

# The Tagliavini Report Revisited: Jus ad Bellum and the Legality of the Russian Intervention in Georgia

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## Keywords

Georgia-Russia War 2008, EU Fact-Finding Mission, Use of Force, Self-defence, Protection of Peacekeepers, Protection of Nationals Abroad

## Abstract

The purpose of this manuscript is to critically examine the legal findings of the Tagliavini Report in hope of contributing to the debate on its principal conclusions. The establishment of an independent fact-finding commission to explore the origins and course of the conflict marked the first time in its history that the EU, key mediator in concluding the Georgia-Russia conflict's ceasefire, intervened actively in an armed conflict.

The author, disparate from the Fact-Finding Mission, does not find Georgia to have the right of self-defence in regard of attacks by Ossetian secessionist forces preceding the Russian invasion. The author argues, analogously to the Tagliavini Report, that Georgian offensive on Tskhinvali in South Ossetia represented an excessive use of force which violated Article 2(4) of the UN Charter.

In regards to the central issue, the author contends that the Russian military intervention in Georgia on 8 August 2008 following Georgian offensive on Tskhinvali was not justified under the scope of reinforcing its peacekeeping force, or on the grounds of humanitarian intervention, intervention by invitation, or protection of citizens. Distinct from the Tagliavini Report, this manuscript reaches the conclusion that Russia was neither entitled to invade Georgia for protecting its peacekeeping contingent that comprised part of an international peacekeeping force.

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## I. Introduction

In the prevailing opinion, Georgia has been held liable for initiating the ‘five-day’ international armed conflict against Russia in August 2008. This is due to the argument that it allegedly commenced military activities in South Ossetia and thus purportedly acted as an aggressor State under the ‘first strike rule’. Yet, as Sir Gerald Fitzmaurice has noted: ‘When you get a war involving a group of States, you get a chain of events in which it is very difficult to say which action comes first, and vis-à-vis whom.’<sup>1</sup> This characterization describes fittingly the situation on 7/8 August in South Ossetia as well as the days leading up to the escalation of the conflict.

Thus, this analysis addresses the events leading up to the outbreak of the August 2008 armed conflict in Georgia with focus on the legality of the Russian intervention in the South Ossetia conflict. This paper aims to deconstruct the controversial legal narrative,<sup>2</sup> in hope of contributing to the debate on whether the Russian Federation had the right under international law to invade Georgia on 8 August 2008.<sup>3</sup> In this light, this study is divided into four main chapters; the first three chapters address the state of affairs in South Ossetia prior to 8 August so as to provide the basis for examining the legality of the Russian invasion on 8 August in the fourth chapter. Here, the analysis focuses on four main justifications set forth by Russia: intervention by invitation, humanitarian intervention, protection of citizens, and protection of peacekeepers.

The key materials used for the analysis are the extensive volumes of the report conducted by the Independent International Fact-Finding Mission on the Conflict in Georgia (‘Tagliavini Report’ and ‘Fact-Finding Mission’ used interchangeably). The Fact-Finding Mission noted that its report marked ‘the first time in its history that the European Union has decided to intervene actively in a serious armed conflict’.<sup>4</sup> This intervention incorporated the input of twenty experts on military, legal, humanitarian and historical issues, and this mission provided an invaluable material used in this study. Hence, this paper draws heavily from and critically analyses the findings of the Tagliavini Report. The following chapter provides an overview of its principal conclusions.

## II. Description of the main findings of the Tagliavini Report

Hostilities between the Georgian paramilitary and police units and the Ossetian militia escalated in July 2008. The latter had effective control over most part of the breakaway region.<sup>5</sup> A report was issued at the beginning of August 2008 by the observers of the Organization for Security and Cooperation in Europe (OSCE) and the representatives of Russian forces in South Ossetia. They claimed that there was evidence of attacks, involving heavy weapons prohibited under the 1992 Sochi Agreement,<sup>6</sup> against ethnic Georgian villages in the region.<sup>7</sup>

The Fact-Finding Mission established that the hostilities did not only affect the paramilitary units and militia of the warring parties, but also had a significant impact on the inhabitants of the villages under attack. Consequently, fatalities occurred on both sides and the hostilities were characterized as ‘heavy fighting’ from 6 August 2008 onwards.<sup>8</sup> The evacuation of the Ossetian civilian population from South Ossetia to Russia had commenced in early August 2008 and explicitly indicated the extent of the warfare in the region.<sup>9</sup> The Tagliavini Report characterized the conflict as a low-intensity war prior to the Russian intervention on 8 August 2008.<sup>10</sup>

The Tagliavini Report concluded that the Georgian offensive on 7/8 August 2008 on the South Ossetian capital Tskhinvali

1 Quoted in SM Schwebel, *Justice in International Law* (Cambridge University Press 1994) 568.

2 For an illustrative example of Georgia’s and Russia’s contrasting interpretations of relevant facts see *Case Concerning Application of the International Convention on the Elimination of All Forms of Racial Discrimination (Georgia v Russian Federation)* [2011] ICJ Rep (1 April 2011).

3 For an analysis of the conflict through the prism of international relations see eg PW Schulze, ‘Geopolitics at Work: the Georgian-Russian Conflict’ [2009] 1 GoJIL 332. For a study on the region’s history see eg SE Cornell, *Small Nations and Great Powers: A Study of Ethnopolitical Conflict in the Caucasus* (Curzon Press 2001).

4 H Tagliavini (ed), ‘Independent International Fact-Finding Mission on the Conflict in Georgia’ 1 (Report, The Council of the European Union 2009) 2.

5 C Welt, ‘The Thawing of a Frozen Conflict: The Internal Security Dilemma and the 2004 Prelude to the Russo-Georgian War’ [2010] 62 Eur Asia Stud 93-94. See also A Bellal and S Casey-Maslen, ‘Enhancing Compliance with International Law by Armed Non-State Actors’ [2011] 3 GoJIL 184.

6 Art 3 of the Agreement on Principles of Settlement of the Georgian – Ossetian Conflict 1992 in T Diasamidze, *Regional Conflicts in Georgia – the Autonomous Oblast of South Ossetia, the Autonomous SSR of Abkhazia (1989-2006)* The Collection of Political-Legal Acts (The Regionalism Research Centre 2006) 98. Subsequently references in relation to Georgia’s legal acts are made to the latter compilation, albeit the documents are available also at <<http://www.rrc.ge>> accessed 4 May 2011.

7 M Malek, ‘Georgia & Russia: The “Unknown” Prelude to the “Five Day War”’ [2009] 3 CRIA 229.

8 H Tagliavini (ed), ‘Independent International Fact-Finding Mission on the Conflict in Georgia’ 2 (Report, The Council of the European Union 2009) 245.

9 *ibid* 208.

10 *ibid* 209.

did not satisfy the requirements of having been necessary and proportionate in order to defend the Georgian villages that had been targeted by the Ossetian militia. It also found that the Georgian use of force against Russian peacekeeping forces during the military assault on Tskhinvali, *i.e.* on Georgian territory, was not justified. The reasons for such conclusion were manifold. First, Russia had not launched its armed invasion before the start of the Georgian operation. Second, the purported large-scale presence of Russian armed forces in South Ossetia prior to the Georgian offensive was not verified. Likewise, the Tagliavini Report did not ascertain that Russia was on the verge of such attack. Third, no evidence supported claims that Russian peacekeeping contingent in South Ossetia had been in flagrant breach of their obligations under international agreements. In essence, the Tagliavini Report noted that Russia had the right to defend its peacekeeping contingent using proportionate military means, whereas its claims in support of humanitarian intervention and for the protection of its own citizens were not legitimate under international law. Therefore, Russia's initial intervention in Georgia for the protection of its peacekeepers was regarded as legal, but the majority of the subsequent military operations were deemed to exceed the reasonable limits of defense, *e.g.* the bombing of the upper Kodori Valley and Georgian towns, the deployment of armoured units to reach extensive parts of Georgia, the establishment of military positions in major Georgian towns, the deployment of navy units on the Black Sea.<sup>11</sup>

Prior to the Russian intervention on 8 August 2008, the belligerents in the intra-State phase of the conflict were Georgian armed forces and South Ossetian militia that comprised the special police units 'OMON' as well as the 'national guard'. Subsequent to the Russian invasion in Georgia, its forces and South Ossetian militia constituted a coalition against Georgia. Yet, at the time of conflict, an additional armed contingent was present in South Ossetia, made up of peacekeeping troops. Hence, it is necessary to analyse its mandate and ostensible responsibility for its failure to contain the fighting from both sides.

### III. Peacekeepers' Role during the Conflict Prior to 8 August 2008

#### A. The Mandate and Efficacy of the Peacekeeping Force

The 1992 Sochi Agreement, signed by Georgian, Russian and South Ossetian leaders, aimed for 'immediate cessation of bloodshed and achieving comprehensive settlement of the conflict'.<sup>12</sup> As a result, Article 3(5)<sup>13</sup> of the 1992 Sochi Agreement outlined the tenets for the Joint Peacekeeping Force (JPKF) to safeguard this objective. The scope of this mandate was further specified in the protocols to the Sochi Agreement according to which the JPKF was more similar to a peace-enforcement than a peacekeeping mission, although it was formulated as the latter. The JPKF was authorized to 'restore' peace, 'support law and order' and make 'active use of measures including use of weapons in the case of violating by uncontrolled armed formations of any opposed parties to the conflict'.<sup>14</sup>

However, the impartiality and neutrality of the JPKF, composed mainly (two-thirds of the overall force) of the Russian and Ossetian troops, had been in doubt.<sup>15</sup> In 2006, the Georgian Parliament adopted unequivocally a non-binding resolution in which it called for a review of the 1992 Sochi Agreement and the replacement of the JPKF with truly international peacekeeping troops.<sup>16</sup> However, Georgia was unable to provide any corresponding evidence of a material breach of the 1992 Sochi Agreement. Consequently, it did not terminate or suspend the treaty under Article 60(1) of the Vienna Convention on the Law of Treaties (VCLT).<sup>17</sup> The treaty did not contain provisions on the termination of the peacekeeping mission in South Ossetia. Hence, the Sochi Agreement, along with the peacekeeping regime in South Ossetia, remained in force until 29 August 2008 when the Georgian government issued Decree 552 whereby it denounced the treaty under Article 60(1) of the VCLT.

