

## CHAPTER 3

### PASSPORTIZATION, PEACEKEEPERS AND PROPORTIONALITY: THE RUSSIAN CLAIM OF THE PROTECTION OF NATIONALS ABROAD IN SELF-DEFENCE

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#### Introduction

The aim of this chapter is to apply the international law on the use of force – the *jus ad bellum* – to the events in the Caucasus in the summer of 2008. Specifically, it focuses on the claim of the Russian Federation that its intervention into South Ossetia and beyond into Abkhazia and ‘Georgia proper’ was justified in international law as an action of self-defence. It is notable that comparatively few western legal scholars have examined the lawfulness of the Russian intervention into Georgia.<sup>1</sup> It is therefore important that the Russian self-defence claim is properly assessed.

The Russian claim is here tested with regard to the existing conventional and customary international law governing the use of force. In doing so, this chapter has two main points of focus: the ‘protection of nationals abroad’ as a manifestation of self-defence and an application of the criterion of proportionality. With regard to the former, the basis for Russia’s self-defence claim was that it was protecting its nationals within Georgian territory. Whilst there is some state practice supporting the legal justification of protecting nationals abroad under the rubric of self-defence, this manifestation of the right remains a controversial justification for the use of force. Nonetheless, it is argued herein that the protection of nationals abroad concept may be a legally acceptable one in principle.

Having said this, the Russian claim, as applied with regard to the 2008 conflict in the Caucasus, is rather unique for a number of reasons, most notably Russia's policy of 'passportization' in the region and thus the Russian 'manufacture of nationals' in South Ossetia. The specifics of the Russian justification mean that – even if one accepts the protection of nationals abroad argument in principle – the *application* of this manifestation of self-defence by Russia is questionable in this instance. Perhaps more importantly, the Russian use of force was notably disproportionate to the goal of protecting these nationals. It is this disproportionality that most fundamentally demonstrates the unlawful nature of the Russian intervention. This chapter concludes by looking at the wider implications of the Russian self-defence claim for international legal order.

### The Russian Legal Justification

Following its military intervention on 8 August 2008 into Georgian territory,<sup>2</sup> Russia quickly made the explicit claim before the Security Council that it was acting in self-defence. Specifically, the Russian ambassador to the United Nations (UN), Vitaly Churkin, argued in a letter of 11 August 2008 that: 'the Russian side had no choice but to use its inherent right to self-defence enshrined in Article 51 of the Charter of the United Nations'.<sup>3</sup> As such, there is no question that Russia employed self-defence as a legal justification with regard to its actions in the breakaway regions and Georgia more generally.

That Russia claimed self-defence is unsurprising, given that this essentially constituted the only feasible legal justification that could be offered for its use of force. This is because the only

universally accepted exceptions to the prohibition on the use of force as set out in Article 2(4) of the UN Charter are: a) military action authorised by the UN Security Council (a collective security action) and b) self-defence, as defined by Article 51 of the Charter and customary international law. As Russia had clearly received no mandate from the Security Council for its military intervention, it would appear that the only possible justification under international law for the use of force was that it constituted an action in self-defence. Having said this, before moving on to the substance of this paper and an analysis of the Russian self-defence claim, it is necessary to question, as a preliminary matter, whether there existed an additional legal justification advanced by Russia to justify its intervention.

Some commentators have argued that Russia in part justified its intervention as an act of unilateral humanitarian intervention.<sup>4</sup> In simple terms, unilateral humanitarian intervention can be defined as the use of force to protect non-nationals from gross violations of human rights within the territory of another state, without Security Council authorisation.<sup>5</sup> This view is supported by the fact that Russia undoubtedly appealed to humanitarian concerns to legitimate its action in South Ossetia and other areas of Georgia. For example, both President Medvedev and, more notably, his foreign minister Sergei Lavrov, employed language that is evocative of a justification of unilateral humanitarian intervention. Russia accused Georgia of a massive onslaught on civilians amounting to ‘genocide’ and ‘ethnic cleansing’.<sup>6</sup> Such statements have been taken by some to indicate that Russia was invoking humanitarian intervention as a legal justification, to be coupled with, or to be taken in the alternative to, its self-defence claim.

However, it seems evident that, in spite of its repeated use of humanitarian language, Russia did not in fact invoke the *legal* claim of unilateral humanitarian intervention. This is a justification for the use of force that is not provided for by the UN Charter and is, at best, extremely controversial in customary international law. Indeed, it is notable that any Russian invocation of a legal doctrine of unilateral humanitarian intervention would have been diametrically contrary to the long established Russian (and Soviet) rejection of the concept as an aspect of customary international law.<sup>7</sup>

This fact in itself does not, of course, establish that Russia did not make a legal claim of unilateral humanitarian intervention; dramatic reversals in international legal policy are far from uncommon. Interestingly, the Report of the Independent International Fact-Finding Mission on the Conflict in Georgia (IIFFMCG),<sup>8</sup> published in September 2009, took the view that Russia would be estopped from relying on the doctrine of unilateral humanitarian intervention anyway, given that it had so persistently objected to such a concept in the past.<sup>9</sup> This may go slightly too far, but Russia's previous practice would certainly undermine any such subsequent claim.

What is more important is that the appeals that Russia made to concerns of humanity were clearly advanced in a political or moral sense. They were aimed at justifying the military action, certainly, but they were not delivered in a 'legal' manner. When it came to the formalities of legal justification, Russia followed the example of the overwhelming majority of other states in the UN era – along with its own previous practice – and shied away from officially justifying its action as being based on a legal notion of unilateral humanitarian intervention. It is notable that in the 'official' legal justification for the intervention provided to the Security Council, Russia

made an explicit and rather detailed claim of self-defence, whilst not referring to the dubious legal concept of unilateral humanitarian intervention at all.<sup>10</sup>

Moreover, although Russia used phrases such as ‘genocide’, and initially claimed mass casualties in the thousands, it later revised the death toll, at least on the Russian and Ossetian side, to around a hundred and fifty dead.<sup>11</sup> This figure sits more comfortably with independent casualty estimates.<sup>12</sup> Such relatively small figures (even including the comparatively large number of displaced persons) would undermine any claim of unilateral humanitarian intervention had Russia made it, given that even those that advocate this right require a gross or large scale violation of human rights before force can be employed.<sup>13</sup>

Given the above, it is apparent that the right of self-defence was the sole legal justification advanced by Russia. The remainder of this chapter will now go on to analyse that claim.

### The Key Criteria for Self-Defence

There is near-universal acceptance that, under customary international law, all uses of force in self-defence must meet the dual criteria of necessity and proportionality.<sup>14</sup> The criterion of necessity requires that military action must be taken as a last resort; the responding state must show that non-forcible measures were either exhausted, or that it would have been unreasonable to expect the responding state to attempt non-forcible measures of resolution.<sup>15</sup> The requirement of proportionality refers not just to a numerical equivalence of scale between attack and response, but also to the need for the state to act in a manner that is proportional to the

established defensive necessity. In other words, the response must not be excessive with regard to the goal of abating or repelling the attack being responded to.<sup>16</sup> We will return to these criteria, particularly that of proportionality, in later sections.

In addition to the two customary requirements of necessity and proportionality, a further key criterion for lawful self-defence, explicitly set out in Article 51 of the Charter, is the occurrence of an ‘armed attack... against a Member of the United Nations’. As to the meaning of this phrase, the International Court of Justice (ICJ) has famously stated in more than one decision that an armed attack is to be considered ‘the most grave form of the use of force’.<sup>17</sup> To put this another way, the attack being responded to must be of a particular level of ‘gravity’ beyond a use of force *simpliciter*.<sup>18</sup> Traditionally, such an attack – a grave use of force to which a state may respond with force in self-defence – has been viewed as necessarily being an attack against the territory of the state in question.<sup>19</sup>

Notwithstanding the difficulties concerning the reliability of the various factual accounts of the 7/8 August,<sup>20</sup> it seems relatively clear that Georgia fired the first shots in the South Ossetia region during these initial stages of the conflict, though of course this was in the context of a number of comparatively minor exchanges stretching back over the preceding months.<sup>21</sup> Somewhat obviously, a claim of self-defence cannot be valid if the state making that claim attacked first (other than arguably in the controversial context of anticipatory self-defence in response to an imminent threat).<sup>22</sup> In the context of the 2008 conflict in the Caucasus, then, it is important for the Russian claim that – as appears evident – Russia did not use force first.

