

William R. Slomanson<sup>1</sup>:

### Legitimacy of the Kosovo, South Ossetia and Abkhazia secessions: Violations in search of a rule

#### INTRODUCTION

The Russia-Georgia conflict of August 2008 sparked another skirmish: whether Kosovo's independence served as a viable precedent for the legitimacy of the *prior* secessions of South Ossetia and Abkhazia. The more substantial question is this: When can a State's political subdivision legitimately claim Statehood?

I will ultimately conclude that none of these secessions are entitled to recognition under International Law. To develop support for this conclusion, I will first summarize the relevant political underpinnings of International Law. I will then turn to what we know that is *not* in dispute, and the associated "spin" that has engulfed both regional conflicts. I will focus primarily on the contemporary default rule that shuns secession, coupled with the extraordinary circumstances exception which Russia and the US claim to be applicable to these secessions.

I will close my presentation with several rhetorical questions. They are the cornerstone for constructing a realistic dialogue about the legitimacy of future secessions. I say "future" because these three genies cannot be squeezed back into their prior geopolitical bottles.

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## I. RELEVANT INTERNATIONAL LAW PARADIGM

### A. Governing Law

International Law is a unique blend of politics and law. It is not as readily defined as the national law of Russia, Hungary, or Ukraine. This comparative vagueness results from our geopolitical system consisting of nation-States. Each portrays its distinctive size, power, and politics. Recall that just five decades ago, the United Nations (UN) consisted of only fifty-one nations. Today, that number has nearly quadrupled.<sup>2</sup> More States are likely to materialize in the UN General Assembly.<sup>3</sup> Kosovo, South Ossetia, and Abkhazia could be among them. But the questionable legitimacy of their secessions suggests otherwise. The political “spin” associated with these particular secessions is not surprising. One must acknowledge that the “UN Charter was not written with secession conflicts in mind.”<sup>4</sup>

Under International Law, States govern themselves. The resulting ebb and flow of its substantive content can be difficult to define at any precise moment—*especially* for ultra-sensitive matters like secession. The most relevant example is the absence of a multilateral treaty on secession.<sup>5</sup> When there is no applicable treaty, International Law is essentially rooted in the customary practice of States. Its content then depends upon the following variables: the State practice of nearly 200 nations; the influence of their half-dozen major legal systems; the not-so-subtle impact of distinct cultures and politics; and varied perceptions about the content of the laws that govern them.<sup>6</sup>

A number of politicians and journalists thus claim that International Law is in the eye of the beholder. But as aptly articulated by St. John’s University School of Law Professor Christopher Borgen:

If international law is all but irrelevant to international relations, as some skeptics maintain, why do states spend so much time and effort justifying their actions under international law? Saddam Hussein attempted to justify Iraq’s invasion of Kuwait in 1990. George W. Bush attempted to justify the US invasion of Iraq in 2003. Vladimir Putin attempted to justify the Russian invasion of Georgia in 2008.<sup>7</sup>

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<sup>2</sup> See Table 2.1: Sovereign States—From UN Inception to the Present, W. Slomanson, *FUNDAMENTAL PERSPECTIVES ON INTERNATIONAL LAW*, at \_\_\_\_ (6<sup>th</sup> ed. Boston, MA: Cengage, 2010) (displayed by timeframe and region).

<sup>3</sup> See generally, T. Grant, *ADMISSION TO THE UNITED NATIONS: CHARTER ARTICLE 4 AND THE RISE OF UNIVERSAL ORGANIZATION* (Leiden, Neth: Martinus Nijhoff, 2009).

<sup>4</sup> G. Nolte, *Secession and External Intervention*, ch. 3, in M. Kohen (ed.), *SECESSION: INTERNATIONAL LAW PERSPECTIVES* 66 (Cambridge, Eng: Cambridge Univ. Press, 2006) [hereinafter Kohen].

<sup>5</sup> See ch. 4, *A Constitutional Right to Secede*, in A. Buchanan, *THE MORALITY OF POLITICAL DIVORCE FROM FORT SUMPTER TO LITHUANIA AND QUEBEC* 127 (Boulder, CO: Westview Press, 1991).

<sup>6</sup> K. Zwrigert & H. Kotz, *AN INTRODUCTION TO COMPARATIVE LAW* (3d ed. Oxford, Eng: Clarendon Press, 1998).

<sup>7</sup> Symposium: *Great Power Politics, The Language of Law and the Practice of Politics: Great Powers and the Rhetoric of Self-Determination in the Cases of Kosovo and South Ossetia*, 10 *CHICAGO J. INT’L LAW* 1 (2009) [hereinafter Borgen].

The International Law our early ancestors experienced has existed for millenniums.<sup>8</sup> The more contemporary version, sired by the debut of the modern nation-State after the 1648 Peace of Westphalia,<sup>9</sup> has continually influenced international decision-makers.

## B. Three Paths to Statehood

The relevant subtopics within the domain of Statehood are: Succession, Secession, and Self-Determination. *Succession* occurs when one State takes over another. Examples include Germany's annexation of Austria prior to World War II; Iraq's takeover of Kuwait prior to the 1991 Persian Gulf War; and arguably Russia's presence in South Ossetia and Abkhazia. The Russian government claims that its military intervention supported two legitimate successions, buttressed by its recent recognition of their independence. However, the West has some intriguing views about whether your homeland intends to install puppet regimes in South Ossetia and Abkhazia. If so, there might be a paper-thin line between independence and an occupation which could lead to a Russian succession.

This flame was fanned by the August 2009 statement by South Ossetia's separatist leader:

We will be determining how to live and who to live with. Today we are an independent and recognised state. We will build our own state, despite all economic difficulties, ... but I want to stress it once more, we will be in alliance with Russia and together with Russia. The time will come, and I am not excluding that, one day we will be part of Russia. I do not [plan to] exclude the wish of the majority, [the] *overwhelming* majority [italics added]. You understand that 98 percent of South Ossetian citizens are Russian Federation passport holders. And the West should respect this fact.<sup>10</sup>

*Secession* is the second of the three sub-terrains in this whirlwind overview of the contemporary paths to Statehood. It is the centerpiece of this presentation. Today, numerous separatist movements actively pursue a provincial break away from some mother State. South Ossetia and Abkhazia claimed independence from Georgia in 1991. Kosovo claimed independence from Serbia just last year. Ironically, the legitimacy of secession debate seems to have centered on whether Kosovo's 2008 secession is a model for the claimed secessions of South Ossetia and Abkhazia in the early 1990s. We will address the legitimacy of all three claims by delving into the specifics of the law of secession, after this introductory description of these distinct but related paths to Statehood.

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<sup>8</sup> The Origins of the Law of Nations, Introduction, Part II., in W. Grewe, THE EPOCHS OF INTERNATIONAL LAW 7 (Berlin: Walter de Gruyter Pub., 2000) [hereinafter EPOCHS].

<sup>9</sup> In the humanitarian intervention context, see G. Lyons & M. Mastanduno (ed.), BEYOND WESTPHALIA?: STATE SOVEREIGNTY AND INTERNATIONAL INTERVENTION (Baltimore, MD: John Hopkins Univ. Press, 1995).

<sup>10</sup> Rustavi 2 Broadcasting Company, Separatist Leader of South Ossetia Seeks Unity with Russia (Aug. 15, 2009), at: <[http://rustavi2.com/news/news\\_text.php?id\\_news=32997&pg=1&im=main&ct=0&wth=>](http://rustavi2.com/news/news_text.php?id_news=32997&pg=1&im=main&ct=0&wth=>).

*Self-determination* is the third path. All people have at least a theoretical right to determine their geopolitical status. Self-determination of course is not synonymous with Statehood.<sup>11</sup> As noted earlier, the UN Charter did not contemplate secessionist conflicts. It was a visionary blueprint for a new world order.<sup>12</sup> Its undefined principle of self-determination did not reach its zenith until the 1960s. Self-determination was “primarily designed to foster the decolonization process.”<sup>13</sup>

Europe’s gypsies, for example, have a right to self-determination because they are a distinct and readily definable people.<sup>14</sup> Unlike the separatist movement *du jour*, however, they do not intend to create a Gypsy State. Gypsies reside throughout much of Europe. Their self-determination objective is to be free to migrate at will. When Romania joined the European Union in 2007, a sizeable number of its gypsies migrated to Ireland. Just ten days ago, you will recall that they were chased and beaten in Belfast.<sup>15</sup> Ireland responded by offering to pay for their return to Romania.<sup>16</sup> Most endure some form of discrimination, wherever they reside. Nevertheless, they do *not* covet the creation of their own nation-State.

Of these three pillars of mainstream Statehood analysis, we will be focusing on *secession*. To do so, we must first acknowledge the historical evolution of the nation-State. In the Dark Ages, there were no States. There were instead feudal fiefdoms and kingdoms. In 1648, the predecessors of the modern State forged the Treaty of Westphalia, with a view toward replacing those fiefdoms with a new epoch in international legal relations.<sup>17</sup> Three centuries later, near the close of World War II, fifty-one nations cultivated the UN sword-to-plowshare ideal. The ensuing decolonization movement of the 1960s yielded a massive influx of State actors onto the international stage. The early 1990s produced a splintering of Statehood associated with the end of the Cold War.<sup>18</sup> The Soviet Union separated into fifteen truly independent republics. The former Yugoslavia violently broke into some half-dozen States along the lines of its prior administrative districts.<sup>19</sup> For these and related reasons, the UN General Assembly now consists of 192 nations.<sup>20</sup>

If today’s ubiquitous ethnic separatist groups were to have their way, that number would significantly increase, as these Peoples pursue their claimed right to separation from their

<sup>11</sup> See State Practice in the Field of Non-recognition of Claims to Statehood, Section 5, in D. Raic, STATEHOOD AND THE LAW OF SELF-DETERMINATION 116 (Hague: Kluwer Law Int’l, 2002).

<sup>12</sup> See T. Hoopes & D. Brinkley, FDR AND THE CREATION OF THE U.N. (New Haven, CT: Yale Univ. Press, 1997) & O. Schachter, The UN Legal Order: An Overview, Chap. 1, in C. Joyner (ed.), THE UNITED NATIONS AND INTERNATIONAL LAW 3 (Cambridge, Eng: Cambridge Univ. Press, 1997).

<sup>13</sup> C. Tomuschat, Secession and Self-Determination, ch. 1, in Kohen, cited in note 3 supra, at 23.

<sup>14</sup> See T. Acton, A Three-cornered Choice: Structural Consequences of Value-Priorities in Gypsy Law as a Model for More General Understanding of Variations in the Administration of Justice, 51 AMER. J. COMPARATIVE LAW. 639 (2003) & Gypsy Law Symposium, 55 AMER. J. COMPARATIVE LAW 225–442 (1997).

<sup>15</sup> Romanians Flee Homes in Belfast, BBC NEWS (June 16, 2009), at: <[http://news.bbc.co.uk/2/hi/uk\\_news/7459669.stm](http://news.bbc.co.uk/2/hi/uk_news/7459669.stm)>.

