
**THE RUSSO-GEORGIAN WAR OF 2008: DEVELOPING
THE LAW OF UNAUTHORIZED HUMANITARIAN
INTERVENTION AFTER KOSOVO**

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*“[U]nfortunately there do occur ‘hard cases’ in which terrible dilemmas must be faced and imperative political and moral considerations may appear to leave no choice but to act outside the law. The more isolated these instances remain, the smaller will be their potential to erode the precepts of international law”*¹

- Bruno Simma (1999)

I. INTRODUCTION

The August 2008 war involving the Caucasus region of South Ossetia caused concern among Western powers as they interpreted Russia’s response to Georgia’s military strikes as an act of unwarranted aggression. Although Russia never expressly characterized it as such, the event

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¹ Bruno Simma, *NATO, the UN and the Use of Force: Legal Aspects*, 10 EUR. J. INT’L L. 1, 22 (1999). Simma became a judge at the International Court of Justice in 2003. International Court of Justice, *Judge Bruno Simma*, <http://www.icj-cij.org/court/?p1=1&p2=2&p3=1&judge=14> (last visited Oct. 28, 2009).

could be viewed as the first unsanctioned humanitarian intervention in Europe since NATO's 1999 bombardment of the Federal Republic of Yugoslavia ("FRY") to end ethnic cleansing in Kosovo. South Ossetia, the site of most of the fighting, is a territory smaller than Rhode Island, but the events there rapidly involved a wide variety of international actors such as U.S. presidential candidates, non-recognized governments, human-rights groups, and especially the mass media.² The United Nations' role was very limited, even more so than in Kosovo.³ The international community's reaction to the war often mixed both legal and political arguments, and by late October, condemnation of Russia had cooled in the wake of revelations of human-rights abuses by all of the parties to the conflict.⁴

The law of war is one of the more uncertainty-filled areas of international law,⁵ although the formal legal framework governing transnational conflict is ostensibly very simple. The UN Charter has given the Security Council the sole discretion to "determine the existence of any threat to the peace, breach of the peace, or act of aggression"⁶ and to act upon these findings as it sees fit, including through the use of armed force.

² See Michael Cooper & Elisabeth Bumiller, *War Puts Focus on McCain's Hard Line on Russia*, N.Y. TIMES, Aug. 12, 2008, at A19; Ellen Barry & Steven Lee Myers, *Medvedev Promises Georgia Enclaves Protection; U.S. Warns Russia of Perilous Path*, N.Y. TIMES, Sept. 18, 2008, at A14 (noting that the Palestinian group Hamas recognized South Ossetia and the Georgia breakaway region of Abkhazia as independent following the August 2008 war); HUMAN RIGHTS WATCH, UP IN FLAMES: HUMANITARIAN LAW VIOLATIONS AND CIVILIAN VICTIMS IN THE CONFLICT OVER SOUTH OSSETIA (2009), available at <http://www.hrw.org/sites/default/files/reports/georgia0109web.pdf>; Mikhail Gorbachev, Op-Ed., *Russia Never Wanted a War*, N.Y. TIMES, Aug. 20, 2008, at A23 (accusing the West of "mount[ing] a propaganda attack against Russia, with the American news media leading the way" during the war).

³ In contrast to the Kosovo situation, there were no Security Council resolutions addressing the humanitarian situation in South Ossetia prior to the start of Russia's intervention. Security Council Resolution 1808 addressed the situation in Abkhazia, another breakaway region of Georgia. See S.C. Res. 1808, U.N. Doc. S/RES/1808 (Apr. 15, 2008).

⁴ See, e.g., Tim Whewell, *Georgia Accused of Targeting Civilians*, BBC NEWS, Oct. 28, 2008, available at <http://news.bbc.co.uk/2/hi/7692751.stm>.

⁵ As one scholar has put it, "[I]f international law is, in some ways, at the vanishing point of law, the law of war is, perhaps even more conspicuously, at the vanishing point of international law." H. Lauterpacht, *The Problem of the Revision of the Law of War*, 29 BRIT. Y.B. INT'L L. 360, 382 (1952). In addition, "[D]espite the postwar effort to subject war to law, the *jus ad bellum* remains, as it has been historically, manipulable and often highly politicized." Robert D. Sloane, *The Cost of Conflation: Preserving the Dualism of Jus ad Bellum and Jus in Bello in the Contemporary Law of War*, 34 YALE J. INT'L L. 47, 69 (2009).

⁶ U.N. Charter art. 39.