Therefore, in the course of the conflict in July and in the beginning of August 2008, the JPKF had under Article 3 of the 1992

11 Tagliavini (n 4) 23-24.

12 Preamble of the Agreement on Principles of Settlement of the Georgian – Ossetian Conflict 1992 in Diasamidze (n 6) 98.

13 *ibid*, Art 3(5). 'In case of violation of provisions of this Agreement, the Control Commission shall carry out investigation of relevant circumstances and undertake urgent measures aimed at restoration of peace and order and non-admission of similar violations in the future.'

14 Art 1 of the Annex No 1 to Protocol No 3 of the JCC Session (12 July 1992) in Diasamidze (n 6) 106. See also Protocol No 3 of the Meeting of Joint Control Commission ('JCC') for the Georgian-Ossetian Conflict Settlement (12 July 1992) in Diasamidze (n 6) 105. The UN peacekeeping forces, by comparison, have a very limited mandate. See LC Green, *The Contemporary Law of Armed Conflict* (Manchester University Press 2008) 382.

15 I Facon, 'Integration or Retrenchment? Russian Approaches to Peacekeeping' in RE Utley (ed), *Major Powers and Peacekeeping: Perspectives, Priorities and the Challenges of Military Intervention* (Ashgate Publishing 2006) 32. See also H McCoubrey and J Morris, *Regional Peacekeeping in the Post-Cold War Era* (Kluwer Law International 2000) 85.

16 G Hafkin, 'The Russo-Georgian War of 2008: Developing the Law of Unauthorized Humanitarian Intervention after Kosovo' [2010] 28 BUILJ 223-224.

17 Vienna Convention on the Law of Treaties (adopted 22 May 1969, entered into force 27 January 1980) 1155 UNTS 331 (VCLT).

Sochi Agreement, the obligation to ‘undertake urgent measures aimed at restoration of peace and order’. By August 2008 however, the peacekeeping regime in South Ossetia had broken down and the fighting could not have been countered by the JPKF.<sup>18</sup> Moreover, the Joint Control Commission (‘JCC’), composed of representatives from the OSCE, Georgia, Russia, North Ossetia and South Ossetia, did not function effectively. Hence, it was unable to safeguard peace in South Ossetia.

#### *B. Georgia’s Prospects in Regard of the Malfunctioning Peacekeeping Force*

Prior to the Georgian offensive on Tskhinvali, the peacekeeping regime in South Ossetia had broken down. The Russian Commander of the JPKF had reported on 7 August that he could not stop the Ossetian attacks launched against the Georgian villagers and police.<sup>19</sup> This provided Georgia with evidence of the malfunctioning of the 1992 Sochi peacekeeping regime.

Furthermore, Georgia alleged that Russia had intervened indirectly in its internal armed conflict by sending irregulars, as well as providing armaments and logistical support to help secessionist forces. On these grounds, if sufficiently proven, Georgia could have made a claim for a material breach of the 1992 Sochi Agreement under Article 60(1) of the VCLT. Georgia may have additionally relied on a material breach of the stationing agreements contained in the 1992 Sochi Agreement. On this basis, Georgia would have been entitled to terminate the bilateral treaty on a prior notice.<sup>20</sup> In principle, it could have appealed for a different international peacekeeping mission in South Ossetia, following the example of the re-establishment of the peacekeeping force in the Israel-Lebanon border in 2006.<sup>21</sup>

### **IV. The Legality of the Georgian Offensive on 7/8 August**

#### *A. The Applicability of Article 2(4) of the UN Charter to the Georgian Intra-State Conflict*

The Ossetian militia’s attacks were ongoing on 7 August 2008, hence providing legitimacy in the light of immediacy and necessity for the Georgian offensive on Tskhinvali.<sup>22</sup> Georgia’s offensive commenced at 23:35 on 7 August 2008 and involved approximately ten to eleven thousand troops.<sup>23</sup> Whether the offensive reached the threshold of Article 2(4) of the United Nations (UN) Charter<sup>24</sup> (Article 2(4)) needs additional scrutiny.

The answer to this question is affirmative as is evidenced by the choice of the weapons used in an indiscriminate manner<sup>25</sup> in the civilian area, *e.g.* cluster munitions.<sup>26</sup> Furthermore, the political objective of the offensive is noticeable from the selection of its target, *i.e.* the capital of South Ossetia, which was not directly related to the hostilities against Georgian villages and police.<sup>27</sup> Moreover, the form of the action clearly exceeded its defensive implications.<sup>28</sup> It thus cannot be characterized as a police operation that would not violate the ban on the use of force. By employing excessive and punitive counter-force, Georgia thus breached Article 2(4).

Yet, it is widely claimed that Article 2(4) only applies to the inter-State level and does not refer to a State’s right to suppress its internal conflicts.<sup>29</sup> Resultantly, it is alleged, Article 2(4) should not have any relevance for the internal conflict in the region of South Ossetia, due to the fact that the latter constituted an integral part of Georgia. Hence, it may be argued that Georgia could have easily suppressed the internal conflict by means of crackdown without conflicting international law and

18 Tagliavini (n 8) 250.

19 *ibid.*

20 South Ossetia was not a Party to the treaty.

21 LC Green (n 14) 384. Israel claimed that the peacekeeping force was powerless in preventing Hezbollah attacks, thus not fulfilling its mandate. Subsequently, a new international force was established in accordance with SC Resolution 1701 with the mandate to, *inter alia*, take action for preventing potentially both sides from initiating hostilities.

22 Tagliavini (n 8) 247. See also M Kamto, ‘The Time Factor in the Application of Countermeasures’ in J Crawford, A Pellet and S Olleson (eds), *The Law of International Responsibility* (Oxford University Press 2010) 1174. In regard of the criterions of immediacy and necessity see also *Legality of the Threat or Use of Nuclear Weapons* (Advisory Opinion) [1996] ICJ Rep 226, para 141 and *Case Concerning Oil Platforms (Iran v United States of America)* [2003] ICJ Rep 161, paras 43, 51, 73–78.

23 Tagliavini (n 8) 249.

24 Charter of the United Nations (adopted 26 June 1945, entered into force 24 October 1945) 1 UNTS XVI.

25 J Buchanan (ed), ‘Up in flames: Humanitarian Law Violations and Civilian Victims in the Conflict over South Ossetia’ (Report, Human Rights Watch 2009) 44.

26 Human Rights Watch *A Dying Practice: Use of Cluster Munitions by Russia and Georgia in August 2008* (Report, 2009) 67.

27 Tagliavini (n 8) 251.

28 Tagliavini (n 4) 22–29. See also Tagliavini (n 8) 248–251.

29 B Simma (ed), *The Charter of the United Nations: A Commentary* vol. I (Oxford University Press 2002) 121. See also CO Quaye, *Liberation Struggles in International Law* (Temple University Press 1991) 267–269. On a differing view see *ibid* 269.

the ban on the use of force.

Nevertheless, according to Bruno Simma's commentary on the UN Charter, South Ossetia is subject to Article 2(4) due to its status as a *de facto* State: 'It is almost generally accepted that *de facto* regimes exercising their authority in a stabilized manner are also bound and protected by Art. 2(4).'<sup>30</sup> Furthermore, in accordance with the *Nicaragua* case, the prohibition on the use of force constitutes a rule of customary law.<sup>31</sup> Thus, contrary to Article 51 of the UN Charter (Article 51), which is subject to considerably stricter threshold criteria,<sup>32</sup> Article 2(4) was applicable to the Georgian intra-State conflict prior to 8 August 2008. Hence, it restricted the conflicting sides to conduct measures short of the use of force. The Georgian authorities, as well as their South Ossetian counterparts, were entitled to undertake only such operations that would not breach Article 2(4) or that would conform with the exceptions to the general prohibition on the use of force stated in the UN Charter.

In this regard, it is relevant to recall that the prohibition on the use of force under Article 2(4), widely considered as a *jus cogens* rule, is subject to two exceptions under the UN Charter: the authorization for the use of force by the UN Security Council under Chapter VII and the inherent right to invoke the concept of self-defence under Article 51.<sup>33</sup> Due to the political impasse in the Security Council on this matter, its potential power to authorize measures under Article 2(4) could not have provided any remedy to the counterparties. In this context, Georgia invoked the right of self-defence to repel the attacks conducted by the Ossetian militia against its villages and police. Its right to invoke Article 51 depended on various factors that will be subsequently examined.

#### B. *The Ossetes' Armed Activities in Georgia in View of Article 51*

##### 1. The Applicability of Article 51 to Non-State Actors

The hostilities against Georgian villages and police were conducted by individuals and armed groups that were not directly controlled by any State.<sup>34</sup> Significantly, however, the concept of self-defence, as traditionally understood, applies to an armed response to an attack by a State.<sup>35</sup> It is notable that, despite the fact that the UN General Assembly Resolution 3314 Definition of Aggression<sup>36</sup> did not intend to provide the definition of 'armed attack',<sup>37</sup> its references to different acts of aggression in Article 3 are limited to inter-State attacks. According to the International Court of Justice (ICJ), this includes a State's 'substantial involvement' in 'the sending by or on behalf of a state of armed bands, groups, irregulars or mercenaries, which carry out acts of armed force against another state',<sup>38</sup> in the event that 'such an operation, because of its scale and effects, would have been classified as an armed attack rather than as a mere frontier incident had it been carried out by regular armed forces.'<sup>39</sup>

In the *Palestinian Wall* the ICJ established that an 'armed attack' under Article 51 is confined to States, either in direct or indirect terms,<sup>40</sup> and does not encompass actions by non-State actors which are not attributable to States.<sup>41</sup> In this regard, the Ossetian militia's attacks against Georgian villages and police cannot be attributed to any State. This entails that under the restrictive approach to Article 51, Georgia could not have invoked the right of self-defence.<sup>42</sup> The Tagliavini Report,

30 Simma (n 29) 121.

31 *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v United States of America)* (Merits) [1986] ICJ Rep 14, para 188.

32 Simma (n 29) 796.

33 N Schrijver, 'Challenges to the Prohibition to Use Force: Does the Straitjacket of Article 2(4) UN Charter Begin to Gall Too Much?' in N Blokker and N Schrijver (eds), *The Security Council and the Use of Force: Theory and Reality – a Need for Change?* (Martinus Nijhoff 2005) 36.

34 There was no indication that Russia had sent any irregulars from its territory to fight in South Ossetia prior to the Georgian assault on Tskhinvali on 7/8 August 2008. Therefore, Russia cannot be held responsible under Art 4 of the articles on State Responsibility and Art 3(g) of the Definition of Aggression concerning the sending by or on behalf of a State of armed bands, groups, irregulars or mercenaries.

