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Defense of Nationals Abroad: The Legitimacy of Russia's Invasion of Georgia

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DEFENSE OF NATIONALS ABROAD: THE LEGITIMACY OF RUSSIA'S INVASION OF GEORGIA

*Robert P. Chatham**

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I am obligated to defend the life and honor of Russian Citizens, wherever they may be. We will not let those responsible for the deaths of our people go unpunished.¹

I. INTRODUCTION

On August 8, 2008, Russia invaded² the sovereign nation of Georgia.³ In doing so, Russia claimed it was acting in self-defense of its citizens living in Georgia and located predominantly in the region of South Ossetia.⁴ Russian forces went well beyond South Ossetia and invaded further into Georgian territory, and remained in Georgian territory for approximately two months.⁵

This Article analyzes the legality of the stated Russian justification for invading Georgia—defense of its citizens. This Article will first provide a background on the conflict in South Ossetia.⁶ The Article will then examine the law applicable to a state's defense of its nationals abroad. Finally, it will apply the law and historical examples to determine the legality of the Russian invasion. While it is recognized that there may be additional justifications for the Russian invasion, this

1. Tony Karon, *Has Georgia Overreached in Ossetia?*, TIME, Aug. 9, 2008, available at <http://www.time.com/time/world/article/0,8599,1831073,00.html> (quoting Russian President Dmitry Medvedev).

2. The terms "invasion," "intervention," "interdiction," and "incursion" are synonymous for the purpose of describing the entry of Russian armed forces into Georgian territory.

3. Russia Completes Troop Pullout from S. Ossetia Buffer Zone, RIA Novosti, Oct. 08, 2008, <http://en.rian.ru/world/20081008/117600495.html> (last visited Jan. 25, 2011).

4. *Id.*

5. *Id.*

6. Due to the recentness of Russia's incursion into Georgia and the conflict in South Ossetia (Aug. 2008), many sources for this Article are from the Internet or news agencies.

Article focuses primarily on the defense of nationals abroad justification. It evaluates both Russia's claim that some South Ossetian residents were its citizens,⁷ as well as the legitimacy of the claim that it acted in their defense. This Article applies the known facts of the invasion to the international law that allows state armed attacks in certain limited circumstances and compares it to other invasions that have used a similar justification.

This Article raises numerous questions regarding the legitimacy of Russia's justification for invading Georgia. For example, does Russia's responsibility to protect its nationals abroad trigger a right to an invasion? Is an invasion proportional to Russia's need to defend its citizens? Is Georgia's alleged targeting of Russian inhabitants of South Ossetia, an internationally recognized Georgian territory, enough justification for Russia to invade Georgia? Does Georgia's failure to protect Russian citizens when using armed aggression to regain control of South Ossetia justify Russia's invasion? These questions must be analyzed in determining whether Russia was justified in invading Georgia to protect its citizens. Ultimately, this Article concludes that Russia's invasion of Georgia was not legitimate because it violated international law.

II. BACKGROUND

Georgia, sitting between Russia and Turkey along the Black Sea, contains two Russian-backed separatist regions—South Ossetia and Abkhazia.⁸ Established by the former Soviet Union in 1922, South Ossetia comprises a semi-autonomous region in northern Georgia, governing the region effectively independent from Georgia.⁹ A similar North Ossetian autonomous region exists within Russia dividing the Ossetia ethnic group between Russia and Georgia.¹⁰ The region has proclaimed its independence from Georgia, but no state recognized South Ossetia as an independent state when the conflict began.¹¹ Sizeable portions of South Ossetia are populated mainly by Georgians,

7. See discussion *infra* Part IV.

8. Reports: 6 *Die as Georgia Shells South Ossetia*, CNN.COM, Aug. 2, 2008, <http://www.cnn.com/2008/WORLD/europe/08/02/georgia.ossetia/index.html#cn-STCText> (last visited Jan. 24, 2011).

9. PETER ROUDIK, LAW LIBR. OF CONG., RUSSIAN FEDERATION: LEGAL ASPECTS OF WAR IN GEORGIA 2 (2008). Not much bigger than Rhode Island, South Ossetia is semi-autonomous but not recognized by the international community as independent. Karon, *supra* note 1.

10. ROUDIK, *supra* note 9, at 2.

11. AMNESTY INT'L, CIVILIANS IN THE LINE OF FIRE: THE GEORGIA RUSSIA CONFLICT 7 (2008). Russia (Aug. 26, 2008) and Nicaragua (Sept. 5, 2008) recognized South Ossetia's independence after the Russian invasion of Georgia, but during the Russian-Georgia conflict. *Id.*

and continue to be governed by Georgia.¹² In 2003, Georgia's current president, Mikheil Saakashvili, took office amidst the "Rose Revolution," making the restoration of Georgia's territorial integrity a priority.¹³ South Ossetia remains an internationally recognized part of Georgia.¹⁴

Shortly after the break-up of the Soviet Union, an agreement established the stationing of Russian, Georgian, and Ossetian peacekeeping units in South Ossetia.¹⁵ Russia has supported South Ossetian independence since the break-up of the Soviet Union.¹⁶ In 2006, Russia began to grant Russian citizenship to South Ossetians and issue them passports.¹⁷ Russia's claim of defense of its citizens within Georgia as justification for its invasion is based on these grants of citizenship.

III. THE CONFLICT

The five-day conflict between Georgia and Russia began on the night of August 7, 2008.¹⁸ Tensions between Georgia and South Ossetia were high throughout the first week of August and involved armed skirmishes.¹⁹ Under the protection of Russian forces, South Ossetia sought to expel ethnic Georgians from the region during the first few days of August.²⁰ At 1900 on August 7, 2008, Georgian President

12. *Id.*

13. U.S.: *Russia Trying to Topple Georgia Government*, CNN.COM, Aug. 11, 2008, <http://www.cnn.com/2008/WORLD/europe/08/10/un.georgia/index.html#cn-STCText> (last visited Jan. 24, 2011). The Rose Revolution occurred when a pro-Russian government in Georgia was replaced by one promoting western democracy. Robert Maginnis, *Russian Invasion of Georgia is an East-West Tipping Point*, HUM. EVENTS ONLINE, Aug. 10, 2008, <http://www.humanevents.com/article.php?id=27975> (last visited Jan. 24, 2011).

14. *South Ossetia Shootings Heighten Georgia Tension*, CNN.COM, July 4, 2008, <http://www.cnn.com/2008/WORLD/europe/07/04/georgia.ossetia/index.html#cn-STCText> (last visited Jan. 24, 2011). Several U.N. Security Council Resolutions affirm the international recognition of South Ossetia as part of Georgia. *Reaction to Russia's Recognition of Rebels*, BBC NEWS, Aug. 26, 2008, <http://news.bbc.co.uk/2/hi/europe/7582367.stm> (last visited Jan. 24, 2011) (quoting leaders such as former U.S. Secretary of State Condoleezza Rice and North Atlantic Treaty Organization Secretary-General Jaap De Hoop Scheffer confirming international recognition of South Ossetia as part of Georgia).

15. ROUDIK, *supra* note 9, at 2; *South Ossetia Shootings Heighten Georgia Tension*, *supra* note 14.

16. ROUDIK, *supra* note 9, at 3.

17. *Id.* at 2.

18. AMNESTY INT'L, *supra* note 11, at 9.

19. *Georgia 'Under Attack' as Russian Tanks Roll In*, CNN, Aug. 8, 2008, available at http://georgiandaily.com/index.php?option=com_content&task=view&id=5443&Itemid=69 [hereinafter *Georgia 'Under Attack'*].

20. ROUDIK, *supra* note 9, at 3.

Mikheil Saakashvili declared a unilateral ceasefire.²¹ That same night, after announcing that Georgian villages were being shelled and seeking to crack down on the separatists,²² Georgia launched an armed attack on the South Ossetian capital, Tskhinvali, at approximately 2300.²³ By the next day, Russia retaliated with an armed invasion of South Ossetia after Georgia had gained control of the region.²⁴ Within forty-eight hours, the Russian military subdued Georgian armed forces and continued its invasion into the sovereign Georgian territory beyond South Ossetia, even attacking within proximity of the Georgian capital of Tbilisi.²⁵ On August 12, 2008, Russia agreed to a truce, ending operations in Georgia, although it remained in Georgia for a considerable time after this date.²⁶

IV. GEORGIAN TERRITORIAL INTEGRITY

As armed skirmishes began and continued the first week of August 2008 between the Georgian government and South Ossetia, Georgia claimed it was executing its right to protect its territorial integrity.²⁷ International law afforded Georgia the right to maintain its territorial

21. AMNESTY INT'L, *supra* note 11, at 9.

22. C.J. Chivers & Ellen Barry, *Georgia Claims on Russia War Called Into Question*, N.Y. TIMES, Nov. 7, 2008, at A1; *Georgia 'Under Attack,' supra* note 19; Luke Harding, *EU Asked to Pinpoint Aggressor in Russia-Georgia War*, GUARDIAN, Nov. 18, 2008, available at <http://www.guardian.co.uk/world/2008/nov/18/russia-georgia-war>. New accounts have called into question Georgia's assertion that it was acting defensively against South Ossetian separatists. Chivers & Barry, *supra*, at A1. The true reason for Georgia's attack of the South Ossetia region is immaterial to this Article, which focuses solely on the legitimacy of Russia's justification for invading Georgia of acting in defense of its citizens.