Yet in spite of Georgia ‘firing first’ in the conflict, prior to the Russian military response, Russia had clearly not been the victim of an armed attack against its *territory*. The initial large scale attack by Georgia was directed against a *de facto* autonomous region within its own borders. Indeed, it would have been difficult for Russia to argue that the Georgian action, notably ‘Operation Clear Field’ (initiated to capture the South Ossetian capital of Tskhinvali), constituted even an *imminent threat* to the territory of the Russian Federation itself.

Given the fact that Russia could not claim that it had suffered an armed attack against its territory from Georgia, it instead advanced the more controversial claim that it was responding to an armed attack against its nationals within Georgian territory, specifically within the breakaway region of South Ossetia. In its letter to the Security Council, Russia explicitly took the position that the actual and potential future harm to its nationals within South Ossetia was – in itself – enough to trigger the right of self-defence.<sup>23</sup>

### An Overview of the Protection of Nationals Abroad

The Russian claim of self-defence therefore amounted to what is often referred to as the ‘protection of nationals abroad’ justification for the use of force. The core element to this particular version of the right of self-defence is relatively straightforward. The protection of nationals abroad concept can be defined as: the use of force by a state to protect its nationals that are under attack – actual or threatened – outside of its own territory, without the consent of the state against which the force is used or the authorisation of the UN Security Council.<sup>24</sup> It is a legal argument that has been made on a number of occasions by states. However, equally, it can

hardly be said to be a common claim in international law, and it is one that remains controversial. This chapter, with its specific focus on the Russian claim of self-defence of August 2008, is not the place to advance a detailed examination of the protection of nationals abroad concept in general terms.<sup>25</sup> Nonetheless, a brief overview of this disputed manifestation of self-defence is necessary to shed some light on Russia's legal arguments.

To the extent that a claim of protection of nationals abroad could be seen as being lawful, it can only be so as a manifestation of the right of self-defence. Despite some arguments to the contrary,<sup>26</sup> the use of force to protect nationals abroad would clearly amount to a breach of Article 2(4) of the UN Charter and therefore any such action must fall under one of the existing exceptions.<sup>27</sup> Neither the Charter nor customary international law provide for a separate exception to protect nationals abroad. Such an action, if taken unilaterally, can not fall under the collective security exception. Therefore, the protection of nationals abroad justification for the use of military force *must* exist within the parameters of the right of self-defence if it is to be considered lawful.

Having said this, it has been argued that the protection of nationals abroad can be seen as a manifestation of unilateral humanitarian intervention.<sup>28</sup> Leaving aside the fact, noted above, that this justification for the use of force is in itself at best extremely controversial, a conceptual distinction should be made between such actions and those aimed at the protection of nationals abroad. One claim relates to the protection of a state's own nationals, the other to the protection of foreign nationals.<sup>29</sup> More importantly, it is apparent that when states do make a legal claim based on the protection of nationals abroad, they do so within the rubric of the right of self-



defence.<sup>30</sup> This is presumably because arguing self-defence is in general terms far less controversial than arguing for either unilateral humanitarian intervention or a free standing right to protect your nationals abroad.<sup>31</sup> Ultimately, then, the general framework for the protection of nations abroad, for those that advance it, is that the ‘armed attack’ required to trigger self-defence need not necessarily be directed against the territory of the state itself. Instead, it is enough that it is directed against the nationals of the state.

Many writers object to this avowed manifestation of self-defence. This rejection is based upon three interrelated arguments. First, objection has been raised on the basis that the language of Article 51 simply does not extend to the use of force to protect nationals abroad.<sup>32</sup> In other words, this argument holds that such actions cannot be seen as falling within the notion of an ‘armed attack... against a Member of the United Nations’ because they do not constitute attacks against the territory of the responding state. Some writers take this view based simply on the traditional reading of Article 51 – that an ‘armed attack’ means an attack against the territory of a state.<sup>33</sup> Others better support the position by concluding that attacks outside of the territory of the state responding do not threaten its fundamental security or survival, and therefore necessarily fall outside of the scope of self-defence.<sup>34</sup>

Secondly, it has been argued that state practice does not support the concept of the protection of nationals abroad.<sup>35</sup> This is because, in a relatively large proportion of the limited number of instances where states have invoked the protection of nationals abroad, the majority of other states have held the action in question to be unlawful.

Thirdly, there exists a policy based objection. The protection of nationals abroad is viewed by many as constituting an extension of ‘traditional’ self-defence that would leave the right open to (further) abuse.<sup>36</sup> To put this another way, there is concern that the protection of nationals abroad claim can be used as a pretext for using force in support of other, less desirable, goals.

With respect to the first objection, following a close reading of Article 51, it is here argued that there is nothing in that article to preclude the extension of self-defence to attacks that occur outside of the territory of the responding state. As noted, Article 51 requires that an armed attack has occurred ‘against a Member of the United Nations’. The article does not refer to the *territory* of a Member of the UN. It is also clear from state practice that self-defence is not restricted only to fundamental instances where the survival of the state is at stake.<sup>37</sup> Again, the text of Article 51 does restrict self-defence in this way and the ICJ has taken the view that an armed attack can occur outside of a state’s territory, at least in principle.<sup>38</sup>

As such, the concept of an attack against a state could plausibly be seen as including the nationals of that state, as constituting a part of that state or an extension of that state. In the view of the present author, this is not an unreasonable stretch of the language of Article 51: ‘People being a necessary condition for the existence of a state, the protection of nationals can be assimilated without great strain to the right of self-defence explicitly conceded in the text of the Charter.’<sup>39</sup>

Of course, the attack against nationals would have to be ‘grave’ as with all armed attacks. As such, it is worth noting that Russia was keen to stress when making this legal claim regarding its

August 2008 intervention that the ‘scale’ of the attack against its nationals was large (large enough to constitute an armed attack, and therefore trigger self-defence).<sup>40</sup> This can be debated factually, in that it appears that the initial Russian claims as to scale here were somewhat inflated,<sup>41</sup> but after the ICJ’s *Oil Platforms* decision it would seem that an attack on a single vessel may be considered to be ‘grave’ enough to constitute an armed attack.<sup>42</sup> By analogy then, there is enough to make an argument that the Russian position, that an armed attack had occurred, could be correct in terms of its gravity, so long as the general concept that an armed attack can occur against nationals outside of the territory of the state responding is accepted.

If one adopts the position that there is nothing in Article 51 itself that precludes the extension of self-defence to allow for the protection of nationals abroad, it is necessary to respond to the second objection raised by critics of the concept. The question is whether this manifestation of self-defence has been accepted into state practice as a customary international law interpretation of the Charter right. In the UN era at least, the protection of nationals abroad version of self-defence has been a relatively rare claim.

Again, the current chapter is not the place to set out the existing state practice on the protection of nationals abroad in any detail.<sup>43</sup> Nonetheless, an examination of the state practice indicates that, for the most part, in instances where protection of nationals abroad has been claimed, states responding to the claim have seen the use of force to be unlawful. Taking this state practice at face value, the indication is that the notion of the protection of nationals abroad therefore does not form part of customary international law. However, when one looks more closely at the rejections by states of the claim in specific instances, an alternative conclusion may be reached.

To highlight this, a handful of examples – being generally representative of the wider state practice – will be examined here.

