement and the

[65] Y. Dinstein, *War, Aggression and Self-Defence* (3rd edition), 2001, 266.
[66] *Certain Expenses Case* (1962) para 10.

fundamental norms of the international order, strongly suggest that Russia's unilateral use of force finds support neither in an expanded doctrine of self-defence nor a discrete right to use force to defend national contingents in peacekeeping contexts.

III. FACTUAL CIRCUMSTANCES

Russian actions before the military aggression in August 2008

Russia's actions with regard to Abkhazia, Georgia and the Tskhinvali Region/South Ossetia took a qualitatively more aggressive turn at the beginning of 2008, following the recognition of Kosovo. Immediately prior to the declaration of Kosovo's independence and in reaction to this recognition, then-Russian President Vladimir Putin declared that Russia had "pre-designed plans".[67] Russian actions became more focused and intense, and consisted of a series of escalating but inter-linked interventions. These included: hostile political steps (*inter alia*, the establishment of official links with proxy regimes) accompanied by direct military actions and interventions (i.e. the shooting down of an unmanned, unarmed Georgian drone by a Russian fighter jet), illegal deployment of new Russian troops in Abkhazia, (i.e. paratroopers and railway troops) as well as construction of fortifications in eastern part of the province. Until June 2008, Russian actions were mostly focused on Abkhazia, Georgia.

The situation in the Tskhinvali Region/ South Ossetia escalated significantly in the beginning of July 2008 – in parallel with the completion of offensive military infrastructure projects in

[67] See the record of Putin's speech:
http://www.kremlin.ru/appears/2008/02/14/1327_type63380type82634_160108.shtml

Abkhazia – when a terrorist attack took place, aimed at the elimination of the Head of the Provisional Administration of South Ossetia, Mr. Dimitry Sanakoev. This act was accompanied by substantial increases in the scale and intensity of attacks by proxy militants on Georgian government controlled villages,[68] Georgian police, and peacekeepers. These acts resulted in casualties and fatalities (mortars of 120 mm caliber, prohibited under then-existing agreements were used in the shelling for the first time since early 1990s). At the same time, the flow of mercenaries into the Tskhinvali Region/South Ossetia increased, as did violations of Georgian airspace by Russian military aircraft. In a symptomatic move, on July 9, four Russian military aircraft violated Georgian airspace on the eve of the visit of US Secretary of State Condoleezza Rice to Georgia. This violation was confirmed by the Russian Ministry of Foreign Affairs.

Finally, there was a marked increase in the deployment of military hardware and units of the regular Russian army. Specifically a large number of Russian military personnel were mobilized close to the Russia-Georgia border for military exercises titled, "Caucasus 2008". During those exercises more 8,000 troops (including 58th Army, North Caucasus Military District, units of Airborne Troops, 4th Russian Air Army and air defence) and at least 700 of heavy equipment and 30 aircraft simulated an invasion of " a neighboring state". Although the exercises were completed on August 2, those forces did not re-deploy.

Pre-war deployment of Russian troops in the territory of Georgia

[68] Georgian Government was aware that those were targeted attacks on the Georgian-controlled villages aiming at maximum destruction. For example, the proxy Interior Minister Mikhail Mindzaev instructed his subordinate to wipe out a Georgian-government controlled village. The Ministry of Internal Affairs owns the relevant evidentiary transcript of the telephone conversation

According to Georgian intelligence information, units of the separate reconnaissance battalion of the 19th Motor Rifle Division of the 58th Russian Army were reported to be deployed in Java district through the Roki Tunnel on August 3, 2008. On the night of August 4, 10 units of armor (BTR/BMP vehicles) were brought into Tskhinvali Region/South Ossetia from the Russian Federation and distributed among the *de facto* regime's irregular forces. Two vehicles were handed over to the *de facto* regime irregular forces unit located in village Dmenisi, Tskhinvali district. On the same day, the head of South Ossetian proxy authorities, Eduard Kokoity, told the Russian media outlet "Caucasian Knot" that 300 "volunteers" (i.e. mercenaries) from North Ossetia, Russian Federation, had already arrived in South Ossetia and their number would eventually increase to two thousand.[69] Later in the evening, a member of the Russian State Duma, Viktor Vodolatsky, officially promised support to the Tskhinvali proxy regime while the Commander of the second Don Cossack Forces, Nikolai Kozitsin, announced that he could send from 10 to 15 thousand "volunteers" (i.e. mercenaries) to South Ossetia.[70]