35 EPJ Myjer and ND White, 'The Twin Towers Attack: An Unlimited Right to Self-Defence?' [2002] 7 JCSL 7. See also A Cassese, 'Terrorism is Also Disrupting Some Crucial Legal Categories in International Law' [2001] 12 EJIL 993.

36 UNGA Res 3314 (1974) GAOR 29th Session Supp 19.

37 T Ruy and S Verhoeven, 'Attacks by Private Actors and the Right of Self-defence' [2005] 10 JCSL 302-303.

38 UNGA Res 3314 (n 36) Art 3(g).

39 *Military and Paramilitary Activities in and against Nicaragua* (n 31), para 195.

40 See for the difference between the two concepts in TD Gill, 'The Law of Armed Attack in the Context of the Nicaragua Case' [1988] 1 Hague YIL 49. See also Report of the Secretary-General 'Question of Defining Aggression' (1952) UN Doc A/2211, 56. See also Schwebel (n 1) 561.

41 *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory* (Advisory Opinion) [2004] ICJ Rep 136, para 139. See also A Orakhelashvili, 'Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory: Opinion and Reaction' [2006] 11 JCSL 125. See also NA Shah, 'Self-defence, Anticipatory Self-defence and Pre-emption: International Law's Response to Terrorism' [2007] 12 JCSL 97. See also K Oellers-Frahm, 'The International Court of Justice and Art 51 of the UN Charter' in K Dicke et al. (eds), *Weltinnenrecht: Liber amicorum Jost Delbrück* (Duncker & Humblot 2005) 510.

however, did not interpret Article 51 restrictively and concluded, presumably in relation to Article 3(a) of the Definition of Aggression<sup>43</sup>, that:

In this context, the delineation of the territories of South Ossetia and Georgia follows de facto jurisdiction of the South Ossetian entity short of statehood. Because 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>44</sup>

This line of reasoning is significant for its possible implications on the limits and scope of the concept of self-defence. In the immediate aftermath of the 11 September 2001 terrorist attacks, the conditions for invoking the right of self-defence were subject to extensive debate. Thus, it was argued that due to the scale and effects of the operations, an armed attack in terms of Article 51 encompasses non-State actors.<sup>45</sup> This debate has implications to the Georgian intra-State conflict’s legal framework because, similarly to the Al-Qaeda terrorist network, the Ossetian militia was a non-State actor.

Therefore, the ICJ’s opinion in the *Palestinian Wall* that Article 51 covers only States but not non-State actors, has been subject to criticism. It has been noted that ‘[t]his finding is inconsistent with the Court’s own judgment in *Nicaragua* and state practice before and after 9/11.’<sup>46</sup> It has also been underlined that Article 51, due to the inherent character of the right of self-defence, ‘must reflect the realities of the international system and the aspirations of the international community’.<sup>47</sup> Indeed, among the UN Member States, only Iran and Iraq challenged the legality of the 7 October 2001 military operation against Afghanistan.<sup>48</sup> Notably, Article 51 does not explicitly limit the scope of perpetrators of an ‘armed attack’ to States.<sup>49</sup> Hence, it is widely argued, contrary to the ICJ in the *Palestinian Wall* opinion, that Article 51 also includes attacks of sufficient scale and effects that have been committed by non-State actors.<sup>50</sup> Therefore, if the 9/11 terrorist attacks did result in a new understanding of the limits of Article 51, it would be justifiable to reach the conclusion that was drawn in the Tagliavini Report. The attacks against Georgian villages and police, commenced by the Ossetian militants, would thus fall under the scope of Article 51.

However, previous research on this matter has concluded that ‘State practice has consistently upheld the need for a certain link with a state’.<sup>51</sup> Furthermore, with reference to the principles of non-intervention and State sovereignty, it has been pointed out that a different conclusion would undermine the fundamental principles of State sovereignty and non-intervention.<sup>52</sup> In this regard, it is important to note that the applicability of Article 51 to the circumstances in the Georgian intra-State conflict is questionable in comparison to the 9/11 terrorist attacks. Unlike the Al-Qaeda terrorist network that was harbored by Afghanistan, the Ossetian militants’ activities were not imputable to any State. Hence, it is uncertain whether Georgia had the right to invoke the right of self-defence in its intra-State conflict, as maintained in the Tagliavini Report.

## 2. The Applicability of Article 51 to Intra-State Armed Activities

The 9/11 terrorist attacks provide another illustrative example for analyzing the applicability of Article 51 to the Georgian intra-State armed conflict. Universally, it is agreed that the terrorist attacks against the United States were directed from abroad. This constituted the essential precondition for NATO to qualify them as ‘armed attacks’ in terms of Article 5 of the North Atlantic Treaty<sup>53</sup> and Article 51 of the UN Charter.<sup>54</sup> This position was adopted *inter alia* by the European Union

42 *Military and Paramilitary Activities in and against Nicaragua* (n 31), para 211.

43 UNGA Res 3314 (n 36) Art 3(a) concerning the invasion or attack by the armed forces of a State of the territory of another State.

44 Tagliavini (n 8) 244.

45 R Müllerson, ‘Jus Ad Bellum: Plus Ca Change (Le Monde) Plus C’est La Même Chose (Le Droit)?’ [2002] 7 JCSL 176-178. See also T Gazzini, ‘A Response to Amos Guiora: Pre-Emptive Self-Defence Against Non-State Actors?’ [2008] 13 JCSL 27.

46 Ruys and Verhoeven (n 37) 305.

47 T Gill, ‘The Temporal Dimension of Self-Defence: Anticipation, Pre-emption, Prevention and Immediacy’ [2006] JCSL 369.

48 Ruys and Verhoeven (n 37) 297.

49 *ibid* 291 for a discussion on *travaux préparatoires*.

50 Shah (n 41) 104-105.

51 Ruys and Verhoeven (n 37) 312.

52 *ibid*.

53 North Atlantic Treaty (adopted 4 April 1949, entered into force 24 August 1949) 34 UNTS 243, Art 5.

54 MC Wood, ‘Towards New Circumstances in which the Use of Force May be Authorized? The Cases of Humanitarian Intervention, Counter-terrorism, and Weapons of Mass Destruction’ in Blokker and Schrijver (n 33) 85-86.

and Russia,<sup>55</sup> as well as by the Organization of American States and, debatably,<sup>56</sup> by the UN Security Council in Resolutions 1368 and 1373.

In contrast, the Ossetian militia's attacks against Georgian villages and police were directed from *de jure* Georgian territory. The Tagliavini Report nevertheless recognized them as armed attacks under Article 51. This is noteworthy as it contradicts ICJ's position. In the *Palestinian Wall*, the Court stated that the position as adopted in the Tagliavini Report, is not in accordance with Article 51.<sup>57</sup> The Court's reasoning applies *mutatis mutandis* to the situation in Georgia:

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. However, Israel does not claim that the attacks against it are imputable to a foreign State. The Court also notes that Israel exercises control in the Occupied Palestinian Territory and that, as Israel itself states, the threat which it regards as justifying the construction of the wall originates within, and not outside, that territory. [...] Consequently, the Court concludes that Article 51 of the Charter has no relevance in this case.<sup>58</sup>

Notably, Georgia's territorial integrity at the time of the August 2008 conflict was recognized by all member States of the UN. The Tagliavini Report thus concluded that a recognition of Abkhazia and South Ossetia as independent States would breach international law.<sup>59</sup> Furthermore, with regard to the aforementioned ICJ arguments, it is worth mentioning that Georgia's control over South Ossetia was analogous with Israel's over Palestine, *i.e.* lack of political control, yet the presence of troops in the territory.

Yet, the Tagliavini Report established essentially that Articles 3(b) and 3(d) of the Definition of Aggression were applicable to the situation in Georgia because of the Ossetes' use of heavy weapons and attacks against Georgian villages and police.<sup>60</sup> The Tagliavini Report concluded 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>61</sup>

Notably, the Tagliavini Report makes the distinction between territories that fall under South Ossetia's jurisdiction and those that are under Georgia's jurisdiction.<sup>62</sup> This is significant, as the Tagliavini Report, on the other hand, accepted Georgia's territorial integrity. In view of the Tagliavini Report, South Ossetia was an 'entity short of statehood' that supposedly justified the applicability of Article 51, since the hostilities 'are equivalent to an attack on the "territory of another State"'.<sup>63</sup>

This line of reasoning might find support from certain scholarly disputes, as evidenced in the dissenting views of Judge Burgenhal and Judge Higgins in the *Palestinian Wall* as they argued that Article 51 does not unequivocally subject the right of self-defence to armed attacks from abroad.<sup>64</sup> However, within the current context, it seems that by categorizing the Ossetian militia's hostilities against ethnic Georgian villagers and police as armed attacks in terms of Article 51 and thereby entitling the Georgians to invoke the right of self-defence, the Tagliavini Report has expansively interpreted the scope of Article 51.

This conclusion raises the question of the range of available measures for a conflicting side that has been a victim of an unlawful use of force, *e.g.* Georgia, but cannot invoke the right of self-defence since the use of force has not reached the strict conditions of an armed attack in terms of Article 51.

55 Myjer and White (n 35) 8-9.

56 See Oellers-Frahm (n 41) 505-506. See also Shah (n 41) 104. On a differing view see Myjer and White (n 35) 11. Arguments in favour of the restrictive interpretation of Resolutions 1368 and 1373 are also presented in Ruy and Verhoeven (n 37) 311-312.

57 C Gray, 'The Protection of Nationals Abroad: Russia's Use of Force in Georgia' in A Constantinides and N Zaikos (eds), *The Diversity of International Law: Essays in Honour of Professor Kalliopi K. Koufa* (Martinus Nijhoff 2009) 142-143. See also Wood (n 54) 84.

58 *Construction of a Wall in the Occupied Palestinian Territory* (n 41), para 139. See also Orakhelashvili (n 41) 125, 127-128.

59 Tagliavini (n 4) 17.

60 UNGA Res 3314 (n 36) Art 3(b),(d) concerning bombardment or the use of any weapons against the territory of another State and an attack on the forces of another State.

61 Tagliavini (n 8) 244. See also *Military and Paramilitary Activities in and against Nicaragua* (n 31), para 195. The threshold for an armed attack in terms of scale and effects is not defined and it is thus a subject of conflicting interpretations. See also Simma (n 29) 795. See also Oellers-Frahm (n 41) 507.