A classic example – often used as an indication of the unlawfulness of the protection of nationals abroad – is ‘Operation Urgent Fury’, the large air and sea assault undertaken by forces of the United States against Grenada in 1983. Here, one of the legal grounds for the intervention by the United States was self-defence to protect its nationals on the island.<sup>44</sup> This was generally seen as an unlawful action by other states.<sup>45</sup> It is also fairly evident that the intervention was primarily taken in response to a socialist coup, with the protection of nationals abroad argument being merely used as a pretext.

However, condemnation by other states of the intervention by the United States into Grenada was for the most part based on its disproportional nature.<sup>46</sup> Over seven thousand troops were deployed to protect fewer than a thousand nationals, and certain objectives of the initial operation, such as the securing of the Richmond Hill prison, clearly went beyond what was necessary to ensure the safety of American nationals.<sup>47</sup> Moreover, in the longer term, the United States overthrew the new socialist regime in Grenada, and remained afterwards to oversee the installation of pro-American government.

With regard to its intervention into Panama in 1989, the United States again argued that one legal basis for this was the protection of nationals abroad (indeed, it argued this even more forcibly than it did with regard to the intervention into Grenada).<sup>48</sup> As in 1983, states almost universally rejected this argument.<sup>49</sup> Again, though, the primary reason for these objections was the issue of

proportionality. The large scale of the action – ten thousand troops being deployed to protect just a few hundred American nationals – coupled with the fact that forces of the United States remained to instate a democratically elected government, meant that the action was viewed by most states as being disproportional.<sup>50</sup> As with the Grenada intervention, the protection of nationals abroad claim can be seen as a pretext for other policy goals: in this instance the removal of military dictator Manuel Noriega from power.

Another famous example is the 1976 hijacking by forces representing Baader-Meinhof and the Popular Front for the Liberation of Palestine of a French plane flying from Israel. Whilst discussions were being undertaken for the release of hostages being held at Entebbe airport in Uganda, Israeli Special Forces stormed the airport and rescued the hostages. International reaction to the Israeli action was mixed. Again, the majority of states that took a position on the action found it to be unlawful.<sup>51</sup> For some, this was admittedly an objection to the protection of nationals abroad concept in itself.<sup>52</sup> In contrast, many other states that felt that the action was unlawful because the criteria for self-defence had not been met in the particular case in question. This was either on the basis that there had been no ‘armed attack’ against Israeli territory (as the hostage crisis was not grave enough to constitute such an attack),<sup>53</sup> or that the Israeli action did not meet the requirement of necessity (because negotiations were being undertaken for the release of the hostages at the time of the intervention).<sup>54</sup> As such, the majority of states that took a position did not make a principled objection to the protection of nationals abroad concept.

Indeed, a number of states explicitly argued that self-defence did extend to the protection nationals abroad.<sup>55</sup> It is also worth noting that the Israeli response was relatively limited in this

instance. Its special forces removed the hostages in a fairly ‘surgical’ manner. As a result, the intervention was seen by some states as being proportional and, therefore in some cases, lawful.<sup>56</sup> Importantly, most states took no position; there was a general acquiescence to the Israeli action.

Although the Entebbe incident does not confirm the lawfulness of the protection of nationals abroad by any measure – given that a group of states did object to the concept in principle – it is notable that some states supported the action, and many more chose not to condemn it. This response can be contrasted to the near universal condemnation of interventions into Grenada and Panama in the 1980s. The factual distinction between these examples is that the Israeli response may be viewed as being a proportional one. Of the states that did view Israel’s action as unlawful, this was again largely on the basis that the intervention did not meet the usual criteria for self-defence (in this instance, an armed attack or necessity).

Given these examples, it is here argued that the protection of nationals abroad aspect of the Russian claim is one that can be defended, at least in principle. This conclusion is admittedly controversial. Indeed, it may appear strange, given that the majority of states have rejected applications of the concept in the majority of instances where it has been claimed in practice. However, this view is taken on the basis that neither Article 51, nor customary international law (as evidenced by state responses to the claim in practice), rule out this extension of the right of self-defence *per se*.

Instead, the issue for the majority of states has been the *application* of the protection of nationals abroad justification, either on the basis that the response taken was disproportional, unnecessary, or that the attack or threat to nationals was not grave enough to constitute an armed attack. All that this practice indicates is that customary international law requires that any exercise of this manifestation of self-defence must meet the requirements of armed attack, necessity and proportionality: something that holds equally true for more traditional actions in self-defence. In cases where the factual basis for the legal claim made did not meet the criteria for self-defence, ‘the international response cannot fairly be interpreted as an indictment of the exculpatory theory as distinguished from its particular application’.<sup>57</sup> If the protection of nationals abroad is not clearly ‘ruled out’ by the Charter or custom, it seems reasonable to rule it ‘in’, at least in principle.<sup>58</sup>

Finally, it should be noted that the third objection to the protection of nationals abroad concept – the policy based concern that this extension of self-defence is open to abuse and can be flexibly employed as a pretext for intervention – is one that appears to be borne out by the state practice. The examples of the interventions in Grenada and Panama, amongst others, support this conclusion. Whilst such practice is undoubtedly concerning, it should not be viewed as a reason to reject the entire protection of nationals abroad justification.

Abuses of this version of self-defence simply underline the importance of a strict application of the existing criteria, most notably of necessity and proportionality.<sup>59</sup> Actions to protect nationals abroad must be restricted to situations where a state is faced with a *genuine* necessity to protect its nationals abroad through the use of force. Additionally, the force employed must be strictly

proportional to that necessity: no more force may be employed than is required to abate the attack and protect the nationals in question. Such restrictions – particularly the proportionality requirement – would act as a good safeguard (albeit not a perfect one) against the claim being used as a pretext for more wide ranging interventions and a shield for additional policy goals.<sup>60</sup> At the same time, the protection of nationals abroad, suitably restricted by the usual requirements for self-defence, allows for states to use force in circumstances where there is no option but to do so to protect the lives and safety of its nationals in the territory of another state.

### Protecting Peacekeepers and Passport Holders

It was argued in the previous section that it is possible to view the protection of nationals abroad as a valid manifestation of the right of self-defence, assuming that, in its application, it meets the usual requirements for ‘traditional’ self-defence. If this is accepted, then the core basis of the Russian claim is at least defensible in international law, in a general sense. In this section, the specifics of that particular claim will be examined in more detail.

The Russian claim of self-defence was based on the protection of two groups of Russian nationals in particular. The first of these groups were Russian peacekeepers stationed in the South Ossetia region. More crucially, the second group were individuals of Ossetian ethnicity that had been provided with Russian passports.

With regard to the first group, there were five hundred or so Russian peacekeepers stationed in South Ossetia, as part of a joint peacekeeping force, along with ethnic Ossetians and Georgians.



This multinational peacekeeping force was established under the 1992 Sochi peace agreement. This chapter is certainly not the place to discuss in detail the lawfulness of the Russian peacekeeping presence in Georgia. In simple terms, the legal basis for the initial presence of Russian peacekeepers in the South Ossetia region under the 1992 agreement is uncontroversial. Less clear is whether the Georgian consent to the presence of such forces had been revoked prior to the 2008 crisis.<sup>61</sup> Whether such a withdrawal of consent in fact occurred, and, indeed, whether Georgia had the legal right to unilaterally require the removal of the Russian peacekeepers are issues that will not be explored here.

Irrespective of the lawfulness of the presence of peacekeepers of Russian nationality in the South Ossetia region in August 2008, there has been a widespread acceptance by commentators that the use of (necessary and proportional) force by Russia to protect its peacekeepers in Georgia could be viewed as being lawful.<sup>62</sup> Similarly, the IIFMCG Report uncritically took the view that ‘there seems to be little doubt that if the Russian peacekeepers were attacked, Russia had the right to defend them using military means proportionate to the attack’.<sup>63</sup> If one subscribes to the protection of nationals abroad concept in principle, it certainly may be said that the protection of Russian nationals present on Georgian territory in a peacekeeping capacity was the ‘best’ possible justification Russia could advance for its use of force. However, this does not mean that this argument is uncontroversial, even excluding the debate surrounding the protection of nationals abroad generally. This is not because of a substantive legal objection as such: if one is willing to accept the protection of nationals abroad in principle, then this would logically extend to Russia protecting its nationals in South Ossetia if attacked, be they peacekeepers or not. Rather, there may be a policy objection to this relatively rare extension of the protection of

nationals abroad argument to peacekeepers. This is because it has possible implications for peacekeeping missions in the future.

