

# **THE APPLICABILITY OF THE *JUS AD BELLUM* TO ENTITIES SHORT OF STATEHOOD IN THE REPORT OF THE INDEPENDENT INTERNATIONAL FACT- FINDING MISSION ON THE CONFLICT IN GEORGIA**

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## I. INTRODUCTION

On 2 December 2008 the Council of the European Union took the decision to establish an Independent International Fact-Finding Mission on the Conflict in Georgia (IIFFMCG) which had occurred in August of that year.<sup>1</sup> The Mission conducted visits and meetings and received correspondence from all four entities involved in the conflict.<sup>2</sup> It was able to call on the guidance and advice of an advisory board of politicians and senior civil servants, as well as on the expertise of military and legal experts, historians and political analysts.<sup>3</sup> On 30 September 2009, just over a year after the tensions in the Caucasus boiled over into a high-intensity armed conflict, the Mission published its Report.<sup>4</sup> The Report is significant because, as it correctly noted, '[t]his is the first time in its history that the European Union has decided to intervene actively in a serious armed conflict. It is also the first time that after having reached a ceasefire agreement the European Union set up a Fact-Finding Mission as a political and diplomatic follow-up to the conflict.'<sup>5</sup>

However, whilst it labeled itself as a ‘fact-finding mission’, IIFFMCG’s remit went beyond simply investigating ‘the origins and the course of the conflict in Georgia’.<sup>6</sup> The Mission was additionally charged with assessing these facts ‘with regard to international law..., humanitarian law and human rights, and the accusations made in that context’.<sup>7</sup> Thus, whilst the Report was keen to stress ‘that the Fact-Finding Mission is strictly limited to establishing facts and is not a tribunal’<sup>8</sup> there was an inherent contradiction in what it set out to do and, ultimately, the 1100-page ‘fact-finding’ Report ended up casting judgment on the lawfulness of many of the issues that arose from that conflict. Given that it would seem unlikely that the legal issues addressed in the Report will ever be examined by the International Court of Justice

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<sup>1</sup> EU Council Decision 2008/901/CFSP of 2 December 2008 concerning an independent international fact-finding mission on the conflict in Georgia, Official Journal of the European Union 323/66.

<sup>2</sup> The Report of the Independent International Fact-Finding Mission on the Conflict in Georgia (IIFFMCG), 30 December 2009, all three volumes at <http://www.ceiig.ch/Report.html>, see Volume I, 39-43.

<sup>3</sup> *ibid.*

<sup>4</sup> *ibid.*

<sup>5</sup> *ibid* 2.

<sup>6</sup> EU Council Decision (n 1) Article 1(2).

<sup>7</sup> *ibid.* This phraseology is odd, as it implies that international humanitarian law and international human rights law are not part of international law.

<sup>8</sup> IIFFMCG Report, Volume I (n 2) 2.

(ICJ)<sup>9</sup> or any other international tribunal, the legal determinations therein are potentially significant.

Whilst the Report offered a comprehensive background to the events that erupted on 7/8 August 2008 and presented its conclusions as to violations of international humanitarian law and international human rights law,<sup>10</sup> it was its assessment of the lawfulness of the use of force by all of the parties involved in the conflict that was perhaps the most notable. This was not least because of the factual confusion that existed over the initial stages of the conflict, including what measures of force were employed, when and by whom.<sup>11</sup> Indeed, on the day of the publication of the Report it was the *jus ad bellum* issues that made the headlines.<sup>12</sup>

The aim of this short article is not to offer an assessment of the lawfulness of the actions of the parties concerned.<sup>13</sup> Neither is it to give a full summary of the findings of the Mission, either generally or with regard to use of force issues specifically. Indeed, it is worth noting that there are a number of aspects of IFFMCG's treatment of *jus ad bellum* issues that are worth further consideration,<sup>14</sup> but these will not be

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<sup>9</sup> Of course, the ICJ does have a contentious case relating to the conflict on its docket, but this application is jurisdictionally based upon the International Convention on the Elimination of All Forms of Racial Discrimination (CERD). As the Court pointed out in its provisional measures order, it is required to 'confine its examination...to those [matters] which appear to fall within the scope of CERD.' See the *Case Concerning the Application of the International Convention on the Elimination of All Forms of Racial Discrimination (Georgia v. Russian Federation) (Request for the Indication of Provisional Measures Order)* [2008], <http://www.icj-cij.org/docket/files/140/14801.pdf> para 127.