States may use force only if authorized by the Security Council⁷ or through individual or collective-self defense.⁸ NATO's intervention in Kosovo was inconsistent with this process, but it prompted some scholars to argue that it nevertheless was or should be legal, either due to implicit authorization or necessity arising out of a paralyzed Security Council.⁹ The Ossetia conflict could be viewed as evidence of even further deterioration of the formal framework for armed peacekeeping. International law, however, develops not just through treaties such as the UN Charter but also through incidents and through how international-law actors respond to them.¹⁰

Russia was among the fiercest objectors to the Kosovo intervention,¹¹ though nine years after that conflict it proceeded to fight in Ossetia on a somewhat similar rationale. The aim of this note is to explain how these two conflicts, taken together, are contributing to a gradual change in the law of force that takes power and influence away from the Security Council and grants it to regional alliances, or even individual states, to determine the existence of situations that warrant humanitarian intervention. Thus, the Russia-Georgia war is simply the latest precedential incident in this emerging doctrine of international law.

This note explores in Part II the history of conflict in the region, including the situation in Soviet times and in independent Georgia prior to the 2008 war, the events during the war itself and international reaction to the conflict. Part III discusses the theory of humanitarian intervention and the way that it was applied to justify the Kosovo conflict, along with the effect that Kosovo had on the law of war. Part IV synthesizes the discussion by placing the Russian intervention in Georgia in the context of the post-Kosovo international legal order.

II. BACKGROUND TO THE CONFLICT

A. *The Georgian-Ossetian Conflict Prior to the 2008 War*

At the end of the Soviet Union, fewer than 70,000 Ossetians resided in South Ossetia, but they formed nearly 70% of the population of the

⁷ *Id.* art. 42.

⁸ *Id.* art. 51.

⁹ See, e.g., Ruth Wedgwood, Comment, *NATO's Campaign in Yugoslavia*, 93 AM. J. INT'L L. 828, 832 (1999) (discussing the theory of implicit approval); GEORGE P. FLETCHER & JENS DAVID OHLIN, DEFENDING HUMANITY: WHEN FORCE IS JUSTIFIED AND WHY 133-34 (2008) (comparing unauthorized humanitarian intervention to civil disobedience)

¹⁰ See W. Michael Reisman, *International Incidents: Introduction to a New Genre in the Study of International Law*, in INTERNATIONAL INCIDENTS: THE LAW THAT COUNTS IN WORLD POLITICS 3, 16 (W. Michael Reisman & Andrew R. Willard eds., 1988).

¹¹ *Russia Takes Protest to the U.N. Council*, N.Y. TIMES, Mar. 26, 1999, at A13.

region on the border with Russian North Ossetia.¹² Georgians and Ossetians are both Orthodox Christians, but they are members of different ethno-linguistic groups.¹³ Twentieth-century relations between the two peoples were strained by an Ossetian uprising between 1918 and 1920, during which Ossetia, previously a part of the Russian Empire, unsuccessfully tried to establish its own Soviet republic.¹⁴ Following the Soviet invasion of Georgia in 1921, Ossetia became an autonomous oblast (province) of the Georgian Soviet Socialist Republic.¹⁵ Soviet rule was characterized by peacefulness, with high rates of intermarriage.¹⁶

During the period of Georgian nationalism at the beginning of the 1990s, and indeed through the 2008 war, both peoples viewed their neighbors' motives with suspicion: "Ossetians saw remaining in Georgia as threatening their survival, whereas Georgians saw Ossetia as a tool of Moscow in undermining Georgian sovereignty and aspirations to independence."¹⁷ Low-level clashes in 1989 led South Ossetia to declare itself an independent Soviet Democratic Republic in September, and nearly three months later, the Georgian parliament abolished South Ossetian autonomy.¹⁸ A war lasted until 1992, when a cease-fire agreement was reached in Sochi, Russia.¹⁹

The Agreement on Principles of Settlement of the Georgian-Ossetian Conflict ("Sochi Agreement") was signed by President Boris Yeltsin of Russia and Eduard Shevardnadze, the president of Georgia, on June 24, 1992.²⁰ In addition to outlining the timing of the cease-fire and the withdrawal of Russian armed forces, the Sochi Agreement called for "a mixed Control Commission composed of representatives of opposing parties"

¹² SVANTE E. CORNELL, *AUTONOMY AND CONFLICT: ETHNOTERRITORIALITY AND SEPARATISM IN THE SOUTH CAUCASUS – CASES IN GEORGIA* 186, 189 (2001).