62 Tagliavini (n 8) 244.

63 *ibid.*

64 Orakhelashvili (n 41) 125.

### C. Countermeasures in an Intra-State Conflict

The ICJ has introduced an innovative concept of countermeasures under its case law. Thus, Georgia might have been entitled to undertake proportional countermeasures in accordance with Article 22 of the International Law Commission (ILC) Articles on State Responsibility as a means for redress when confronting unlawful use of force.<sup>65</sup> The applicability of this ‘very controversial and contested concept’<sup>66</sup> to the Georgian intra-State conflict is discussed below.

As generally understood, countermeasures exclude the responsibility of the actor and preclude the wrongfulness of the act *per se*.<sup>67</sup> This is further evidenced in the ICJ’s judgments in *United States Diplomatic and Consular Staff in Tehran*,<sup>68</sup> *Military and Paramilitary Activities in and Against Nicaragua*,<sup>69</sup> and in *Gabčíkovo-Nagymaros Project*.<sup>70</sup> Yet, the ILC Articles on State Responsibility under Articles 51 and 52 as well as the ICJ in its case law have limited the use of countermeasures to the preconditions of proportionality and necessity.<sup>71</sup> Notably, the condition of proportionality is determined and evaluated on the basis of the aim of the countermeasures, which entails that, if necessary, the measures undertaken may exceed the limits of the unlawful action that is being repelled.<sup>72</sup>

However, it is questionable whether States may undertake countermeasures for deterring unlawful use of force. Some legal scholars have argued that countermeasures may involve use of force outside the UN’s Charter system in order to provide legal means for States, *e.g.* Georgia, to counter unlawful use of force short of an armed attack.<sup>73</sup> Yet, this position is superseded by Article 50(1)(a) of the ILC Articles on State Responsibility according to which: ‘Countermeasures shall not affect the obligation to refrain from the threat or use of force as embodied in the Charter of the United Nations.’ Therefore, the concept of countermeasures similarly to the concept of self-defence under Article 51 was not applicable to the intra-State conflict in Georgia. Hence, Georgia was obliged to comply with Article 2(4) in its response to the unlawful use of force by the Ossetian militia.

Since Georgia’s right to invoke Article 51 as well as the concept of countermeasures for countering the Ossetian attacks was questionable, it is necessary to examine whether Georgia had the right to undertake the offensive on Tskhinvali on the basis of pre-emptive self-defence for deterring the alleged Russian invasion in South Ossetia.

### D. The Applicability of Pre-emptive Self-Defence vis-à-vis Russia

Russian forces had stayed on high alert pursuant to the conclusion of large-scale<sup>74</sup>, military exercises since 2 August 2008 and were situated close to the Georgian border on the other side of the Caucasus near the Roki mountain tunnel. In the context of the unstable situation in South Ossetia, it constituted a threat of force against Georgia in terms of Article 2(4).<sup>75</sup>

However, it cannot be verified on the basis of available evidence that Russia ‘was on the verge of such a major attack, in spite of certain [military] elements and equipment having been made readily available.’<sup>76</sup> Thus, Georgia could not have appealed to the right of pre-emptive self-defence, the concept of which as a whole has been generally considered to be in breach of modern international law.<sup>77</sup> The Russian military build-up on the other side of the Caucasus constituted an abstract threat, which does not permit the other side to use force under the scope of Article 51. As widely acknowledged, Article 2(4), grounded further by customary law, is ‘a cornerstone of the United Nations Charter’ and has to be read restrictively.<sup>78</sup>

65 H Lesaffre, ‘Circumstances Precluding Wrongfulness in the ILC Articles on State Responsibility: Countermeasures’ in Crawford, Pellet and Olleson (n 22) 471.

66 Ruy and Verhoeven (n 37) 309. Despite referring to its controversiality, the authors adopted the concept in their substantive analysis. *ibid* 318.

67 Lesaffre (n 65) 473.

68 *United States Diplomatic and Consular Staff in Tehran (United States of America v Iran)* (Merits) [1980] ICJ Rep 3, para 53.

69 *Military and Paramilitary Activities in and against Nicaragua* (n 31) para 248.

70 *Gabčíkovo-Nagymaros Project (Hungary v Slovakia)* (Merits) [1997] ICJ Rep 7, para 82.

71 Shah (n 41) 108. Oellers-Frahm (n 41) 508. See also *Gabčíkovo-Nagymaros Project* (n 70), para 85. See also R O’Keefe, ‘Proportionality’ in Crawford, Pellet and Olleson (n 22) 1160, 1165-1166.

72 A Tanca, *Foreign Armed Intervention in Internal Conflict* (Martinus Nijhoff 1993) 57. See also E Cannizaro, ‘The Role of Proportionality in the Law of International Countermeasures’ [2001] 12 EJIL 910-912.

73 Simma (n 29) 790-792. See also Oellers-Frahm (n 41) 508.

74 Malek (n 7) 229. 8,000 soldiers, 30 fixed-wing aircrafts and helicopters and 700 vehicles rehearsed a military operation in Abkhazia and South Ossetia.

75 N Stürchler, *The Threat of Force in International Law* (Cambridge University Press 2007) 261.

76 Tagliavini (n 4) 23.

77 Simma (n 29) 803. See also A Orakhelashvili, ‘Overlap and Convergence: The Interaction Between Jus ad Bellum and Jus in Bello’ [2007] 12 JCSL 177. See also Gazzini (n 45) 25-26. See also T Gazzini, ‘The Rules on the Use of Force at the Beginning of the XXI Century’ [2006] 11 JCSL 337-339. See also Shah (n 41) 115.

78 *Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v Uganda)* [2005] ICJ Rep 168, para 148. See also Gazzini (n 77) 328-329.

## E. The Applicability of Article 51 and Anticipatory Self-Defence vis-à-vis Russia

Prior to the commencement of the Georgian offensive on Tskhinvali around midnight of 8 August, Georgia had claimed that Russia had sent regular forces to South Ossetia.<sup>79</sup> Russia, on the other hand, maintains that such movement was part of the normal operation of the peacekeeping force.<sup>80</sup> The dispute is significant as it could essentially alter the responsibility of the warring sides for the outbreak of the August 2008 conflict in South Ossetia.

The 1992 Sochi Agreement on the ceasefire of the 1991-1992 conflict in South Ossetia provided, under Article 2, the withdrawal of the conflicting sides' armed forces. The treaty established the JPKF, which was composed of three battalions (each up to 500 troops) from Russia, Georgia and South Ossetia and was headed by a Russian officer.<sup>81</sup> Additionally, each of the three sides was permitted to have 300 troops in reserve and allowed to deploy them under the prior authorization of the JCC.<sup>82</sup> Unauthorized reinforcement of the peacekeeping force was not allowed.

On the basis of Georgia's allegations, if Russia had launched a military invasion in South Ossetia prior to the Georgian offensive on Tskhinvali, Russia's main justifications – protection of citizens and peacekeepers – would be eroded. In such a case, Russia could not have based its intervention on the right of self-defence under Article 51. Instead, its invasion would have constituted an act of aggression under Article 3(a)<sup>83</sup> of the Definition of Aggression, thereby altering the responsibility for waging an inter-State armed conflict.<sup>84</sup>

However, Georgia, having the burden of proof in this case, has failed to substantiate these allegations.<sup>85</sup> Furthermore, the Fact-Finding Mission concluded that: 'There is no evidence that the number of Russian peacekeepers present in South Ossetia was higher than allowed.'<sup>86</sup> To conclude, it has not been established that Russian armed forces had been present in South Ossetia prior to 8 August 2008. It has also not been proven that Russia had significantly surpassed the limit on the number of its peacekeeping troops, which might have otherwise constituted an act of aggression under Article 3(e) of the Definition of Aggression<sup>87</sup>.

Hence, Georgia could not have claimed the right to commence the offensive in South Ossetia under Article 51. For the same reason it could not have invoked the right to interceptive anticipatory self-defence, a concept that has been widely understood in accordance with the UN Charter and customary law.<sup>88</sup> This means that Georgia's offensive on Tskhinvali, the scale of which did not fall below the threshold of Article 2(4), constituted a violation of the prohibition on the use of force as stated in Article 2(4).

## V. The Legality of the Russian Military Invasion

As a direct consequence of the Georgian offensive on the South Ossetian capital Tskhinvali on 7 August 2008, the intra-State conflict escalated to an international scale. Russia immediately commenced its military invasion, contrary to the expectations of the Georgian authorities and military planners.<sup>89</sup>

Russia set forth essentially four justifications for its invasion in South Ossetia on 8 August 2008: the invitation by the South Ossetian *de facto* authorities, invasion for humanitarian purposes, protection of its citizens, and protection of its

79 Malek (n 7) 230.

80 Hafkin (n 16) 224. See also CJ Chivers, 'Georgia Offers Fresh Evidence on War's Start' *New York Times* (New York, 16 September 2008) A1. If Russia had breached the stationing agreement on a small scale, that would not have constituted an 'armed attack' and given Georgia the right to act under self-defense. See also Simma (n 29) 799. See also Tagliavini (n 4) 20.

81 Annex No 1 to the Decision Concerning the Basic Principles of Operation of the Military Contingents and of the Military Observers Designated for the Normalisation of the Situation in the Zone of the Georgian-Ossetian Conflict (6 December 1994) in Diasamidze (n 6) 177. See also Tagliavini (n 4) 14.

82 Art 2 of Decision No 1 of the Session of Joint Control Commission (4 July 1992) in Diasamidze (n 6) 101. See also Tagliavini (n 8) 257.

83 UNGA Res 3314 (n 36) Art 3(a) concerning the invasion or attack of the territory of another State.

84 See more on the 'first strike rule', its development in the legal framework, and explanatory State practice in O Olusanya, *Identifying the Aggressor under International Law: A Principles Approach* (Peter Lang 2006) 56-89.

85 H Tagliavini (ed), 'Independent International Fact-Finding Mission on the Conflict in Georgia' 3 (Report, The Council of the European Union 2009) 24.

86 Tagliavini (n 8) 257.

87 UNGA Res 3314 (n 36) Art 3(e) concerning the sending by or on behalf of a State of armed bands, groups, irregulars or mercenaries.