<sup>10</sup> See, in general, IFFMCG Report, Volume II (n 2).

<sup>11</sup> One notable example is that Georgia claimed that the Russian intervention into Georgian territory began on the 7 August 2008 (see M Saakashvili, 'Georgia Acted in Self-Defence' Wall Street J, 2 December 2008, <http://online.wsj.com/article/SB122817723737570713.html>), whereas Russia maintained this did not occur until the following day (see UN Doc S/2008/545). Indeed, the conflict was one that was clouded in a great deal of factual disagreement, propaganda, and media misdirection. This is to an extent true with regard to all conflicts, but this was a problem that was particularly pronounced in the case of the Russia/Georgia dispute. Furthermore, as the Report noted, this problem was exacerbated by the technological disruption of so-called 'cyber-attacks', which affected all parties and led to the disruption and occasional collapse of servers in the region. See IFFMCG Report, Volume II (n 2) 117-119.

<sup>12</sup> See, for example, 'Uncomfortable Conclusions for Georgia' BBC News Online, 30 September 2009, <http://news.bbc.co.uk/1/hi/world/europe/8284046.stm>.

<sup>13</sup> For a detailed legal assessment of various aspects of the conflict see JA Green and CPM Waters (eds) *Conflict in the Caucasus: Implications for International Legal Order* (Palgrave, Basingstoke, forthcoming 2010). See also NN Petro, 'The Legal Case for Russian Intervention in Georgia' (2009) 32 Fordham Int'l LJ 1524; A Nußberger, 'The War between Russia and Georgia – Consequences and Unresolved Questions' 1 (2009) Göttingen J Int'l L 341, 359-360; C King, 'The Five Day War: Managing Moscow After the Georgia Crisis' (2008) 87 Foreign Aff 2; NM Shanahan Cutts, 'Enemies Through the Gates: Russian Violations of International Law in the Georgia/Abkhazia Conflict' (2007-2009) 40 Case W Res J Int'l L. 281, 302-304; and M Iqbal and S Hassan, 'Armed and Ready' (2008) 158 New LJ 1277.

<sup>14</sup> For example, the Mission's treatment of the criteria of necessity and proportionality in the context of self-defence was cursory and arguably inconsistent with customary international law (cf IFFMCG Report, Volume II (n 2) 269-274 with J Gardam, *Necessity, Proportionality and the Use of Force by States* (Cambridge University Press, Cambridge, 2004) 138-187; and JA Green, *The International Court of Justice and Self-Defence in International Law* (Hart Publishing, Oxford, 2009) 63-109). Other *jus ad bellum* issues in the Report that are potentially of concern include: reference to a seemingly new concept of 'formal' reporting of actions of self-defence to the UN Security Council, the treatment of the notion of 'reprisals' and the 'accumulation of events' theory in the context of self-defence.

discussed here. These issues will necessarily be left for others to examine. The sole aim of this piece is to offer some comments on the single most important conclusion of the Report, and the one that significantly altered the way in which the Mission carried out its analysis on the use of force issues. That is, the applicability of the *jus ad bellum* to entities short of statehood.<sup>15</sup>

## II. THE APPLICABILITY OF THE *JUS AD BELLUM* TO ENTITIES SHORT OF STATEHOOD

Despite the fact that the *jus ad bellum* is a notoriously uncertain area of international law, its *applicability* to the forcible actions of states – particularly the applicability of its fundamental provisions in the United Nations (UN) Charter: Article 2(4) and Chapter VII – is uncontroversial.<sup>16</sup> Of course, one might well dispute the specific *application* of the law in any given case, but its applicability to states in the first instance is clear. Thus, here, the fact that *jus ad bellum* governs the respective uses of military force – and, indeed, the preceding threats of military force – by Russia and Georgia is not worthy of further comment.