23. AMNESTY INT'L, *supra* note 11, at 9. Originally, Georgia stated that it launched its attack on South Ossetia to restore constitutional order throughout the region. Dmitry Avaliani et al., *How the Georgian War Began: IWPR-Trained Reporters Investigate the Tragic Sequence of Events that Triggered War in South Ossetia*, CAUCASUS REPORTING SERV., No. 456 (Inst. for War and Peace Reporting), Aug. 22, 2008, http://www.iwpr.net/?p=crs&s=f&o=346346&apc_state=henh; *Georgia 'Under Attack,' supra* note 19. However, this is disputed as Georgian President Saakashvili stated on August 13, 2008 that Georgia responded to a Russian invasion of tanks into Georgian Territory. *Countdown in the Caucasus: Seven Days that Brought Russia and Georgia to War*, FIN. TIMES, Aug. 26, 2008, http://www.ft.com/cms/s/0/af25400a-739d-11dd-8a66-0000779fd18c.html?ncllick_check=1 (last visited Jan. 24, 2011). The actual reason is immaterial to this Article, which focuses solely on the legitimacy of one sovereign state invading another based on a claim of defense of the formers' citizens.

24. Karon, *supra* note 1.

25. ROUDIK, *supra* note 9, at 2; AMNESTY INT'L, *supra* note 11, at 11; Kelly Hearn, *Bush Condemns "Brutal" Russian Invasion; U.N. Stands Powerless as Forces Near Georgian Capital*, WASH. TIMES, Aug. 12, 2008, at A1.

26. AMNESTY INT'L, *supra* note 11, at 10.

27. Chivers & Barry, *supra* note 22, at A1.

integrity and political unity.²⁸ In order for parts or all of South Ossetia to assert its independence against Georgia, as part of Georgian territory, it must either have had the right to self-determination or have been viewed as a “power” under Common Article 2 of the Geneva Conventions.²⁹ Otherwise, actions by South Ossetia are internal to Georgia and can be dealt with as Georgia deems fit.

South Ossetia’s geographic location and status internationally were important in determining whether it had a right to move for independence against Georgia. Generally, only those people living in non-contiguous, separate territorial units have a right to self-determination.³⁰ South Ossetia lacked the right to self-determination because it lies within the contiguous, internationally-recognized sovereign borders of Georgia. Equally as limiting for South Ossetia is the fact that no country had recognized its independence at the time of the conflict with Georgia.³¹ However, portions of the region had been operating effectively independent from Georgia while other portions continued to be governed by Georgia. Ultimately, Georgia’s right to maintain territorial integrity arguably trumped the rights of South Ossetia to create an independent state.³² The conflict between South Ossetia and Georgia was likely an internal conflict or domestic action. Therefore, Georgia was bound only by Common Article III to the Geneva Conventions, requiring humane treatment without distinction of those not involved in hostilities, when taking action to maintain its territorial integrity.³³ Georgia had a right to maintain its territorial boundaries and political independence with necessary force particularly in response to the efforts by South Ossetia to expel ethnic Georgians and in response to any armed attack being delivered upon it by South Ossetia. But would legitimate efforts by Georgia imperil Russian citizens in a manner that would allow Russian intervention?

28. See Christian J. Garris, *Bosnia and the Limits of International Law*, 34 SANTA CLARA L. REV. 1039, 1066 (1994).

29. See Duncan B. Hollis, *Accountability in Chechnya-Addressing Internal Matters with Legal and Political Norms*, 36 B.C. L. REV. 793, 812–19 (1995).

30. *Id.* at 819–20.

31. AMNESTY INT’L, *supra* note 11, at 7.

32. See Garris, *supra* note 28, at 1067.

33. See Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field, art. 3, Aug. 12, 1949, 75 U.N.T.S. 31; Geneva Convention for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea, art. 3, Aug. 12, 1949, 75 U.N.T.S. 85; Geneva Convention Relative to the Treatment of Prisoners of War, art. 3, Aug. 12, 1949, 75 U.N.T.S. 135; Geneva Convention Relative to the Protection of Civilian Person in Time of War, art. 3, Aug. 12, 1949, 75 U.N.T.S. 287.

V. JUSTIFICATION

Russia's stated justification for its invasion of Georgia was the necessity to defend its citizens in South Ossetia from Georgian armed aggression.³⁴ Essentially, Russia claimed that Georgia had failed in its "responsibility to protect"³⁵ its inhabitants, many of whom were Russian citizens. The Russian Ambassador gave Russia's official position to the U.N. Security Council:

I have the hono[r] to assure you 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 from the illegal actions of the Georgian side and to prevent future armed attacks against them. . . . The use of force by the Russian side in self-defen[s]e will continue until the circumstances that brought it about cease to exist.³⁶

Russia claimed a right to defend its citizens in Georgian territory.³⁷ In insisting its actions were justified, Russia claimed that its citizens were being killed by Georgian armed forces in South Ossetia.³⁸ Moscow pledged that it sought only to restore the status quo in South Ossetia where its citizens resided.³⁹ Russia cited a constitutional mandate requiring it to protect its citizens in South Ossetia from alleged harm caused by Georgia.⁴⁰ Russian President Dmitry Medvedev also strongly asserted that Georgia had launched cruel attacks in South Ossetia killing Russian citizens.⁴¹

President Medvedev stated that Russia "will not allow the deaths of our compatriots to go unpunished," and "those guilty will receive due punishment. My duty as Russian president is to safeguard the lives and dignity of Russian citizens, wherever they are. This is what is behind

34. ROUDIK, *supra* note 9, at 3.

35. See GARETH EVANS, *THE RESPONSIBILITY TO PROTECT* 4–5 (2008). Responsibility to protect is a recent concept in international relations asserting that states have a duty not to mistreat their populations. *Id.*

36. Letter from Vitaly Churkin, Russian Ambassador to the United Nations, to the President of the Security Council, U.N. Doc. S/2008/545 (Aug. 11, 2008) (on file with author).

37. SECURITY COUNCIL REPORT, UPDATE REPORT: GEORGIA, NO. 2 (Aug. 12, 2008), available at <http://www.securitycouncilreport.org/site/c.glKWLeMTIsG/b.4423477/>.

38. Maginnis, *supra* note 13.

39. Oliver Knox, *Bush: Russia Must Reverse Course in Georgia*, AGENCE FR. PRESSE, Aug. 11, 2008, available at 2008 WL 120229.

40. Hearn, *supra* note 25.

41. Vladimir Rayuhin, *Medvedev, Putin Accuse Georgia of Genocide*, HINDU, Aug. 11, 2008, available at <http://www.hindu.com/2008/08/11/stories/2008081156011500.htm>.

the logic of the steps we are undertaking now.”⁴² He characterized the Georgian attack on South Ossetia as an act of aggression against Russian citizens even though it was an attack entirely within the sovereign territory of Georgia.⁴³ He compared alleged attacks on Russian citizens suffered in South Ossetia at the hands of Georgia armed forces to the attacks United States citizens suffered on 11 September 2001.⁴⁴ Russian leaders went so far as to say the invasion was justified because of the need to protect Russian citizens living in South Ossetia from “genocide” by the Georgian armed forces, and it must protect its citizens using military means, if necessary.⁴⁵

VI. USE OF FORCE

Before the justification can be reviewed, the international law basis for such use of force must be examined. Russia’s justification for using military force to protect its nationals abroad finds its roots in customary international law and the U.N. Charter (Charter). Both sources of law are crucial in determining the legitimacy of the justification.

A. Customary International Law

The use of force in self-defense has long predated the United Nations as a key part of customary international law and proper application of *jus ad bellum*.⁴⁶ Before the twentieth century, war was seen as a legal method for states to settle disputes.⁴⁷ Hugo Grotius first recognized three requirements for invoking the right to self-defense: (1) an immediate danger; (2) defensive actions are necessary to defend against the threat; and (3) the necessary actions are proportionate to the threat.⁴⁸ Grotius, noted as the father of international law,⁴⁹ articulated self-defense principles (imminence and necessity) using human

42. Georgia ‘Under Attack,’ *supra* note 19.

43. ROUDIK, *supra* note 9, at 8.

44. Dmitry Medvedev, Remarks at the Meeting of the Russian President with the Participants in the International Valdai Club (Sept. 12, 2008) (transcript available at http://www.kremlin.ru/eng/speeches/2008/09/12/1644_type82912type82917type84779_206409.shtml).