In the afternoon of August 5, 2008, approximately 150 additional mercenaries from the North Caucasus arrived in Tskhinvali as reported by the Russian media.[71] The flow of mercenaries from North Ossetia was confirmed by the Deputy Commander of Don Cossack Forces, Vladimir Voronin, in his interview with the Russian radio station "Echo Moskvi".[72]

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[69] 'В Россию прибыли эвакуируемые из Южной Осетии дети и женщины', 04.08.2008, http://www.kavkaz-uzel.ru/newstext/news/id/1226513.html

[70] 'Казаки России и Зарубежья готовы оказать помощь Южной Осетии', 04.08.2008, http://cominf.org/node/1166477843 ; 'Шашки наголо, Донские казаки готовятся воевать в Южной Осетии', 06.08.2008, http://www.ng.ru/regions/2008-08-06/1_kazaki.html

[71] 'В Южную Осетию прибывают добровольцы', 05.08.2008, http://regnum.ru/news/1036598.html; 'В Южную Осетию прибывают добровольцы', 05.08.2008, http://www.radiomayak.ru/doc.html?id=88115

[72] 'Россия реально может быть втянута в возможное вооруженное противостояние между Грузией и Южной Осетией', 05.08.2008, http://www.echo.msk.ru/news/531989-echo.html; 'Тбилиси и Цхинвали обменялись угрозами', 06.08.2008, http://www.kommersant.ru/doc-rss.aspx?DocsID=1008389

On the same day of August 5, 40 units of self-propelled artillery and a reconnaissance battalion of the 33rd Motor Rifle Mountain Brigade from Botlikh, Dagestan were deployed in Tskhinvali region/South Ossetia through the Roki Tunnel, in addition to that 30 artillery guns were brought into Java district of the region. Some units of the 58th Army were reported to be mobilized near the Roki Tunnel in North Ossetia, Russia, including the 135th Separate Motor Rifle Regiment from Prokhladniy, Kabardino-Balkaria and the 693rd Motor Rifle Regiment from Zaramag, North Ossetia. The deployment of armor continued on the following day.

Large scale incursion of the Russian troops into Georgian territory

In the early morning of August 7, 2008, the MIA of Georgia obtained the first communication intercept indicating that a Russian military unit that included tanks and military trucks loaded with soldiers had entered the Roki Tunnel.[73] At 03:41 of the same morning, a large number of armored vehicles, tanks and military trucks of the Russian regular army streamed into the Roki Tunnel and deployed in Java district as confirmed by three mobile telephone conversations intercepted by the MIA of Georgia.[74] Numerous articles in the Russian press also confirm that Russian army units, namely parts of the 693rd and 135th motor rifle regiments of the 58th Army, had entered South Ossetia prior to August 8.[75]

[73] The Ministry of Internal Affairs owns the relevant evidentiary transcript of telephone conversations
[74] The Ministry of Internal Affairs owns the relevant evidentiary transcript of telephone conversations
[75] 'ЖИЗНЬ ПРОДОЛЖАЕТСЯ', Ирина ЖИРНОВА, 'Красная звезда', http://www.redstar.ru/2008/09/03_09/2_03.html;'Лейтенант-танкист Александр Попов: 'Мама, я ранен, но живой!'' 13.08.08, http://www.izvestia.ru/obshestvo/article3119449/;'Пермские солдаты оказались в эпицентре войны', 15.08.2008, http://www.permnews.ru/story.asp?kt=2912&n=453; 'Пермские солдаты, не отслужившие полгода, будут отозваны из зоны конфликта, 02.09.2008, http://prm.ru/perm/2008-09-02/22365; 'Вечерний Саранск', 27.08.2008, http://www.vsar.ru/; 'Военнослужащий из Мордовии награжден за мужество Президентом России', 28.08.2008, http://www.saransk-online.ru/news/index.php?ID=3510; 'В Южной Осетии погиб контрактник из Казани', 12.08.2008, http://www.kp.ru/daily/24144/361865/; 'Война всѐ спишет! Саакашвили как европейский шпион', 12.08.2008, http://www.apn.ru/column/article20635.htm; 'Блиц-опрос:

In the evening of August 7, the Government of Georgia faced a qualitatively changed situation: despite numerous attempts to decrease tension and a unilateral ceasefire implemented by the Government of Georgia, Georgian-controlled villages, police, and peacekeeping posts were under continuous fire. In this context, civilians in the already cut-off enclave were defenseless and, for the first time, two Georgian peacekeepers were killed[76] as a result of targeted military attacks that afternoon. Commenting on the alarming and unprecedented rise in violence, proxy leader, Eduard Kokoity, threatened to "wipe out" the Georgian enclaves unless Georgian law enforcement personnel left the region. In addition to publicized reports on the inflow of mercenaries into the region and initial human intelligence reports of a Russian army intrusion, the Government of Georgia obtained solid evidence that a large-scale Russian invasion was in progress. On August 7, late in the evening, the Georgian government received multiple human intelligence reports that about 150 armored vehicles and trucks with Russian soldiers were

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"Мама, нас отправляют в Южную Осетию', 15.08.2008, http://www.vk-smi.ru/2008/2008_08/vk_08_08_15_03.htm; 'ОСЕТИНСКОЕ СЕРДЦЕ РУССКОГО СОЛДАТА', 23.09.2008, http://www.redstar.ru/2008/09/23_09/2_01.html; 'В Южной Осетии ранены трое курян', 26.08.2008, http://dddkursk.ru/number/724/new/005540/print/; 'Что война будет, мы знали еще в начале августа', 17.08.2008, http://www.kp.ru/daily/24147/364238/; 'Не смогу я теперь своих солдатиков бросить', http://www.gazetayuga.ru/archive/2008/35.htm; 'Трое суток в чеченском 'Востоке', Будни элитного спецподразделения федеральных сил', 08.08.2008, http://nvo.ng.ru/forces/2008-08-08/6_vostok.html; 'Военно-осетинские дороги', 15.09.2008, http://www.novayagazeta.ru/data/2008/68/17.html; '12 часов до смерти Первый день войны глазами спецкора 'МК', 12.08.2008, http://www.mk.ru/blogs/MK/2008/08/12/society/366011/; Вадим Речкалов, http://voinodel.livejournal.com/33871.html?thread=916559#t916559; 'Le conflit qui empoisonne, les rapports Est-Ouest', http://www.lefigaro.fr/international/2008/09/01/01003-20080901ARTFIG00298-le-conflit-qui-empoisonne-les-rapports-est-ouest-.php; 'Мать погибшего донского солдата: «Два дня нам не говорили о смерти сына', 15.08.2008, www.kp.ru/daily/24146/363581/; 'КАЛЕНЫЕ ОГНЕМ', 24.09.2008, http://www.redstar.ru/2008/09/24_09/3_03.html; 'Вернулся в строй, Во Владикавказе установили бюст Героя России', 21.05.2009, http://www.rg.ru/2009/05/21/reg-kuban/geroy.html; 'Времена и …, Все зависит от нашей политической зрелости и национальной состоятельности', 07.03.2009, http://ugo-osetia.ru/9_19+20/9_19+20-10.html

[76] Two Georgian peacekeepers Shalva Trapaidze and Vitali Takadze were killed and five wounded (see annex 33 of the answer to question 1 of the military set of questions) on August 7 at around 14:00 as a Georgian peacekeepers checkpoint was shelled with 100 and 120mm artillery o from the proxy regime-controlled village Khetagurovo. A proxy militant reported to superiors the fact of killing Georgian peacekeepers in a telephone conversation also intercepted by the Georgian Ministry of Internal Affairs on 07.08.2008. The Ministry of Internal Affairs owns the relevant evidentiary transcript of telephone conversations

approaching the Roki Tunnel from Russia and moving towards the Tskhinvali Region/South Ossetia. Later, multiple signal intercepts of phone conversations among the *de facto* security and military officials that took place between 02:20 and 04:30 on August 8 confirm that Russian military columns were stretched from the Roki Tunnel to the village of Java.[77]

In response to these escalations, and consistent with his constitutional duty (Article 71 of the Georgian Constitution) to protect the sovereignty and territorial integrity of Georgia as well as the security of Georgia's citizens, at 23:35 on August 7, the President of Georgia issued an order to start a defensive operation.