However, in analysing the use of force in the context of the Caucasus conflict, the Mission for the most part took the view that the legal regime of the *jus ad bellum* was applicable in its entirety to the forcible actions of all of the entities involved – to Russia and Georgia as states, but also to South Ossetia (categorised in the Report as ‘an entity short of statehood’)<sup>17</sup> and Abkhazia (which was viewed as ‘a state-like entity’).<sup>18</sup>

Such a wholesale application of the law on the use of force to entities that are not states is, at the very least, highly controversial.<sup>19</sup> This is not to say that the application of the *jus ad bellum* to non-state entities is necessarily always incorrect, at least when the law on the use of force is taken as constituting more than just the general prohibition of the use of force enshrined in Article 2(4), only that such an approach is far from being as free from controversy as the Report implied. Perhaps more important, then, is the fact that IIFFMCG’s *reasoning* for this approach was neither clear nor consistent.

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<sup>15</sup> It is worth noting that the Mission made it clear that the comparatively short Volume I of the Report should be viewed as authoritative (IIFFMCG Report, Volume II (n 2) 1). Much of the analysis herein relates to Volume II. However, the two volumes do not contradict each other, and Volume I is drawn from the findings set out in Volume II. Ultimately, Volume II still represents the published conclusions of the Mission and is therefore equally worthy of analysis.

<sup>16</sup> As Gray remarks, ‘The provisions in Articles 2(4) and 51...are accordingly directed to inter-state conflict.’ See C Gray, *International Law and the Use of Force* (Oxford University Press, Oxford, 3<sup>rd</sup> ed, 2008) 7.

<sup>17</sup> IIFFMCG Report, Volume II (n 2) 229.

<sup>18</sup> *ibid.*

<sup>19</sup> The generally accepted view is that ‘[t]he UN Charter, and *jus ad bellum* generally, only deals with conflicts between states. It treats internal disputes, even those involving secessionist enclaves like South Ossetia and Abkhazia, as a domestic matter.’ A Dworkin, ‘The Georgian Conflict and International Law’ (2008) *Crimes of War Project*, <http://www.crimesofwar.org/onnews/news-georgia.html>. However, for the minority contrary view as to the applicability of Article 2(4) to non-state entities, see T Gazzini, *The Changing Rules on the Use of Force in International Law* (Manchester University Press, Manchester, 2005) 180-181.

#### *A. Article 2(4) of the UN Charter*

In applying the *jus ad bellum* to the non-state entities involved in the conflict, the Report began by referencing Article 2(4). This provision as it appears in the UN Charter reads as follows:

All Members 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 other manner inconsistent with the Purposes of the United Nations.<sup>20</sup>

Before addressing any issue of applicability, the first point of concern here is the fact that the Report misquoted Article 2(4). It stated that ‘[u]nder Article 2(4) of the UN Charter, the use of force is prohibited only if it is directed against “the sovereignty, territorial integrity or political independence of another state”, or if it is “in any other manner inconsistent with the Charter of the United Nations.”’<sup>21</sup> There is no mention of ‘sovereignty’ in that provision.<sup>22</sup> Moreover, this article of the Charter refers to the *purposes* of the UN, and not the ‘Charter’ of the UN as the Report indicates. This is perhaps a relatively minor point, in that the meaning of Article 2(4) was essentially preserved. Having said this, it is hardly reassuring that, in a Report of this kind, the core provision of the law in this area was incorrectly stated, especially when this was presented as a direct quote and was compounded by repetition.<sup>23</sup>

The Report then proceeded to submit that the prohibition on the use of force should be applied to South Ossetia. Yet, the prohibition on the use of force, as found in Article 2(4), is clearly addressed to ‘states’. In fact, not only is Article 2(4) addressed to states, it is also explicit in prohibiting the use of force in the ‘international relations’ of states. This would further indicate that the use of force employed as part of a state’s ‘internal relations’ – such as an attack on a non-state entity existing within the state – would not be prohibited by Article 2(4). Or, as Dinstein has put this, ‘[i]ntra-state clashes therefore are out of reach of the Charter’s provision.’<sup>24</sup>

Irrespective of this apparent inapplicability of Article 2(4) to forcible actions taken by or against South Ossetia or Abkhazia, the Mission took the view that ‘[i]n the Georgian-South Ossetian conflict, the use of force is “inconsistent with the Charter of the United Nations [sic]”, and therefore the prohibition of the use of force is applicable to the conflict...’<sup>25</sup> Of course, the use of force in the Georgian-South Ossetian conflict was almost certainly not consistent with the Charter of the UN broadly defined (or the *purposes* of the UN, somewhat more specifically – not to

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<sup>20</sup> UN Charter, Article 2(4).

<sup>21</sup> IIFFMCG Report, Volume II (n 2) 239.