88 Gazzini (n 77) 329. See also Shah (n 41) 111-112.

89 V Cheterian, 'The August 2008 War in Georgia: From Ethnic Conflict to Border Wars' in SF Jones (ed), *War and Revolution in the Caucasus: Georgia Ablaze* (Routledge 2010) 70-71.

peacekeepers. Russia could not have claimed the right to individual or collective self-defence under Article 51, since its territory was not attacked by Georgia nor was South Ossetia, as a region short of statehood,<sup>90</sup> subject to the collective self-defence system.<sup>91</sup> Likewise, Russia could not have justified its intervention by claiming the right to anticipatory self-defence. Thus, the Nuremberg Tribunal has maintained that: '[P]reventive action in foreign territory is justified only in case of "an instant and over-whelming necessity for self-defence, leaving no choice of means, and no moment of deliberation"'.<sup>92</sup> In this regard, the Georgian offensive on Tskhinvali was not directed against Russia and took place in the Georgian territory. As examined earlier, Russia did not have the right to send its armed forces into Georgia under the façade of a unilateral reinforcement of peacekeeping troops. Thus, the subsequent analysis on the legality of the Russian invasion in Georgia is limited to the above four arguments set forth by the Russian Federation.

#### A. Intervention by Invitation

Russia claimed that it launched its military invasion in South Ossetia 'following a request from the government of South Ossetia'.<sup>93</sup> The concept of military intervention, distinguished from collective self-defence,<sup>94</sup> subsequent to request on behalf of a legitimate government, constitutes a rule of customary law.<sup>95</sup> According to Article 20 of the ILC Articles on State Responsibility, further supported by the ICJ's judgment in *Armed Activities on the Territory of the Congo*,<sup>96</sup> a corresponding valid consent by the host State for the presence of foreign forces constitutes a circumstance precluding wrongfulness.<sup>97</sup>

Nevertheless, South Ossetia requested Russia's military assistance at 11:00 on 8 August 2008, *i.e.* after Russian forces had launched its attacks against Georgian troops.<sup>98</sup> It thus constituted an *ex post facto* invitation, which is legally invalid.<sup>99</sup> Additionally, it is relevant to recall that South Ossetia was not an independent State. Thus, it has been noted that in case 'the government that invites the intervention is widely recognized as both the *de facto* and the *de jure* government, the international community accepts the government's right to request outside armed assistance'.<sup>100</sup>

Despite the South Ossetian government's *de facto* rule over most of the breakaway region's territory, it lacked international legitimacy as no State, including Russia at the time,<sup>101</sup> had recognized its statehood. It should be noted that the ICJ reiterated in the *Nicaragua* case that 'no such general right of intervention, in support of an opposition within another State, exists in contemporary international law'.<sup>102</sup> The Ossetian authorities thus did not have the right to invite Russian regular forces to invade Georgia.<sup>103</sup>

90 On South Ossetia's right to secession see A Nussberger, 'The War between Russia and Georgia - Consequences and Unresolved Questions' [2009] 1 GoJIL 351-360. See also R Müllerson, 'Precedents in the Mountains: On the Parallels and Uniqueness of the Cases of Kosovo, South Ossetia and Abkhazia' [2009] 8 Chinese JIL 10-17. See also K Knop, *Diversity and Self-Determination in International Law* (Cambridge University Press 2002). For an analysis on the recognition of South Ossetia see C Ryngaert and S Sobrie, 'Recognition of States: International Law or Realpolitik? The Practice of Recognition in the Wake of Kosovo, South Ossetia, and Abkhazia' [2011] 24 LJIL 467-490.

91 Prior to the August 2008 conflict in South Ossetia, none of the UN Member States had recognized the independence of South Ossetia. The UN Security Council in Resolution 1808, less than four months preceding the outbreak of the conflict in South Ossetia, confirmed its support to the territorial integrity of Georgia. However, due to the change of policy in Russia, it recognized the independence of South Ossetia, as well as Abkhazia, on 26 August 2008. By recognizing the unlawful statehood of the breakaway regions, Russia violated Georgia's sovereignty and the principle of non-intervention under Art 2(1) of the UN Charter. See C Ryngaert and C Griffioen, 'The Relevance of the Right to Self-determination in the Kosovo Matter: In Partial Response to the Agora Papers' [2009] 8 Chinese JIL 579.

92 *The Ministries Case (United States of America v Ernst von Weizsaecker et al.*, 14 'Nuremberg Military Tribunal' (United States Government Printing Office 1950) 207.

93 Tagliavini (n 8) 276.

94 R Müllerson, 'Intervention by Invitation' in LF Damrosch and DJ Scheffer (eds), *Law and Force in the New International Order* (Westview Press 1991) 127. See also Tanca (n 72) 19.

95 *Military and Paramilitary Activities in and against Nicaragua* (n 31), para 126. See also E Lieblich, 'Intervention and Consent: Consensual Forceable Interventions in Internal Armed Conflicts as International Agreements' [2011] 29 BUILJ 363.

96 *Armed Activities on the Territory of the Congo* (n 78), paras 105-106, 149. See also AB Mansour, 'Circumstance Precluding Wrongfulness in the ILC Arts on State Responsibility: Consent' in Crawford, Pellet and Olleson (n 22) 439-440.

97 See on the implications of a given consent in cases of a violation of an *erga omnes* norm in Tanca (n 72) 20-22.

98 Tagliavini (n 8) 281.

99 N Ronzitti, 'Use of Force, Jus Cogens and State Consent' in A Cassese, *The Current Legal Regulation of the Use of Force* (Martinus Nijhoff 1986) 160. See also Mansour (n 96) 444-445.

100 D Wippman, 'Treaty-Based Intervention: Who Can Say No?' [1995] 62 UCLR 621. See also L Doswald-Beck, 'The Legal Validity of Military Intervention by Invitation of the Government' [1985] BYBIL 191-192. See also A Abass, 'Consent Precluding State Responsibility: A Critical Analysis' [2004] 53 ICLQ 215.

101 Russia recognized South Ossetia on 26 August 2008.

102 *Military and Paramilitary Activities in and against Nicaragua* (n 31), para 209.

103 G Cahin, 'Attribution of Conduct to the State: Insurrectional Movements' in Crawford, Pellet and Olleson (n 22) 248. See also Mansour (n 96) 443.

## B. Humanitarian Intervention

Russian authorities argued initially that the Georgian offensive on Tskhinvali resulted in the death of approximately 2,000 civilians.<sup>104</sup> Pursuant to the commencement of the Georgian military operation, the Ossetes pledged to the Russian authorities 'to do everything to stop the genocide of the Ossetian people'.<sup>105</sup> However, the alleged fatality rate of 2,000 people was significantly overestimated.

Independent studies suggest that 162 civilians died in the course of the August 2008 conflict.<sup>106</sup> This figure includes the fatalities that resulted from the offensives of the Russian and Ossetian forces. Thus, the Tagliavini Report concluded that the 'allegations of genocide [...] are neither founded in law nor substantiated by factual evidence'.<sup>107</sup>

In any event, the UN General Assembly in its resolutions<sup>108</sup>, as well as an overwhelming majority of States, have taken the position that humanitarian intervention under international law is not permitted.<sup>109</sup> This implies that humanitarian intervention may not be regarded as a rule of customary law. Moreover, Russia in particular has persistently objected to State practice that would mirror aspects of a humanitarian intervention.<sup>110</sup> Consequently, in accordance with the estoppel principle, it cannot appeal to this concept on its own.

## C. Protection of Nationals Abroad

As the third principal justification for its intervention, Russia argued that it had the right to protect its citizens in South Ossetia. Thus, Russia invoked Article 61(2) of its Constitution according to which '[t]he Russian Federation shall guarantee its citizens defense and patronage beyond its boundaries'.<sup>111</sup> On the basis of this legal reasoning, Russia alleged that it had the right to launch 'counter-attacks'.<sup>112</sup> However, as evidenced in Article 27 of the VCLT and pursuant to the *Nottebohm* case, '[i]t is international law which determines whether a State is entitled to exercise protection'.<sup>113</sup> Thus, Article 61(2) of the Russian Constitution could not justify the Russian intervention in case it would breach international law.

The use of force for protecting citizens or nationals abroad has been widely regarded as not falling within the scope of the concept of self-defence and Article 51.<sup>114</sup> Bruno Simma's comment on the UN Charter states that:

The use of force to protect nationals abroad is a breach of international law, even if some authorities have claimed the contrary and international practice is showing a tendency to resurrect the law in existence before the U.N. Charter came into force.<sup>115</sup>

On the basis of the extensive analysis on State practice and *opinio juris*, Tom Ruys concludes similarly that: 'In light hereof, the author finds it impossible to assert that there exists *de lege lata* a customary right of forcible protection of nationals, as defined by Waldock, Dugard and others'.<sup>116</sup> Even scholars who advocate in support of the right to protect citizens abroad,<sup>117</sup>

104 Buchanan (n 25) 74.

105 Ministry for Press and Mass Media of the Republic of South Ossetia 8 August 2008, 'Georgian SU-25 planes dropped bombs on civilians' <<http://www.webcitation.org/5kAsptlJ>> accessed 8 May 2011.

106 Tagliavini (n 4) 21.

107 *ibid* 26-27.

108 Eg UNGA Res 2131 (1965) GAOR 19th Session Supp 12; UNGA Res 2625 (1970) GAOR 25th Session; UNGA Res 3314 (1974) GAOR 29th Session Supp 19.

109 T Gazzini, *The Changing Rules on the Use of Force in International Law* (Manchester University Press 2006) 176.

110 *ibid*.

111 Art 61(2) of the Constitution of the Russian Federation (1993).

112 Malek (n 7) 230.

113 *Nottebohm case (Liechtenstein v Guatemala)* (Merits) [1955] ICJ Rep 4, paras 20-21.

114 See on the views of different groups of scholars in T Ruys, 'The 'Protection of Nationals' Abroad Doctrine Revisited' [2008] 13 JCSL 235-236.

However, '[w]ithin the ILC [in the course of a related debate], only two delegates accepted in principle that the use of force in the exercise of diplomatic protection could constitute a form of self-defence.' *ibid* 257. Moreover, '[t]he debates within the UNGA Sixth Committee -all the more relevant, since they reflect states' *opinio iuris*- show a broadly similar picture. Only one state implicitly supported the legality of forcible protection of nationals: Italy'. *ibid* 258.