45. ROUDIK, *supra* note 9, at 9.

46. Ziyad Motala & David T. ButleRitchie, *Self-Defense in International Law, The United Nations, and the Bosnian Conflict*, 57 U. PITT. L. REV. 1, 10 (1995); Robert A. Zayac, Jr., *United States’ Authority to Legally Implement the Self-Defense and Anticipatory Self-Defense Doctrines to Eradicate the Threat Posed by Countries Harboring Terrorists and Producing Weapons of Mass Destruction*, 29 S. ILL. U. L.J. 433, 438 (2005).

47. Motala & ButleRitchie, *supra* note 46, at 15.

48. *Id.* at 10.

49. MOHAMMAD TAGHI KAROUBI, JUST OR UNJUST WAR? 70 (2004).

reasoning.⁵⁰

1. *Caroline* Doctrine

From the *Caroline* case emerged the doctrine widely held to be the basis for modern customary international law on the use of force in self-defense officially recognizing the requirements Grotius had promulgated.⁵¹ R.Y. Jennings, writing in 1938, stated that the *Caroline* case moved self-defense from a political excuse to a legal doctrine.⁵² The *Caroline* incident happened during the Canadian rebellion of 1837.⁵³ Many Americans were sympathetic with the Canadian rebels opposing British rule, especially near the Canadian border, and the U.S. government was not able to quell the sympathizers' support of the rebels.⁵⁴ British forces decided to destroy the *Caroline*, an American ship operating in and around Canadian and British waters, to hinder the rebels' efforts.⁵⁵ When the British first targeted the *Caroline*, she had made her way into Canadian waters and was being used in support of the rebellion.⁵⁶ But by the time the British attacked her, she had made her way back into U.S. territory.⁵⁷ Ultimately, the British forces set the *Caroline* on fire and destroyed the ship.⁵⁸

The British asserted self-defense as justification for its actions.⁵⁹ On April 24, 1841, U.S. Secretary of State Daniel Webster sent a letter to Henry Fox, the British minister in Washington, expressing the formula for what has become modern customary international law on self-defense.⁶⁰ The letter stated, "It will be for [the British] government to show a necessity of self-defense, instant, overwhelming, leaving no choice of means, and no moment for deliberation."⁶¹ It has become commonly accepted that the general rule and basic elements for the legitimate use of force in self-defense under customary international law

50. Jason A. Wrachford, *The 2006 Israeli Invasion of Lebanon: Aggression, Self-Defense, or a Reprisal Gone Bad?*, 60 A.F. L. REV. 29, 51–52 (2007). St. Augustine and St. Thomas Aquinas preceded Grotius with their just war theory based on Christian theology. See KAROUBI, *supra* note 49, at 62–63, 67.

51. Motala & ButleRitchie, *supra* note 46, at 10.

52. R.Y. Jennings, *The Caroline and McLeod Cases*, 32 AM. J. INT'L L. 82, 82 (1938).

53. *Id.*

54. *Id.*

55. *Id.* at 82–83.

56. *Id.* at 83.

57. *Id.*

58. *Id.*

59. *Id.* at 85.

60. *Id.* at 89.

61. DANIEL WEBSTER, THE DIPLOMATIC AND OFFICIAL PAPERS OF DANIEL WEBSTER, WHILE SECRETARY OF STATE 110 (1848).

was set out in the letter.⁶² With the requirement of proportionality augmenting Grotius' requirements of necessity and immediacy, Secretary Webster's assertion makes up the *Caroline* Doctrine.⁶³

2. Immediacy

Secretary Webster's formulation of self-defense presumes an armed attack or imminent threat of armed attack to justify an armed response.⁶⁴ Real and ongoing threats signal immediacy—though immediacy is not defined by international law.⁶⁵ Force is only permitted in cases where the immediacy of attack is abundantly clear and great.⁶⁶ A response in self-defense must take place close in time to the attack so that the relationship of the response to the attack is evident.⁶⁷ Response timing holds importance, as a state may not use force in self-defense long after an attack has concluded, or to deter non-imminent future aggression.⁶⁸

3. Necessity

Daniel Webster described necessity best as a threat that must be instant and overwhelming, leaving no other choice.⁶⁹ Necessity requires the existence of a danger and the nonexistence of reasonable peaceful alternatives.⁷⁰ A state may only use force in response to a threat if no other reasonable means of addressing the threat exist.⁷¹ A response aimed at stopping an immediate, unavoidable threat would satisfy the necessity requirement.⁷² State attempts to first peacefully resolve the threat, if practical, before using force are helpful in demonstrating the necessity to use force.⁷³

62. Timothy Kearley, *Raising the Caroline*, 17 WIS. INT'L L.J. 325, 325 (1999); see 1 OPPENHEIM'S INTERNATIONAL LAW 420 (Robert Jennings & Arthur Watts eds., 8th ed. 1992).

63. Kearley, *supra* note 62, at 325.

64. Martin A. Rogoff & Edward Collins, Jr., *The Caroline Incident and the Development of International Law*, 16 BROOK. J. INT'L L. 493, 501–02 (1990).

65. Zayac, *supra* note 46, at 451.

66. Rogoff & Collins, *supra* note 64, at 506.

67. Wrachford, *supra* note 50, at 70.

68. Mikael Nabati, *International Law at a Crossroads: Self-Defense, Global Terrorism, and Preemption (A Call to Rethink the Self-Defense Normative Framework)*, 13 TRANSNAT'L L. & CONTEMP. PROBS. 771, 777 (2003).

69. WEBSTER, *supra* note 61, at 110.

70. Lee Stuesser, *Active Defense: State Military Response to International Terrorism*, 17 CAL. W. INT'L L.J. 4, 31 (1987).

71. Rogoff & Collins, *supra* note 64, at 498.

72. Karl M. Meessen, *Unilateral Recourse to Military Force Against Terrorist Attacks*, 28 YALE J. INT'L L. 341, 349 (2003).

73. Oscar Schachter, *The Right of States to Use Armed Force*, 82 MICH. L. REV. 1620, 1635 (1984); Zayac, *supra* note 46, at 451.

4. Proportionality

According to Secretary Webster, proportionality permits use of force only as necessary to counter a threat and requires use of force to not be unreasonable or excessive.⁷⁴ Thus, an action in self-defense that greatly exceeds the imminent threat will be viewed as illegally disproportionate.⁷⁵ An isolated attack confined to a given location generally would not warrant a counter action that invades the territory of the aggressor state far separate from the original location of conflict unless necessary to alleviate the threat.⁷⁶ A response to a threat is not unreasonable or excessive if limited to the necessity of alleviating or removing the threat.⁷⁷ It must be aimed at repelling an attack or restoring the status quo.⁷⁸

B. U.N. Charter

The use of force, once governed only by customary international law set out by Secretary Webster's *Caroline* Doctrine, found codification in the U.N. Charter. The Charter, similar to the *Caroline* Doctrine, severely limited the situations where one sovereign state could use force against another. Most importantly, however, a state's ability to use force in self-defense endured under the Charter.

1. Article 2(4)

The modern law on *jus ad bellum* is found in the Charter.⁷⁹ War (and other uses of force) was thought to have been outlawed upon passage of the Charter.⁸⁰ The Charter asserts a strict prohibition against the use of

74. Michael J. Glennon, *The Fog of Law: Self-Defense, Inherence, and Incoherence in Article 51 of the United Nations Charter*, 25 HARV. J.L. & PUB. POL'Y 539, 545 (2002); Zayac, *supra* note 46, at 451–52.

75. Schachter, *supra* note 73, at 1637. Proportionality in the context of *jus ad bellum* should not be confused with the term as used in the context of *jus in bello*. Proportionality in *jus in bello* refers to the fundamental law of war principle that the loss of civilian life and damage to civilian property must not be excessive when compared to the military advantage gained. Wrachford, *supra* note 50, at 87.

76. Schachter, *supra* note 73, at 1637–38.

77. See Wallace F. Warriner, *The Unilateral Use of Coercion Under International Law: A Legal Analysis of the United States Raid on Libya on April 14, 1986*, 37 NAVAL L. REV. 49, 59 (1988); Zayac, *supra* note 46, at 452–53.

78. Nabati, *supra* note 68, at 778.

79. Rogoff & Collins, *supra* note 64, at 505. The Charter was established on October 24, 1945. MARY ELLEN O'CONNELL, INTERNATIONAL LAW AND THE USE OF FORCE: CASES AND MATERIALS 211 (2005).