<sup>22</sup> Article 2(4) also prohibits the threat or use of force against ‘any state’, not ‘another state’ as the Report indicates.

<sup>23</sup> Indeed, the misquotation of Article 2(4) is not the only basic error of this kind in the Report (though it is perhaps the most concerning). For example, the Report referred to the prominent international legal scholar (and specialist on the *jus ad bellum*), Professor Christine Gray, as ‘Susan Gray’. See IIFFMCG Report, Volume II (n 2) 255.

<sup>24</sup> Y Dinstein, *War, Aggression and Self-Defence* (Cambridge University Press, Cambridge, 4th ed, 2005) 85.

<sup>25</sup> IIFFMCG Report, Volume II (n 2) 239-240.

mention more accurately – defined), given the organisation’s penchant for the peaceful settlement of disputes and the non-use of force.<sup>26</sup>

However, this in itself is a somewhat flimsy basis for arguing that Article 2(4) is applicable to non-state entities. The Report expands upon this assertion on the basis that the prohibition on the use of force is referred to in three separate peace agreements made between various different groupings of Georgia, Russia, South Ossetia, North Ossetia and Abkhazia.<sup>27</sup> Whilst the prohibition of the use of force is indeed mentioned explicitly in two of these three documents<sup>28</sup> (and is inherently implicit in the third),<sup>29</sup> Article 2(4) itself is not expressly mentioned in any of them.

Nevertheless, the Mission seemed sure that ‘[d]espite the differing status of the parties to the conflict (Georgia as a state, South Ossetia as an entity short of statehood and legally a part of Georgia), the prohibition of the use of force *as endorsed in the UN Charter* applies to their relations.’<sup>30</sup> This is, as we have noted, at best debatable and the support for this contention in the Report is weak.

For example, IIFFMCG placed a great deal of weight on the fact that the preamble of the 1992 Sochi Agreement reaffirms ‘the commitment to the UN Charter and the Helsinki Final Act.’<sup>31</sup> Indeed, it is concluded that ‘[t]his clause is a clear indication that Georgia accepts the applicability of the prohibition of the use of force in its conflict with South Ossetia.’<sup>32</sup> Furthermore, the Report goes on to state that ‘[t]he reference to the UN Charter would not make any sense if it did not include the prohibition of the use of force, as this is the centrepiece of the Charter.’<sup>33</sup> Yet, this seems an illogical conclusion. There would be no need, in any of the three peace agreements, for an express denunciation of the use of force if Article 2(4) was in fact applicable. In such a case, Article 2(4) would, in and of itself, act as a restriction of the use of force against or by a non-state entity.

It is not uncommon for various international instruments to call for the non-use of force between different entities.<sup>34</sup> It does not follow from this, however, that a wholesale incorporation of the prohibition of the use of force that applies between states is what is being alluded to in such instruments. References to abstinence from

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<sup>26</sup> As is stressed, in particular, in Articles 2(3) and 2(4) of the UN Charter.

<sup>27</sup> IIFFMCG Report, Volume II (n 2) 240-241. These agreements are: ‘The Agreement on Principles of Settlement of the Georgian-Ossetia Conflict’ of 24 June 1992 (the so-called ‘Sochi Agreement’); ‘The Agreement on the Further Development on the Process of the Peaceful Regulation of the Georgia-Ossetian Conflict and on the Joint Control Commission’ of 31 October 1994; and ‘The Memorandum on Necessary Measures to be Undertaken in Order to Ensure Security and Strengthening of Mutual Trust between the Parties to the Georgian-Ossetian Conflict’ of 1996. All three documents can be found in T Diasamidze, *Regional Conflicts in Georgia (The Autonomous Oblast of South Ossetia, The Autonomous SSR of Abkhazia 1989-2008): The Collection of Political-Legal Acts* (Regionalism Research Centre, Tbilisi, 2<sup>nd</sup> ed, 2008) 110, 192 and 244 respectively.

<sup>28</sup> That is, in the 1994 Agreement and the 1996 Memorandum, *ibid*.

<sup>29</sup> That is, in the 1992 Agreement (n 27).

<sup>30</sup> IIFFMCG Report, Volume II (n 2) 242, emphasis added.

<sup>31</sup> *ibid* 240.

<sup>32</sup> *ibid*.