¹³ *Id.* at 187. Notably, the Ossetian language is related to Farsi, and Ossetian culture is said to be strongly influenced by pre-monotheistic beliefs. *Id.* at 186-87. Georgians and Ossetians have competing understandings of how long the Ossetians have lived in the Caucasus. INT'L CRISIS GROUP, *GEORGIA: AVOIDING WAR IN SOUTH OSSETIA* 2 (2004), http://www.crisisgroup.org/library/documents/europe/caucasus/159_georgia_avoiding_war_in_south_ossetia.pdf [hereinafter ICG REPORT].

¹⁴ ANTJE HERRBERG, *CRISIS MANAGEMENT INITIATIVE, CONFLICT RESOLUTION IN GEORGIA: A SYNTHESIS ANALYSIS WITH A LEGAL PERSPECTIVE* 10 (2006), www.cmi.fi/files/Conflict_resolution_Georgia.pdf.

¹⁵ *Id.* at 10-11.

¹⁶ Cornell, *supra* note 12, at 189.

¹⁷ *Id.* at 186.

¹⁸ *Id.* at 192-93.

¹⁹ HERRBERG, *supra* note 14, at 11.

²⁰ Agreement on Principles of Settlement of the Georgian-Ossetian Conflict, *Geor.-Russ.*, June 24, 1992, *translation available at* http://www.rrc.ge/law/xels_1992_06_24_e.htm?lawid=368&lng_3=en [hereinafter Sochi Agreement]; Marietta König, *The Georgian-South Ossetian Conflict*, O.S.C.E. Y.B. 237, 241 (2004), *available at* <http://www.core-hamburg.de/documents/yearbook/english/04/K%F6nig.pdf>.

set up “[i]n order to exercise control over the implementation of cease-fire, withdrawal of armed formations, disband [sic] of forces of self-defense and to maintain the regime of security in the region”²¹ Article 3 of the agreement provided a rough outline of the methods that the Joint Control Commission (JCC) could use to enforce its mandate: “In case of violation of provisions of this Agreement, the Control Commission shall carry out investigation of relevant circumstances and undertake urgent measures aimed at restoration of peace and order and non-admission of similar violations in the future.”²² The JCC contained representatives from Russia, Georgia, North Ossetia and South Ossetia, while the Joint Peacekeeping Forces (JPKF) incorporated Russian, Georgian and Ossetian military units.²³ In 1994, the Organization for Security and Cooperation in Europe (OSCE) received a mandate to monitor the JPKF.²⁴

Prior to the 2008 war, the Sochi Agreement had come under criticism for failing to put a firm end to the conflict and for giving Russia a disproportionate role in its implementation.²⁵ Although the area remained peaceful for twelve years,²⁶ talks aimed at the *political* (rather than the *military*) resolution of the Georgian-Ossetian conflict did not occur until 1999.²⁷ In May 2004, Georgia President Mikheil Saakashvili unsuccessfully attempted to restore Tbilisi’s control in South Ossetia in response to smuggling in the region, leading to a series of armed skirmishes.²⁸ Georgia accused Russia of sending military equipment including tanks and armed personnel carriers from North Ossetia into South Ossetia and allowing as many as 1000 Russian mercenaries to fight for South Ossetia.²⁹

The Sochi Agreement came under further attack in February 2006, when the 225-seat Georgian parliament voted 179-0 in favor of a non-binding resolution urging the government to review the 1992 treaty and

²¹ Sochi Agreement, *supra* note 20, art. 3, cl. 1.

²² *Id.* art. 3, cl. 5.

²³ HERRBERG, *supra* note 14, at 12. For a description of the duties of the JPKF, see ICG REPORT, *supra* note 13, at 4.

²⁴ ICG REPORT, *supra* note 13, at 19.

²⁵ HERRBERG, *supra* note 14, at 12; Vladimir Socor, *South Ossetia Joint Control Commission Ingloriously Mothballed*, EURASIA DAILY MONITOR, Mar. 7, 2008, available at [http://www.jamestown.org/programs/edm/single/?tx_ttnews\[tt_news\]=33440&tx_ttnews\[backPid\]=166&no_cache=1](http://www.jamestown.org/programs/edm/single/?tx_ttnews[tt_news]=33440&tx_ttnews[backPid]=166&no_cache=1) (arguing that the JCC membership structure “was designed from the outset to isolate Georgia, leaving it face to face with three incarnations of Russia, in the absence of international involvement”).

²⁶ ICG REPORT, *supra* note 13, at 1.