80. Jackson Nyamuya Maogoto, *Walking an International Law Tightrope: Use of Military Force to Counter Terrorism—Willing the Ends*, 31 BROOK. J. INT'L L. 405, 411 (2006);

force.⁸¹ The Charter requires member states to “settle their international disputes by peaceful means. . . .”⁸² But it restricts the United Nations from intervention “in matters which are essentially within the domestic jurisdiction of any state. . . .”⁸³ Article 2(4) is the key provision of the Charter for controlling and preventing conflict and aggression.⁸⁴ It requires members to “refrain in their international relations from the threat or use of force” to resolve disputes.⁸⁵ Any clear, direct threat violates the Charter.⁸⁶ While Article 2(4) expressly limits threat or use of force intending to violate a state’s territorial integrity or political independence, any attack that trespasses on a state’s territory likely violates the Article.⁸⁷ The Charter delineates two exceptions to the prohibition on the use of force: self-defense upon an armed attack and use of force authorized by the U.N. Security Council.⁸⁸

2. Article 51

Article 51 codifies when states can resort to the use of force in self-defense.⁸⁹ The Article states:

Nothing in the present Chapter shall impair the inherent right of individual or collective self-defense if an armed attack occurs against a member of the United Nations, until the Security Council has taken measures necessary to maintain international

Schachter, *supra* note 73, at 1620.

81. U.N. Charter art. 2, para 4.; 1 BRUNO SIMMA, *THE CHARTER OF THE UNITED NATIONS, A COMMENTARY* 123 (2d ed. 2002); Timothy Kearley, *Regulation of Preventive and Preemptive Force in the United Nations Charter: A Search for Original Intent*, 3 WYO. L. REV. 663, 669 (2003).

82. U.N. Charter art. 2, para 3. (“[a]ll Members shall settle their international disputes by peaceful means in such a manner that international peace and security, and justice, are not endangered.”).

83. U.N. Charter art. 2, para 7. (“[n]othing contained in the present Charter shall authorize the United Nations to intervene in matters which are essentially within the domestic jurisdiction of any state. . . .”).

84. Thomas Graham, Jr., *National Self-Defense, International Law, and Weapons of Mass Destruction*, 4 CHI. J. INT’L L. 1, 3 (2003); Zayac, *supra* note 46, at 439.

85. U.N. Charter art. 2, para 4. (“[a]ll members shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any state. . . .”).

86. Graham, *supra* note 84, at 8.

87. IAN BROWNLIE, *INTERNATIONAL LAW AND THE USE OF FORCE BY STATES* 265–68 (1963); Maogoto, *supra* note 80, at 412 (stating that “[t]he terms ‘territorial integrity’ and ‘political independence’ include most forms of armed force . . . incursion into the territory of another state constitutes an infringement of Article 2(4), even if . . . invading troops are meant to withdraw immediately after completing a temporary and limited operation.”).

88. SIMMA, *supra* note 81, at 125–28; Schachter, *supra* note 73, at 1620.

89. Zayac, *supra* note 46, at 440.

peace and security. . . .⁹⁰

In authorizing self-defense, Article 51 legitimizes certain acts of force which would otherwise be illegal.⁹¹ The United Nations intended Articles 2(4) and 51 to work together even though Article 51 is the only exception allowing a state to use force (prior to U.N. approval) without being labeled an aggressor.⁹²

Article 51 does not explicitly list or require any prerequisite conditions prior to a state asserting self-defense as a justification for the use of force.⁹³ But, customary international law requires the prerequisites of immediacy, necessity, and proportionality.⁹⁴ As part of Article 51, the “inherent right” of self-defense refers to and includes the customary international law rights to self-defense that pre-dated the Charter.⁹⁵ In a 1986⁹⁶ dispute between Nicaragua and the United States,⁹⁷ the International Court of Justice (ICJ) affirmed that the Article

90. U.N. Charter art. 51.

91. INGRID DETTER DE LUPIS, *THE LAW OF WAR* 173 (1987).

92. Zayac, *supra* note 46, at 445. It preserves a state's inherent right to determine whether an armed attack has taken place against it, as long as it is not made in error, without being treated as an aggressor in violation of Article 2(4). *Id.* at 448.

93. *Id.* at 449. The Article requires an “armed attack” but there is substantial debate over whether the term means an actual, direct armed attack. Robert F. Teplitz, *Taking Assassination Attempts Seriously: Did the United States Violate International Law in Forcefully Responding to the Iraqi Plot to Kill George Bush?*, 28 CORNELL INT'L L.J. 569, 581 (1995). An armed attack always violates Article 2(4) while not all violations of Article 2(4) are armed attacks legalizing the right to self-defense under Article 51. SIMMA, *supra* note 81, at 796.

94. Zayac, *supra* note 46, at 450.

95. CHRISTINE GRAY, *INTERNATIONAL LAW AND THE USE OF FORCE* 98 (2d ed. 2004); Kearley, *supra* note 62, at 327; Rogoff & Collins, *supra* note 64, at 506. A counter (restrictive) view exists that holds Article 51 substantially narrowed the right of self-defense as it existed under customary international law prior to the Charter and must be in response to an armed attack. Kearley, *supra* note 62, at 669-70. Adoption of this view would require states to suffer an armed attack before responding, perhaps no longer with the capacity to be able to respond. D.W. BOWETT, *SELF-DEFENCE IN INTERNATIONAL LAW* 191-92 (1958). For the purpose of this Article it is not necessary to explore this counter view because Russia asserts that it invaded Georgia in response to an actual armed attack on its citizens which would satisfy either view on the right to self-defense.

96. *Id.* at 94, 103; Kearley, *supra* note 62, at 327. “It cannot therefore be held that Article 51 is a provision which ‘subsumes and supervenes’ customary international law. It rather demonstrates that . . . customary international law continues to exist alongside treaty law.” Military and Paramilitary Activities, 1986 I.C.J. at 94. The Third Restatement of U.S. Foreign Relations Law asserts that when international judicial tribunals rely on a doctrine, it greatly shows that the doctrine is accepted international law. Teplitz, *supra* note 93, at 579; *see also* SIMMA, *supra* note 81, at 133-35 (stating that the majority of international law commentators consider Articles 2(4) and 51 to be part of customary international law, and the ICJ adopted this view).

97. The ICJ ruled against the United States for violating international law by supporting the contra opposition to the Nicaraguan government (including placing mines in the Nicaraguan

51 right of self-defense already existed and continues to exist as a matter of customary international law. It also essentially adopted the *Caroline* Doctrine by explicitly recognizing the customary international law requirements of immediacy, necessity, and proportionality.⁹⁸ Therefore, Article 51 incorporates and codifies the *Caroline* Doctrine delineating how states may respond to an armed attack.⁹⁹

3. The *Caroline* Doctrine in the Charter Era

Particularly since the Charter was formed, the *Caroline* Doctrine's application, as customary international law, has expanded to all uses of force in self-defense by states.¹⁰⁰ The *Caroline* Doctrine and the requirements of immediacy, necessity, and proportionality remain applicable as a way to interpret the Charter and as an alternative source of law.¹⁰¹ The elements of immediacy, necessity, and proportionality are accepted as part of customary international law in addition to the requirements of Article 51.¹⁰²

4. Defense of Nationals Abroad

International law does not blindly ignore situations where the safety of a state's nationals is threatened within the territory of another state. Ignoring such situations would be contrary to the Charter's intent to respect and protect human rights. Under customary international law, a state may protect its citizens abroad if they are in danger and the host state is unable or unwilling to protect them.¹⁰³ Under a social contract

territorial sea) while the United States contended that Nicaragua's support (supplying arms) to guerillas fighting against El Salvador constituted an armed attack against El Salvador. Military and Paramilitary Activities [(Nicar. v. U.S.), 1986 I.C.J. 14 (June 27)] (holding that assistance to rebels by providing weapons does not equal an armed attack, and in customary international law collective self-defense is illegal without a request for assistance from the victim state).

98. Glennon, *supra* note 74, at 545; Motala & ButleRitchie, *supra* note 46, at 11; Zayac, *supra* note 46, at 450–51; see SIMMA, *supra* note 81, at 793 (stating that the ICJ considers that Article 51 and the right of self-defense under customary international law coincide).

99. Kearley, *supra* note 62, at 327; see Ronald St. John Macdonald, *The Use of Force by States in International Law*, in INTERNATIONAL LAW: ACHIEVEMENTS AND PROSPECTS 717, 721 (Mohammed Bedjaoui ed., 1991).

100. Kearley, *supra* note 62, at 325. One of four accepted sources of international law listed by Article 38 of the Statute of the ICJ, International custom or customary international law results through common and continuous practice and observance of states as *opinio juris*. INT'L & OPERATIONAL LAW DEP'T, THE JUDGE ADVOCATE GENERAL'S LEGAL CTR. AND SCH., U.S. ARMY, 57TH GRADUATE COURSE DESKBOOK VOL. I (Aug. 2008) at B-3-4.