States have intervened to protect peacekeepers in the past, the best example being the operation to protect peacekeepers in Rwanda in 1994, which met with essentially no international censure.<sup>64</sup> That operation was large in scale, but it was also multilateral, with seven states contributing to the rescue operation. In contrast, this aspect of the Russian claim in 2008 was unilateral. If states are entitled to forcibly protect their nationals on peacekeeping missions when they are under threat unilaterally, this could destabilise international peacekeeping mechanisms. This is because other states may be less likely to allow peacekeeping forces into their territories, for fear of this forming a later pretext for an intervention by a powerful state whose nationals form part of the peacekeeping force.

Again, in theory, the requirements of necessity and proportionality should guard against this concern to some extent, in that any action to protect peacekeepers should be genuine, a last resort and limited in scope. Nonetheless, peacekeepers are, by the very nature of their role, likely to face a degree of threat to their person, and the majority of peacekeeping operations include personnel from ‘powerful’ states (as they are best placed to provide the manpower). As such, there is scope for a ‘protection of peacekeepers’ claim to be made with a degree of regularity by powerful states, and the Russian claim of 2008 has the potential to act as a precedent in this respect. Many states – especially developing states – may therefore understandably fear the abuse of the protection of nationals abroad concept, where peacekeepers are (or are proposed to

be) deployed on their territory. Such a fear of abuse could have wide ranging implications, in terms of state consent to, and co-operation with, future peacekeeping missions.

Whilst it is worth keeping in mind that the aspect of the protection of nationals abroad claim relating to Russian peacekeepers has such potentially problematic implications, this did not form the core element of the Russian legal justification in 2008, and as such shall not be discussed further here. The Russian peacekeeping forces in South Ossetia were few in number when compared with the second group of nationals that Russia was claiming to protect. As such, the crux of the Russian protection of nationals abroad claim rests on the protection of ethnic Ossetians who had been granted Russian passports.

The Russian Federation has had a policy of issuing passports to people in both South Ossetia and Abkhazia since the early 1990s, but this passportization process accelerated considerably throughout 2008.<sup>65</sup> This widespread distribution of passports had led to what may be referred to as the ‘manufacture of nationals’ in the breakaway regions. By the time of the August 2008 conflict, around 90% of the population of South Ossetia held a Russian passport. That such a population of newly created ‘nationals’ formed the basis of a protection of nationals abroad claim involving the use of military force is unique in the state practice.

It must be said that in the vast majority of cases, South Ossetians have been eager to gain Russian nationality. A Russian passport represents a lifeline for South Ossetians, a way to get an education or a job in North Ossetia or Moscow. There are few jobs in the South Ossetian region; as such, many families have at least one member working in Russia and sending money back

home.<sup>66</sup> However, there were additionally reports suggesting that a minority of individuals had actually been *coerced* into taking Russian passports.<sup>67</sup> It is difficult to confirm such reports with any degree of certainty,<sup>68</sup> but if this practice did in fact occur, this would amount to a concerning and seemingly unique situation of ‘nationality at gunpoint’.

Leaving this possibility aside and assuming that the South Ossetians in question took Russian passports willingly (which was certainly true in at least the vast majority of instances), this practice nonetheless led to the accusation from some commentators that Russia had essentially ‘manufactured’ a population of Russian nationals within *de jure* – if not *de facto* – Georgian territory. Moreover, it has been argued that this practice of passportization was a pretext for intervention, particularly given that a large number of these passports were issued in the period immediately prior to the conflict.<sup>69</sup> As Umland has stated, rather convincingly:

Moscow’s provision of Russian passports for the populations of these territories is designed to accelerate local conflicts, create a pretext for Russian involvement (including military)... Moscow wants to use a grey area of international law – a state’s right to protect, even by violent means, its citizens abroad – for revisionist aims.<sup>70</sup>

Of course, it cannot be known for sure whether the issuance of passports in this manner was intended to provide a subsequent justification for the use of force or, in other words, to establish the conditions for Russia to be able to viably make a claim of protection of nationals abroad in self-defence. Nonetheless, the widespread issuance of passports may be seen as indicative of a

general premeditated tactic to annex the region. Further circumstantial evidence to support this is the fact that in July 2006, the Russian Duma passed a resolution explicitly authorising Russian troops to serve anywhere in the defence of Russian nationals.<sup>71</sup>

Admittedly, international law leaves it for a state to decide under its own domestic rules whether to confer nationality and upon whom. Therefore Russia was and is entitled to grant nationality to whomsoever it likes.<sup>72</sup> However, as the ICJ has indicated in the *Nottebohm* case, for an individual's nationality to be enforceable against *other states* at the international level there is a requirement of 'real and effective' nationality: a meaningful connection to the state in question must be shown.<sup>73</sup> Without going too deeply into the rules on nationality here, it is unclear whether the *Nottebohm* test would have been met in South Ossetia during 2008. It is arguable that there are many more *de facto* ties between the people in the region and Russians – ties of language, for example – than there are ties with Georgians. Irrespective of this, it may be difficult to hold that the ethnic Ossetians in question were 'really' and 'effectively' Russian enough to give rise to a right of self-defence against another sovereign state. The genuine nature of their Russian nationality, not just in fact but in international law, is debatable at best.

As such, even if one accepts the justification of the protection of nationals abroad in principle – as does the current author – the manner in which it was employed by Russia is open to question. This claim with regard to the protection of its peacekeeping forces is relatively defensible, if still one with concerning implications. In relation to the more important claim regarding South Ossetians with Russian passports, though, this 'manufacture of nationals' aspect raises questions of good faith in the application of the already controversial protection of nationals abroad

justification, which seriously undermine the validity of the Russian self-defence claim. As the IIFMCG Report put it, in the context of this ‘group of “new” Russians, it seems abusive to rely on their need for protection as a reason for intervention, because Russia itself created this reason for intervention through its own policy’.<sup>74</sup> Furthermore, it is clear that the Russian claim is even more significantly undermined if the allegations of ‘nationality at gunpoint’ are true, even if only in a small minority of cases.

### Applying the Criterion of Proportionality

In the last section, the validity of the Russian protection of nationals abroad claim was examined. The manner in which Russia applied the protection of nationals abroad manifestation of self-defence in the context of the conflict in the Caucasus is questionable, given the ‘manufacture of nationals’ within Georgian territory. Having said this, in fact, the issue of the protection of nationals abroad, and whether the claimed protection of those holding Russian passports could be viewed as legitimate, is ultimately something of a ‘red herring’ in the context of the final analysis of whether the Russian action was a lawful exercise of the right of self-defence. This is because the most fundamental issue with regard to the lawfulness of the Russian use of force is the application of the criterion of proportionality.

It has already been noted that all exercises of self-defence must be proportional under customary international law, and that ‘proportionality’ is calculated by reference both to the scale of the response, and, fundamentally, to the necessity of defence.<sup>75</sup> Let us accept for a moment, then, the general concept of the protection of nationals abroad *and* the Russian application of this to

peacekeepers and ethnic Ossetians in the region holding Russian passports. If the response by Russia to any attack against such Russian nationals in Georgia was a disproportionate one, then that action would be unlawful, irrespective of the protection of nationals abroad issue.