<sup>16</sup> Some would call this a humanitarian gesture. Others might characterize it as a veiled deportation.

<sup>17</sup> The Subjects of the International Legal Community: The Politics of the Feudal Age, Chap. Three, in EPOCHS, cited in note 7 supra, at 61.

<sup>18</sup> In a splintering of Statehood context, see The Peace of Westphalia, A. Khan, THE EXTINCTION OF NATION-STATES: A WORLD WITHOUT BORDERS 37 (Hague: Kluwer Law Int’l, 1996).

<sup>19</sup> E. Hasani, SELF-DETERMINATION, TERRITORIAL INTEGRITY AND INTERNATIONAL STABILITY: THE CASE OF YUGOSLAVIA (Vienna: Nat’l Defense Academy Inst. Peace Support and Conflict Management, 2003).

<sup>20</sup> For a complete listing and numerous related details for each of them, visit the UN’s Member States of the United Nations, at <<http://www.un.org/en/members/index.shtml>>.

motherland via Statehood. The more patient advocates, such as the residents of Canada's French-speaking Quebec province, pursue Statehood in a manner akin to natural childbirth. Too many secessionist movements, however, pursue the birthing of a newborn State via a more invasive procedure analogous to a Caesarian-section. Some familiar examples include: the Kurds in the adjacent regions of Iraq, Turkey, and Iran;<sup>21</sup> Turkey's Republic of North Cyprus;<sup>22</sup> Russia's Chechens;<sup>23</sup> and Spain's Basque population.<sup>24</sup>

## II. WHAT DO WE KNOW THAT IS NOT IN DISPUTE?

Prior to addressing the specifics of the law of secession—and the related elements for legitimate claims to Statehood by political subdivisions—much can be resolved by acknowledging what we do know that is *not* disputed. A great deal of confusion has been spawned by competing populist versions of the facts attributed to the August 2008 conflict between Georgia and Russia.<sup>25</sup> The same could be said of Kosovo, if one were to acknowledge its incredible importance in secessionist dialogue.

I often tell my students that, although they are in *Law* school, it is critically important to recognize that they are also in *Fact* school. Legal interpretations may vary. But ignorance of the facts necessarily precludes one's ability to unearth the truth.<sup>26</sup> I will now summarize the facts, on a chronological timeline as is doable with the respective Balkan and South Caucasus regional conflicts.

### A. Stacking the (Ethnic) Deck

We know that Stalin ceded South Ossetia and Abkhazia to Georgia after World War II. Russia began to issue its passports to the ethnic-Russian inhabitants of both provinces in the early 1990s. Russia thus facilitated their *de facto* breakaway from Georgia, as their ethnic balance began to literally shift toward Russia. During the same period, Serbian migration out of Kosovo was facilitated by Albanian extremists. Some favored unification with Albania. Others favored

<sup>21</sup> See, e.g., Comment, The Case for Kurdish Statehood in Iraq, 41 CASE WEST. RESERVE UNIV. J. INT'L L. 513 (2009).

<sup>22</sup> See, e.g., R. Delahunty & A. Perez, The Kosovo Crisis: A Dostoevskian Dialogue on International Law, Statecraft, and Soulcraft, 42 VANDERBILT J. TRANSNAT'L L. 15 (2009) [hereinafter Dostoevskian Dialogue].

<sup>23</sup> See, e.g., Chechnya: Access Denied, 40 GEORGETOWN J.I.L. 985 (2009).

<sup>24</sup> See, e.g., J. Paoletti, Rights and Duties of Minorities in a Context of Post-Colonial Self-Determination: Basques And Catalans In Contemporary Spain, 15 BUFFALO HUMAN. RTS L.R. 159 (2009). One might also reference Moldova. Unlike the above secessionist movements which have boiled over, this quest is only simmering. See Special Committee on European Affairs of the New York Bar, Executive Summary: Thawing a Frozen Conflict: Legal Aspects of the Separatist Crisis in Moldova, 14 I.L.S.A. J. INT'L & COMP. L. 379 (2008)

<sup>25</sup> For a succinct but authoritative factual overview, see II. A Tale of Two Crises, in Borgen, cited in note 6 *supra*, at 3.

<sup>26</sup> See generally K. Vandeveld, Researching the Facts, ch. 4, in THINKING LIKE A LAWYER: AN INTRODUCTION TO LEGAL REASONING 57 (Boulder, CO: Westview Press, 1998). For a Georgian-based account of regional conflict facts, see <[http://www.rrc.ge/admn/searchr.php?sbtm=x&lng\\_3=en&dt1=1992-06-24&dt2=&srs1=0&srs2=0&asc2=ON&R1=V1&lawtp=7&B1=Search](http://www.rrc.ge/admn/searchr.php?sbtm=x&lng_3=en&dt1=1992-06-24&dt2=&srs1=0&srs2=0&asc2=ON&R1=V1&lawtp=7&B1=Search)>.

independence. All of them, according to the Serbian Academy of Sciences, waged war against Kosovo's Serbs, resulting in the "physical, political, juridical and cultural genocide' of Kosovo's Serb population...."<sup>27</sup>

We know that the South Ossetians fled to North Ossetia in 1992 and 2004 when Georgian military actions were launched in what was becoming an ethnically non-Georgian South Ossetia (and Abkhazia), rather than consider their demands for federalization.<sup>28</sup> With what was claimed to be Russian assistance, separatists altered the ethnic balance via ethnic cleansing. The now predominant Kosovo Albanian population likewise fled from Kosovo to Albania, Macedonia, and other receptive Balkan and European venues, during Belgrade's ethnic cleansing campaign commenced after Serbia's former president Slobodan Milosevic took power in the 1990s. He was allegedly responsible for, or a not-so-silent partner in an ethnic reign of terror in the Balkans in the early 1990s. The international community took decisive action via the 1995 Dayton Peace Accords in Bosnia, and the NATO bombing campaign against Serbia in 1999. But we also know that this "humanitarian intervention by the international community in Bosnia Herzegovina and in Kosovo was too little, too late and poorly executed."<sup>29</sup>

The Serbian population of Kosovo, in turn, has fled to northern Kosovo from time to time during the ensuing UN administration of Kosovo. In March 2004, for example, nineteen Serbian churches were burned and thirty people were killed (both Albanian and Serbian Kosovars).

In the 1990s, former Yugoslavian President Slobodan Milosevic disbanded the autonomy which Kosovo had enjoyed under Tito. Milosevic did so in the name of Serbian nationalism. Kosovo had previously been far freer and more State-like because of its comparative autonomy within Yugoslavia.<sup>30</sup> That autonomy was effectively vitiated, first by Belgrade, then at commencement of the 1999 NATO military occupation and continuous international administration of Kosovo—both of which are still in effect today.

## B. Non-peacekeeping Peacekeeping

We also know that the UN established its Observer Mission in Georgia (UNOMIG) sixteen years ago. Russia brought that to an end two weeks ago. Russia's UN Security Council veto<sup>31</sup> adjourned that mission for not-so-subtle reasons. Per the responsive July 2009 UN Press Release: "UNOMIG was entrusted with overseeing the ceasefire accord between the

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<sup>27</sup> Kosovo After the Death of Tito: 1981-1997, Ch. 17, in N. Malcolm, *KOSOVO: A SHORT HISTORY* 334, at 340 (London: Macmillan, 1998) [hereinafter *SHORT HISTORY*].

<sup>28</sup> A. Domrin, *From Fragmentation to Balance: The Shifting Model of Federalism in Post-Soviet Russia*, 15 *TRANSNAT'L LAW & CONTEMPORARY PROBLEMS* 515, 519 (2006). Another excellent analysis is available in N. Cutts, *Enemies Through the Gates: Russian Violations of International Law in the Georgia/Abkhazian Conflict*, 40 *CASE WESTERN RESERVE J. I.L.* 281 (2008).

<sup>29</sup> *Ethnic Conflict in the Balkans 1992-1999: A Case Study*, Chap. 5, in J. Janzokovic, *THE USE OF FORCE IN HUMANITARIAN INTERVENTION: MORALITY AND PRACTICALITIES* 159 (Aldershot, Eng: Ashgate, 2006).

<sup>30</sup> See generally, Part II: *The Notion and Essence of Autonomy*, in R. Lapidot, *AUTONOMY: FLEXIBLE SOLUTIONS TO ETHNIC CONFLICTS* 27 (Wash., DC: Inst. of Peace Press, 1996).

<sup>31</sup> A. Patil, *THE UN VETO IN WORLD AFFAIRS 1946-1990: A COMPLETE RECORD AND CASE HISTORIES OF THE SECURITY COUNCIL'S VETO* (Sarasota, FL: UNIFO Pub., 1992) [hereinafter *VETO*].

Government and Abkhaz separatists in the country's north-western region. It had no jurisdiction in nearby South Ossetia, the scene of fighting last August which pitted Georgia against separatists and their Russian allies."<sup>32</sup> The European Union Monitoring Mission in Georgia reacted to the presence of Russian troops in Georgia by extending its mission through September 2010 in the following terms: "The Council recalled its conclusions ... and those of the European Council ... and reiterated its firm support for the security and stability of Georgia, based on full respect for the principles of independence, sovereignty and territorial integrity recognised by international law...."<sup>33</sup>

We know that in October 2003, Russia announced its right to militarily intervene into all former Soviet States wherever ethnic-Russian human rights are allegedly violated. We also know that International Law frowns upon unilateral invasions in the name of humanitarian intervention.<sup>34</sup> How would you feel if the Georgian military suddenly appeared here in St. Petersburg, alleging its right to protect all ethnic Georgians? Because Stalin ceded authority over South Ossetia and Abkhazia to Georgia, it is not surprising that both Georgian citizens and the Georgian Diaspora strongly object to Russia's military presence in these provinces—and other parts of Georgia Proper.

Our factual expedition includes the short-lived conclusion of Russia's 200-year military presence in November 2007. Russia then closed its last military base in Georgia. Only five months later, the US responded by ratcheting up its fast-track NATO-membership objective for Georgia and Ukraine. Prime Minister Putin shortly thereafter travelled to Abkhazia to announce Russia's pledge to reassert its presence via a \$500 million military base to reinforce Abkhazia's de facto border with Georgia. After NATO considered enlarging its membership to include Georgia (and Ukraine), Russia re-introduced 10,000 Russian troops onto Georgian soil at five military bases. It did so within the context of post-conflict Status of Forces Agreements with South Ossetia and Abkhazia.<sup>35</sup>

One might argue that Russia made a better case for intervention than understood by the West. International observers generally agree that Georgia's August 2008 shelling of the South Ossetian capital of Tskhinval was the very first State use of armed force in this conflict. As the University of Rhode Island Professor of Political Science Nicolai Petro explains:

Had greater attention been paid, it would have revealed the unusual degree to which Russia sought the support of international institutions for what its leadership clearly believed to be a solid legal case for humanitarian intervention. Since an appeal to legal argument is often considered a hallmark of the Western political tradition (and a weakness of the Russian political tradition),

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<sup>32</sup> UN News Centre, Georgia: Personnel from Defunct UN Mission to Leave Next Week (July 10, 2009), at <<http://www.un.org/apps/news/story.asp?NewsID=31437&Cr=georgia&Cr1=>>.