101. Kearley, *supra* note 62, at 327.

102. See Macdonald, *supra* note 99, at 721.

103. Schachter, *supra* note 73, at 1630; Gregory Travalio, *Terrorism, International Law, and the Use of Military Force*, 18 WIS. INT'L L.J. 145, 160–61 (2000); see BOWETT, *supra* note 95, at 87–88. This right is recognized by the United States, the United Kingdom, France, Israel,

theory between a state and its citizens, a wrong against a citizen is a wrong against the state, and the state must protect its citizens whether at home or abroad.¹⁰⁴ There must be an imminent threat of injury to a state's citizens, a failure or inability of the host state to protect them, and measures of protection must be strictly confined to protecting the citizens from harm.¹⁰⁵ The use of force by a state may be defined as self-defense provided that the state complies with the principles of necessity, proportionality, and immediacy.¹⁰⁶ This places the use of force in conformity with Article 51 of the Charter. The principle of proportionality requires that any invasion for the purpose of protecting a state's citizens abroad must be terminated as soon as possible with minimal encroachment on the territorial sovereignty of the host state.¹⁰⁷ The right of self-defense exists as long as it is limited to that necessary to protect the nationals from harm.¹⁰⁸ A state's actions will be judged in hindsight, and, therefore, states are cautioned to limit their use of force as much as possible.

This form of armed intervention in self-defense has generally been justified by the necessity of quick action to save the lives of innocents where the host government is unwilling or unable to act.¹⁰⁹ Without action, innocent nationals abroad would have no means of protection. Action in self-defense may only be taken where there is no other way to protect the nationals and the danger is real and immediate.¹¹⁰ All

and numerous other states and has never been contradicted by U.N. action. Warriner, *supra* note 77, at 65. Under Article 51, use of force in self-defense is permitted if an armed attack has occurred which includes an attack on a state's citizens abroad. Antonio Cassese, *The International Community's "Legal" Response to Terrorism*, 38 INT'L & COMP. L.Q. 589, 596 (1989).

104. Nikolai Krylov, *Humanitarian Intervention: Pros and Cons*, 17 LOY. L.A. INT'L & COMP. L.J. 365, 377 (1995).

105. YORAM DINSTEIN, *WAR, AGGRESSION AND SELF-DEFENCE* 231 (4th ed. 2005).

106. *Id.* In other words, the customary international law requirements promulgated in the *Caroline* doctrine must be met. Rogoff & Collins, *supra* note 64, at 502. Israel's ambassador to the United Nations cited the *Caroline* doctrine as justification for Israel's actions to protect its nationals abroad at the Entebbe Airport in Uganda in 1976. Graham, *supra* note 84, at 7. Some international law experts assert another basis for intervention—the protection of nationals abroad does not violate Article 2(4) because the use or threat of use is not a breach of the territorial integrity or political independence of a state. Richard B. Lillich, *Forcible Self Help Under International Law*, in NATIONAL SECURITY LAW 129 (John Norton Moore & Robert F. Turner eds., 2d ed. 2005); Schachter, *supra* note 73, at 1632. While this argument is recognized, Russia asserted a right to self-defense under Article 51 in protecting its citizens in Georgian territory. Furthermore, most governments hold that any forcible entry into another state's territory violates its territorial integrity regardless of the justification making the Article 2(4) prohibition of the use of force applicable to protection of nationals abroad. *Id.*

107. BROWNIE, *supra* note 87, at 265; DINSTEIN, *supra* note 105, at 232.

108. Schachter, *supra* note 73, at 1630.

109. *Id.*

110. *Id.* at 1631.

diplomatic and political options should be exhausted before using force. The legitimacy of self-defense to protect a state's citizens abroad is based on the nexus of citizenship and it is inapplicable to non-citizens.¹¹¹ In order for a state to invoke a right to self-defense of its nationals abroad, the harm to its citizens must be significant and at the direction or omission of another state.¹¹² Because any action likely violates the territorial integrity of another state, it should only be used in exceptional circumstances, as a last resort, and where tremendous harm is imminent. Russia's actions in Georgia will be judged by these standards.

5. Reprisal

Russia's actions may be judged as retaliation against Georgia for past wrongs since the actions occurred long after troubles between the two states had begun.¹¹³ All uses of force must be justified as self-defense under Article 51, and reprisals, once lawful, are no longer permitted under any circumstances.¹¹⁴ A reprisal comes after an event where the harm has already taken place and can no longer be defended against.¹¹⁵ Legitimate self-defense is limited to repelling an armed attack and cannot be for retaliatory or punitive reasons.¹¹⁶ While the Charter does not specifically address reprisal, the U.N. General Assembly affirmatively declared that states must not commit reprisals.¹¹⁷ Incorporation of the *Caroline* Doctrine as part of Article 51 ensures that states do not act in retaliation.¹¹⁸ In order to not constitute a reprisal, Russia's actions must not have been an effort to inflict harm on Georgia for a previous disagreement, and must have been legally justified.

6. Humanitarian Intervention

While Russia asserted defense of its nationals abroad as the lawful basis for its invasion of Georgian territory, humanitarian intervention is

111. DINSTEIN, *supra* note 105, at 234; see BOWETT, *supra* note 95, at 94–96. The legality of humanitarian intervention for non-citizens is reviewed in Part VI.B.6. of this Article.

112. Warriner, *supra* note 77, at 61. The ICJ has suggested that there must be a substantial degree of control by a state over individual acts for those acts to be credited to the state. Travalio, *supra* note 103, at 152.

113. See generally *infra* note 196 and accompanying text (discussing the Georgia-Russia conflict history).

114. Maogoto, *supra* note 80, at 420; Rogoff & Collins, *supra* note 64, at 510.

115. Warriner, *supra* note 77, at 59.

116. SIMMA, *supra* note 81, at 670.

117. Warriner, *supra* note 77, at 55.

118. Graham, *supra* note 84, at 7.

another possible basis to legitimize Russia's actions. The doctrine of humanitarian intervention allows a unilateral action that infringes on another state's territorial sovereignty to prevent that state from committing human rights violations against its citizens.¹¹⁹ It is best justified as a necessary action against a state's sovereignty where that state acts contrary to general concepts of humanity.¹²⁰ In such cases, use of force against the territorial integrity or political independence of the state acting contrary to the laws of humanity is legitimized. Russia's actions, under this doctrine, would have been to prevent Georgia from continuing to commit human rights violations against the residents of South Ossetia.

Some consider humanitarian intervention to encompass defense of a state's nationals abroad.¹²¹ Protecting one's nationals abroad should be justified as a form of legitimate self-defense.¹²² The Charter prohibits the threat or use of force, with self-defense and the authorization of the Security Council being the only express exceptions to this prohibition. Intervening on behalf of another state's citizens cannot be interpreted as self-defense.¹²³ This makes defense of a state's citizens abroad distinct from humanitarian intervention and a much stronger argument for Russia's intervention in Georgia.

However, with state sovereignty a critical principle of international law, the Preamble to the Charter may support humanitarian intervention¹²⁴ as it calls on Member States "to ensure, by the acceptance of principles and the institution of methods, that armed force shall not be used, save in the common interest."¹²⁵ Furthermore, the

119. Barry M. Benjamin, *Unilateral Humanitarian Intervention: Legalizing the Use of Force to Prevent Human Rights Atrocities*, 16 FORDHAM INT'L L.J. 120, 120 (1992).

120. Thomas M. Franck & Nigel S. Rodley, *After Bangladesh: The Law of Humanitarian Intervention by Military Force*, 67 AM. J. INT'L L. 275, 277 (1973). Both St. Thomas Aquinas and Hugo Grotius supported such a position. See Krylov, *supra* note 104, at 368. Aquinas declared that where a state treats its citizens in a way contrary to that which is acceptable, another state had the right to intervene. Jean-Pierre L. Fonteyne, *The Customary International Law Doctrine of Humanitarian Intervention: Its Current Validity Under the U.N. Charter*, 4 CAL. W. INT'L L.J. 203, 214 (1974). Grotius similarly opined that society had a right to intervene when a state unjustly mistreated its citizens. HUGO GROTIUS, *DE JURE BELLI AC PACIS* 584 (Francis W. Kelsey trans., Clarendon Press 1925). For further discussion, see also Nicholas Onuf, *Humanitarian Intervention: The Early Years*, 16 FLA. J. INT'L L. 753 (2004).

121. Krylov, *supra* note 104, at 368.

122. See *id.* at 380.

123. *Id.*

124. See Benjamin, *supra* note 119, at 141, 149. Another argument in support of the legality of humanitarian intervention is that it does not violate Article 2(4) because it does not breach another state's territorial integrity or political independence. *Id.*

125. U.N. Charter pmbl. The 1948 Universal Declaration of Human Rights, the 1966 Covenant of Human Rights, the 1950 European Convention of Human Rights, the 1975 Helsinki Accords, and the Copenhagen Declaration, as well as the ICJ's recognition of an obligation to

Preamble seeks “to reaffirm faith in fundamental human rights, in the dignity of and worth of the human person. . . .”¹²⁶ As a member of the United Nations or through treaty obligations, a state may limit its authority or sovereignty but strengthen its security and receive additional benefits.¹²⁷ Its authority may be limited with regard to its treatment of its nationals. But without action by the Security Council, using humanitarian intervention as a justification for the use of force is a much weaker argument than the defense of one’s nationals abroad as it is not broadly accepted as legitimate. This is likely the reason, in addition to Russia’s claim that the South Ossetian residents it was protecting were Russian nationals, that Russia did not claim humanitarian intervention as justification.