Russian troop movement after the incursion

On August 8, at 05:20, incoming Russian troops passed the village of Java crossed the Gupta Bridge and advanced on the Dzari bypass road, which is confirmed by a telephone conversation intercepted by the Ministry of Interior of Georgia.[78] Soon after that, two more columns of Russian troops entered the Roki Tunnel and advanced south by the Geri-Dmenisi road. At 18:45, one column of Russian tanks, armored vehicles and trucks approached Tskhinvali by the Dzara road. Two more columns were stopped near the village of Dmenisi. Russian forces opened intensive fire on Georgian armed forces located in Dmenisi, in Tskhinvali and on the neighboring heights. By 22:00, Russian troops approached the Big Liakhvi valley from the north, but failed to enter it, suffering heavy losses caused by Georgian artillery fire, and also stopped moving on the Dzara road towards Tskhinvali.

[77] The Ministry of Internal Affairs owns the relevant evidentiary transcript of telephone conversations
[78] The Ministry of Internal Affairs owns the relevant evidentiary transcript of telephone conversations

On August 9, at 11:40, Russian forces, including airborne troops started to enter Tskhinvali from the north-west and from village Tbeti. At 17:00, additional Russian troops entered Tskhinvali.

On the same day, in between 13:40 and 14:40, Russian military aircraft bombed the central government controlled villages in Upper Abkhazia/Kodori Gorge, including the district's administrative center, Chkhalta. At 22:20, Russian aviation again bombed Upper Abkhazia/Kodori Gorge.

On August 10, early in the morning, more than 300 Russian tanks and armored vehicles, together with more than 10 000 Russian troops, passed through the Roki Tunnel. On the same day, in between 06:00 and 11:30, Russian aircraft bombed Upper Abkhazia/Kodori Gorge. The aerial attack on Kodori Gorge continued through the next day too. In the afternoon of August 11, 2008, the Russians obtained full control over Kodori Gorge/Upper Abkhazia.

On August 11, 2008 Georgian troops began a withdrawal and retreated towards Tbilisi to protect the capital from the ongoing movement of the Russian military.

On August 12, 2008, a French brokered seize-fire was agreed; however, Russian occupation of Georgian territories continued.

To date, Russia occupies Tskhinvali region/South Ossetia, including the territories under the control of the central Government of Georgia before the August war, as well as Abkhazia

including Kodori Gorge, which had not been under the Abkhaz/Russian control before the August 2008.

During the August war, all Georgian troop movements occurred on the territory of Georgia as established and recognized by international treaties and UN SC resolutions 1808, 1781, 1752, 1716, 1666, 1656, 1615, 1582, 1554, 1524, 1494, 1462, 1427, 1393, 1364, 1339, 1311, 1287, 1255, 1225, 1187, 1150, 1124, 1096, 993, 971, 937, 934, 906, 901, 896, 892, 881, 876, 858, 854, 849. These movements were conducted within constitutional limits, as an aspect of Georgia's sovereign rights over its own territory and in exercise of the right of self-defence as defined by Article 51 of UN Charter and in customary international law.

IV. RUSSIA'S USE OF FORCE AGAINST GEORGIA IS AN ILLEGAL ACT OF AGGRESSION

Russia invaded and occupied Georgia in the absence of an international legal justification of the action. Russia's use of force was not authorized by the United Nations Security Council and cannot be qualified as a lawful exercise of the right of self-defence. It is clear that Russian Federation forces crossed Georgian-Russian border and invaded and occupied Georgian territory in violation of numerous international legal norms (*supra*). Nor is the Russian invasion justified under the terms of the so-called right to use force abroad to protect nationals; this right has no basis under international law, interventions in purported exercise of this norm have been roundly condemned by the international community and the use of this alleged justification is, most often as it is in this case, a pretext for an illegal intervention (*supra*). The Russian invasion cannot be justified as a "humanitarian intervention". The doctrine continues to enjoy very little support

among states and commentators and, in any case, the Russian invasion does not meet the conditions necessary for the exercise of such a right. Finally, Russia cannot invoke protection of peacekeepers deployed in Tskhinvali region/South Ossetia for the reasons already stated above and because Georgian uses of force against peacekeepers was employed only after they lost the protection due to their direct participation in hostilities begun by the Russian Federation and the abrogation of the peacekeeping agreement by Russia.

The first two possible grounds of justification, i.e. UNSC authorization and the self-defense has not been contested by the Russian Federation and are clearly irrelevant; therefore, we refrain from the in-depth elaboration on those points.