The Russian intervention into Georgia in August 2008 was not limited to the South Ossetia region, but went well beyond into Abkhazia and Georgia proper. It included such acts as the bombing and occupation of Gori, the occupation of Poti, and moves towards the capital of Tbilisi. It is here argued that such actions were ‘manifestly excessive’ in terms of scale when compared to the attacks on Russian nationals (be they ‘true’ nationals or not) present in South Ossetia, to which Russia was ostensibly responding.<sup>76</sup> Perhaps more importantly, such actions were also disproportional when assessed against Russia’s defensive goal of protecting its nationals within the South Ossetia region.

The Russian response appears even more starkly disproportional if one takes the view that the only legitimate ‘nationals’ that Russia was entitled to protect were the small number of its peacekeepers in the region. However, the action should still be viewed as disproportional even if the Russian claim of forcible protection could be extended not only to its peacekeepers but also to the comparatively large number of ethnic Ossetians holding Russian passports. The scale and nature of the Russian intervention, into Abkhazia and in the context of attacks on certain cities in Georgia proper, appears disproportional irrespective of whether one accepts that the protection of nationals abroad claim can be stretched to cover Ossetians holding Russian passports or not. Indeed, the Russian action seems particularly disproportional when it is considered that the withdrawal of the main Russian force in late August 2008 was in fact only partial. There

remained troops stationed for an additional two months around Gori and Poti, as well as in ‘buffer-zones’ outside of the South Ossetian and Abkhaz regions. Even after the removal of these troops following the appearance of the European Union observer mission in October 2008, Russian forces remain in the two disputed regions at the time of writing.

Of course, Russia itself was careful to argue that it was acting in a proportional manner, explicitly stating that ‘the use of force by the Russian side is strictly proportionate to the scale of the attack and pursues no other goal but to protect the Russian peacekeeping contingent and citizens of the Russian Federation...’<sup>77</sup> However, in the view of the present writer, this was simply not borne out in reality. Similarly, the majority of commentators have taken this position,<sup>78</sup> though as one would expect, a minority of writers have attempted to argue that the Russian intervention can be viewed as being proportional.<sup>79</sup> Far more important than academic and media opinion is the fact that other states have also viewed the action as being unlawful for this reason: of the few states that gave an official response to the Russian claim of self-defence, it is notable that many explicitly condemned the action on the basis that it was *disproportional*. This issue of proportionality formed the crucial aspect of the legal criticism from the United States,<sup>80</sup> Germany,<sup>81</sup> France,<sup>82</sup> the United Kingdom<sup>83</sup> and Panama,<sup>84</sup> as well as from the Secretary General of NATO.<sup>85</sup> It similarly formed a key objection to the Russian action coming from Georgia itself.<sup>86</sup> Finally, the IIFMCG Report of September 2009 also found that the Russian use of force was disproportional, when measured either in relation to the protection of peacekeepers alone, or with regard to the protection of all Russian passport holders in South Ossetia.<sup>87</sup>



As such, it is difficult to argue that the Russian claim to be acting in self-defence was a valid one; the intervention into Georgia must be viewed as being unlawful. This is most fundamentally because of the disproportional nature of the Russian intervention.

Of course, it is worth keeping in mind that this conclusion in no way legitimates the prior military action taken by Georgia – most notably ‘Operation Clear Field’ – against the region of South Ossetia. It would be admittedly difficult to view the Georgian attacks of 7 August 2008 against that region as a breach of Article 2(4) of the UN Charter, as that provision is confined to the use of force between ‘states’ in the technical sense. It is therefore not applicable to an entity within a state – such as South Ossetia – however factually autonomous it may be.<sup>88</sup> In contrast, these actions 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>89</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>90</sup> In addition, it is relatively clear that in the course of its attacks against South Ossetia in 2008, Georgia breached various provisions of international humanitarian law (as did Russia in the context of its response).<sup>91</sup>

Nonetheless, such breaches of international law by Georgia in the South Ossetia region do not in themselves mean that the Russian response was a lawful self-defence action. Having tested the Russian claim of self-defence from 2008 in this chapter, it must be concluded that Russia breached international law – specifically Article 2(4) of the UN Charter – by using military force against Georgian territory.

## Implications for International Legal Order

It has been argued in this chapter that the core protection of nationals abroad argument advanced by Russia may in fact be a valid one in principle, despite the misgivings of many writers and its apparent rejection by the majority of states in other instances. Having said this, it must ultimately be concluded that the Russian intervention into Georgia was contrary to international law. Going beyond this conclusion, this final section explores the implications that the Russian intervention, and the particular self-defence claim advanced to justify it, have for future international legal practice and international order more generally.

The Caucasus conflict represents the first time that Russia (or its predecessor, the Soviet Union) has explicitly employed the protection of nationals abroad argument.<sup>92</sup> This indicates the possibility of a growing acceptance of the concept. Previous invocation of this version of self-defence has predominantly come from states such as the United States, the United Kingdom, France, Belgium and Israel. That Russia, a powerful state of a different sort, has employed the protection of nationals abroad for the first time may encourage other powerful non-western states to use such a claim to justify international uses of force. The seeds for this already exist. For example, the Chinese Foreign Ministry indicated that China would be willing to use force to protect ethnic Chinese in Indonesia during the widespread anti-Chinese riots of 1998.<sup>93</sup> China quickly backed away from this position at the time, but China's stance in 1998 demonstrates the potential that could now be sparked by the Russian precedent set ten years later. Of course, this is merely speculative: it is impossible to know whether other geopolitically comparable states

will follow Russia's lead. The general international condemnation that greeted the Russian claim in 2008 may have the opposite effect.

In any event, an increase in the use of the protection of nationals abroad claim would not necessarily be a negative development. There are arguable benefits to the right to protect nationals abroad being supported by more (and more politically and geographically diverse) state practice, particularly given the continued growth of transnational terrorism and its implications for the safety of individuals in territories other than their own. However, this argument can only hold if the protection of nationals abroad claim is strictly regulated by the requirements of necessity and proportionality. It can equally be argued that – given the abuse of the concept that has clearly occurred in the existing practice – it is evident that states that make the claim do not adhere to necessity and proportionality in this way, and, as such, an increase in its invocation will only be detrimental for world order.

It has already been noted that the aspect of the Russian claim relating to the protection of peacekeepers has the potential to have a destabilising effect on peacekeeping operations generally. This is on the basis that it could make states less willing to co-operate with peacekeeping missions, for fear of inadvertently providing a legal basis for a full scale military intervention.<sup>94</sup> In addition, the unique employment of the protection of nationals abroad argument based upon the 'manufacture of nationals' has practical implications for international stability. This is because the possibility of a state unilaterally 'creating' a group of nationals, which can then be defended through military force, only increases the scope for states to abuse the protection of nationals abroad concept, and should certainly be resisted.

Indeed, it is possible that the 2008 conflict is already being employed as an undesirable precedent by Russia itself. It has been suggested that one implication of the conflict is that Russia would take it as an indication that it could adopt a more generally militarist foreign policy.<sup>95</sup> More specifically, concern has been raised about whether the Georgian intervention – and the protection of nationals abroad legal claim employed by Russia – would ‘stoke up unrest in pro-Russian parts of the Ukraine... [notably] the Crimean peninsula and especially Sevastopol’.<sup>96</sup> Reports indicate that Russia has begun to employ a policy of distributing Russian passports to individuals in the Ukrainian city, many of the residents of which have historic ties with Russia.<sup>97</sup> Admittedly, it seems unlikely that this would, or could, be used as the basis for any kind of forcible intervention into the Ukraine. Nonetheless, the fact that Russia has expanded its policy of distributing passports to individuals in pro-Russian regions in other states – given that this *did* form the key justification for its use of force in Georgia – has implications for the security of numerous states in what would once have been called the ‘Soviet sphere of influence’.

The seemingly disingenuous application of the protection of nationals abroad concept by Russia in 2008, and the possibility that it could employ this type of claim again in relation to other states will (rightly) strengthen the view of those who reject this manifestation of the self-defence as one particularly open to abuse. As Iqbal and Hassan have stated, ‘[a]lthough Russia has not created a new doctrine it has set a dangerous precedent liberalising the standard of international law self-defence. The danger being that states may predictably abuse liberalised standards.’<sup>98</sup> Equally, such a strengthening of a position that *rejects* the protection of nationals abroad would be

concerning for the growing number of states, particularly those faced with the threat of transnational terrorism, for which genuine – and arguably valid – situations where there is a need to protect nationals abroad occur and will continue to occur.