For any possible legitimate justification of humanitarian intervention, it must only be employed in extreme circumstances of widespread abuse involving a large number of people.¹²⁸ Georgia’s treatment of the South Ossetian residents is debatable. Georgia claimed that any armed action it took against South Ossetia was to reclaim and control its own territory. Russia painted a very different story of Georgia targeting and harming South Ossetian residents. But Russia would have a difficult time showing an extreme circumstance of Georgia committing widespread abuse.

Even if Russia could show that widespread abuse took place, use of force should be the last action after collective responses.¹²⁹ Using force alone, without the cooperation of additional states or organizations, might imply an impermissible action in violation of Article 2(4).¹³⁰ Therefore, humanitarian intervention should only take place when no other alternative or solution exists. The response should be on par with the human rights violations.¹³¹ Russia acted alone before any attempt at a collective action was made other than filing a protest with the United Nations. Enlisting the United Nations or other states to help stop the conflict in South Ossetia were viable options that Russia ignored. Because the legality of humanitarian intervention is tenuous at best, and

respect human rights, further support the legitimacy of humanitarian intervention in violation of a state’s sovereignty. Krylov, *supra* note 104, at 374–75.

126. U.N. Charter pmbl. Use of force consistent with principles of the Charter pertaining to human rights and not directed against the territorial integrity or political independence of a state in violation of Article 2(4) may be legitimate. Krylov, *supra* note 104, at 383.

127. *Id.* at 375.

128. Benjamin, *supra* note 119, at 153–54.

129. Krylov, *supra* note 104, at 385.

130. See Benjamin, *supra* note 119, at 130. The legislative history of the Charter indicates that the drafters intended the use of force to be illegal in all cases except those expressly stated. *Id.* This defeats any reading or interpretation of the Preamble and other provisions of the Charter as supportive of the concept of humanitarian intervention. *Id.*

131. Krylov, *supra* note 104, at 392.

Russia would have a hard time showing it responded to an extreme circumstance of widespread abuse, Russia was wise in using protection of its nationals abroad as its justification rather than the doctrine of humanitarian intervention.

VII. RUSSIAN CITIZENSHIP

Russia's claim that it was defending its citizens within the sovereign Georgian territory of South Ossetia rests entirely on the validity of that citizenship. Without certain South Ossetian residents having Russian citizenship, Russia would have little legal justification, if any, for protecting those residents. The ICJ identified nationality as the factor that allows a state to protect its citizens in the *Nottebohm* case.¹³² A state can only afford diplomatic protections to its own nationals. Friedrich Nottebohm was born in Germany in 1881 and retained German citizenship until 1939 when he applied for naturalization in Liechtenstein in order to avoid ties with Germany shortly after the opening of World War II.¹³³ Beginning in 1905, he lived in Guatemala and conducted all his business activities there.¹³⁴ Prior to applying for naturalization, Nottebohm's connections to Liechtenstein were very tenuous other than a few visits to see his brother who began living there in 1931.¹³⁵ Even after applying for naturalization, he continued to have his permanent residence in Guatemala.¹³⁶ The ICJ decided that the grant of nationality by Liechtenstein did not obligate Guatemala to recognize the grant even though it may have been valid under Liechtenstein's domestic law.¹³⁷ Liechtenstein failed to show that Nottebohm had closer ties to it than any other state at the time of his naturalization.¹³⁸ Nottebohm's connections to Guatemala were long and close, while he had no bond with Liechtenstein, and the naturalization did not alter his lifestyle.¹³⁹ International law has absorbed the *Nottebohm* holding as the general rule.

International law does not restrict a state's right to confer citizenship; rather, it limits the recognition by other states of

132. *Nottebohm Case (Liech. v. Guat.)*, 1955 I.C.J. 4, 13 (Apr. 6, 1955) (holding that the nationality Liechtenstein conferred on Nottebohm could not be relied upon against Guatemala making Liechtenstein's claim inadmissible based on international law).

133. *Id.*

134. *Id.*

135. *Id.*

136. *Id.*

137. *Id.* at 26.

138. *Id.* at 24–26.

139. *Id.* at 26.

unreasonable grants of citizenship.¹⁴⁰ Every state is entitled, within its own domestic jurisdiction, to determine its own rules regarding the grant of citizenship, and the grant shall be recognized by other states as long as it is consistent with international law.¹⁴¹ Likewise, Russia was entitled to grant citizenship to South Ossetian residents. But that grant must have been consistent with international law for Georgia and other states to be required to recognize it. In order to be a bona fide national of a state recognized as such by international law, there must be a “genuine link” between the national and the state.¹⁴² The ICJ cited strong factual ties between the person whose nationality is questioned and the states involved as well as the habitual residence, center of interests, family ties, participation in public life, intentions for the future, traditions, activities, and attachment shown by the person for a given country as key factors taken into consideration when determining a state’s right to exercise protection over that person.¹⁴³ The person must be more closely connected with the population of the state conferring citizenship than with any other state.¹⁴⁴ There must be a genuine connection between a person and a state that wishes to protect him or her against other states. It is questionable, at best, whether such a genuine connection existed between the residents of South Ossetia granted citizenship and Russia.

If the residents of South Ossetia had never visited or entered the territory of Russia, their relationship with Russia would be even more tenuous than *Nottebohm*’s relationship with Liechtenstein.¹⁴⁵ The longer a person resides in and contributes to a state, the greater the nexus between that state and the naturalization it confers on the person.¹⁴⁶ Obtaining naturalization has been dependent on the

140. Robert D. Sloane, *Breaking the Genuine Link: The Contemporary International Legal Regulation of Nationality*, 50 HARV. INT’L L.J. 1, 3 (2009).

141. *See id.* at 7.

142. *Id.* at 1; *see* IAN BROWNLIE, *PRINCIPLES OF INTERNATIONAL LAW* 374, 396 (6th ed. 2003). “For purposes of international law, an individual has the nationality of a state that confers it, but other states need not accept that nationality when it is not based on a genuine link between the state and the individual.” RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW OF THE UNITED STATES § 211 (1987).

143. *Nottebohm*, 1955 I.C.J. at 22–24.

144. *Id.* at 23.

145. *See, e.g.,* Pasha L. Hsieh, *An Unrecognized State in Foreign and International Courts: The Case of the Republic of China on Taiwan*, 28 MICH. J. INT’L L. 765, 812 (2007). This Article does not go into investigative depth regarding the genuine connection between the naturalized South Ossetian residents and Russia. The Article ventures beyond whether Russia could prove a genuine link that would enable it to protect its citizens in South Ossetia so that the legitimacy of the defense of those citizens can be evaluated.

146. Yaffa Zilbershats, *Reconsidering the Concept of Citizenship*, 36 TEX. INT’L L.J. 689, 710 (2001).

precondition of residence.¹⁴⁷ Previous attempts by a state to confer citizenship on all persons within a given radius or of a certain political persuasion have failed to gain recognition at an international level.¹⁴⁸ The specific intent behind a person's naturalization by a state must be evaluated.¹⁴⁹ Therefore, if Russia simply wanted to expand its reach and control by naturalizing residents within the limits of South Ossetia, without more, it likely would not have to be recognized by other states. The naturalized residents did not reside in Russia, so any nexus created by their contributions to Russia were tenuous. As residents of sovereign Georgian territory, the greater nexus existed between them and Georgia. Without residency in Russia, the other factors considered by the ICJ in the *Nottebohm* case must be evaluated. Though residency is the primary factor, the ethnicity, interests, family ties, traditions, future intentions, and activities of naturalized South Ossetian residents may all have related to Russia and shown a stronger nexus to that nation. Among the factors to consider are that the Soviet Union established the Ossetian region, and the Soviet Union, after its collapse, eventually evolved into the Russian Federation.¹⁵⁰ Additionally, the region is split in half with the north part of Russia and the south part of Georgia.¹⁵¹ After evaluating the other factors, perhaps a genuine connection could be found between the naturalized South Ossetian residents and Russia. Failure to show such a connection—a huge obstacle because the South Ossetians were not residents of Russia—would defeat Russia's claim that it was defending its nationals abroad.

VIII. ANALYSIS

Although Russia would have a hard time proving that the citizenship it bestowed on residents of South Ossetia must be recognized by other states under international law, Russia stated a lawful justification under the Charter and customary international law for its actions in Georgia. Assuming Russia could prove the South Ossetians were its nationals, the justification must be reviewed to determine its legitimacy and whether it was a pretext. To be legitimate, Russia must have acted for the limited purpose of self-defense of its nationals residing in Georgian territory.