115 Simma (n 29) 133. See also Ronzitti (n 99) 153. Yet, it is debatable whether such a right existed even prior to the UN Charter. See PH Winfield, 'The Grounds of Intervention in International Law' [1924] BYBIL 160. Ruys has however observed that '[t]here is little doubt that before 1945 interventions of this type were permitted.' Ruys (n 114) 235.

116 Ruys (n 114) 263.

117 DW Bowett, 'The Use of Force for the Protection of Nationals Abroad' in A Cassese (n 99) 40-41. See also Schrijver (n 33) 38. The positions of scholars supportive of such a right have been also referenced in N Ronzitti, *Rescuing Nationals Abroad Through Military Coercion and Intervention on Grounds of Humanity* (Martinus Nijhoff 1985) 4-5. See also statements made by the delegations in the UN Security Council during the South Ossetia conflict in Gray (n 57) 142-151.

do not challenge the argument that such operations have to be accompanied by situations of emergency and strictly limited in scope.<sup>118</sup> Generally, the proponents of the concept argue that three cumulative preconditions have to be satisfied, as mandated by Sir Humphrey Waldock: if (1) an imminent threat of injury to nationals exists, (2) which the territorial sovereign is unwilling or unable to counter by providing protection to the citizens, the intervening State may then (3) undertake actions that are strictly confined to the object of protecting its nationals against injury.<sup>119</sup> They admit that unless such operations satisfy the 'Caroline' criteria,<sup>120</sup> they cannot be undertaken.<sup>121</sup> Additionally, States that commence military action on this basis have to demonstrate that they have previously exhausted other available means, *e.g.* evacuation which, however, might constitute itself a violation of the host state's sovereignty if conducted without its prior consent<sup>122</sup> and negotiations.<sup>123</sup> In any case, a large-scale military invasion for the protection of citizens in another sovereign State is prohibited under international law.

More importantly, the Russian line of argument poses greater challenges. Ninety percent of residents in South Ossetia<sup>124</sup> who had Russian citizenship, were naturalized through the 'passportisation' policy. This was based on the Russian Law on Citizenship, which entered into force in 2002. It provided, under Article 14, that Russian citizenship might be granted under a simplified procedure.<sup>125</sup> It made it possible for South Ossetian residents to apply for a Russian citizenship without leaving home.<sup>126</sup> Thus, the question that arises is how the 'passportisation' policy is reconcilable with the effective nationality principle as formulated in the *Nottebohm* case.<sup>127</sup>

The Ossetes who were naturalized through the 'passportisation' policy retained their Georgian citizenship. Hence, they had dual citizenship. Under the effective nationality principle, it is possible to argue that the Russian citizenship may have had precedence in some instances over Georgian citizenship due to their personal ties to Russia. Even so, it cannot overrule the fact that the granting of Russian citizenship in South Ossetia under simplified terms took place in breach of international law.

The inhabitants of South Ossetia lived *de jure* in Georgia. Under international law, an explicit consent of the home country is a compulsory precondition for changing one's citizenship: in this regard, Georgian domestic law does not recognize dual citizenship.<sup>128</sup> Moreover, under the scope of the 'passportisation' policy, Georgia's approval for the conferral of citizenship was not sought. This rationale was followed in the Tagliavini Report, which concluded:

The vast majority of purportedly naturalized persons from South Ossetia and Abkhazia are not Russian nationals in terms of international law. Neither Georgia nor any third country need acknowledge such Russian nationality. They were still citizens of Georgia at the time of the armed conflict of August 2008, and in legal terms they remain so to this day unless they had renounced or lost their Georgian nationality in regular ways.<sup>129</sup>

The term 'in regular ways' should be understood as other legal methods distinct from the artificial acquisition of Russian passports via the 'passportisation' policy.<sup>130</sup> In this regard, the *Nottebohm* case notes that although a State is free to determine the rules related to the acquisition of its citizenship, it is international law that sets forth the rules for establishing whether a State's policy is in conformity with law and should be recognized accordingly by other States.<sup>131</sup>

118 M Shaw, *International Law* (Cambridge University Press 2008) 1145. See also Tanca (n 72) 118.

119 Ruyts (n 114) 234-235.

120 RSJ Macdonald, 'The Use of Force by States in International Law' in M Bedjaoui (ed), *International Law: Achievements and Prospects, Part II* (Martinus Nijhoff 1991) 733.

121 Shaw (n 118) 1144. See also Schrijver (n 33) 38.

122 Ruyts (n 114) 265-267.

123 K Land, 'Legal aspects of the conflict in Georgia and post-conflict developments' [2009] EMFAY 52.

124 K Natoli, 'Weaponizing Nationality: An Analysis of Russia's Passport Policy in Georgia' [2010] 28 BUILJ 396.

125 Art 14 of the Act on Citizenship (The Russian Federation, entered into force 1 July 2002).

126 Natoli (n 124) 396.

127 *Nottebohm* case (n 113), para 22.

128 Art 12(2) of the Constitution of Georgia (24 August 1995) in Diasamidze (n 6) 198.

129 Tagliavini (n 4) 18.

130 *ibid.*

131 *Nottebohm* case (n 113), para 23.

## D. Protection of Peacekeepers

### 1. Fatalities in the Russian Peacekeeping Contingent

According to the Tagliavini Report it was 'likely'<sup>132</sup> that two Russian peacekeepers in Tskhinvali had died and five had been wounded as a result of the Georgian offensive around midnight of 8 August. The Georgians, however, claim that they were fired at from the peacekeepers' compound and thus they had to return fire.<sup>133</sup>

It is a general rule that by infringing the principle of neutrality, peacekeepers lose their protective civilian status and thus may lawfully be subject to an attack.<sup>134</sup> Hence, if peacekeepers have initiated hostilities or launched hostile acts they may be targeted as any other combatants of warlike armed forces. This raises the question whether the two alleged fatalities and five casualties in the Russian peacekeeping contingent,<sup>135</sup> provided the legal basis for the Russian military invasion in Georgia.<sup>136</sup>

### 2. Uncertainty over an Alleged Georgian Attack on the Russian Peacekeeping Base

The Tagliavini Report concludes that the alleged Georgian assault against Russian peacekeepers equalled an armed attack against the Russian Federation.<sup>137</sup> The Tagliavini Report reached this conclusion on the basis of two considerations: first, the Commander of the JPKF was in all circumstances appointed from the Russian side, and secondly, the State that was to provide the troops to the JPKF had to also bear the consequences of the violations of the peacekeeping regime that were committed by the peacekeepers.<sup>138</sup> Therefore, Russia purportedly had the right to self-defence and to intervene in the Georgian intra-State armed conflict within the tenets of Article 3(d) of the Definition of Aggression.<sup>139</sup>

Nevertheless, this argument should be approached critically. As already stated, Georgian forces had the right to undertake proportional countermeasures. Thus, the initiation of the Georgian offensive *per se* was not in breach of international law, as also noted in the Tagliavini Report.<sup>140</sup> It is yet to be established whether Georgian forces initiated the hostilities against the Russian peacekeepers. Georgia denied these claims, stating that its troops that entered Tskhinvali were fired upon from the Russian peacekeeping positions.<sup>141</sup> This line of events should not be excluded, considering the prevailing situation in Tskhinvali.

If the Georgian arguments were correct, the Russian peacekeepers could not claim the right of self-defence, as they would be held accountable for opening fire. Yet, no factual evidence suggests that the Russian peacekeepers had been acting in the alleged manner. Hence, the neutral status of the peacekeepers was not lifted. However, the Fact-Finding Mission, by referring to the conflicting narratives of the Russian and Georgian sides, noted that it 'does not have independent reports, which could substantiate or deny the allegations of either side'<sup>142</sup> and 'that the fact of the Georgian attack on the Russian peacekeepers' base could not be definitely confirmed by the mission'.<sup>143</sup> Despite the lack of clear evidence the Tagliavini Report continued to draw its conclusions on the basis that Georgian forces had commenced an attack against the Russian peacekeepers' military base.<sup>144</sup> Thus, one of the main conclusions of the Tagliavini Report on which it based its subsequent analysis on the legality of the Russian invasion was that:

132 Tagliavini (n 8) 222.

133 *ibid* 221.

134 Buchanan (n 25) 33. See also Bulletin of Secretary General 'Observance by United Nations Forces of International Humanitarian Law' (1999) UN Doc. ST/SGB/1999/13. See also O Engdahl, *Protection of Personnel in Peace Operations: The Role of the 'Safety Convention' against the Background of General International Law* (Martinus Nijhoff 2007) 101-103.

135 Tagliavini (n 8) 222.

136 NN Perro, 'Legal Case for Russian Intervention in Georgia' [2008] 32 FILJ 1526. Russia invoked the right of self-defense on this basis as evidenced by its Ambassador's letter to the UN Security Council on 11 August 2008. It is worthy of mentioning that it thus met the requirement under art 51 of the UN Charter, according to which a State needs to report immediately if it has invoked the right of self-defence.

137 Tagliavini (n 4) 21. See also Tagliavini (n 8) 268.

138 Tagliavini (n 8) 267.

139 *ibid* 253.

140 *ibid* 251.

141 Tagliavini (n 8) 27-28. According to Georgia's information dossier provided to the Fact-Finding Mission, the Russian Deputy Minister of Foreign Affairs informed the Georgian Foreign Minister of Foreign Affairs on 8 August 2008 at 02:37, three hours prior to the first encounter between the Russian peacekeeping contingent and Georgian forces, that Russian military started operations in South Ossetia due to casualties in its peacekeeping forces.

142 Tagliavini (n 4) 21.

143 Tagliavini (n 8) 265.

144 *ibid* 269.