<sup>33</sup> Council of the European Union, Council Conclusions on EUMM Georgia (July 27, 2009), at <[http://www.consilium.europa.eu/uedocs/cms\\_Data/docs/pressdata/en/gena/109392.pdf](http://www.consilium.europa.eu/uedocs/cms_Data/docs/pressdata/en/gena/109392.pdf)>.

<sup>34</sup> See G. Khutsishvili & A. Schnabel, *The Kovo Conflict: The Balkans and the Southern Caucasus*, Chap. 5, in A. Schnabel & R. Thakur, *KOSOVO AND THE CHALLENGE OF HUMANITARIAN INTERVENTION: SELECTIVE INDIIGNATON, COLLECTIVE ACTION, AND INTERNATIONAL CITIZENSHIP* 64 (Tokyo: UN Univ. Press, 2000).

<sup>35</sup> A. Cohen, *Why Obama Should be Tough: The New President Mustn't be Suckered by Moscow's Limited Concessions*, *THE MOSCOW NEWS* (July 7, 2009).

Russia's emphasis on the legal justification for intervention should be viewed as a significant step to the adaptation of Russian foreign policy to post-Soviet norms.

Having weathered this crisis, Russia will increasingly construct its foreign policy arguments with an eye toward both following and shaping international law. To the extent that Western analysts continue to dismiss Russia's legal arguments, they will persistently fail to grasp the degree to which being part of the international legal system has become a fundamental ambition of Russian foreign policy.<sup>36</sup>

And as claimed by Vitaly Churkin, Russia's envoy to the UN: "The [August 2008 Georgian] attack on Russian peacekeepers in South Ossetia in accord with [i.e., as opposed to] agreements signed and ratified by Georgia, and alongside OSCE observers, constitutes an attack on Russia's armed forces."<sup>37</sup>

We know that in a parliamentary hearing in Tbilisi, a former diplomat who was Georgia's Ambassador to Moscow testified that Georgian authorities had started the five day war. He said that Georgian officials told him in April 2008 that Georgia had planed to start a war in Abkhazia after receiving approval from the US government. He also testified that Georgia instead decided to start the war in South Ossetia—and would have extended it into Abkhazia if Russia had not intervened in both provinces.<sup>38</sup> Russia literally took steps to augment its military presence beyond these two provinces. It unabashedly relocated a section of the de facto border between South Ossetia and the rest of Georgia—not to mention Russian military over flights which have allegedly violated Georgian airspace.<sup>39</sup>

The US bitterly complained about Russia's waging this conflict (both in and) outside of South Ossetia and Abkhazia. The US Department of State focused not only on Georgian sovereignty, but also the threat to civilians by Russian missiles and bombers, in the following terms:

Deputy Secretary of State John D. Negroponte summoned Russian Charge d'Affaires Darchiyev today to press Moscow to cease military operations in Georgia. The Deputy Secretary said that we deplore today's Russian attacks by strategic bombers and missiles, which are threatening civilian lives. These attacks mark a dangerous and disproportionate escalation of tension, as they occur across Georgia in regions far from the zone of conflict in South Ossetia.<sup>40</sup>

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<sup>36</sup> The Legal Case for Russian Intervention in Georgia, 32 *FORDHAM INT'L L.J.* 1524, 1524–1525 (2009).

<sup>37</sup> PBS NewsHour: Russia, Georgia Agree to Terms of Cease-fire Deal (PBS television broadcast Aug. 12, 2008), at: <[http://www.pbs.org/newshour/bb/europe/july-dec08/georgiadeal\\_08-12.html](http://www.pbs.org/newshour/bb/europe/july-dec08/georgiadeal_08-12.html)>.

<sup>38</sup> O. Vartanyan & E. Barry, Former Georgian Envoy to Moscow Puts Blame For War on His Own Country, *NEW YORK TIMES* (Nov. 26, 2008), at: <<http://www.nytimes.com/2008/11/26/world/europe/26iht-georgia.4.18177349.html>>.

<sup>39</sup> Radio Free Europe Radio Liberty, Russian Troops Try To Shift South Ossetia Border Markers (Aug. 15, 2009), at: <[http://www.rferl.org/content/Russian\\_Troops\\_Try\\_To\\_Shift\\_South\\_Ossetia\\_Border\\_Markers/1791641.html](http://www.rferl.org/content/Russian_Troops_Try_To_Shift_South_Ossetia_Border_Markers/1791641.html)>.

<sup>40</sup> US Dep't State Press Statement No. 2008/627, Russian Actions in Georgia (Aug. 8, 2008), at: <<http://www.state.gov/r/pa/prs/ps/2008/aug/108097.htm>>.



Our assessment of non-peacekeeping peacekeeping has repercussions well beyond Georgia's borders. Russia pulled out of a NATO-sponsored vessel-monitoring mission in the Black Sea. NATO had suspended it ties with Russia as a result of the August 2008 Georgian conflict. At that point in time, the number of NATO ships in the Black Sea outnumbered Russian ships.<sup>41</sup>

We also know that in August 2008, and continuing to the present time, Russia violated Georgia's territorial sovereignty beyond the two provinces in question.<sup>42</sup> Even today, Russian troops continue to inhabit a sizeable swath of Georgia Proper beyond South Ossetia and Abkhazia.

### III. THE WORLD OF "SPIN"

What do I mean by "spin?" Have you and your spouse or significant other ever witnessed the very same event, only to walk away with polar opposite views of what has just occurred? A less rhetorical example would be the Moscow Times and New York Times publishing contradictory conclusions about the same event. For example, most of your Russian casinos closed just this week. The Moscow Times reported that this was necessary to control the corruption which festers in the casino industry.<sup>43</sup> The New York Times, on the other hand, reported that this was an attempt to collectively discriminate against Georgians, many of whom were in charge of Russian casinos.<sup>44</sup>

#### A. South Ossetia and Abkhazia

The seeds of the August 2008 conflict appear to have been sown by NATO and the US presidential administration (four months earlier). In April 2008, Georgia's NATO membership aspiration blossomed at a NATO summit meeting in Bucharest, Romania. Member nations then promised that Georgia would eventually join the organization. NATO did not immediately agree to place Georgia and Ukraine on a fast-track for NATO membership. But the US desire to achieve that end was quite evident. The US strongly reaffirmed its objective during US Vice

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<sup>41</sup> The transit of some of these NATO warships violated International Law. Turkey must be notified fifteen days in advance should any foreign military vessel plan on passing through its straits into the Black Sea. Those of us who have sailed through Istanbul's narrow one to two kilometer-wide Bosphorus Strait can imagine the political impact of seeing a number of NATO military vessels sailing into the Black Sea.

The 1936 Treaty of Montreux is summarized, with related resources, at the US Naval Treaty Implementation Project, at: <[http://www.ntip.navy.mil/montreux\\_convention.shtml](http://www.ntip.navy.mil/montreux_convention.shtml)>.

<sup>42</sup> The deluge of formal protests is briefly chronicled in J. Crook, Contemporary Practice of the United States Relating to International Law: U.S. Statements Responding to Russia's Intervention into Georgia and Recognition of South Ossetia and Abkhazia, 103 AMER. J. INTL LAW 108 (2009).

<sup>43</sup> "[T]hey closed down all Moscow casinos, shut down Cherkizovsky—the biggest retail market in Europe.... Clearly[,] closing casinos in Moscow is a noble cause, and so is shutting down a customs tax evasion scheme in Cherkizovsky that was a source of corruption for the whole Moscow district." Small Business Vanishes, MOSCOW TIMES (Aug. 14, 2009), at: <<http://www.themoscowtimes.com/article/1052/42/380141.htm>>.

<sup>44</sup> "[T]he timing suggested that Mr. Putin was in part seeking to wound the Georgian diaspora here, which is said to have an influential role in the industry." Exiled by Russia: Casinos and Jobs, NEW YORK TIMES (June 28, 2009).

President Joe Biden's July 2009 visit to Georgia, when he stated: "We understand that Georgia aspires to join NATO. We fully support that aspiration. And, members of Parliament, we will work to help you meet the standards of NATO membership."<sup>45</sup>

Let's pause to reflect upon Russia's rekindled interest in Georgia's two provinces. The boundary of South Ossetia was drawn in the 1920s. The Soviet Union then gave it autonomous status within Georgia. In 1931, Stalin allowed the Georgian Soviet Socialist Republic (SSR) to formally annex what was formerly the Abkhazian SSR. That the Soviet Union ultimately ceded both provinces to its Georgian SSR was not the earthshaking event it would be today (after the demise of the Soviet Union). But as the Soviet Union neared collapse, Georgia revoked their autonomous status, thereby stoking the separatist conflict that flared up last August.

Remember that the Soviet collapse was foreshadowed by US President Regan in his historic 1987 speech at the Berlin Wall. He then said: "Mr. Gorbachev, tear down this wall."<sup>46</sup> During the ensuing German reunification negotiations, Reagan's Secretary of State Howard Baker added that if the Warsaw Pact were disbanded, NATO would not move "one inch" to the east.<sup>47</sup>

NATO and the US have been muscle-flexing in the interim. NATO took advantage of the Warsaw Pact's demise. Presidents Bush and Obama both touted NATO's missile defense system in the Czech Republic and in Poland.<sup>48</sup> NATO had already waged its first war in the spring of 1999, with a view toward a military occupation of Kosovo. NATO has unabashedly moved far more than one inch to the east. According to my map, the Czech Republic, Kosovo, Poland, Georgia, and Ukraine are all east of the former Berlin Wall. The Russian bear thus fears what it sees as, inter alia, Czech-Polish wolves in sheep's clothing. Russia stresses that today's shield against "Iran" could be tomorrow's Trojan Horse—with the mere rotation of this imminent NATO "defense" system in Russia's direction and in Russia's backyard. [Two months after this presentation, President Obama abruptly cancelled this program. Secretary of Defense Gates *claimed* that Iran's "changing capabilities" drove this decision, rather than any US attempt to ally Russia's fears.]

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<sup>45</sup> Speech by Vice President Biden to Georgian Parliament: U.S. Supports Journey to [a] Secure, Free and Democratic Georgia, AMERICA.GOV (July 23, 2009), at: <<http://www.america.gov/st/texttrans-english/2009/July/20090723115911xjsnommis0.2602045.html>>.

<sup>46</sup> For transcript of entire speech, see <[http://www.ronaldreagan.com/sp\\_11.html](http://www.ronaldreagan.com/sp_11.html)>.