Finally, the Russian intervention into Georgia can be seen as another in a long line of examples of states in the UN era that have claimed self-defence but have then gone beyond the bounds of the customary international law requirement of proportionality. In the view of the present author, this criterion is the most crucial element for lawful self-defence, in that it acts as the greatest restraint against the abuse of the right whilst retaining its functionality.<sup>99</sup>

In this respect, the Russian claim in the context of the conflict in the Caucasus is not especially damaging to the international rule of law in itself. Nonetheless, it should be seen as part of a cumulative erosion of the fundamental proportionality criterion in customary international law. That the Russian intervention adds to the weight of this disregard in state practice for the need for a proportional response in self-defence is ultimately perhaps more concerning than the unique aspects of the protection of nationals abroad concept – and the implications of the ‘manufacture of nationals’ and the notion of forcibly protecting peacekeepers – that formed the basis of Russian justification.

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<sup>1</sup> This point is made by N.N. Petro (2009) ‘The Legal Case for Russian Intervention in Georgia’, *Fordham International Law Journal*, 32, 1524.

<sup>2</sup> It is worth noting that – in contrast to the timeline indicated by Russia – Georgia claimed that Russian forces first entered Georgian territory on 7 August 2008 and not the following day. See

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the article written by the Georgian President for the Wall Street Journal: M. Saakashvili, 'Georgia Acted in Self-Defence', *Wall Street Journal* (2 December 2008), online: <http://online.wsj.com/article/SB122817723737570713.html>.

<sup>3</sup> UN Doc. S/2008/545.

<sup>4</sup> See Q. Peel, 'Russia's Reversal: Where Next for Humanitarian Intervention?', *The Financial Times* (22 August 2008), online: [http://www.ft.com/cms/s/0/e06e25fc-7076-11dd-b514-0000779fd18c.html?nlick\\_check=1](http://www.ft.com/cms/s/0/e06e25fc-7076-11dd-b514-0000779fd18c.html?nlick_check=1); A. Cassese, 'The Wolf that Ate Georgia', *Project Syndicate* (2008), online: [http://www.project-syndicate.org/print\\_commentary/cassese5/English](http://www.project-syndicate.org/print_commentary/cassese5/English); and G. Evans, 'Putin Twists UN Policy', *The Australian* (2 September 2008), online: <http://www.theaustralian.news.com.au/story/0,,24278542-17062,00.html>.

<sup>5</sup> This chapter is not the place to discuss the concept of unilateral humanitarian intervention. There is a vast amount of literature on the subject; a good starting point is J.L. Holzgrefe and R.O. Keohane (eds.) (2003) *Humanitarian Intervention: Ethical, Legal and Political Dilemmas* (Cambridge: Cambridge University Press).

<sup>6</sup> See 'Russia Recognises Georgian Rebels', *BBC News* (26 August 2008), online: [http://news.bbc.co.uk/1/hi/in\\_depth/7582181.stm](http://news.bbc.co.uk/1/hi/in_depth/7582181.stm) for the claim of 'genocide' made by President Medvedev; and 'Sergey Lavrov: Georgia Carries out Ethnic Cleansing of South Ossetia', *Kommersant* (8 August 2008), online: [http://www.kommersant.com/p-13041/r\\_530/Sergey\\_Lavrov\\_lashed\\_out\\_georgia](http://www.kommersant.com/p-13041/r_530/Sergey_Lavrov_lashed_out_georgia) for Foreign Minister Lavrov's position.

<sup>7</sup> For example, such a legal claim would be a complete reversal of the Russian position with regard to NATO action in Kosovo in 1999. See Peel, *supra* note 4.

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<sup>8</sup> The Report of the Independent International Fact-Finding Mission on the Conflict in Georgia (IIFFMCG) (30 September 2009), online: <http://www.ceiig.ch/Report.html>.

<sup>9</sup> *Ibid.*, Volume II, 284. See also Volume I, 24.

<sup>10</sup> UN Doc. S/2008/545.

<sup>11</sup> ‘Russia Scales Down Georgia Toll’, *BBC News* (20 August 2008), online: <http://news.bbc.co.uk/1/hi/world/europe/7572635.stm>.

<sup>12</sup> See, for example, Human Rights Watch, ‘Up in Flames: Humanitarian Law Violations and Human Victims in the Conflict Over South Ossetia’ (2009), 74, online: <http://www.hrw.org/en/reports/2009/01/22/flames-0>; and the Council of Europe, Parliamentary Assembly, ‘The Consequences of the War Between Russia and Georgia’, Res. 1633 (2008), online: <http://assembly.coe.int/Main.asp?link=/Documents/AdoptedText/ta08/ERES1633.htm>.

<sup>13</sup> The scale of the violation of the human rights being responded to forms part of almost all summaries of the requirements for unilateral humanitarian intervention (for those who view it as being potentially lawful). A classic example is the criteria set out by R.B. Lillich (1967-1968) ‘Forcible Self-Help by States to Protect Human Rights’, *Iowa Law Review*, 53, 347-351. Of course, the legal concept of ‘genocide’ itself does not require a large scale action *per se* (as pointed out by Petro, *supra* note 1, 1537-1538), although it would be similarly difficult to argue that the legal conditions for the commission of genocide were present in the 2008 Caucasus conflict.

<sup>14</sup> J. Gardam (2004) *Necessity, Proportionality and the Use of Force by States* (Cambridge: Cambridge University Press), particularly at p. 6 and p. 11.

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<sup>15</sup> J.A. Green (2006) ‘Docking the *Caroline*: Understanding the Relevance of the Formula in Contemporary Customary International Law Concerning Self-Defence’, *Cardozo Journal of International and Comparative Law*, 14, 450-457.

<sup>16</sup> R. Wedgwood (1992) ‘Proportionality and Necessity in American National Security Decision Making’, *American Society of International Law Proceedings*, 86, 59.

<sup>17</sup> See *Military and Paramilitary Activities in and Against Nicaragua (Nicaragua v United States of America)* merits [1986] I.C.J. Rep. 14, para. 191; and *Case Concerning Oil Platforms (Islamic Republic of Iran v United States of America)* merits [2003] I.C.J. Rep. 161, para. 51.

<sup>18</sup> J.A. Green (2009) *The International Court of Justice and Self-Defence in International Law* (Oxford: Hart Publishing), particularly pp. 31-42.

<sup>19</sup> I. Brownlie (1963) *International Law and the Use of Force by States* (Oxford: Oxford University Press), pp. 278-279.

<sup>20</sup> As were noted in the Introduction to this volume.

<sup>21</sup> See T.W. Waters, ‘Russia-Georgia: The Separatist Regions, the Western Response’, *The New York Times* (29 August 2008), online: <http://topics.blogs.nytimes.com/2008/08/29/russia-georgia-the-separatist-regions-the-western-response/#more-141>; and C. Clover *et al*, ‘Countdown in the Caucasus: Seven Days that Brought Russia and Georgia to War’, *The Financial Times* (26 August 2008), online:

[http://www.ft.com/cms/s/0/af25400a-739d-11dd-8a66-0000779fd18c.html?nclick\\_check=1](http://www.ft.com/cms/s/0/af25400a-739d-11dd-8a66-0000779fd18c.html?nclick_check=1).

<sup>22</sup> Y. Dinstein (2005) *War, Aggression and Self-Defence*, 4th edn (Cambridge: Cambridge University Press), p. 178.

<sup>23</sup> UN Doc. S/2008/545.



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<sup>24</sup> This definition is adapted from the one given in A.C. Arend and R.J. Beck (1993), *International Law and the Use of Force* (London: Routledge), p. 94.