If the Russian allegations were true, the attack by Georgian armed forces on the Russian military base would surpass the minimum threshold in scale and effects required for an “armed attack” in the sense of Art. 51 of the UN Charter. In such a case, Georgia could not justify its operation against the peacekeepers as self-defense necessary to respond to an ongoing or imminent attack by Russia. Therefore there was an armed attack by Georgia in the sense of Art. 51. That means that Russia’s military response could be justified [...].<sup>145</sup>

This line of argument is an aberration based on a conditional clause and formulated by assumptions, and yet it stands as the basis for a far-reaching conclusion. It has been noted by Théo Boutruche that: ‘Crucially, for any type of fact-finding to be meaningful it needs to be credible.’<sup>146</sup> The conclusion made in the Tagliavini Report was not based on impartial evidence as noted in the Report itself,<sup>147</sup> but on information that could not be confirmed or verified by the Fact-Finding Mission. It is also indicative that the Tagliavini Report did not provide any study of the purported Georgian actions against the Russian peacekeepers in its overview on the military activities in Georgia.<sup>148</sup>

The standard of proof based on the comparative method, which was adopted by the Tagliavini Report<sup>149</sup>, fails to establish facts in relation to a contentious matter. Théo Boutruche has pointed out that: ‘Fact-finding serves a primary purpose of objectively establishing “what really happened”’.<sup>150</sup> However, in the Tagliavini Report the Russian intervention was proven lawful along with the escalation of the conflict to international scale without sufficient evidence to support such a strong conclusion. This runs against the judgment in the *Oil Platforms* case in which the ICJ noted that the State which claims to have been a victim of an attack has to provide clear evidence in support of that claim: failing to do so would result in the dismissal of the claim.<sup>151</sup>

The Tagliavini Report acknowledged that the circumstances in which it had to provide its conclusion on the legality of the Russian invasion were unclear. Yet, on the basis of unconfirmed facts and evidence, it nevertheless drew its conclusion in support of the Russian claim. It thus represents probably the weakest link in the Tagliavini Report’s analysis. However, as the decision was made in the Report to proceed with the legal analysis on the basis that an alleged attack on the Russian peacekeepers base had occurred, so will the present study carry on the examination of the Report’s analysis in this regard.

### 3. Peacekeepers as State Instrumentalities: the Command and Control Test

The question of whether the purported attack on the Russian peacekeeping contingent in Tskhinvali could be categorized as an aggression against Russian land forces in terms of Article 3(d) of the Definition of Aggression is ambiguous. Moreover, it is the principal indicator for the analysis on the applicability of the concept of an armed attack and Article 51.

Georgia, South Ossetia and Russia, as the troop-allocating entities, were responsible for the actions of their peacekeeping troops. It is unequivocal that this is an important factor in determining whether a peacekeeping contingent represents ‘State instrumentalities’.<sup>152</sup> Nevertheless, it should not be regarded as the only principal criterion. It has been noted that the decisive factor for determining whether a peacekeeping force represents its allocating State, is subject to the test based on command and control. This ‘is an indication of the extent to which personnel should be regarded as agents of the entity leading the operation and whether or not their actions are imputable to that entity’.<sup>153</sup> Hence, the JPKF should be subject to the command and control test, which was not scrutinized in the relevant analysis in the Tagliavini Report.

In order to determine the status of the Russian peacekeeping troops, it is necessary to analyze the legal instruments to the JPKF in South Ossetia. The following factors have particular significance. First, although it has been claimed that the JPKF

145 ibid.

146 T Boutruche, ‘Credible Fact-Finding and Allegations of International Humanitarian Law Violations: Challenges in Theory and Practice’ [2011] 16 JCSL 106.

147 Tagliavini (n 4) 21.

148 Tagliavini (n 8) 209.

149 ibid 222. See on the standard of proof required for verifying certain facts in Boutruche (n 146) 112-115.

150 Boutruche (n 146) 109.

151 *Case Concerning Oil Platforms* (n 22), para 64. ‘As regards the alleged firing on United States helicopters from Iranian gunboats and from the Reshadat oil platform, no persuasive evidence has been supplied to support this allegation. There is no evidence that the minelaying alleged to have been carried out by the Iran Ajr, at a time when Iran was at war with Iraq, was aimed specifically at the United States; and similarly it has not been established that the mine struck by the Bridgeton was laid with the specific intention of harming that ship, or other United States vessels.’

152 Report of Secretary General (1996) UN Doc A/51/389, para 16.

153 Engdahl (n 134) 20. See also *Reparation for Injuries Suffered in the Service of the United Nations* (Advisory Opinion) [1949] ICJ Rep 174, 177.

was deployed in South Ossetia under the authority of the regional organization Commonwealth of Independent States<sup>154</sup> this claim was erroneous, unlike the case in Abkhazia.<sup>155</sup> Second, under the 1992 bilateral Sochi Agreement, the control over the implementation of the cease-fire in South Ossetia was exercised by 'a mixed Control Commission [JCC] composed of representatives of opposing parties'<sup>156</sup> along with the participation of Russia, North Ossetia, the OSCE, and the United States' Federal Government's agency the Commission on Security and Cooperation in Europe.<sup>157</sup>

Thirdly, the OSCE in South Ossetia undertook various obligations,<sup>158</sup> but most importantly, it acted 'as the major international peacekeeper and participant in the Joint Control Commission'<sup>159</sup> and 'the consensus-based decision making at the OSCE [...] enable[d] the organization to act as a truly independent party'.<sup>160</sup> Fourthly, the JCC had its own headquarters in Tskhinvali.<sup>161</sup> Fifth, the JPKF, which was a tripartite force equally based on the Russian, Ossetian and Georgian contingents,<sup>162</sup> was subordinated to the joint military command (headed by the commander from the Russian side who was subject to specific rights and obligations,<sup>163</sup> and two other chief military commanders from the Ossetian and the Georgian side)<sup>164</sup> which was in turn subordinated to the JCC,<sup>165</sup> and further monitored and assisted by the OSCE.<sup>166</sup>

Additionally, '[t]he organizational-staffing structure of the joint forces' was subject to approval by the JCC:<sup>167</sup> 'Changes in it are permitted only with JCC permission'.<sup>168</sup> Thus, '[t]he places of deployment of the military contingents' were to be 'determined by the JCC'.<sup>169</sup> Furthermore, the contingents, on the battleground, had to observe orders from the joint military command.<sup>170</sup> In addition, for their daily activities they followed orders from the JCC and the joint military command.<sup>171</sup>

The military contingents wore unified insignia:<sup>172</sup> 'blue stripe on the left hand, helmet and combat technique',<sup>173</sup> which had to be attached also 'on the means of transport, on control posts, and on other technical items and equipment relating to the given contingents'.<sup>174</sup> Also, peacekeepers were 'bound [to] unquestionably fulfil all orders and instructions of the

154 K Tsikhelashvili and N Ubilava, 'Case Study of the Conflict in South Ossetia' in M Weller and B Metzger (eds), *Settling Self-Determination Disputes: Complex Power-Sharing in Theory and Practice* (Martinus Nijhoff 2008) 285. CIS peacekeeping troops presence in South Ossetia has been also mentioned in Simma (n 30) 698. However, these claims are false. See also N MacQueen, *Peacekeeping and the International System* (Routledge 2006) 174. See in general about CIS and regional peacekeeping in BR Pirnie and WE Simons, *Soldiers for Peace: Critical Operational Issues* (RAND 1996) 71. See also FK Bouayad-Agha and BP Krasulin, 'Report on Sharing Responsibilities in Peace-Keeping: The United Nations and Regional Organizations' UN Doc (1995) JIU/REP/95/4, para 34. See also K Korkelia, 'The CIS Peace-Keeping Operations in the Context of International Legal Order' (Report, NATO Democratic Institutions Fellowships 1997-1999) 36 <<http://www.nato.int>> accessed 10 May 2011. See also D Lynch, *Russian Peacekeeping Strategies in the CIS* (MacMillan Press 2000) 163. See in general about the competence of the UN Security Council to delegate Chapter VII powers to regional organizations in D Sarooshi, *The United Nations and the Development of Collective Security: The Delegation by the UN Security Council of its Chapter VII Powers* (Oxford University Press 1999) 248-253.

155 J Mackinlay and E Sharov, 'Russian peacekeeping operations in Georgia' in J Mackinlay and P Cross (eds), *Regional Peacekeepers: The Paradox of Russian Peacekeeping* (United Nations University Press 2003) 72-87, 91. See also A Kreikemeyer and AV Zagorski, 'The Commonwealth of Independent States (CIS)' in L Jonson and C Archer (eds), *Peacekeeping and the Role of Russia in Eurasia* (Westview Press 1996) 160-163. See also T Potier, *Conflict in Nagorno-Karabakh, Abkhazia and South Ossetia: A Legal Appraisal* (Kluwer Law International 2001) 121. See also O Ramsbotham and T Woodhouse, *Encyclopedia of International Peacekeeping Operations* (ABC-CLIO 1999) 98-100.

156 Arts 3(1) and 3(2) of the Agreement on Principles of Settlement of the Georgian – Ossetian Conflict in Diasamidze (n 6) 98.

157 Petro (n 136) 1528.

158 Mackinlay and Sharov (n 155) 84.

159 Tsikhelashvili and Ubilava (n 154) 356.

160 *ibid* 357.

161 Arts 3(1) and 3(2) of the Agreement on Principles of Settlement of the Georgian – Ossetian Conflict in Diasamidze (n 6) 98.

162 Art 2 of the Decision No 1 of the Session of Joint Control Commission (4 July 1992) in Diasamidze (n 6) 101. See also Pirnie and Simons (n 154) 71. See on the national contingents in Mackinlay and Sharov (n 155) 80-81.

163 Annex No 1 to the Decision Concerning the Basic Principles of Operation of the Military Contingents and of the Military Observers Designated for the Normalisation of the Situation in the Zone of the Georgian-Ossetian Conflict (6 December 1994) in Diasamidze (n 6) 177.

164 Art 1 of the Decision No 1 of the Session of Joint Control Commission (4 July 1992) in Diasamidze (n 6) 101.

165 Art 2 of Annex No 1 to Protocol No 3 of the JCC Session (12 July 1992) in Diasamidze (n 6) 106. See also art 2 of the Regulation Concerning the Basic principles of Operation of the Military Contingents and of the Groups of Military Observers Designated for the Normalization of the Situation in the Zone of the Georgian-Ossetian Conflict (6 December 1994) in Diasamidze (n 6) 174.

166 Tsikhelashvili and Ubilava (n 154) 357.

167 Art 5 of Annex No 1 to Protocol No 3 of the JCC Session (n 165) 106. Art 9 established a contractual relationship between the peacekeepers and the JCC.

168 Art 5 of Regulation of 6 December 1994 in Diasamidze (n 6) 174. See also Decision No. 1 of the Session of Joint Control Commission (4 July 1992) in Diasamidze (n 6) 101.

169 Art 5 of the Regulation of 6 December 1994 in Diasamidze (n 6) 174. See also Art 5 of Annex No 1 to Protocol No 3 of the JCC Session (n 165) 106.