<sup>47</sup> R. Rauchhaus, EXPLAINING NATO ENLARGEMENT 193 n.7 (Abingdon, Oxon, UK: Routledge, 2000) (and associated resources).

<sup>48</sup> See, e.g., US Diplomatic Mission to Warsaw Poland—NATO Missile Defense Activities, at: <<http://poland.usembassy.gov/missile/nato-missile-defense-activities.html>>.

## B. Kosovo

The debate surrounding Kosovo's secession might be characterized as the Spin of the Century. UN Security Council Resolution 1244 of June 1999 was the overreaching constitutive document for the international occupation and administration of Kosovo.<sup>49</sup> It expressly reserved the territorial integrity of the former Yugoslavia. Yet Kosovo unilaterally declared its independence nine years later. The relevant diplomatic spin included the novel position that Serbia's sovereignty appeared only in the *preambular* language of Resolution 1244—but not in any of the *operative* sections. This so-called distinction was the basis for the argument that 1244's express preservation of Belgrade's sovereignty over Kosovo could be vitiated by such legalese. Most Russians and all objective observers would understandably question how the ink in that portion of Resolution 1244 could totally fade away with the mere passage of time.<sup>50</sup>

As a result of the 1999 occupation of Kosovo, NATO and the United Nations established a unique status quo. Their methodology may have stirred a brewing recipe for disaster. They cooked up an incredibly symbiotic combination of three distinct elements: (1) the international administration of Kosovo by the UN—although the UN was never designed to act as a sovereign nation; (2) the *de facto* independence of Kosovo—because of the immediate development of parallel state-like governmental institutions; and (3) simultaneous lip service to *de jure* Serbian jurisdiction over Kosovo—which was temporarily “suspended” by Resolution 1244. The penultimate result was the absence of a bargained-for territorial exchange. The ultimate result was that the legitimacy of Kosovo's independence is still far from resolved. It's been forcefully shelved by 16,000 NATO troops and 5,000 US troops in waiting at Camp Bondsteel. Were they all to pull out tomorrow, this province's secession would be put to the test. Otherwise, why are they still present—as they will be for years?<sup>51</sup>

As stated by the US professors and former government lawyers Robert Delahunty and Antonio F. Perez in 2009:

the Western powers are attempting to sustain Kosovo by diplomatic means. ... And those efforts constitute yet another international wrong. No one could plausibly claim that, by recognizing Kosovo, the Western powers were merely acknowledging the existence of an accomplished reality—as happened, for example, when the United States recognized the Soviet Union in 1933 or the People's Republic of China in 1978. No, the Western powers were plainly attempting to conjure the secessionist state of Kosovo into existence.<sup>52</sup>

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<sup>49</sup> For Resolution 1244, and a number of Kosovo's other constitutive documents, see <[http://home.att.net/~slomansonb/KSU\\_Present.html](http://home.att.net/~slomansonb/KSU_Present.html)>.

<sup>50</sup> For a contrary opinion regarding the preambular-operative wording distinction, see Christopher J. Borgen, Kosovo's Declaration of Independence: Self-Determination, Secession and Recognition, ASIL INIGHT (Feb. 29, 2008), at: <<http://www.asil.org/insights080229.cfm>>.

<sup>51</sup> For a pictorial tour of the perimeter of this and many other locations of interest, see the author's Kosovo webpage, at <[http://home.att.net/~slomansonb/KSU\\_Present.html](http://home.att.net/~slomansonb/KSU_Present.html)>.

<sup>52</sup> Dostoevskian Dialogue, cited in note 21 *supra*, at 90.

So it is not surprising that on August 25, 2009 the Palestinian Prime Minister declared the intent “to establish a de facto state apparatus within the next two years.” This ambitious blueprint calls for a new international airport in the Jordan Valley, rail links to neighboring States, and changes to the economy that would free it from its reliance on Israel. The highest level Israeli government official to respond, told Israeli Radio: “There is no place for *unilateralism*” [italics added].<sup>53</sup> Unfortunately, unilateralism is precisely what happened in all three provinces we consider this evening.

The UN implemented a comparable program to free Kosovo from its reliance on Serbia. Kosovo suddenly had the following trappings of Statehood: a President; a Parliament; a Kosovo Police Service operating under the control of the UN’s “CivPol” civilian police; numerous public works projects directed by foreign (non-Serbian) entities; and a “fire brigade” that would be hard to distinguish from most paramilitary groups because of its camouflage military uniforms.<sup>54</sup> Thus, it would be difficult for the West to make a laugh test-survivable claim that the NATO-UN mission in Kosovo did not establish the embryo of a de facto State from the outset. Kosovo’s 2008 unilateral declaration of independence might thus be characterized as a model for Palestinian unilateralism with a view toward yet another two-State solution to these ethnic and geopolitical conflicts.<sup>55</sup>

While NATO was moving eastward toward Russia by leaps and bounds, Belgrade’s sovereignty was simultaneously receding: first from its northwestern border, as its administrative districts all unilaterally began to declare their independences; second, from within Kosovo on the southeastern edge of Serbia Proper, via implementation of UN Security Council Resolution 1244. One can thus appreciate why Russia staunchly backed Serbia when each complained about the international community’s apparent disregard of the legitimacy of Kosovo’s 2008 secession.

I am by no means alone in this concern. The latest challenge to the validity of Kosovo’s independence was the General Assembly’s October 2008 lodging of a case in the International Court of Justice (ICJ). Seventy-seven States supported this referral to the ICJ. Seventy-four abstained, including the twenty-two European Union nations that recognized Kosovo.<sup>56</sup> It is not hard to predict that the fifteen judges on the UN’s Court will divide along political lines. There is no doubt how the US and Russian Federation judges will vote. Why is that? Because—as researched by Eric Posner, one of America’s most influential judges—international judges consistently vote for their own nations over ninety percent of the time.<sup>57</sup>

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<sup>53</sup> I. Kershner, Palestinian Leader Maps Plan for Separate State, *NEW YORK TIMES* (Aug. 25, 2009).

<sup>54</sup> This “T.M.K.” paramilitary force is rumored to be the successor to the Kosovo Liberation Army. It disclaimed any military association prior to independence. I was at a 2003 TMK headquarters briefing in the TMK’s national headquarters in Pristina. The non-military military commander in camouflage military fatigues sat near a NATO officer. That commander (who later became Kosovo’s Prime Minister prior to independence) acknowledged the presence of stored small arms within the TMK’s headquarters. I also observed TMK anti-aircraft gunnery under wraps across the street from my apartment. It was once briefly unclipped for target practice, when a US military helicopter flew overhead.

<sup>55</sup> Palestinian PM Plans for Statehood, Al JazeeraNet English, at: <<http://english.aljazeera.net/news/middleeast/2009/08/200982554728336508.html>>.

<sup>56</sup> For press release, see <<http://ome.att.net/~slomansonb/txtcesite.html>>, scroll to Chapter Two CASES, then click ICJ Kos Indep.

<sup>57</sup> All Justice, Too, Is Local, *NEW YORK TIMES* Dec. 30, 2004), at: <<http://query.nytimes.com/gst/fullpage.html?res=9803E5D81739F933A05751C1A9629C8B63>>. See also, J.

The perennial problem with judicial resolutions, however, is that the winner takes all. There is normally no compromise. Regardless of the outcome of the UN's ICJ case on the legitimacy of Kosovo's secession, one side will necessarily be the loser. Assume (but do not presume) that the ICJ decides that Kosovo's secession violated International Law. The ICJ does not have the independent power to enforce its judgment. Enforcement measures, if any, will be left to the will of the international community of nations. They will presumably acquiesce in the geopolitical status quo wrought by sixty recognitions of Kosovo's Statehood,<sup>58</sup> without reference to its legitimacy as measured by the norms of International Law—which I will shortly address.

While we are in the Twilight Zone of “spin,” the answer to the question of the legitimacy of Kosovo's secession is *easy*: just ask any Russian! Less facetiously, the Russian government would assert that because of the West's assertion of the legitimacy of Kosovo's unilateral secession from Serbia, it cannot balk at Russia's similar characterization of South Ossetia and Abkhazia.

Even if not legitimate under International Law, Russia offers two fall-back positions. First, it had to intervene on humanitarian grounds, based upon the so-called Georgian genocide. Second, it had to implement its 2003 pronouncement about the need to protect ethnic Russians in the former Soviet Republics, wherever they are subject to human rights violations. This latter “justification” has been met with Western spin on spin. The international community's post-World War II and Cold War staunch support of the UN Charter provisions, matched by State *opinio juris*,<sup>59</sup> steadfastly proclaim the inviolability of territorial sovereignty.

If we were to poll the European Union (EU), we would observe an interesting split. There were twenty-two “yes” votes and five “no” votes on the legitimacy of Kosovo's secession. Spain's negative vote in this matter mirrored the Basque problem it has endured for decades. Greece and Cypress have a relevant problem with the Turkish Republic of North Cypress.

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Goldsmith & E. Posner, *International Law and Moral Obligation*, Chap. 7, in *THE LIMITS OF INTERNATIONAL LAW* 185 (Oxford, Eng: Oxford Univ. Press, 2005).

<sup>58</sup> Since this presentation (July 2, 2009), Jordan and the Dominican Republic recognized Kosovo. The current total is sixty-two States. See *Who Recognized Kosova as an Independent State?*, at: <<http://www.kosovothankyou.com>>.

<sup>59</sup> Perhaps the quintessential restatement, providing a succinct but authoritative definition and application of *opinio juris*, is located in L. Condorelli, *Custom*, Chap. 7, in M. Bedjaoui (ed.), *INTERNATIONAL LAW: ACHIEVEMENTS AND PROSPECTS* 179, 187–192 (Paris: UNESCO, 1991). For the ICJ's strict construction of the requirements to establish *opinio juris*, see its *North Sea Continental Shelf Cases* decision, *I.C.J. REPORTS* (1969), at 3.

#### IV. INTERNATIONAL LAW YARDSTICK FOR MEASURING THE LEGITIMACY OF SECESSION

##### A. Theory and Reality

The legal regime applicable to secession is quite riddled with doubt. As noted by Professor Borgen in his article on the diplomatic rhetoric associated with the Russia-Georgia conflict:

The difference between when and how the US uses legal rhetoric versus its use by Russia is striking. Whereas both use law talk when the concepts are relatively simple to describe—the US defending Georgia’s territorial integrity and right to nonintervention and Russia doing the same for Serbia—only Russia also used legal argumentation when the case was a harder one to make (the defense of its invasion of Georgia on legal grounds). Although the US and NATO briefly used legal language to defend the Kosovo intervention, they discarded this tactic upon seeing how controversial it was and instead focused on the moral importance of stopping ethnic cleansing.<sup>60</sup>

The so-called legitimist school consists of those theoreticians who “require a seceding unit to be released by the mother State if it wants to acquire independence.”<sup>61</sup> Quests for “legitimacy” tug at the heart of this particular debate on secession. Legitimacy in international relations is the “X Factor” that is often responsible for whether a claimed norm, or its application, is in fact adopted by the immediate players. As poignantly articulated by the late New York University Professor Thomas Franck, we must observe that:

some international rules are more regularly obeyed than others. ... In the international system, unlike national legal systems, if rules are obeyed it cannot be because of the coercive power of the sovereign. There is no global sovereign, no global sheriff. Consequently, conformity of state behaviour to predictive [treaty] texts must be due to something else [i.e., legitimacy, which is the “X” factor].<sup>62</sup>

A focused search for legitimacy in the law of secession would no-doubt include UN Security Council Resolution 1785—rendered within the year before the 2008 Georgian conflict, which came on the heels of the 2008 unilateral declaration by Kosovo.<sup>63</sup> That Resolution

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<sup>60</sup> Comparison of Russian and American Use of International Legal Arguments, in Borgen, cited in note 6 supra, at 24.