<sup>25</sup> There is a wealth of literature on the protection of nationals abroad. Key texts include: T.C. Wingfield (1999-2000) 'Forcible Protection of Nationals Abroad', *Dickinson Law Review*, 104, 447; N. Ronzitti (1985) *Rescuing Nationals Abroad Through Military Coercion and Intervention on the Grounds of Humanity* (Dordrecht: Martinus Nijhoff); D.W. Bowett (1986) 'The Use of Force for the Protection of Nationals Abroad' in A. Cassese (ed.) *The Current Legal Regulation of the Use of Force* (Dordrecht: Martinus Nijhoff), p. 39; R.B. Lillich (T.C. Wingfield and J.E. Meyen, eds.) (2002) 'Lillich on the Forcible Protection of Nationals Abroad', *International Law Studies Series, US Naval War College*, 77, i; T. Ruys (2008) 'The "Protection of Nationals" Doctrine Revisited', *Journal of Conflict and Security Law*, 13, 233; and R.J. Zedalis (1990) 'Protection of Nationals Abroad: Is Consent the Basis of Legal Obligation?', *Texas International Law Journal*, 25, 209.

<sup>26</sup> Bowett, *ibid.*, 40.

<sup>27</sup> Zedalis, *supra* note 25, 221-229.

<sup>28</sup> D.J. Gordon (1977) 'Use of Force for the Protection of Nationals Abroad: The Entebbe Incident', *Case Western Reserve Journal of International Law*, 9, 131-132.

<sup>29</sup> Wingfield, *supra* note 25, 440-441; and Arend and Beck *supra* note 24, 94.

<sup>30</sup> T. Gazzini (2005) *The Changing Rules on the Use of Force in International Law* (Manchester: Manchester University Press), p. 170.

<sup>31</sup> C. Gray (2008) *International Law and the Use of Force*, 3rd edn (Oxford: Oxford University Press), p. 157.

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<sup>32</sup> M. Iqbal and S. Hassan (2008) ‘Armed and Ready’, *New Law Journal*, 158, 1277. It is also notable that two judges of the ICJ appeared to take this view in regard to the ill-fated attempt by the United States to rescue hostages in Tehran in April 1980. See *United States Diplomatic and Consular Staff in Tehran (United States v Iran)* merits [1980] I.C.J. Rep. 3, dissenting opinion of Judge Morozov, 56-57; and dissenting opinion of Judge Tarazi, 64-65. However, in arguing that the United States had not suffered an armed attack against it, neither judge was particularly clear as to whether this was because of issues of gravity, or because attacks on nationals abroad could *never* constitute an armed attack. It is also worth noting that the majority merits decision took no position on this point (as the Court concluded the American intervention was not a matter before it), see 43-44 of the judgment.

<sup>33</sup> Ronzitti, *supra* note 25, 12; Arend and Beck, *supra* note 24, 106 and 110; and J. Quigley (1990) ‘The Legality of the United States Invasion of Panama’, *Yale Journal of International Law*, 15, 287.

<sup>34</sup> A. Randelzhofer (2002) ‘Article 51’ in B. Simma (ed.), *The Charter of the United Nations: A Commentary, Vol I*, 2nd edn (Oxford: Oxford University Press), pp. 798-799.

<sup>35</sup> Ruys, *supra* note 25, 259-263; Ronzitti, *supra* note 25, 62-64; and J. Allain (2004) ‘The True Challenge to the United Nations System of the Use of Force: The Failures of Kosovo and Iraq and the Emergence of the African Union’, *Max Planck Yearbook of United Nations Law*, 8, 243.

<sup>36</sup> Brownlie, *supra* note 19, 301. It is notable that this objection is, understandably, advanced most strongly in the developing world, see Quigley, *supra* note 33, 293.

<sup>37</sup> Dinstein, *supra* note 22, 175.

<sup>38</sup> See *Oil Platforms*, *supra* note 17, para. 72.

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<sup>39</sup> T.J. Farer (1990) 'Panama: Beyond the Charter Paradigm', *American Journal of International Law*, 84, 505.

<sup>40</sup> UN Doc. S/2008/545.

<sup>41</sup> See *supra* note 11; and also A. Nußberger (2009) 'The War Between Russia and Georgia – Consequences and Unresolved Questions', *Göttingen Journal of International Law*, 1, 359-360; and A. Dworkin (2008) 'The Georgian Conflict and International Law', *Crimes of War Project*, online: <http://www.crimesofwar.org/onnews/news-georgia.html>.

<sup>42</sup> Specifically based on *Oil Platforms*, *supra* note 17, para. 72. On this, see Green, *supra* note 18, 38-41.

<sup>43</sup> A very good recent summary is provided by Ruys, *supra* note 25, 238-263.

<sup>44</sup> See Statement Presented to the United States House Committee on Foreign Affairs by Deputy Secretary of State, K.W. Dam, 2 November 1983, reproduced in M.N. Leich (ed.) (1984) 'Contemporary Practice of the United States Relating to International Law', *American Journal of International Law*, 78, 200, especially 203-204.

<sup>45</sup> This is well evidenced by a resolution of the General Assembly, which condemned the American intervention and labelled it 'a flagrant violation of international law'. GA Res. 38/7, 1983.

<sup>46</sup> A good example of the state response to the intervention with regard to the question of proportionality is the statement made by the representative of Zimbabwe in the Security Council, see UN Doc. S/PV.2491, 5.

<sup>47</sup> M.J. Levitin (1986) 'The Law of Force and the Force of Law: Grenada, the Falklands, and Humanitarian Intervention', *Harvard International Law Journal*, 27, 650.

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<sup>48</sup> UN Doc. S/PV.2899, 31-37; and the letter dated 21 December 1989 from President Bush to Congress, extract in R. Wedgwood (1991) 'The Use of Armed Force in International Affairs: Self-Defence and the Panama Invasion', *Columbia Journal of Transnational Law*, 29 , 609.

<sup>49</sup> Again, a General Assembly resolution condemned the action as being 'a flagrant violation of international law'. GA Res. 44/240, 1989. See also, *inter alia*, the statements of Nicaragua, UN Doc. S/PV.2899, 3-17; and Peru, UN Doc. S/PV.2900, 34-37.

<sup>50</sup> See, for example, the statement of Finland in the Security Council, UN Doc. S/PV.2900, 14-15. It is worth noting that a minority of states argued that the intervention was unlawful because no armed attack had occurred, on the basis that the threat to American nationals in Panama was not grave enough to constitute an armed attack; see, for example, the view of the Soviet Union, UN Doc. S/PV.2899, 17-21. Of course, this position was equally not a rejection of the concept of the protection of nationals abroad justification in principle.

<sup>51</sup> See generally UN Docs. S/PV.1939-1943.

<sup>52</sup> See, for example, the position of Cuba, UN Doc. S/PV.1943, 11.

<sup>53</sup> See, for example, the view taken by Panama, UN Doc. S/PV.1942, 4; and by India, UN Doc. S/PV.1942, 17.

<sup>54</sup> See the statements made by Mauritania (on behalf of a group of African states), UN Doc. S/PV. 1939, 26; and Mauritius, UN Doc. S/PV.1940, 6.

<sup>55</sup> Examples include the view taken by the United States, UN Doc. S/PV.1941, 8; France, UN Doc. S/PV.1943, 7; and Mauritius, UN Doc. S/PV.1940, 6.

<sup>56</sup> For example, the United States was careful to point out that the 'Israeli military action was limited to the sole objective of extricating the passengers and crew and it terminated when that objective was accomplished.' UN Doc. S/PV.1941, 8.

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<sup>57</sup> Farer, *supra* note 39, 505. In the quoted passage, Farer was specifically referencing the Grenada intervention of 1983, though it is notable that in the same article he takes the view that one can argue for the lawfulness of the protection of nationals abroad concept, but not the Panama intervention of 1989 (for the same reason). See also V.P. Nanda (1990) 'The Validity of United States Intervention in Panama Under International Law', 84 *American Journal of International Law*, 494, 496-497.