²⁷ HERRBERG, *supra* note 14, at 12.

²⁸ Kim Murphy, *In Caucasus, Frozen Conflicts Are Still Hot: Disputes Stoked After the Soviet Breakup Wreak Misery and Instability Years Later*, L.A. TIMES, Sept. 13, 2004, at A1; ICG REPORT, *supra* note 13, at i.

²⁹ ICG REPORT, *supra* note 13, at 16.

to replace Russian troops in the JPKF with an international peacekeeping force.³⁰ Georgian government officials accused Russia of arming separatists, threatening Georgian citizens and taking part in raids and smuggling operations.³¹ In order to facilitate a legal unilateral withdrawal from the bilateral treaty, Georgia would have needed to prove that Russia's actions constituted a "material breach" within the meaning of the Vienna Convention on the Law of Treaties.³² Despite the vote, the treaty nominally remained in force. In November 2006, South Ossetian officials announced that ninety-nine percent of voters supported independence for the region,³³ though the referendum was "denounced by Georgia and the international community as a bid to join with Russia, which provides the region with overwhelming economic support."³⁴

B. *The 2008 War*

The exact nature of the start of the August 2008 war is uncertain, characterized by a controversy over whether Russia or Georgia was the initial aggressor.³⁵ Georgia claimed that a Russian regiment crossed into South Ossetia early on August 7, while Russia responds that this was part of the normal movements related to the peacekeeping operation.³⁶ The Russian view of the war holds that Russian combat units entered South Ossetia only after Saakashvili ordered an attack on the South Ossetian capital of Tskhinvali on the evening of the August 7.³⁷

In November 2008, accounts from OSCE monitors suggested that contrary to Georgian claims no significant shelling of Georgian villages was reported prior to the beginning of the Georgian offensive at 11:35 p.m. on August 7.³⁸ Despite the uncertainties over what happened on that day, it was clear by August 10 that the war would involve not just South Ossetia,

³⁰ Jean-Christophe Peuch, *Georgia: Parliament Votes Russian Troops out of South Ossetia*, RADIO FREE EUROPE/RADIO LIBERTY, Feb. 15, 2006, <http://www.rferl.org/content/Article/1065805.html>.

³¹ *Id.*

³² Vienna Convention on the Law of Treaties art. 60, ¶ 1, *opened for signature* May 23, 1969, 1155 U.N.T.S. 331, 346 ("A material breach of a bilateral treaty by one of the parties entitles the other to invoke the breach as a ground for terminating the treaty or suspending its operation in whole or in part.").

³³ Michael Schwirtz, *Georgia: Province Backs Independence*, N.Y. TIMES, Nov. 14, 2006, at A9.

³⁴ Daria Vaisman, *No Recognition for Breakaway Zone's Vote*, CHRISTIAN SCI. MONITOR, Nov. 10, 2006, at 7.

³⁵ C.J. Chivers, *Georgia Offers Fresh Evidence on War's Start*, N.Y. TIMES, Sept. 16, 2008, at A1.

³⁶ *Id.*

³⁷ *Id.*

³⁸ C.J. Chivers & Ellen Barry, *Accounts Undercut Claims By Georgia on Russia War*, N.Y. TIMES, Nov. 7, 2008, at A1. One of the main justifications for Georgia's attack on Tskhinvali was the alleged shelling of Georgian villages. *Id.*

but also areas of Georgia outside the disputed region. News reports indicated that Russia shelled the city of Gori and dropped bombs on an airport and aviation factory in the capital of Tbilisi.³⁹ On August 14, the Russian General Prosecutor's Office Investigation Committee launched an investigation into charges of genocide⁴⁰ by Georgian troops against Russian citizens in Ossetia.⁴¹ The South Ossetian government reported that more than 2100 people died during the conflict, while Georgia disputed the numbers, which could not be independently verified during the war.⁴² In 2009, estimates for the number of dead from the shelling of Tskhinvali ranged from 162 to 400.⁴³

There is some evidence that both Russia and Georgia committed war crimes during the conflict. A 2009 Human Rights Watch ("HRW") report has faulted Russia for "fail[ing] to observe their obligations to do everything feasible to verify that the objects to be attacked were military [rather than civilian] objectives,"⁴⁴ and noted that "Russian forces may have intentionally targeted civilians" in civilian vehicles.⁴⁵ HRW likewise cited Georgia for failing to distinguish between military and civilian targets, including using BM-21 rocket launchers to shell Tskhinvali and attacking Ossetian civilians fleeing the conflict in their vehicles.⁴⁶ The report faulted both sides for using cluster munitions.⁴⁷

Russia's official explanation for its actions early in the war can be gleaned from an August 8 statement from President Dmitry Medvedev.