<sup>61</sup> P. Hilpold, What Role for Academic Writers in Interpreting International Law?—A Rejoinder to Prakhelashvili, 8 CHINESE J. INT’L L. 291, 292 (2009) [hereinafter Hilpold].

<sup>62</sup> Legitimacy as a Matter of Degree, Chap. 3, in T. Franck, THE POWER OF LEGITIMACY AMONG NATIONS 41, at 48 (New York, NY: Oxford Univ. Press, 1990).

<sup>63</sup> This Resolution authorized a further year for the work of the European Union Stabilization Force. Its mandate is to ensure continuing compliance with the 1995 Dayton Peace Agreement that ended the fighting in Bosnia.

“reaffirms its commitment to the political settlement of the conflicts in the former Yugoslavia, [while] preserving the sovereignty and territorial integrity of all States within their internationally recognized boundaries.”<sup>64</sup> So the legal regime associated with secession does not dovetail with the political reality of modern secessions—particularly in Kosovo, South Ossetia, and Abkhazia.<sup>65</sup> These newborns violate the “internationally recognized boundaries” objective of Resolution 1785.

One thing is clear: It is no longer possible to force Kosovo back into Serbia, regardless of what the International Court of Justice says about the legitimacy of Kosovo’s independence. It is also impossible to force Abkhazia or South Ossetia back into Georgia. There are Russian “peacekeeping” forces in both provinces; Russia recognized their independence; and the US continues to insist that Georgia and Ukraine must join NATO as soon as political circumstances permit.

As lawyers, we must now consider the default rules of secession. International Law does not *permit* secession. Nor does International Law *prohibit* secession. Yet there is a clear bias against it. That bias is usually articulated in terms of the preservation of territorial sovereignty of existing nation States. Even the UN Charter does not allow the organization to act in a way which would interfere with the domestic jurisdiction of a member State.<sup>66</sup> From the birth of the UN, diplomats and jurists have dogmatically maintained that the right of self-determination does not include the general right to secession; and, that there is no general right to Secession. Both limitations conform to the UN’s bedrock principle—the territorial integrity of its member States.

## B. Extraordinary Circumstances Exception

There must be “extraordinary circumstances” for the international community to recognize the legitimacy of any secession. This exception—the name for which I have just coined—is premised upon three commonly accepted elements. There must be: (1) a distinct People; (2) *gross* human rights violations; and (3) no alternative *but* secession.<sup>67</sup>

### 1. “People”

The definition of this element is by no means uniform. But a good example would be Finland’s secession from Russia in 1917. Finnish ancestors seemed to have immigrated from the Urals to Finland some 2,000 years ago. But the Finnish people later evolved as a result of successive waves of immigration coming from east, south, and west. Finland was part of

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<sup>64</sup> A. Orakhelashvili, The Kosovo UDI [Unilateral Declaration of Independence] Between Agreed Law and Subjective Perception: A Response to Hilpold, 8 CHINESE J. INT’L L. 285, 288 (2009).

<sup>65</sup> See Defining the Boundaries of Legality: Unlawfulness of Territorial Situations, ch. 4, in E. Milano, UNLAWFUL TERRITORIAL SITUATIONS IN INTERNATIONAL LAW: RECONCILING EFFECTIVENESS, LEGALITY AND LEGITIMACY 101 (Leiden, Neth: Martinus Nijhoff, 2006).

<sup>66</sup> Per article 2.7 of the UN Charter: “Nothing contained in the present Charter shall authorize the United Nations to intervene in matters which are essentially within the domestic jurisdiction of any state or shall require the Members to submit such matters to settlement under the present Charter....”

<sup>67</sup> Perhaps the best articulation of this exception is available in *Re Secession of Quebec*, 2 S.C.R. 217, commencing at para. 123 (1998), at: <<http://scc.lexum.umontreal.ca/en/1998/1998rcs2-217/1998rcs2-217.html>>.

Kingdom of Sweden until 1809 when it was ceded to the Russian Empire. But its people did not lose their distinct character or language. In 1917, the Bolsheviks declared that the general right of self-determination included the right of complete secession for “the Peoples of Russia.” On the same day, the Finnish Parliament issued a declaration wherein it conveniently assumed that it could finally declare its own sovereignty.<sup>68</sup>

The Georgian population of South Ossetia and Abkhazia (according to my arguably trustworthy Georgian sources) *were* a significant percentage of each province. In the 1990s, after they proclaimed their independence from Georgia, separatists directly uprooted many of them from their homes. That “cleansing” forced them into other parts of Georgia. The separatists supposedly enjoyed Russia’s clandestine support. Rumors were naturally spawned by the quantity and quality of captured military weapons not available from Georgian military sources. Population cleansing numbers ranged from 200,000 to 250,000 ethnic Georgians being displaced from Abkhazia.<sup>69</sup> The numbers in South Ossetia are not as concrete. But the ethnic Russian population grew significantly in both provinces, if for no other reason than remaining relatively constant.

Abkhazia was originally settled by Greeks. At the hands of the Ottomans, it gradually lost its cultural and religious ties with the rest of Georgia. In 1810 Russian forces conquered the region containing Abkhazia. There were a number of revolts since then. In 1920, the Soviet Union established the Abkhazian Soviet Socialist Republic. Stalin’s five-year plans resulted in the resettlement of many minorities. In 1949, for example, the 2700 year-old Greek population of Abkhazia was completely deported by Stalin in a single night. It would thus be fair to argue that South Ossetia and Abkhazia historically each present a distinct People.<sup>70</sup>

South Ossetians are such a “People.” They came from Iran into the Caucasus in the thirteenth century as a result of Mongol invasions. But a “People” that we now call Russians also settled in the Ossetia region.<sup>71</sup>

It would be more challenging for Kosovo’s Albanians to qualify as a “People” for the purpose of triggering an exception to the default no-secession rule. They formerly constituted an ethnic minority in an enclave that arguably spilled over the Albanian border into Southern Serbia. Kosovo’s Albanians do not claim that they crossed any border. Instead, it crossed them.<sup>72</sup> Regardless of any related debate, Albanians constitute some ninety-two percent of Kosovo’s current population. So there is now a 200,000 Serb minority within Kosovo’s total population of

<sup>68</sup> A. Lahelma & J. Olofsson, SCANDINAVIA COUNTRIES FAQ, at: <<http://stason.org/TULARC/travel/nordic-scandinavia>>. See also Michigan State University, Finland: History, at: <<http://globaleedge.msu.edu/countryInsights/history.asp?countryID=50&regionID=2>>.

<sup>69</sup> Regarding Abkhazian displacements, see UN Gen. Assembly Reso. 62/249 (Dec. 2008), at: <<http://daccessdds.un.org/doc/UNDOC/GEN/N07/478/71/PDF/N0747871.pdf?OpenElement>>.

<sup>70</sup> Abkhazeti, History of Abkhazia, at: <<http://www.abkhazeti.com/history-of-abkhazia.html>>.

<sup>71</sup> Kafkas Vakfi (Caucasus Foundation), n.d., The history of South Ossetia, at: <<http://www.hartford-hwp.com/archives/63/129.html>>.

<sup>72</sup> This spillover is comparable to the predominantly Hungarian enclave of Vojvodina in Northeastern Serbia adjacent to Hungary. Vojvodina is the lone remaining ethnic enclave in pre-Milosevic Serbia—formerly consisting of six provinces and these two autonomous ethnic enclaves.

One must not ignore the Albanian Separatist intimidation of the pre-Milosevic era, when many Serbs were driven out of Kosovo. See *The Great Rebellions, the Serbian Conquest and the First World War: 1908–1918*, ch. 13, in *SHORT HISTORY*, cited in note 26 *supra*, at 239.



2,000,000. They are heavily concentrated in the northern fifteen percent of Kosovo, bordering on Serbia Proper.

A number of human rights violations of the respective Albanian and Serbian Peoples have occurred in this region for many decades. Those historical “rights,” however, were not the subject of the major international treaties that did not formally materialize until well after World War II.<sup>73</sup> But historical human rights atrocities do not enlighten the contemporary debate regarding legitimacy of secession.

## 2. Gross Human Rights Violations

### (a) Who Did What to Whom?

The second element for a *legal* recognition of secession requires gross human rights violations. Secession has been supported by the international community when there are acts by the majority population or government rendering a minority unable to develop its identity within the framework of the existing State.

And now for more “spin.” The Kosovo Albanians tell me that the Serbs prohibited Albanian children from attending public schools. This was the reason for Kosovars establishing a comprehensive alternative system of schools in private homes. Belgrade’s Serbs, however, tell me that the Kosovo Albanians boycotted the schools of Kosovo. While I personally believe that one of these incredibly contradictory versions of the truth is preposterous, my point is that not all of us have been to Pristina, Belgrade, South Ossetia, or Abkhazia. We are thus at a personal disadvantage when attempting to distinguish between spin and truth. The lack of trustworthy evidence, or on-the-ground experience, similarly causes journalists with deadlines to sometimes embrace not-so-reliable sources for what they would prefer to be spin-free evidence.

A number of Belgrade’s gross human rights offenses in Kosovo (not to mention Kosovo Liberation Army atrocities) occurred in direct defiance of the UN Security Council regime in the Balkans. The international community disavowed the then Yugoslavian President Slobodan Milosevic’s harsh military and ethnic cleansing tactics against Kosovo’s Albanian population on the basis that he was protecting the Serbian population of Kosovo. For these and related reasons, Slobodan Milosevic was the first national leader to be indicted by an international tribunal for war crimes and human rights violations. That particular prosecution of course broke with millenniums-old State practice whereby Heads of State were immune for the atrocities they perpetrated while in office.<sup>74</sup>

Human rights violations have nevertheless occurred in Kosovo since its independence in February 2008—notwithstanding the continuing international military occupation and

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<sup>73</sup> The essential instruments include the 1948 UN Declaration on Human Rights (the UN Charter stating only a aspirational few specifics); the two 1966 International Covenants on Civil and Political Rights (ICCPR) and Economic, Social and Cultural Rights; and the Optional Protocols to ICCPR regarding the death penalty and right of individual petition to the UN.