<sup>33</sup> *ibid*.

<sup>34</sup> UN Security Council Resolutions act as a good illustration of this point. Take, as just one example, Resolution 1701, UN Doc S/RES/1701 (2006), which called for – amongst other things – the ‘immediate cessation by Hezbollah of all attacks’.

forcible action of this kind may well be intended to reaffirm Article 2(4), but they may equally be used instead of it because it does not apply. In the case of the Caucasus conflict, all that the three agreements noted by the Report indicate is that the parties have pledged not to use force in solving *this* crisis, nothing more.

The simple fact that the various entities involved in this dispute (or set of disputes) have agreed not to use force against each other does not constitute an incorporation of Article 2(4) into these agreements. Nor does it hold as a basis for the conclusion that this provision is applicable to non-state entities. It should be recalled that Article 2(4) is a treaty provision between the member states of the UN and is recognised as being applicable in customary international law to the international relations of non-party states.<sup>35</sup> The various uses of force in the Caucasus by or against non-state entities may well breach the provisions of the agreements between them (and between them and state parties) that pledge to maintain peaceful relations, but this does not correspond to a breach of Article 2(4). This is particularly true when it is considered, as has already been noted, that this provision (and its corresponding customary international law manifestation) is directed at the use of force between ‘states’ in the technical sense.<sup>36</sup>

### *B. The Definition of Aggression*

All of this is not to say that the *jus ad bellum* is necessarily inapplicable to non-state entities in its entirety. In contrast to the application of Article 2(4), forcible actions by or against South Ossetia (or Abkhazia) were arguably contrary to Article 3(d) of the 1974 Definition of Aggression, which holds that an ‘attack by the armed forces of a state on the land, sea or air forces, or marine or air fleets of another state’ constitutes an unlawful act of aggression.<sup>37</sup> This is on the basis that Article 1 of that instrument indicates that the term ‘state’ is used therein without prejudice to issues of recognition or membership of the UN.<sup>38</sup> As such, the *de facto* ‘state like’ qualities of South Ossetia or Abkhazia would mean that the prohibition of acts of ‘aggression’ would apply as much to those entities as to Russia or Georgia. Of course, the Definition of Aggression is not binding in itself, but the ICJ has indicated that at least some of its provisions are representative of customary international law.<sup>39</sup>

The Report missed this key distinction between the meaning of ‘state’ in the UN Charter and the meaning of the same term in the Definition of Aggression. Indeed, when it did apply the Definition of Aggression to the actions of Georgia against South Ossetia on 7/8 August 2008, the Report simply noted that these actions ‘were not directed against the territory of “another state”, but against the territory of an entity short of statehood outside the jurisdiction of the attacking state. But as argued above, the prohibition of the use of force applies here as well.’<sup>40</sup> This completely misses the

<sup>35</sup> Gray (n 16) 8. This is also implicit in the conclusions as to the customary international law status of Article 2(4) drawn by the ICJ in the *Nicaragua* case (as well as in the views of the parties to that dispute on this issue). See *Military and Paramilitary Activities in and Against Nicaragua (Nicaragua v. United States of America) (Merits)* [1986] ICJ Rep 14 paras 187-188.

<sup>36</sup> Dworkin (n 19).

<sup>37</sup> Definition of Aggression, annexed to GA Res. 3314, 1974.

<sup>38</sup> This point is made, with relation to South Ossetia, by Petro (n 13) 1526-1528.

<sup>39</sup> *Nicaragua (Merits)* (n 35) para 195.

<sup>40</sup> IIFMCG Report, Volume II (n 2) 243.

point that the attacks against South Ossetia *were* in all likelihood attacks against a ‘state’ for the purposes of the Definition of Aggression. Instead, the dubious conclusion as to the applicability of the general prohibition on the use of military force was simply reiterated.