<sup>58</sup> This conclusion is well set out by Ruys, *supra* note 25, 261, although he goes on to question it given that there is practice that suggests a *principled* rejection of the protection of nationals concept by some states.

<sup>59</sup> Bowett, *supra* note 25, 46.

<sup>60</sup> Indeed, it has been said that proportionality is the 'key' to resolving the debate over the protection of nationals abroad, Wingfield, *supra* note 25, 465.

<sup>61</sup> Some have argued that Georgia did withdraw its consent to the presence of the peacekeepers, based upon a number of resolutions of the Georgian Parliament (passed in 2005 and 2006), which called for the revocation of consent. See N.M. Shanahan Cutts (2007-2009) 'Enemies Through the Gates: Russian Violations of International Law in the Georgia/Abkhazia Conflict', *Case Western Reserve Journal of International Law*, 40, 302-304; and C.P.M. Waters (2008) 'Russia, Georgia and the Use of Force', *Jurist*, Forum, online: <http://jurist.law.pitt.edu/forumy/2008/08/russia-georgia-and-use-of-force.php>. In contrast, others have taken the opposite view, based on the fact that the President of Georgia's National Security Council stated in 2008 that the government itself had no intention of withdrawing consent. See Petro, *supra* note 1, 1529.

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<sup>62</sup> See A.-M. Slaughter, 'Russia in Violation of UN Charter, Says International Law Expert' *Eurasia Insight*, EurasiaNet, (21 August 2008),

online: <http://www.eurasianet.org/departments/insight/articles/pp082108a.shtml>.

<sup>63</sup> IIFFMCG Report, *supra* note 8, Volume I, 23. See also Volume II, 268.

<sup>64</sup> See Lillich, *supra* note 25, 107.

<sup>65</sup> A. Umland, 'A Shield of a Passport: Moscow Uses Russian Citizenship as a Tool for Recollecting the Empire's Lands', *Global Politician* (26 August 2008), online: <http://www.globalpolitician.com/25140-russia>.

<sup>66</sup> S. Walker, 'South Ossetia: Russian, Georgian... Independent?', *Open Democracy* (15 November 2006),

online: [http://www.opendemocracy.net/democracy-caucasus/south\\_ossetia\\_4100.jsp](http://www.opendemocracy.net/democracy-caucasus/south_ossetia_4100.jsp).

<sup>67</sup> D. McElroy, 'South Ossetian Police Tell Georgians to Take a Russian Passport, or Leave Their Homes', *The Telegraph* (30 August 2008), online:

<http://www.telegraph.co.uk/news/worldnews/europe/georgia/2651836/South-Ossetian-police-tell-Georgians-to-take-a-Russian-passport-or-leave-their-homes.html>.

<sup>68</sup> The IIFFMCG Report also noted this possibility of coercion, and the factual uncertainty surrounding it. The Report ultimately concluded, though, that the conferral of Russian nationality '*generally* occurred on a voluntary basis', IIFFMCG Report, *supra* note 8, Volume II, 168 (emphasis added).

<sup>69</sup> This was certainly Georgia's claim, see Saakashvili, *supra* note 2. A number of commentators have also taken this view, see Cassese, *supra* note 4; McElroy, *supra* note 67; Waters, *supra* note 61; Umland, *supra* note 65; and A. Blomfield, 'Russia Distributing Passports in the Crimea', *The Telegraph* (17 August 2008), online:

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<http://www.telegraph.co.uk/news/worldnews/europe/ukraine/2575421/Russia-distributing-passports-in-the-Crimea.html>.

<sup>70</sup> Umland, *ibid.*

<sup>71</sup> This point was made by Shanahan Cutts, *supra* note 61, 301, *prior* to the August 2008 conflict, implying that this demonstrated that Russia was establishing a pretext for intervention (specifically into Abkhazia).

<sup>72</sup> Shanahan Cutts, *ibid.*, 301.

<sup>73</sup> *Nottebohm case (Liechtenstein v Guatemala)* merits [1955] I.C.J. Rep. 4, 22-24.

<sup>74</sup> IIFMCG Report, *supra* note 8, Volume II, 288-289.

<sup>75</sup> See *supra* note 16 and accompanying text.

<sup>76</sup> Evans, *supra* note 4.

<sup>77</sup> UN Doc. S/2008/545.

<sup>78</sup> Slaughter, *supra* note 62; Waters, *supra* note 61; Evans, *supra* note 4; Dworkin, *supra* note 41; T.M. Franck (2008) 'On Proportionality of Countermeasures in International Law', *American Journal of International Law*, 102, 734; and Nußberger, *supra* note 41, 362-363.

<sup>79</sup> See Waters, *supra* note 21; and Petro, *supra* note 1, 1532-1533 and 1543-1544.

<sup>80</sup> See the televised statement of President George W. Bush, video link, BBC News (11 August 2008), online: <http://news.bbc.co.uk/2/hi/europe/7554507.stm>.

<sup>81</sup> See statements made by German Chancellor Angela Merkel, *Deutsche Welle* (15 August 2008), online: <http://www.dw-world.de/dw/article/0,2144,3567243,00.html>.

<sup>82</sup> UN Doc. S/PV.5961, 6.

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<sup>83</sup> ‘Foreign Secretary Deplores Continued Fighting in Georgia’, *Foreign and Commonwealth Office*, press release (9 August 2008), online: <http://www.fco.gov.uk/resources/en/press-release/2008/august/georgia-statement-080809>.

<sup>84</sup> UN Doc. S/PV.5953, 15.

<sup>85</sup> ‘NATO Chief Deplores “Disproportionate” Force in Georgia’, *The Age* (11 August 2008), online: <http://www.theage.com.au/world/nato-chief-deplores-disproportionate-force-in-georgia-20080811-3t3z.html>.

<sup>86</sup> UN Doc. A/62/972.

<sup>87</sup> IFFMCG Report, *supra* note 8, Volume I, 24-25 and Volume II, 274-275.

<sup>88</sup> See C. Henderson and J.A. Green (2010) ‘The *Jus ad Bellum* and Entities Short of Statehood in the Report on the Conflict in Georgia’, *International and Comparative Law Quarterly*, 59, particularly at 131-134; and Dworkin, *supra* note 41.

<sup>89</sup> Definition of Aggression, annexed to GA Res. 3314, 1974.

<sup>90</sup> See Henderson and Green, *supra* note 88, 134; and Petro, *supra* note 1, 1526-1528.

<sup>91</sup> See in general, Human Rights Watch, Report, *supra* note 12.

<sup>92</sup> Though it is worth noting that in 1993, just after the fall of the Soviet Union, Russian ministers did state that if necessary they would use force to protect ethnic Russians in former Soviet republics. However, this was not put into practice and such rhetoric was quickly dropped. See Gray, *supra* note 31, 157.

<sup>93</sup> A.L. Smith, ‘From Latent Threat to Possible Partner: Indonesia’s China Debate’, *Asia-Pacific Centre for Security Studies*, 6 (December 2003),  
online: [http://www.apcss.org/Publications/SAS/ChinaDebate/ChinaDebate\\_SmithIndo.pdf](http://www.apcss.org/Publications/SAS/ChinaDebate/ChinaDebate_SmithIndo.pdf).

<sup>94</sup> See *supra* note 64 and accompanying text.



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<sup>95</sup> C. King (2008) ‘The Five Day War: Managing Moscow After the Georgia Crisis’, *Foreign Affairs*, 87, 7.

<sup>96</sup> R. Müllerson, ‘The World After the Russia-Georgia War’, *Open Democracy* (15 September 2008), online: <http://www.opendemocracy.net/article/the-world-after-the-russia-georgia-war>.

<sup>97</sup> Blomfield, *supra* note 69.

<sup>98</sup> Iqbal and Hassan, *supra* note 32, 1277.

<sup>99</sup> Green, *supra* note 18, 137.