<sup>74</sup> See Heads of State, Ch. 19, in H. Fox, *THE LAW OF STATE IMMUNITY* 667 (2d ed Oxford, Eng: Oxford Univ. Press, 2008) & N. Roht-Arriaza, *THE PINOCHET EFFECT: TRANSNATIONAL JUSTICE IN THE AGE OF HUMAN RIGHTS* (Philadelphia: Univ. Penn. Press, 2005).

organizational co-administration. For example, in spring 2009 EULEX<sup>75</sup> guarded five Albanian homes that were being constructed in the Serbian sector of Northern Kosovo. They were attacked but stood their ground. Recall UN Security Council Resolution 1244 regarding the “grave humanitarian situation” in Kosovo—one which was basis for the UN Security Council’s assumption of the governmental administration of Kosovo. Now, after more than a decade of continuous NATO military occupation and international administration by the UN and now the European Community, there are still legitimate concerns about human rights violations in Kosovo. So the shoe is now on the other foot, given Kosovo’s post-conflict Serbian minority. (Russia will likewise be telescopically scrutinized for its treatment of the remaining Georgian population within South Ossetia and Abkhazia.

#### (b) Genocide Accusations

Attributing a like degree of atrocity by Georgia in South Ossetia and Abkhazia was much harder to substantiate. These provinces were not subjected to a long-term international occupation and international administration as in Kosovo. Russia claimed it necessarily intervened in these Georgian provinces because of the genocide allegedly being perpetrated by President Saakashvili’s Georgian government. The actual perpetration of genocide is of course the ultimate violation of human rights. Article 8 of the Genocide Convention imposes at least a theoretical obligation on the international community to intervene to prevent genocide from occurring.<sup>76</sup> Moscow could thereby claim that it had a moral duty to defend the Georgian provinces, because of the alleged genocide perpetrated by the Georgian military on Georgia’s ethnic-Russian residents.

For too many politicians and journalists, proper application of the term *genocide* is an inconvenient truth. The International Court of Justice (ICJ) made that clear in its February 2007 Bosnian litigation with Serbia.<sup>77</sup> Bosnia accused Serbia of genocide in the mid-1990s in no uncertain terms. You will recall that 7,800 Muslim men and boys were slaughtered over a three-day period at Srebrenica, near this first-ever UN safe haven which was overrun by Bosnia’s (not Belgrade’s) Serbian Army.<sup>78</sup> The ICJ did not embrace Bosnia’s primary accusation that Serbia had *committed* genocide. Rather, Serbia was deemed responsible for the related but distinct treaty offense of *failing to prevent* genocide. The Court’s analysis continues to be criticized, however. Unlike the UN’s other courts—the ICTY and ICTR which prosecute individuals—the ICJ did not have the power to obtain evidence from Serbia that Bosnia considered crucial to its case.<sup>79</sup>

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<sup>75</sup> The EU Rule of Law Mission in Kosovo is the international administrative agency in the process of replacing the UN for the post-independence administration of Kosovo.

<sup>76</sup> 1948 Convention on the Prevention and Punishment of the Crime of Genocide, at: <<http://www.hrweb.org/legal/genocide.html>>.

<sup>77</sup> *Original case*: Case Concerning the Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro), General List No. 91 (26 February 2007) <<http://www.icj-cij.org/docket/files/91/13685.pdf>>. *Edited* *version:*

<<http://home.att.net/~slomansonb/txtcsestite.html>>, scroll to Chapter Ten, then click Bosnia v. Serbia Genocide Case.

<sup>78</sup> Graphic details are available at Public Broadcasting System, Srebrenica: A Cry from the Grave, at: <<http://www.pbs.org/wnet/cryfromthegrave>>.

Genocide is easy to claim but hard to prove. The major reason is that liability for genocide requires the *specific* intent to eradicate a group or a people as such. The ICJ ruled that Serbia had instead failed to *prevent* genocide. But it was not responsible for *committing* genocide in Bosnia. So it would be likewise difficult to say that Georgia committed genocide in South Ossetia-Abkhazia without the necessary witnesses and documentation that has arguably been shielded from judicial review.<sup>80</sup> We have yet to see clear documentation of the gross human rights violations claimed by Russia against the Georgian military in the latter's breakaway provinces.

Mindful of the February 2007 *Bosnia v. Serbia* ICJ decision, Georgia sued Russia several months ago in the ICJ. It lodged that case in the context of the Convention for the Elimination of All Forms Racial Discrimination.<sup>81</sup> The resulting International Court of Justice analysis may provide some spin-laden cannon fodder for both sides, regarding the national status of South Ossetia and Abkhazia. But any Statehood dicta in that opinion will likely be stated in a race discrimination context, as apposed to the broader context required for satisfying the second gross human rights element for a legitimate secession under International Law.

Some Western journalists would be surprised to learn that Georgia was not blame free in its violations of Ossetian and Abkhazian human rights. In the mid-1990s, for example, Georgia imposed its official language on South Ossetia, notwithstanding the fact that the local languages were Russian and Ossetian. While this was not a *gross* human rights violation, it nevertheless concerned the international community.

The tit-for-tat overreaction by governments is not uncommon when both sides instinctively claim human rights violations. I was in Moscow, for example, some months after Georgia arrested four Russian military officers in Tbilisi (and a dozen Russian civilians) in 2006.<sup>82</sup> To the outside world, this appeared to blow over as Russian diplomacy resulted in a protest to the Georgian government. In Moscow, however, Georgian restaurants were targeted with health inspections. Georgian immigrants were selectively rounded up for immigration violations of Russian law. Russia clearly incurred State responsibility under International Law for injuries to aliens during that period. Like Georgia's language demands, the above Russian roundup of selected immigration law violators would not be characterized as a *gross* violation of human rights. Although Georgian immigrants were selectively targeted, they had presumably violated the immigration branch of national law that most nations have appropriately enacted.

We have now addressed two of the three elements for the legitimacy of secession—first “People;” second, “gross human rights violations.” Let's now continue onto the final element in our whirlwind overview of the validity of secession under International Law.

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<sup>79</sup> Only States may be parties in contentious cases lodged in the ICJ. Regarding evidentiary problems in international tribunals generally, see C. Amerasinghe, JURISDICTION OF INTERNATIONAL TRIBUNALS (Hague: Kluwer Law Int'l, 2003); M. Kazazi, BURDEN OF PROOF AND RELATED ISSUES: A STUDY ON EVIDENCE BEFORE INTERNATIONAL TRIBUNALS (Hague: Kluwer Law Int'l, 1995); and R. Lillich (ed.), FACT-FINDING BEFORE INTERNATIONAL TRIBUNALS (Ardsley-on-Hudson, NY: Transnat'l, 1990).

<sup>80</sup> Bosnia requested the minutes of meetings of the Supreme Defense Council of Serbia – the country's highest ranking decision-making body. As the ICJ's Vice President's dissent lamented: “It is a reasonable expectation that those documents would have shed light on the central questions” being considered by the ICJ.

<sup>81</sup> For an edited version of this case (when published), see <<http://home.att.net/~slomansonb/txtcsestite.html>>, scroll to Chapter Ten CASES, then click Georgia v. Russia Race Discrim.

<sup>82</sup> Georgia Detains Russian Officers for Espionage, Georgia Daily Digest (Sept. 29, 2006), at: <<http://www.eurasianet.org/resource/georgia/hypermail/200609/0041.shtml>>.

### 3. No Alternative but Secession

Element number three for a legitimate secession is that there must be no alternative *but* secession. We should first assess the external influences regarding these respective regional claims of legitimate secession. Under Article 72 of the Soviet Union's Constitution, only the fifteen republics had the right to secede from the Soviet Union—not their political subdivisions.<sup>83</sup> Georgia thus declared its own independence from the Soviet Union in 1991.

Upon the demise of the Soviet Union, the European Community (EC) declared guidelines for recognition of the new States in Eastern European and the former Soviet Union.<sup>84</sup> Per the EC objective: “[W]e adopt a common position on process of recognizing these new States, which requires: respect for inviolability of all frontiers, which can only be changed by peaceful means and by common agreement.”<sup>85</sup> The 1991 EC guidelines also include the commitment to peacefully settle all questions of secession. It would not be very convincing were the Russian Federation to respond that it is not a member of the EC, and thus not bound by these guidelines. The 1991 guidelines effectively embody a restatement of Article 2.4 of the UN Charter. It too provides that all States must refrain from using or threatening the use of force in their international relations.

We will now compare whether there was any alternative to secession for Kosovo, South Ossetia, and Abkhazia. In 1999, NATO intervened after a prolonged international effort to resolve the atrocities in the former Serbian province of Kosovo. The December 2007 final failure of the Vienna talks on Kosovo's status spawned the US claim that there was no resolution possible other than secession. Yet there *were* other alternatives.

Serbia could have retained the Northern portion of Kosovo. This fifteen percent of Kosovo has never been under the de facto control of either the UN or EULEX. The UN retained de jure control north of the Ibar River at the city of Mitrovica from 1999 to the present. But neither the UN nor EULEX has yet to actually take over the administration of this Kosovar flashpoint. There is no official civilian court in that part of Kosovo. But the Serbs operate their own local courts. The new Government of Kosovo has no effective influence on either the policy or courts within this Serbian portion of Kosovo adjacent to Serbia Proper. Because the international community does not effectively control it, then the legitimacy of Kosovo's independence necessarily remains in doubt. The secrecy of the critical Vienna negotiations precludes a review of the efficacy of whether northern Kosovo could have remained in Serbia as part of a bargained-for exchange. Had Serbia retained or acquired one inch of territory, there would be at least a colorable argument that Kosovo's Statehood was rooted in *some* agreement – even if one-sided.

Alternative number two is that Kosovo might have traded this northern sector of Kosovo for an expansion of Kosovo into Serbia Proper's Presevo Valley. That Serbian territory

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<sup>83</sup> Constitution (Fundamental Law) of the Union of Soviet Socialist Republics (October 7, 1977), at: <<http://www.constitution.org/cons/ussr77.txt>>.

<sup>84</sup> Recognition of States—Annex 1: Declaration on the 'Guidelines on the Recognition of New States in Eastern Europe and in the Soviet Union' (16 December 1991), at: <<http://207.57.19.226/journal/Vol4/No1/art6.html>>.

<sup>85</sup> EC Declaration on the “Guidelines on the Recognition of New States in Eastern European and the Former Soviet Union, C. Tomuschat, MODERN LAW OF SELF-DETERMINATION 324 (Dordrecht, Neth: Martinus Nijhoff, 1993).

is east of Kosovo. It contains a sizable Albanian population. It is not clear why the availability of this potential territorial exchange appeared to play no role in the resolution of Kosovo's so-called final status. It too makes it difficult to embrace an argument that the "no alternative but secession" element of this secession's legitimacy was fulfilled (or seriously considered).