### C. Article 51 of the UN Charter

The Mission went further than holding that Article 2(4) of the UN Charter was applicable to non-state entities. It also took the view Article 51 of the same treaty, the Charter provision governing self-defence, was similarly applicable in noting that its finding regarding Article 2(4) ‘guides not only the applicability of Art. 2(4), but also of Art. 51 of the UN Charter.’<sup>41</sup>

The reasoning provided by IIFFMCG for this controversial contention was that:

According to the wording of Art. 51, this provision applies only to UN member states. Yet, if the use of force is prohibited in the relations between a state and an entity short of statehood, then self-defence must be available to both sides as well. The scope of both rules *ratione personae* must be identical, because otherwise the regime of the use of force would not be coherent. This means that self-defence is admissible also for an entity short of statehood.<sup>42</sup>

The casual and cursory manner in which the Report stated this conclusion is startling and should not go unchallenged. Whether non-state entities have the right to self-defence under international law is a largely unexplored and controversial issue.<sup>43</sup> The Mission failed to even acknowledge this fact when it set out this claim. It is only much later in the Report that it briefly alluded to the controversy, stating that: ‘[e]ven if self-defence by an entity short of statehood were allowed (which is highly controversial, as shown above).’<sup>44</sup>

Unfortunately, the Report did not elucidate this controversy as it claimed. If anything, it simply implied, uncritically, that entities short of statehood are entitled to invoke the right of self-defence where there has been a call for the abstinance of force by both sides. It is this fact – that the Report did not offer any further explanation for the applicability of self-defence beyond its traditional ‘state-based’ nature – that is most concerning here. Admittedly, there is a degree of logic to the Report’s argument. If one accepts the applicability of Article 2(4) to non-state entities, a corresponding application of Article 51 of the UN Charter would make a degree of theoretical sense. Yet such a theoretical leap – however logical – is not a substitute for the identification of a positive legal basis for such an application of self-defence.

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<sup>41</sup> IIFFMCG Report, Volume II (n 2) 241.

<sup>42</sup> ibid 241-242.

<sup>43</sup> The traditional view is that ‘[a]ccording to the law of nations, a *state* is an entity that is allowed to defend itself.’ Self-defence is therefore triggered when ‘a state (and not a group of people) is physically attacked...’, P Cliteur, ‘Self-Defence and Terrorism’ in A Eyffinger, A Stephens and S Muller (eds) *Self-Defence as a Fundamental Principle* (Hague Academic Press, The Hague, 2009) 83 and 86 respectively (emphasis in original). Although there is a growing body of practice and literature suggesting the possibility of a non-state entity perpetrating an armed attack against a state and therefore triggering the right of self-defence (see n 49 below), there has been little discussion as to whether such an entity possesses the right of self-defence itself.

<sup>44</sup> IIFFMCG Report, Volume II (n 2) 281.

Article 51, much like Article 2(4), is clear that it applies to states, or specifically to armed attacks ‘against a Member of the United Nations.’<sup>45</sup>

#### *D. Specific Problems with the Report’s Application of the jus ad bellum to Non-State Entities*

By concluding that Articles 2(4) and 51 of the UN Charter were applicable to South Ossetia and Abkhazia as well as to Georgia and Russia, the Mission created a variety of problems for itself when it actually came to attempting such an application. The Report had to proceed by stretching the analogy it had drawn between ‘state-like’ entities and an actual state. For example, it took the view that ‘[b]ecause the Georgian villages attacked by South Ossetian forces were not under the jurisdiction of South Ossetia before 8 August 2008, the actions by the South Ossetian militia are equivalent to an attack on the “territory of another State”.’<sup>46</sup> Such a conclusion again logically flows from the starting point of the applicability of Article 2(4), but it would seem to be difficult to reconcile with the accepted approach taken by international law.<sup>47</sup>

Furthermore, the Report went on to say that ‘[t]hese acts were serious and surpassed a threshold of gravity and therefore also constituted an “armed attack” in terms of Art.51 of the UN Charter.’<sup>48</sup> Such a claim is factually debatable in the first instance, and is also cursory in a legal sense (given that the ‘gravity threshold’ for an armed attack is far from clear).<sup>49</sup> More importantly, though, this again assumes that a non-state entity can commit an armed attack at all. This is perhaps arguably the case, given current trends in state practice,<sup>50</sup> but it is far from certain.<sup>51</sup>

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<sup>45</sup> UN Charter, Article 51.

<sup>46</sup> IIFFMCG Report, Volume II (n 2) 244.

<sup>47</sup> It would seem relatively clear that attacks by non-state entities operating from *within the state* do not engage the *jus ad bellum*, but instead are manifestations of an internal armed conflict. For example, the ICJ stated in the *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory (Advisory Opinion)* [2004] ICJ Rep 135 para 139 that ‘Israel exercises control in the Occupied Palestinian Territory and ... as Israel itself states, the threat which it regards as justifying the construction of the wall originates within, and not outside, that territory.’ As such, the Court viewed the *jus ad bellum* as being inapplicable to that threat. See also Dinstein (n 24) 204-205.