147. See *id.* at 713. Residence is a requirement for naturalization in the United States. *Id.* at 714.

148. Sloane, *supra* note 140, at 3.

149. See *id.* at 11.

150. ROUDIK, *supra* note 9, at 2.

151. *Id.*

A. Article 2(4) Violation

Russia defended its intervention into Georgia as a legitimate act of self-defense of its nationals in Georgian territory under Article 51.¹⁵² Article 2(4) proscribes any threat or use of force that violates the territorial integrity of another state.¹⁵³ Once Russia crossed into South Ossetia, part of Georgian territory, and took up arms, it violated Article 2(4). In order for Russia to protect its nationals from mistreatment by Georgia, Russian forces would have to confront and possibly engage Georgian forces. But Russia's actions were specifically directed at the Georgian government and armed forces. Its use of force was not limited in any way to avoid confrontation and engagement with Georgia or to minimize the impact or degree of force to that necessary to rescue its nationals.¹⁵⁴ Russia encroached on the territorial integrity of Georgia (initially into South Ossetia and then further into Georgian territory) defying the Charter's prohibition on the use of force.¹⁵⁵ Russia's invasion of Georgian territory was a violation of international law unless further legitimate justification existed for its actions.

B. Article 51 Exception

Russia justified its actions as self-defense—an exception to the Charter's prohibition on the use of force. Article 51 requires an armed attack in order for Russia to avail itself of the self-defense exception to the Charter. Did the alleged attack by Georgia on Russian citizens within its territory constitute an armed attack against Russia? Ample dispute exists as to Georgia's motivation for military attacks on parts of South Ossetia.¹⁵⁶ Georgia asserts that it was trying to regain control of its territory in South Ossetia.¹⁵⁷ Russia contends that Georgia attacked Russian citizens living in South Ossetia, or, at the very least, did not act to protect them.¹⁵⁸ While Georgia's motives remain unclear, Russian citizens living in South Ossetia must have suffered some form of armed aggression by Georgian forces causing harm, direct or indirect, to

152. Letter from Vitaly Churkin, *supra* note 36.

153. See *supra* notes 79-88 and accompanying text.

154. See generally Peter Worthington, *Russia Taught the World a Lesson on How to Win a War*, KINGSTON WHIG-STAND (Ontario), Aug. 18, 2008, Ed./Op., at 4 (comparing Russia's invasion of Georgia to the U.S. invasion of Panama and asserting that Russia lured Georgian forces into the South Ossetian conflict as an excuse to inflict damage on Georgia).

155. See Wrachford, *supra* note 50, at 77.

156. See Maginnis, *supra* note 13.

157. See *id.* But see Chivers & Barry, *supra* note 22, at A1 (alleging that indiscriminate armed attacks by Georgia exposed civilians, Russian peacekeepers and observers to harm).

158. See *id.* (stating that Russia believed Georgia was involved in ethnic cleansing in South Ossetia).

trigger any possible right for Russia to intervene. That attack and Russia's response to it must meet the customary international law requirements of the *Caroline* doctrine incorporated into Article 51 for any intervention to have been legitimate.¹⁵⁹

C. The Defense of Russian Citizens

Russia's justification rests on the premise that defense of its citizens in Georgia can be self-defense.¹⁶⁰ Georgia's alleged armed attack on or affecting Russian citizens would constitute an armed attack on Russia itself.¹⁶¹ While the extent of Georgia's armed aggression against Russian citizens is unclear, any use of force by Georgia against Russian citizens living within its borders would largely be considered an armed attack on Russia.¹⁶² Based on the assumption of an armed attack by Georgia against Russian citizens of some degree, Russia may avail itself of the Article 51 self-defense exception as long as it meets the requirements of the *Caroline* doctrine.¹⁶³ This also assumes that Russia's justification is not a pretext for other political motives.¹⁶⁴

1. Immediate Threat to Russian Citizens

In order for Russia to act in self-defense, the threat to its citizens must have been tantamount to an emergency where there is an imminent threat of injury.¹⁶⁵ Georgia's antagonism of South Ossetia, regardless of the true motive, was actual armed aggression that had taken place over a prolonged period of time.¹⁶⁶ There had been conflict between Georgia and its semi-autonomous province (*i.e.*, South Ossetia) for a

159. See generally *supra* notes 100-06 and accompanying text (discussing the *Caroline* doctrine and Article 51).

160. See generally *supra* note 106 and accompanying text (commenting on the weakness of the minority view that defense of nationals abroad is humanitarian intervention outside of Article 2(4)'s prohibition on the use of force). Based on this, Russia's only justification can be self-defense.

161. See Schachter, *supra* note 73, at 1632.

162. See DINSTEIN, *supra* note 105, at 231.

163. See *id.*

164. See Schachter, *supra* note 73, at 1631.

165. See generally *supra* notes 103-12 and accompanying text (discussing the defense of nationals abroad).

166. See Ivan Simic, *Georgia vs. S. Ossetia: From Conflict to Major War*, PALESTINE CHRON., Aug. 12, 2008, http://www.palestinechronicle.com/view_article_details.php?id=14066 (last visited Jan. 24, 2011). After increased tensions beginning in 2003, two months of continuous fighting between Georgia and South Ossetia turned severe on August 1, 2008 (approximately 1500 civilians, 15 Russian peacekeepers, and several dozen South Ossetian fighters died). *Id.*

considerable time.¹⁶⁷ However, Russia's response was within days of the last action.¹⁶⁸ The conflict was still ongoing at the time Russia responded.¹⁶⁹ Assuming Russian citizens had suffered some form of continuing armed attack by Georgia, Secretary Webster's definition of immediacy was met. Because the conflict was still ongoing when Russia intervened, there was an immediate threat to any legitimate Russian nationals.

2. Necessity of Russian Action

For Russia's invasion of Georgia to have been necessary, there must have been a failure or inability for Georgia to protect Russia's citizens.¹⁷⁰ By its very nature, since the Georgian government supported and condoned the armed attacks by its forces on South Ossetia, if they affected Russian citizens, Georgia indirectly failed to specifically protect Russia's citizens. This may show the necessity of limited action by Russia to protect its citizens. If Russia needed to protect its nationals in South Ossetia, it would need to degrade Georgia's ability to attack them. To do so, Russia would have a legitimate need to expand operations beyond South Ossetia to degrade Georgia's centers of gravity and quell its military abilities. This degradation effort would be similar to the U.S. operations in the 1991 Gulf War that expanded into Iraqi territory to hamper Iraq's centers of gravity and ability to encroach on Kuwaiti territory. Russian actions limited to subduing Georgia's ability to harm Russian nationals might have been legitimate use of force in self-defense.

However, by occupying Georgia for over two months, and advancing well beyond the conflict area in South Ossetia, Russia's potentially legitimate intervention in Georgia turned into an illegal encroachment of the territorial integrity of Georgia. The legality of Russia's invasion rested precariously on the necessity of it doing no more than rescuing its citizens and getting them out of Georgia. Instead, Russia continued to occupy Georgia long after securing its citizens' safety in a politically motivated effort to restrict Georgia and other former Soviet satellites from shifting away from Russian allegiances to more western pro-democratic alliances.¹⁷¹

167. See Maginnis, *supra* note 13 (illustrating that South Ossetia and Georgia have been in conflict since 1920, and the conflict escalated after Georgia's Rose Revolution in 2003).

168. See Simic, *supra* note 166 (pointing out that Russia's advance into Georgian territory came on August 8, 2008 after days of intense fighting between Georgia and South Ossetia). Suspiciously, however, Russia's invasion came during the Olympics when the world's media attention was focused on Beijing, China—an opportune time. Maginnis, *supra* note 13.

169. See Simic, *supra* note 166.

170. See *supra* notes 103-12 and accompanying text.

171. See Maginnis, *supra* note 13 (asserting Russia wanted to contain relationships

Similarly, the necessity for Russia's action in defense of its citizens could only have existed if all alternatives had been exhausted.¹⁷² Russia did not have to exhaust remedies that would have been futile.¹⁷³ By its own doing, Russia failed to meet this requirement. Russia's first correspondence with the United Nations regarding the safety of its citizens in Georgia came via its letter justifying the invasion.¹⁷⁴ There is little evidence that Russia sought to protect its citizens through peaceful solutions with Georgia. Russia may have been able to conduct an evacuation of its citizens from South Ossetia to a safe haven in Russia if they were truly in danger due to its close proximity bordering South Ossetia. Petitioning the United Nations for a strong peacekeeping force would have offered Russia another peaceful remedy. Thus, because there were several alternative means to protect its nationals in Georgia, Russia's invasion failed to meet the necessity requirement.