Western political pressure may provide the answer. In 2007, President Bush was in Albania's capital city of Tirana. He was asked whether Kosovo should be independent. His immediate and unqualified response was a no-strings-attached "yes." No diplomat from the Vienna talks would have thus interfered with the negotiations regarding Kosovo's final status. In my humble opinion, that single sentence nailed the coffin into any potential that the Vienna negotiators might have had for successfully resolving the Kosovo conundrum via a bargained resolution of Kosovo's final status.

Both Russia and the United States have claimed that neither Kosovo nor South Ossetia-Abkhazia are precedents for other potential secessions. US Secretary of State Condoleezza Rice claimed that the respective regional secessions had nothing in common. In her words: "I do not want to try to judge motive, but we have been very clear. Kosovo is *sui generis*, because of the special circumstances out of which the breakup of Yugoslavia came."<sup>86</sup> The clarity that Ms. Rice voiced is anything but clear. Ms. Rice appears to have thought that Russia was claiming Kosovo as a precedent for secession for South Ossetia and Abkhazia. Russia, however, was essentially responding that the US and the West had no right to judge Russia's support of the independence of the two Georgian provinces—because the US backed the independence of Kosovo without any regard for Serbian interests in the Balkans.

Ms. Rice's Russian counterpart Sergei Lavrov confirmed that Russia had recognized the secession and independence of South Ossetia and Abkhazia. Presumably Lavrov had Chechnya in mind when he said: "recognition by Russia of Georgia's Abkhazia and South Ossetia, as independent States, did not set a precedent for other post-Soviet break-away regions. There can be no parallel's here."<sup>87</sup> As reaffirmed by the Russian Duma: "The right of nations to self-determination cannot justify recognition of Kosovo's independence along with the simultaneous refusal to discuss similar acts by other self-proclaimed states, which have obtained de facto independence exclusively by themselves."<sup>88</sup>

Kosovo could claim a comparative advantage in this label game. As stated by Bing Bing JIA, the distinguished Professor of International Law at Tsinghua University Law School: "The conformity or not with international law of a unilateral act always depends on the legality of both the root for its initiation and the original rationale. From this perspective, the independence of Kosovo is indeed a unique case of secession."<sup>89</sup>

So both former Cold War adversaries claim the respective breakaway provinces legitimately seceded. Both also claim that neither is precedent for the simmering secessionist

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<sup>86</sup> Guy Faulconbridge, Georgia rebel region seeks recognition after Kosovo, REUTERS (Mar. 5, 2008), at: <<http://www.alertnet.org/thenews/newsdesk/L05581876.htm>>.

<sup>87</sup> R. Müllerson, Precedents in the Mountains: On the Parallels and Uniqueness of the Cases of Kosovo, South Ossetia and Abkhazia, 8 Chinese Journal Int'l Law 2, at 3 (2009) [hereinafter Precedents].

<sup>88</sup> N. Kulish & C. Chivers, Kosovo Is Recognized but Rebuked by Others, NEW YORK TIMES (Feb. 19, 2008), at: <<http://www.nytimes.com/2008/02/19/world/europe/19kosovo.html?pagewanted=2&hp>>. See also M. Weller, PEACE LOST: THE FAILURE OF CONFLICT PREVENTION IN KOSOVO (Leiden: Martinus Nijhoff, Dec. 2008).

<sup>89</sup> The Independence of Kosovo: A Unique Case of Secession? 8 CHINESE J. INT'L L. 27 (2009) (abstract).

movements in other parts of the world. As the US did with Kosovo's secession, Russia took steps to conjure the viability of the secession of South Ossetia and Abkhazia. One month after the August 2008 conflict with Georgia, Russia rushed into treaties with South Ossetia and Abkhazia. Moscow thereby committed itself to the defense of these provinces from Georgian attack. The US Department of State responded that Russia should be honoring its previous commitments to Georgia's territorial integrity, rather than entering into treaties with Georgia's political subdivisions. The Russian retort would be that the US and its NATO allies lacked clean hands,<sup>90</sup> given their selective amnesia regarding the constitutive UN resolution which *expressly* reserved Serbian sovereignty over Kosovo.

By comparison, Russia's military entry into South Ossetia and Abkhazia was a single nation intervention. NATO and the UN, on the other hand, had launched what they viewed as a required humanitarian intervention by the respective international organizations.<sup>91</sup> But no NATO nation evinced any intent to permanently annex Kosovo. Thus, it is comparatively harder for Russia to characterize South Ossetia and Abkhazia as legitimate interventions in comparison to the international organizational campaign in Kosovo. Recall the South Ossetian separatist leader's August 2009 proclamation that this province might one day be a part of Russia.

Of course recognition is not an element of Statehood.<sup>92</sup> Yet sixty members of the international community chose to recognize Kosovo in the less than eighteen months since its declaration of independence. In the roughly eighteen *years* since South Ossetia and Abkhazia announced their independence, they received only two recognitions—one by Russia and one by Nicaragua.<sup>93</sup> Even Russia's contemporary six-nation security alliance, the Shanghai Co-operation Organization, declined to fully back Russia's recognition of the independence of the two Georgian provinces.<sup>94</sup> This ambivalence, coupled with the European Union split on Kosovo's recognition, adds a pungent aroma to the International Court of Justice Sir Hersch Lauterpacht's colorful description of recognition—by some but not all—as a “grotesque spectacle.”<sup>95</sup>

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<sup>90</sup> “[A] rule of law that a person coming to court with a lawsuit or petition for a court order must be free from unfair conduct (have “clean hands” or not have done anything wrong) in regard to the subject matter of his/her claim.” Farlex, Clean hands doctrine, at: <<http://legal-dictionary.thefreedictionary.com/clean+hands+doctrine>>.

<sup>91</sup> For perhaps the most authoritative assessment of any humanitarian intervention claim see B. Simma, *Kosovo: A Thin Red Line*, 10 *EUROPEAN JOURNAL INT'L LAW* (1999). An authorized edited version is available at: <<http://home.att.net/~slomansonb/natoyugo.html>>.

<sup>92</sup> See, e.g., *Criteria for Recognition or Criteria for Statehood*, Ch. 4, in T. Grant, *THE RECOGNITION OF STATES: LAW AND PRACTICE IN DEBATE AND EVOLUTION*, p. 83 (Westport, CT: Praeger, 1999) & S. Talmon, *RECOGNITION IN INTERNATIONAL LAW: A BIBLIOGRAPHY* (Hague, Martinus Nijhoff, 2000).

<sup>93</sup> Hamas “recognized” the independence of those two regions. But it has authority only over Gaza—not to mention the question of whether Palestine is in fact a State with the power to recognize other States.

<sup>94</sup> A. Scheineson, *Background: Shanghai Cooperation Organization*, COUNCIL ON FOREIGN RELATIONS, at: <<http://www.cfr.org/publication/10883>>.

<sup>95</sup> For this perspective, and a great deal more on the interplay of recognition and secession, see J. Dugard & D. Raic, *Recognition*, Chap. 4, p.97, in Kohen, cited in note 3 *supra*. Other intriguing descriptions of the law of recognition include P. Chandra, *INTERNATIONAL LAW* 28 (New Delhi: Vikas, 1985) (“chaotic”); D. O’Connell, *INTERNATIONAL LAW* 127 (2d ed. New York: Oceana, 1970) (“confusing;” J. Dugard, *RECOGNITION AND THE UNITED NATIONS* 28 (Cambridge, Eng: Grotius, 1987) (“controversial”).

## V. ACHIEVING COMMON GROUND ON THE LEGITIMACY OF FUTURE SECESSIONS

As I near my conclusion, I cannot help thinking of my four children. When they were younger they thought they had all of the answers. I tried to teach them to ask the right questions. I thus have a handful of arguably rhetorical questions—the answers to which I believe are necessary for a reasoned analysis of the legitimacy of future secessions.

### 1. *Were These Conflicts Really “Proxy Wars?”*

Were Kosovo and South Ossetia Abkhazia “proxy” wars for powerful nations? I use the term “proxy” in the sense of a conflict being waged within Kosovo and Georgia, but in reality being someone else’s war. Per Georgia President Saakashvili’s television description of the August 2008 Russia-Georgia conflict: “It is not a war of [Russia] with Georgia, but of Russia with the West.”<sup>96</sup> The more that Kosovo, South Ossetia, and Abkhazia constitute proxy wars for third-party nations, the less legitimate their secessions.

As poignantly noted by the previously mentioned professors Delahunty and Perez:

the North Cyprus case bears a significant resemblance to the Kosovo situation. In both, an outside power or powers intervened militarily in order to protect a national minority from the asserted risk of persecution at the hands of an established government, supported that minority’s efforts at secession, sought unilaterally to redraw international frontiers, and recognized a secessionist government that was dependent on the invader’s continuing military and administrative presence for its very existence.<sup>97</sup>

Moscow of course would not have supported the independence of Abkhazians and Ossetians had President Saakashvili and former president Vladimir Putin been political allies. But Georgia is now an aspiring member of NATO. It is thus taking calculated risks under the umbrella of US hegemony. The testimony of Howard Berman, Chair of the US House of Representatives Committee on Foreign Affairs, illustrates this point. In a hearing at the US Capitol in September 2008 (one month after the conflict), Berman said that the US *knew* that fast-track NATO membership for Georgia and Ukraine would be blocked by its key NATO allies Germany and France. But this particular expansion of NATO membership represents such a huge policy objective, that the US vetted and is now pursuing their entry into NATO—with little regard for the potential impact on Russia’s directly related security concerns.<sup>98</sup>

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<sup>96</sup> Precedents, cited in note 86 *supra*, at 4.

<sup>97</sup> Dostoevskian Dialogue, cited in note 21 *supra*, at 90.

<sup>98</sup> US House of Representatives Committee on Foreign Affairs, Opening Statement by Chairman Howard L. Berman at hearing, “U.S.-Russia Relations in the Aftermath of the Georgia Crisis” (Sept. 9, 2008), at: <[http://www.internationalrelations.house.gov/press\\_display.asp?id=552](http://www.internationalrelations.house.gov/press_display.asp?id=552)>.

## 2. Does the West Really Care About Another Cold War?

NATO and the US arguably facilitated the contemporary divide between Georgia and Russia. The conflict in Kosovo was about Kosovo. Even Russia voted for the UN's international intervention to stop that bloodshed. But the conflict in South Ossetia and Abkhazia was not necessarily about these Georgian provinces per se. It is more likely that Russia wanted to send a message to the US and Europe that they must reassess the proposed expansion of NATO to include Georgia and Ukraine. Russia has an overarching NATO concern that can be objectively articulated in terms of Article 5 of the NATO treaty. It speaks in terms of collective self-defense: "An attack on one is an attack on all."<sup>99</sup> An increasing number of former Soviet Republics are on Russia's doorstep and allied with the West.