<sup>48</sup> IIFFMCG Report, Volume II (n 2) 244.

<sup>49</sup> Green (n 14) 31-42; and Gray (n 16) 147-148.

<sup>50</sup> There is a growing trend in state practice that suggests that an armed attack (triggering self-defence) may emanate from a non-state actor. Examples include the 2001 intervention in Afghanistan, taken in response to an attack perpetrated by a non-State terrorist group and Israeli action against Hezbollah in 2006. For detailed discussion of these examples in this context, see Green *ibid* 156-159. It is worth noting that these two examples are probably not enough in themselves to constitute a change in customary international law with regard to non-State ‘armed attacks’, but they certainly indicate the beginning of a paradigm shift in that direction, see M Byers, ‘Terrorism, the Use of Force and International Law After 11 September’ (2002) 51 Int’l & Comp L Q 401, 407-409.

<sup>51</sup> For example, the ICJ has appeared to indicate that an armed attack must stem from a state. See *Israeli Wall (Advisory Opinion)* (n 47) para 139, where the Court stated that ‘Article 51 of the Charter thus recognizes the existence of an inherent right of self-defence *in the case of armed attack by one State against another State*’ (emphasis added). See also: I Scobie, ‘Words My Mother Never Taught Me: In Defence of the International Court’ (2005) 99 Am J Int’l L 76, 80-81; and Gazzini (n 19) 184-191.

Similarly, cracks in this apparent application of the *jus ad bellum* are also visible when the Report addressed the issue of Russia's right to the collective self-defence of South Ossetia. Here, the Report again asserted that '[t]he right to individual self-defence is a necessary counterpart to the prohibition on the use of force. If South Ossetia is bound to refrain from the use of force, it must in consequence also be entitled to defend itself.'<sup>52</sup> However, it then went on to acknowledge that a right of collective self-defence in aid of a non-state entity would lead to complications. In particular, the Report noted that '[i]ndividual self-defence and collective self-defence are not logically linked, especially where the right to individual self-defence flows, as here, not unequivocally from Charter law or customary law, but mainly or even exclusively from the special treaties between the sides.'<sup>53</sup> This is interesting not least because it amounts to IIFFMCG acknowledging that its basis for applying the *jus ad bellum* in this context was weak.

Of course, the inapplicability of the right of Russia to invoke the right of collective self-defence in support of South Ossetia must be correct. Any such precedent would be extremely damaging to international peace and security. States could forcibly aid any entity that requested help; the scope for the (increased) abuse of the right of self-defence would be huge. However, the decision of the Mission to apply the *jus ad bellum*, and in particular Article 51, to South Ossetia left it with the difficult task of having to artificially distinguish between individual self-defence (applicable to non-state entities) and collective self-defence (which is necessarily inapplicable to them). The Report defended such a distinction on the basis that '[i]t is not inconsistent to allow an entity short of statehood to defend itself against armed attacks, while at the same time limiting its right to "invite" foreign support.'<sup>54</sup>

Yet to grant the right of individual self-defence whilst denying the right of collective self-defence is surely inconsistent. Both are clearly linked in Article 51. Such logic leads to the bizarre (not to mention confusing) conclusion that *some* of Article 51 applies to non-state entities, but not all of it. Moreover, there are practical problems with such an approach. For example, let us adopt the argument that collective self-defence exists to give weak states the possibility of being defended from attacks by much stronger states: take the archetypal case of Kuwait being attacked by Iraq in August 1990. In such cases, denying the right of collective self-defence to a weak state almost makes providing such a state with the right to individual self-defence useless in practice.<sup>55</sup>

This problem is even more pronounced when the 'weak state' is not in fact a state at all, but a non-state entity. After all, a 'state like' entity is probably going to be even 'weaker' than a weak state. On most occasions such an entity would not be able to defend itself adequately against the organised armed forces of a state. Indeed, this would seem relatively clear from the conflict in the Caucasus, where South Ossetia's

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<sup>52</sup> IIFFMCG Report, Volume II (n 2) 282.

<sup>53</sup> ibid 282.

<sup>54</sup> ibid.