3. Proportionality of Russia's Invasion

The proportionality element of self-defense required Russia to limit its actions strictly to what was necessary to protect its nationals.¹⁷⁵ This restricted Russia to an intervention no further than South Ossetia. Russia's response became disproportional when Russia invaded Georgia well past the South Ossetian area of conflict.¹⁷⁶ The action also ceased to be proportional when the invasion lasted long past the short time necessary to go into Georgia and secure the safety of Russian citizens.¹⁷⁷ Russia continued to occupy Georgia likely due to political motives other than the safety of its citizens. The limited armed actions necessary to evacuate Russian citizens from South Ossetia would have been the proportional response to assure their safety. Russia's actions were not proportional to the threat, especially when compared to other defense of nationals abroad cases.

D. Case Comparisons

Israel's 1976 intervention into Uganda to rescue its citizens held hostage at the Entebbe airport demonstrates the most appropriate case of use of force in defense of a state's nationals abroad (although it

between former Soviet republics and western states particularly after international recognition of Kosovo's independence).

172. See *supra* notes 69-73, 103-12 and accompanying text.

173. See Schachter, *supra* note 73, at 1631.

174. See Letter from Vitaly Churkin, *supra* note 36.

175. See *supra* notes 74-78 and accompanying text.

176. See *supra* notes 74-78, 103-12 and accompanying text.

177. See *supra* notes 103-12 and accompanying text.

involved a much smaller population of nationals).¹⁷⁸ The Ugandan government was complicit in taking Israeli hostages as part of a political action against Israel.¹⁷⁹ The Israeli hostages faced imminent danger or death¹⁸⁰ and were taken to Uganda by force against their will.¹⁸¹ Israel executed a very limited rescue mission into Uganda to save the hostages.¹⁸² Uganda aided an armed attack against Israeli nationals justifying a response in self-defense under Article 51.¹⁸³

In contrast, the United States primarily justified its 1983 invasion of Grenada as protecting approximately one thousand of its citizens from mass chaos.¹⁸⁴ Little harm had been done to the U.S. nationals in Grenada, and they were not being held involuntarily.¹⁸⁵ Furthermore, the U.S. incursion into Grenada lasted well beyond the time necessary to evacuate and rescue its citizens and became an occupation.¹⁸⁶ The United Nations condemned the United States for its actions violating international law.¹⁸⁷ The U.S. intervention in the Dominican Republic in 1965 also received criticism when its forces did not withdraw immediately after evacuating its citizens.¹⁸⁸

Russia's intervention in Georgia finds many more similarities to the Grenada example than the Entebbe model, even though Entebbe involved a smaller number of nationals than South Ossetia. Like in Uganda, if Russian citizens were harmed in South Ossetia, Georgia played a direct part in it. However, the imminence of the danger Russian nationals faced is debatable at best. More significantly, the Russian citizens were very likely voluntarily residing in South Ossetia

178. See DINSTEIN, *supra* note 105, at 233; Warriner, *supra* note 77, at 67. Terrorists hijacked an Air France plane carrying Israeli nationals and took it to Entebbe airport in Uganda with the support of the Ugandan government. DINSTEIN, *supra* note 105, at 233.

179. *Id.*

180. Warriner, *supra* note 77, at 67.

181. DINSTEIN, *supra* note 105, at 233.

182. Warriner, *supra* note 77, at 67.

183. See Schachter, *supra* note 73, at 1630. Governor Scranton, the U.S. representative on the Security Council, affirmed the legitimacy of Israel's use of force because it was limited to what was necessary to save the Israeli hostages. *Id.*; STANIMIR A. ALEXANDROV, SELF-DEFENSE AGAINST THE USE OF FORCE IN INTERNATIONAL LAW 196 (1996). The United Nations never officially judged the legitimacy of Israel's actions. *Id.* at 197; Warriner, *supra* note 77, at 67.

184. Warriner, *supra* note 77, at 66; DINSTEIN, *supra* note 105, at 232.

185. Schachter, *supra* note 73, at 1631; see ALEXANDROV, *supra* note 183, at 199.

186. DINSTEIN, *supra* note 105, at 232; ALEXANDROV, *supra* note 183, at 200. The prolonged intervention thwarted the proportionality requirement of limited violation of a state's territorial integrity. DINSTEIN, *supra* note 105, at 232.

187. ALEXANDROV, *supra* note 183, at 200; Schachter, *supra* note 73, at 1632; Warriner, *supra* note 77, at 66.

188. DINSTEIN, *supra* note 105, at 232; Warriner, *supra* note 77, at 66. The U.S. actions were questioned even though the Dominican Republic government stated that it could not protect the American nationals. Warriner, *supra* note 77, at 66.

and free to leave at any time as they had Russian passports¹⁸⁹ and lived in territory bordering Russia.¹⁹⁰ The northern half of Ossetia was immediately adjacent to Russian territory.¹⁹¹ This fact, more than any other, diminishes the danger the Russians encountered. Russian forces occupied Georgia long past the time necessary to evacuate Russian citizens¹⁹² and well beyond the area required to effect the evacuation.¹⁹³ Once the Russian forces extended their stay, the response mirrored the actions of the United States in Grenada and the Dominican Republic. What may have originally been minimally justified by necessity turned illegitimate; Russian forces tread on the territorial integrity and political independence of Georgia.

In 1985, Israel attacked the headquarters of the Palestine Liberation Organization in Tunisia, claiming that the action was undertaken to provide safety for its citizens abroad.¹⁹⁴ The U.N. Security Council condemned Israel's actions as a reprisal for past wrongful events.¹⁹⁵ Russia and Georgia had long antagonized each other over the semi-autonomous territory of South Ossetia.¹⁹⁶ This raises the possibility that Russia's invasion may have been retaliatory for past wrongs. For Russia to have acted in retaliation, the wrongful events and danger of harm must have ceased.¹⁹⁷ The Georgian armed aggression in South Ossetia possibly affecting Russian nationals was ongoing at or near the time Russia responded. Based on this, and without more, Russia's invasion must be assumed not to be a reprisal, but still an illegitimate use of force.

While perhaps not a reprisal, the length of time Russia occupied Georgian territory subjects Russia's actions to heavy criticism. Furthermore, Russia would struggle to show direct, continuous harm to its citizens by Georgia, just as the United States could not present a case of great harm to its nationals in Grenada. Some similarities exist between previous examples of defense of nationals abroad and Russia's actions. However, far more differences in the previous examples highlight the inadequacy of Russia's justification for invading Georgia.

189. *Putin Defends Russia's Ossetia Inclusion, Slams Georgia Over 'Genocide,'* HAARETZ.COM, Aug. 8, 2008, <http://www.haaretz.com/news/putin-defends-russia-s-osseti-inclusion-slams-georgia-over-genocide-1.251394> (last visited Jan. 24, 2011).

190. *Id.*

191. *Id.*

192. *Id.*

193. *Id.*

194. Warriner, *supra* note 77, at 67.

195. *Id.* at 67-68.

196. See Simic, *supra* note 166 (describing several crises between Georgia and Russia over South Ossetia including Georgia firing missiles at Russian fighter jets and intercepting a Russian military convoy).

197. See *supra* notes 113-18 and accompanying text.

IX. CONCLUSION

In early August 2008, Georgia took action against its South Ossetian region to protect its territorial integrity. Assuming Georgia's conduct included some form of armed attack or harm affecting Russian nationals in South Ossetia, Russia may have initially had the right to use armed force against Georgia in self-defense of its citizens. To do so, however, there must have been a "genuine connection" between Russia and the residents of South Ossetia that it declared its nationals. This alone would be very challenging for Russia because the South Ossetians' residence was separate and outside of Russia. Russia's asserted justification in invading Georgia in defense of its nationals abroad is likely illegitimate based on the tenuous nexus between Russia and the South Ossetians. Other states, including Georgia, likely would not have recognized Russia's grant of citizenship. Therefore, Russia was not acting to protect its nationals abroad. Furthermore, using a separate justification such as humanitarian intervention would be weak because of little evidence of extreme circumstances and widespread abuse in South Ossetia. Russia acted alone without seeking a collective response.

Even if other states were required to recognize Russia's grant of citizenship under international law, Russia seemingly could have assisted its nationals in leaving South Ossetia. Without attempting to aid in their peaceful evacuation, the Russian response in their defense was not necessary. Although Georgia directly participated in any harm to Russian citizens that may have occurred, the imminent danger the Russians faced was marginal. In addition to Russia's initial intervention in South Ossetia being unnecessary, the response was illegal because it was disproportional and not a limited means to protect its citizens. What was an unnecessary use of force further turned into a violation of Georgia's territorial integrity. Russia failed to limit its operation to only what was necessary to protect and evacuate its citizens. Protection of its citizens may have required an incursion into Georgia beyond the limits of South Ossetia to degrade Georgia's ability to attack them. However, by crossing well into Georgia and invading its territory for an extended period of time, Russia's invasion of that country was illegitimate and not an act in self-defense. Ultimately, the Russian invasion of Georgia violated the Charter and customary international law.