Just last Saturday in Corfu, NATO and Russia fortunately resumed their formal co-operation regarding a broad range of security issues. However they failed to bridge their major difference over the secession of South Ossetia and Abkhazia. NATO Secretary General Schaffer said, "Russia needs NATO and NATO needs Russia."<sup>100</sup> Since 1992, the Organization for Security and Cooperation in Europe (OSCE) has strived to unlock this frozen conflict. However, the humanitarian OSCE mission expired two days ago.<sup>101</sup> Unlike the rest of Europe, however, Russia insisted on a *separate* OSCE mandate for the South Ossetia-Abkhazia region in the aftermath of the August 2008 Georgia-Russian conflict.

Russia's August 2008 entry into these Georgian provinces has seriously troubled the international community. Unlike Kosovo, there was no ongoing process of international mediation regarding South Ossetia and Abkhazia's de facto but by no means de jure Statehood. It is not hard to predict that there will be simmering long-term friction in these Georgian provinces because of the almost complete lack of recognition by the international community. One of the complicating variables is that Europe may be too dependent on Russia's oil and gas to do anything. There will be no EU sanctions. There will be no UN sanctions due to Russia's veto power in the Security Council.<sup>102</sup>

US President Bush articulated this concern in terms of the adverse foreign policy consequences. Russia's recognition of South Ossetian and Abkhazian independence spawned his following protest:

The United States condemns the decision by the Russian President to recognize as independent states the Georgian regions of South Ossetia and Abkhazia. This decision is inconsistent with numerous United Nations Security

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<sup>99</sup> The North Atlantic Treaty: Washington D.C.—4 April 1949, Art. 5, at: <<http://www.nato.int/docu/basic/txt/treaty.htm>>.

<sup>100</sup> Press conference response by NATO Secretary General Jaap de Hoop Scheffer after the NATO-Russia Council meeting in Corfu, Greece, 27 June 2009, at: <[http://www.nato.int/cps/en/natolive/opinions\\_55989.htm](http://www.nato.int/cps/en/natolive/opinions_55989.htm)>.

<sup>101</sup> U.S. Response to Report by Head of OSCE Mission on Georgia: U.S. Supports Mission, Worked for Months to Ensure its Continuation, America.gov (June 11, 2009), at: <<http://www.america.gov/st/texttrans-english/2009/June/20090611171604xjsnommmis0.5504724.html>>.

<sup>102</sup> Veto in the Security Council, Part II., in VETO, cited in note 30 supra, at 11.



Council Resolutions that Russia has voted for in the past, and is also inconsistent with the French-brokered six-point ceasefire agreement which President Medvedev signed on August [16], 2008...

The territorial integrity and borders of Georgia must be respected, just as those of Russia or any other country.... In accordance with United Nations Security Council Resolutions that remain in force, Abkhazia and South Ossetia are within the internationally recognized borders of Georgia, and they must remain so.<sup>103</sup>

With the obvious exception of Russia, the G-8 also complained about Russia's excessiveness:

We ... condemn the action of our fellow G8 member. Russia's recognition of the independence of South Ossetia and Abkhazia violates the territorial integrity and sovereignty of Georgia and is contrary to UN Security Council Resolutions supported by Russia. Russia's decision has called into question its commitment to peace and security in the Caucasus.

We deplore Russia's excessive use of military force in Georgia and its continued occupation of parts of Georgia.<sup>104</sup>

Furthermore, the US will not likely risk officially triggering Cold War II by sending US or NATO troops into Georgia. Georgian President Saakashvili nevertheless expressed frustration with the US failure to send US troops during the August 2008 Georgia-Russia conflict. During his July 2009 visit to Tbilisi, US Vice President Joe Biden renewed US support for Georgian membership in the NATO alliance. Biden also reminded Saakashvili of the obvious gravity of a confrontation between NATO and Russia. [Six weeks after my July 2009 presentation in Russia, the US announced its intent to resume a *joint combat training mission in Georgia*—with a view toward preparing the Georgian army for counterinsurgency operations in Afghanistan. This bold initiative may place US and Russian troops within the same nation. Doing so had incredibly adverse consequences in various Cold War contexts.<sup>105</sup>]

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<sup>103</sup> White House News Release, President Bush Condemns Actions Taken by Russian President in Regards to Georgia (Aug. 26, 2008), at: <<http://georgewbush-whitehouse.archives.gov/news/releases/2008/08/20080826-2.html>>.

<sup>104</sup> Joint Statement on Georgia by Foreign Ministers of Canada, France, Germany, Italy, Japan, the United States and the United Kingdom, US Dep't State Media Note No. 2008/669, (Aug. 27, 2008), at: <<http://www.state.gov/r/pa/prs/ps/2008/aug/108941.htm>>.

<sup>105</sup> Reuters, U.S. to Resume Training Georgian Army (Aug. 13, 2009) at: <<http://www.reuters.com/article/worldNews/idUSTRE57D0IG20090814>>. Rustavi 2 Broadcasting Company, Tbilisi expects significance experience from US Marines (Aug. 15, 2009), at: <[http://rustavi2.com/news/news\\_text.php?id\\_news=33171&pg=1&im=main&ct=0&wth=>](http://rustavi2.com/news/news_text.php?id_news=33171&pg=1&im=main&ct=0&wth=>)>.

### 3. *It Ain't Over 'til It's Over*<sup>106</sup>

Is the dispute about the legitimacy of Kosovo and South Ossetia-Abkhazia over? No! It is just beginning. The secession of these provinces did not resemble the US-backed colored revolutions in Europe. For example, the amicable divorce of Czechoslovakia via the so-called Velvet Revolution resulted in the globally recognized Czech Republic and Slovakia. Such territorial political divorces were peaceful separations entitled to international recognition of their respective Statehoods.<sup>107</sup> Kosovo, South Ossetia, and Abkhazia on the other hand, were *unilaterally* declared secessions. Their status was not the product of any negotiated solution. Thus, we have unfortunately not heard the last word.

One has to be troubled by Serbia's not receiving one inch of territory after the NATO-UN nine-year occupation of Kosovo. UN Security Council Resolution 1244 established that Kosovo would become a UN protectorate. Russia supported this Resolution, in part because of its express reference to "Kosovo being [within] the territorial sovereignty of Serbia."<sup>108</sup> These complexities are compounded by the UN Security Council having no power to change the territorial rights of its member states. The UN could only *suspend* the exercise of Serbian sovereignty via its 1999 Security Council Resolution. That constitutive document thus anticipated negotiation of a bargained for *solution* between the real parties in interest.

South Ossetia and Abkhazia *claimed* independence in the 1990s. But their respective claims have not been recognized by the international community. As previously discussed, only two nations have recognized them—many years after their supposed secessions from Georgia.

## CONCLUSION

The time has come to re-evaluate the International Law of provincial secession, with a view towards integrating political reality and traditional legal discourse. The respective sides might start by stopping their respective claims that Kosovo and South Ossetia-Abkhazia are "unique."

The primary national spokes-persons should also stop paying lip service to the default bias against secession. There is no multilateral treaty on secession. State practice, the UN Charter, and Security Council resolutions all disclaim a *right* to secession. To save face, there is the rather malleable extraordinary circumstances exception allegedly supporting the secessions of Kosovo, South Ossetia, and Abkhazia. State practice under this normative regime has proven to be far too manipulable to merit the legitimacy "X Factor" which drives International Law—from beneath the hood, and never in plain sight when crises are speeding their way to driver-defined objectives.

So what is the likely long-term political perspective of the international community on these provinces? The legitimacy of secession issue continues to plague international relations

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<sup>106</sup> The New York Yankee baseball player Yogi Berra was famous for his witty quotes. While stating the obvious, they also contained a profound truth. This one suggests that one should not give up regardless of the odds. See website for Yogi Berra, at: <<http://www.yogiberra.com>>.

<sup>107</sup> The same can be said of geopolitical marriages such as the reunification of Germany.

<sup>108</sup> This resolution and other constitutive documents are available at: <[http://home.att.net/~slomansonb/KSU\\_Present.html](http://home.att.net/~slomansonb/KSU_Present.html)>.

while we witness the broadening pressure to resolve numerous conflicts over numerous claims of the right to secession. We have of course witnessed such dilemmas over the last half-century. Taiwan is perhaps the best illustration.<sup>109</sup> While recognition is no longer an element of Statehood, it is nevertheless an indicator of the political reality necessarily associated with the legitimacy of secession.

I will close my presentation by acknowledging that I have presented more questions than answers. Unlike the US and Russian governments, however, we as private citizens and influential academicians<sup>110</sup> can acknowledge and assert that the legitimacy of the secession of these three areas is far from resolved. Power politics have frozen them into legal and political Twilight Zones. Imagine tomorrow's bloodbath if Russia and the international community were to abandon these three provinces today. In that instance, law and politics would unfortunately align because of the underlying illegitimacy of these third-party manufactured secessions.

The US and Russia have chosen to officially adhere to the default norm: "Thou shall not secede." Their related claim is that these regions satisfy the extraordinary circumstances exception which is the focus of the contemporary debate. That they have done so is evident by their arguments that Kosovo, South Ossetia, and Abkhazia are all "unique"—which supposedly qualifies them under International Law as legitimate secessions.

The international community of nations should instead recognize these secessions for what they are—international proxy wars edging their way toward Cold War II. Innsbruck University's distinguished Professor Peter Hilpold wisely cautions that "many proposals suggesting the need of a radical departure from traditional positions are ill-conceived. Nonetheless, it is the uniqueness of many facets of the Kosovo problem that requires the analyst to look for new solution."<sup>111</sup> In my view, the key protagonists might instead acknowledge that all three secessions are violations in search of a revised legal regime. The proponents would better serve their own national interests if they were to prod the UN membership into negotiating a global multilateral treaty on secession. This recommendation is the cannon fodder for my sequel (article) on the provisions that a secession treaty should include.

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<sup>109</sup> Self-Determination in Action for the People of Taiwan, ch. 16, in J. Henckaerts (ed.), *THE INTERNATIONAL STATUS OF TAIWAN IN THE NEW WORLD ORDER* 241 (London: Kluwer Law Int'l, 1996).

<sup>110</sup> One must also acknowledge that even knowledgeable academicians disagree over the extent to which we can influence change. The contemporary dialogue includes: (1) "[I]nternational legal scholars have an influence probably unparalleled since the juriconsults of classical Roman law[.]" and (2) "As is known, the belief that international lawyers can identify an objective reality has proven to be illusory." R. Jennings, *International Lawyers and the Progressive Development of International Law*, in J. Makarczyk (ed.), *THEORY AND INTERNATIONAL LAW AT THE THRESHOLD OF THE 21<sup>ST</sup> CENTURY: ESSAYS IN HONOUR OF KRZYSZTOF SKUBISZEWSKI* 413 (Hague: Kluwer Law Int'l, 1996) & P. Hilpold, cited in note 60 supra, at 297 (2009).

<sup>111</sup> *The Kosovo Case and International Law: Looking for Applicable Theories*, 8 *CHINESE J. INT'L L.* 47 (2009) (abstract).