170 Annex No 1 to Protocol No 2 of the JCC Session (6 July 1992) in Diasamidze (n 6) 104, section 1.

171 Art 6 of the Regulation of 6 December 1994 in Diasamidze (n 6) 174.

172 *ibid*, Art 8.

173 Art 14 of Annex No 1 to Protocol No 3 of the JCC Session (n 165) 106.

174 Art 3 of the Regulation of 6 December 1994 in Diasamidze (n 6) 174.

command'<sup>175</sup> and the JCC.<sup>176</sup> Finally, '[a] joint (united) military procuracy' was created with equal representation from each side,<sup>177</sup> which was entitled to conduct '[o]versight of the legality of the activity of the military contingents'.<sup>178</sup>

The JPKF was thus subordinate to the JCC and to the joint military command. This line of command indicates that according to the legal regime, the Russian peacekeeping contingent was under an effective control and command of the international peacekeeping force. Therefore, based on the criteria upon which the multinational force (MNF) in Lebanon from 1982-1984, it was considered to maintain a national character. The JPKF in South Ossetia, *mutatis mutandis*, possesses an international character. As such, there existed 'a general rule concerning the behaviour of the force' and a high level of integration was evidenced by a common institution of the participating States, whereby the JPKF was constituted as a unit with a high degree of co-ordination between the various national contingents.<sup>179</sup>

The fact that the JPKF was headed by a Russian commander is without prejudice to the internationality of the peacekeeping mission in Georgia. Previous UN peacekeeping missions contend that 'the operational command of the UN peace-keeping forces lies with the Commander and that the chain of command runs through the commanders of the national contingents'.<sup>180</sup> Thus, the structure of the JPKF seemed to roughly follow the UN standards for peacekeeping missions.

The Tagliavini Report appears to overlook the fact that the JPKF was a tripartite regime in which two allocating entities, *i.e.* South Ossetia and Georgia, were former warring sides. In this context, the appointment of the Russian commander as the head of the mission follows the rationale of safeguarding the impartiality of the tripartite peacekeeping force. Moreover, the Ossetians and the Georgians had the right to appoint the other two chief military commanders of the JPKF.

Similarly, the UN peacekeeping missions, forerunners to the JPKF in South Ossetia, comprised officers who represented their countries at the headquarters.<sup>181</sup> It seems to suggest that the officers in the JPKF that were appointed on the basis of nationality were not prejudicial to its international command and control structure. Therefore, in reference to the criteria applied to the UN peacekeeping missions, the JPKF's command institutions had a 'supranational authority over the military units concerned and the individuals within them' which is why the troop-allocating entities 'relinquished their power of disposal over these contingents, and have thus delegated their sovereignty'.<sup>182</sup>

The Tagliavini Report argued that the allocating States to the JPKF in South Ossetia remained responsible for the violations of the Sochi Agreement and decisions of the JCC.<sup>183</sup> However, this may be seen as an effective means to adjust the JPKF to the specific circumstances of the conflict in South Ossetia and, particularly, to the interests of the three parties involved. Hence, the fact that the allocating States had agreed that they remain responsible for the contingents seemed to guarantee, in terms of Article 31(1) of the VCLT, that they would not readily breach the object and purpose of the 1992 Sochi Agreement, *i.e.* the comprehensive settlement of the conflict between the Ossetians and the Georgians.<sup>184</sup>

Therefore, in interpreting the international nature of the JPKF, this provision may have been incorporated in the treaty-system for practical considerations. It should not impair the intent of the allocating sides (Russia, Georgia and South Ossetia) to internationalise the peacekeeping mission, which is mirrored in the relevant legal instruments. This is further reflected by the fact that the JPKF operated in close co-operation with the OSCE that acted as a peacekeeper and a participant in the work of the JCC. Hence, the legal regime applicable to the peacekeeping contingent was aimed at guaranteeing the neutrality and internationality of the peacekeeping force, despite the attempts by Russian officers to manipulate with the provisions of the legal instruments so as to regard the peacekeeping contingent as part of Russia's national forces.<sup>185</sup>

In summation, the JPKF was allocated under the command and control of the JCC and the joint military command.

175 Art 13 of Annex No 1 to Protocol No 3 of the JCC Session (n 165) 106.

176 Art 12 of the Regulation of 6 December 1994 in Diasamidze (n 6) 174.

177 *ibid.*

178 *ibid.*, Art 19.

179 Simma (n 29) 699.

180 RCR Sickman, *National Contingents in United Nations Peace-Keeping Forces* (Martinus Nijhoff 1988) 112.

181 *ibid* 116. Eg United Nations Operation in the Congo (ONUC); United Nations Peacekeeping Force in Cyprus (UNFICYP).

182 *ibid* 119.

183 Protocol No 2 of the Meeting of Joint Control Commission (JCC) for the Georgian-Ossetian Conflict Settlement (6 July 1992) in Diasamidze (n 7) 102. See also Tagliavini (n 8) 267.

184 Preamble of the Agreement on Principles of Settlement of the Georgian – Ossetian Conflict 1992 in Diasamidze (n 6) 98.

185 R Allison, 'Russia Resurgent? Moscow's Campaign to "Coerce Georgia to Peace" [2008] 84 Int Aff 1157.

That implies that the Tagliavini Report's main conclusion -that Russian peacekeepers in the JPKF represented 'State instrumentalities' subject to an armed attack in terms of Article 3(d) of the Definition of Aggression- is doubtful. On this basis, the Tagliavini Report concluded that Russia was entitled to invoke self-defence under Article 51. As examined, this line of reasoning is not without doubt, which is not to say that the Russian peacekeepers would not have maintained the right to personal on-the-spot self-defence if they had been attacked.<sup>186</sup>

The follow-up of the Russian invasion is not scrutinized in the current study. However, it should be noted that the Russian regular forces, 'covered by air strikes and by elements of its Black Sea fleet, penetrated deep into Georgia, cutting across the country's main east-west road, reaching the port of Poti and stopping short of Georgia's capital city, Tbilisi.'<sup>187</sup> They 'set up military positions in a number of Georgian towns, including Gori, Zugdidi, Senaki and Poti',<sup>188</sup> in addition to an attack on the Georgian positions in the breakaway region in Abkhazia.<sup>189</sup>

## VI. Conclusion

This research established that the peacekeeping force, comprising of troops from Georgia, South Ossetia, and Russia, was provided with the mandate to enforce peace in South Ossetia during the intra-State phase of the conflict prior to 8 August 2008. In reality however, the peacekeeping regime had broken down and consequentially, did not provide efficient means for restrain the warfare.

Within the aforementioned context, Georgia did not have the right to invoke the right of self-defence under Article 51 due to the fact that the attacks by the Ossetian militia were not launched from abroad. Furthermore, Georgia could not have employed countermeasures under chapter II of the ILC Articles on State Responsibility because countermeasures cannot affect the obligation to refrain from the use of force. Hence, Georgian offensive on Tskhinvali around midnight of 8 August 2008 represented an excessive and punitive use of force which violated Article 2(4).<sup>190</sup> Even where the Georgians would have been entitled to undertake conduct under Article 51, as suggested in the Tagliavini Report, it would have violated the Caroline principle to employ 'nothing unreasonable or excessive'<sup>191</sup> and thus the condition of proportionality.<sup>192</sup> Nevertheless, this conclusion *per se* is without prejudice to the legality of the Russian invasion in Georgia that was triggered by the Georgian offensive on 8 August 2008.

In regards to the legality of the Russian military intervention, this paper contends that Russia was not entitled to launch the invasion under the scope of reinforcing the JPKF or on the grounds of humanitarian intervention, intervention by invitation, or protection of citizens. The question of whether the invasion was justified for the purpose of protecting the Russian peacekeeping contingent should be addressed on the basis of two interrelated criteria.

First, in accordance with the *Oil Platforms* case, there has to be sufficient evidence for determining whether an attack has occurred against the peacekeeping contingent in the first place. Second, in case such an attack has occurred, it is relevant to inquire whether it was directed against a State. The latter condition in terms of Article 51 relates to the question whether the peacekeeping troops represented 'State instrumentalities'.

The Fact-Finding Mission noted that there was insufficient evidence to ascertain an attack against the Russian peacekeeping contingent. Moreover, the Tagliavini Report's reliance in establishing facts on what is 'likely',<sup>193</sup> does not provide sufficient grounds for judging over war and peace as evidenced in the ICJ's *Oil Platforms* case. Nevertheless, in case Georgia had initiated an attack against the Russian peacekeeping base in Tskhinvali, the peacekeepers' status as 'State instrumentalities' would still be questionable.

<sup>186</sup> Y Dinstein, *War, Aggression and Self-Defense* (Cambridge University Press 2001) 181. See also Green (n 14) 382. See also R Zacklin, 'The Use of Force in Peacekeeping Operations' in Blokker and Schrijver (n 33) 92-93.

<sup>187</sup> Tagliavini (n 4) 10. See also A Barnard, 'Russians Push Past Separatist Region to Assault City in Central Georgia' *New York Times* (New York 11 August 2008) A1. See also Allison (n 185) 1157-1158.

<sup>188</sup> Tagliavini (n 4) 21.

<sup>189</sup> *ibid* 25.

<sup>190</sup> Bourtruche (n 146) 130-133.

<sup>191</sup> Letter from D Webster to Lord Ashburton 6 August 1842, reprinted in JB Moore, 2 A Digest of International Law (Washington: Government Printing Office 1906) 412.

<sup>192</sup> Tagliavini (n 8) 251.

<sup>193</sup> *ibid* 222.

The two members of the JPKF of Russian nationality that were purportedly killed in the attack by Georgia were under the command and control of the JCC and the joint military command of the JPKF. The international character of the peacekeeping mission is further mirrored in the direct participation of the OSCE. The Tagliavini Report's conclusion, that the Russian peacekeeping contingent represented 'State instrumentalities' and, as a consequence, Russia was entitled to intervene in the intra-State conflict under Article 51, remains uncertain.

It should be noted that the analysis in the Tagliavini Report is focused on the accountability of the allocating States for the activities of the peacekeeping troops. However, this does not undermine the status of the peacekeeping force for the main reason that in jurisprudence, more weight has been accorded to the command and control test. In this regard, it is important that the peacekeeping troops in South Ossetia were subjected to the JCC as well as the joint military command, and not to any one of the three allocating entities. The importance here is that, only the former can exercise command and control over the peacekeeping troops. In closing, unlike the Tagliavini Report, this research finds that the peacekeepers retained their neutral status under the auspices of the JPKF. ■