<sup>55</sup> Cf the views expressed by Judge Schwebel in his dissenting opinion to the *Nicaragua* case, with regard to the Court's limitation of its 'proportionate countermeasures' concept to individual defensive responses only. His objection was similarly based on the position that 'weak' states may not be able to defend themselves without collective support. See *Nicaragua (Merits)* (n 35) dissenting opinion of Judge Schwebel para 177.

resistance to the Georgian offensive was largely ineffectual until Russian support appeared.

Interestingly, the Report notes that ‘the use of force by secessionist groups is in any case illegal under international law, even assuming that a right to secede exists. The general rule is that South Ossetian authorities and armed forces were not themselves entitled to use force in order to attain self-determination.’<sup>56</sup> This conclusion would seem correct, but it ignores the fact that it is at least arguable that *all* of the uses of force by South Ossetia against Georgia were targeted towards the ultimate goal of secession. As such, the prohibition of the use of force as mentioned in the various agreements relied upon by the Mission could be viewed as a reference to force employed in this context, rather than a reference to Article 2(4). If one were to accept this, then the right of self-defence as encompassed in Article 51 would similarly not be applicable.

### III. CONCLUSION

This comment has offered criticism of a specific issue that arises from the Report of the Independent International Fact-Finding Mission on the Conflict in Georgia. Indeed, it has been argued that the Mission’s blanket application of Article 2(4) and 51 of the UN Charter to the actions of, and actions taken against, the two non-state entities involved in the conflict – South Ossetia and Georgia – was flawed. This is both because of the dubious conceptual coherence of such a conclusion, but also because of the practical difficulties associated with in fact applying these core provisions of the *jus ad bellum* to non-state entities.

However, perhaps more concerning than the conclusion of IIFFMCG in this regard was the fact that the controversial aspects of this approach went virtually unacknowledged, and that such stark legal conclusions were reached in such a cursory and uncritical manner. Although, as noted above, this comment does not seek to examine the Mission’s Report in general, or even to offer a comprehensive critique of its use of force aspects, it is worth pointing to the fact that the confused and ultimately inadequate approach to the applicability of the *jus ad bellum* can be seen as stemming, at least in part, from a relatively superficial methodological approach to international law. For example, the Report based too many of its conclusions throughout on the jurisprudence and doctrine of scholarly opinion and the ICJ, as opposed to the practice of states. Indeed, while there were many references to ‘state practice’ to support the positions adopted by the Mission, there were also extremely few instances where actual examples of such practice were drawn upon in support of the contentions made.

This kind of ‘brushstrokes’ approach to international law is surely undesirable, particularly given the *de facto* importance of the Report. Whilst the Mission made it clear it was not a tribunal, it still was required as part of its mandate to address the facts under international law.

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<sup>56</sup> IIFFMCG Report, Volume II (n 2) 279.

Returning to the specific issue discussed here, it would seem that instead of systematically ascertaining and applying international law to the conflict, the Mission took a prescriptive step, and confused the desirable development of the law with its current content. It is certainly possible to argue that there is merit to the Report's view that Article 2(4) should restrict the actions of non-state entities, as well as actions taken against them, and that as a corollary to this, non-state entities should be able to act in self-defence. As a policy matter, it is desirable for states to be restricted directly under the key provisions of the *jus ad bellum* from attacking other entities, be they states or not. Similarly, providing such entities with rights (the lawful right to defend itself) and duties (the obligation not to attack) under the *jus ad bellum* is appealing.

However, it is very difficult to conclude that this is part of the existing *lex lata*. Instead perhaps, it may be suggested that the application of the *jus ad bellum* to non-state entities is aspirational, or, at best, an emerging principle of *lex ferenda*. Any arguments to make the law more 'coherent', whilst welcome, need to be pronounced as *lex ferenda* and have no place in a Report of this nature. Importantly, applying the rules to these entities would mean a large conceptual and practical shift in the legal regime of the *jus ad bellum*. Any such process would need careful consideration; the ramifications could be great. The system as it stands is not able to coherently cope with the applicability of the core provisions of the *jus ad bellum* to non-state entities, as we have seen (for example, with regard to collective self-defence). As such, it must be concluded that the Report's approach to the *jus ad bellum* in this context is extremely concerning, largely because of its failure to acknowledge the controversial aspects of what it set out, or the possible consequences of such a shift.