Protection of its national

As mentioned *supra* international law and the post UN Charter legal order does not recognize the tight of a state to use force in the territory of another state on the ground of the protection of its nationals. Moreover, Russia fails to meet the international legal test of nationality with respect to the civilian population resident in Tskhinvali region/South Ossetia and Abkhazia as developed by the International Court of Justice in the *Nottebom* case. *En masse* distribution of Russian passports to the remaining civilian population of the two Georgian regions represented a deliberate and well-constructed policy aimed at establishing a pretext of the military intervention of the Russian federation on the territory of Georgia under the pretext of non-existing right of protection of nationals abroad.

There are several elements of the process of passportization of the remaining population in Tskhinvali region/South Ossetia and Abkhazia, which are relevant for the demonstration of the lack of genuine link between the Russian Federation and the population in Tskhinvali region/South Ossetia and Abkhazia:

- the process was not driven by individuals willing to accept Russian citizenship on ad hoc basis, it was designed and implemented an masse as part of specific policy of the Russian Federation;
- the process was neither sporadic, nor disorganized, it was well prepared and coordinated among various agencies of the Russian Federation;
- implementation of this policy had been conducted with complete disregard of the national legislation of Georgia, citizens of which were *en masse* granted Russian citizenship, thus clearly violating the sovereign rights of Georgia and principles of friendly relations;

Having pursued illegal passportization of Georgian nationals, Russia amended the relevant legislation in order to facilitate this process. Specifically, the Russian State Duma passed amendments to the Law on Citizenship, which evoked a strong protest from Georgian President Eduard Shevardnadze.[79] This practice of the Russian authorities has been condemned by the international community. The European Union emphasized in its document that this action was a challenge to the territorial integrity and sovereignty of Georgia, construable as a *de facto* annexation of those regions."[80]

[79] "Georgia Protests about Russian Citizenship Law Amendments," Rustavi-2 Television 1600 GMT, 10 June 2002, in BBC Monitoring,

[80] Declarations and Recommendations adopted by EU Parliamentary Cooperation Committee at its 3rd meeting on 18-19 June 2001, IRE/PCC/GH/KM/es, 27 June 2001, para. 27.

Accordingly, any attempt to justify use of force for the protection of the nationals is groundless.

Humanitarian intervention

The principle of humanitarian intervention is not supported by state practice and *opinio juris* and there is no factual ground capable of justifying such force (*supra*).

Despite the significant escalation of the situation in Tskhinvali region/South Ossetia, the constant attacks on Georgian villages, and the casualties among Georgian peacekeepers, police and civilian described *supra*, Georgia employed the utmost restraint and resorted to all available diplomatic measures to avoid use of force (See *infra*).

Although Russian aggression had triggered a use of force in self-defence by Georgia, the Russian government's propaganda continued to assert that Georgia had committed genocide against the ethnic Ossetians.[81] Russian propaganda served two goals, first, to justify Russia's illegal activities and second to encourage Ossetian proxy militants and other armed formations to commit brutalities against ethnic Georgians in revenge for the "genocide and mass killings." Human Rights Watch, in its report "Up in Flames", confirms that Russian claims of genocide committed by Georgians are not supported by any evidence.[82] Neither did the Council of Europe Parliamentary Assembly Committee on the Honoring of Obligations and Commitments by

[81] Dmitry Medvedev statement of August 10, 2008, see SKP RF Opened a Criminal Investigation into the Killings of Russian citizens in South Ossetia, Kommersant Online, August 14, 2008, http://www.kommersant.ru/doc.aspx?DocsID=1011523&ThemesID=301.
[82] Up in Flames, p. 71-72.

Member States, who visited Georgia and Russia in late September, support the allegation.[83] Subsequently, even the special Investigative Committee (Sledstvennyi Komitet Prokuratury, or SKP) documented deaths of 162 individuals instead of inflated figures claimed earlier

Russian claim of humanitarian intervention is an attempt to disguise its real intention and is not supported by facts and cannot be justified under contemporary international law.

Protection of peacekeepers

As the earlier argument made clear, there is no general right to use force in support of or for the protection of national peacekeeping contingents. Indeed, the status and (other forms of) protection accorded to peacekeepers under international law are valid under international law as long the peacekeepers remain neutral; this status is removed and protection is lifted automatically when they participate in the hostilities.

The argument in support of the use of force for the protection of peacekeepers is weakened by the fact that Georgia's defence operation started hours after the Russian invasion and no military clash between Georgian forces and peacekeepers had occurred before this. On the contrary, before the large scale Russian invasion, Georgian peacekeepers deployed in Tskhinvali region/South Osseia and their checkpoints had been attacked during a week before August 7 (see *supra*).

[83] PACE, Committee on Legal Affairs and Human Rights, "The consequences of the war between Georgia and Russia" opinion by Rapporteur Christos Pourgourides, Doc. 11732, rev. October 1, 2008

As regards the participation of peacekeepers in the hostilities, as early as 00:23 on August 8, the Commander of the Joint Peacekeeping Forces, Marat Kulakhmetov, in a phone conversation with the Commander of Georgian peacekeepers Mamuka Kurashvili, admitted that Russian peacekeepers were providing coordinates of the positions Georgian armed forces to the South Ossetian proxy regime militants' artillery.[84] On August 8, at around 06:00, Georgian Ministry of Internal Affairs special forces equipped with "Cobra" type armored vehicles and reinforced by several tanks from the Ministry of Defence of Georgia, moved from the village of Zemo Nikozi towards the outskirts of Tskhinvali. The Ministry of Internal Affairs Special Forces encountered sniper and massive armored vehicle cannon fire from the Russian peacekeeping headquarters "Verkhniy Gorodok" located on the southwestern edge of the town and were compelled to return fire and ask for tank support. In addition to the attack from the base, the roof of the main building of "Verkhniy Gorodok" was used for correcting their artillery fire against Georgian armed forces, which is confirmed by an article in the South Ossetian and Russian press.[85] It must once again be noted that *only* those peacekeeping regiments and infrastructure have been attacked by the Georgian forces, which directly participated in hostilities, whereas other Russian Peacekeeping posts continued to function throughout the hostilities and have never been subject to attack.

Thus, the Russian attempt to justify its use of force as a means of protection of peacekeepers is ungrounded: First there is no general right to use force in support of or for the protection of national peacekeeping contingents. Second the military clash between Russian peacekeepers and Georgian forces occurred at about 6 a.m. on August 8, while the large scale military deployment of the Russian troops started in the early morning of August 7. Moreover, the Russian peacekeeping

[84] The Ministry of Internal Affairs owns the relevant evidentiary transcript of telephone conversations
[85] The Ministry of Internal Affairs owns the relevant evidentiary transcript of telephone conversations. See also http://osradio.ru/genocid/10778-oleg-galavanov-pogib-projaviv-muzhestvo-i-geroizm.html

base attacked by Georgian forces was directly participating in the hostilities and they no longer enjoyed the protection normally accorded to them under international law.

V. GEORGIA ACTED IN SELF-DEFENSE

Georgia's military operation started at 23:50 of August 7, 2008 was an act of self defence *on its own territory* authorized by customary international law and Article 51 of the UN Charter:

- Georgia acted on its own territory against the invaded Russian troops;
- The Russian invasion had already materialized when the order on the use of force was issued by the Commander in Chief;
- An "armed attack" as required under international law was present;
- Georgia's actions were directed at the protection of its sovereignty, territorial integrity as well as the civilian population on its own territory.

The resort to force was necessary to halt the ongoing Russian aggression and was inevitable. Georgia has resorted to all available political and diplomatic means to avoid armed confrontation; however, all these efforts turned to be in futile.

Despite the diplomatic and preventative measures taken, including announcement of unilateral cease fire by the Georgian Government, shelling of Georgian villages as well as movement of Russian troops into the Georgian territories continued and the use of force in self defence became inevitable.

Georgian forces acted in defense of their homeland. Their actions were a legitimate and wholly lawful response to an egregious breach of the UN Charter and customary international law norms of non-intervention and non-interference. Georgia's use of force against the invading Russian army was necessary and proportionate.

To conclude, the Russian invasion of Georgia represents an unlawful use of force contrary to the UN Charter and fundamental norms of international law. None of the exceptions to this general prohibition, actual (self-defence, collective authorization) or purported (humanitarian intervention, protection of nationals, and protection of peacekeepers) can justify the Russian invasion. The Georgian response to the Russian armed attack was a proportionate, necessary and wholly justified exercise of its customary and Charter right to use force in self-defence.