³⁹ Anne Barnard, *Russians Push Past Separatist Region to Assault City in Central Georgia*, N.Y. TIMES, Aug. 11, 2008, at A1.

⁴⁰ Ugolovnyi Kodeks RF [UK] [Criminal Code] art. 357 (Russ.). The Russian genocide statute tracks the definition of genocide from the Genocide Convention and makes genocide punishable by twelve to twenty years confinement, life imprisonment or capital punishment. *See id.*; Convention on the Prevention and Punishment of the Crime of Genocide art. II, *opened for signature* Dec. 9, 1948, 78 U.N.T.S. 277, 280.

⁴¹ *Russia Launches Genocide Probe over S. Ossetia Events*, RIA NOVOSTI, Aug. 14, 2008, <http://en.rian.ru/russia/20080814/116026568.html>.

⁴² U.N. SCOR, 63d Sess., 5961st mtg. at 3, U.N. Doc. S/PV.5961 (Aug. 19, 2008) [hereinafter 5961st mtg.].

⁴³ Ellen Barry, *War Report Finds Fault with Russia and Georgia*, N.Y. TIMES, Jan. 24, 2009, at A8. By late February 2009, the Investigative Committee of the Russian Prosecutor General's Office had documented 165 deaths of South Ossetians. *Russia Lost 64 Troops in Georgia War, 283 Wounded*, REUTERS, Feb. 21, 2009, <http://uk.reuters.com/article/gc07/idUKTRE51K1B820090221>.

⁴⁴ HUMAN RIGHTS WATCH, *supra* note 2, at 7.

⁴⁵ *Id.* at 8. Russian violations cited by Human Rights Watch included attacking medical personnel, firing at close range into homes and looting. *Id.* at 7-8.

⁴⁶ *Id.* at 6-7.

⁴⁷ *Id.* at 10. HRW concluded that Russia's use of cluster munitions was indiscriminate, while withholding an opinion on Georgia's use. *Id.* at 11. Neither Russia nor Georgia is a signatory to the Convention on Cluster Munitions. Convention on Cluster Munitions, Ratifications and Signatures, http://www.clusterconvention.org/pages/pages_i/i_statessigning.html (last visited Nov. 1, 2009).

He stated that on August 7, “Georgian troops committed what amounts to an act of aggression against Russian peacekeepers and the civilian population in South Ossetia.”⁴⁸ Medvedev characterized this as “a gross violation of international law and of the mandates that the international community gave Russia as a partner in the peace process.”⁴⁹ He added that the majority of those who were dying were Russian citizens.⁵⁰ In a news conference one week later, Medvedev appeared to draw upon humanitarian themes in stressing Russia’s role in the region: “[T]he Ossetians . . . themselves trust only the Russian peacekeepers because the events of the last 15 years have shown them that the Russian peacekeepers are the only force able to protect their interests and often their very lives.”⁵¹ At this time, Russia had still recognized South Ossetia as a part of Georgia.⁵² In a November press conference, Medvedev further explained Russia’s actions during the August war: “[W]e had to intervene to protect people, to defend their right to exist simply as ethnic groups, and to prevent a humanitarian catastrophe. Our intervention was limited and absolutely necessary given the situation. We acted in accordance with international law, including the UN Charter and the right of self-defence.”⁵³

C. *International Reaction*

Many Western governments characterized Russian involvement in the war as unlawful. In a speech in late August, British Foreign Secretary David Miliband stated that “what Russia has done goes far beyond the

⁴⁸ Dmitry Medvedev, President of Russ. Statement on the Situation in South Ossetia (Aug. 8, 2008), http://www.kremlin.ru/eng/speeches/2008/08/08/1553_type82912type82913_205032.shtml.

⁴⁹ *Id.*

⁵⁰ *Id.*

⁵¹ Dmitry Medvedev, President of Russ., Joint Press Conference with Federal Chancellor Angela Merkel (Aug. 15, 2008), http://www.kremlin.ru/eng/speeches/2008/08/15/2259_type82912type82914type82915_205379.shtml.

⁵² S.C. Res. 1808, ¶ 1, U.N. Doc. S/RES/1808 (Apr. 15, 2008) (explaining that the Security Council “*Reaffirms* the commitment of all Member States to the sovereignty, independence and territorial integrity of Georgia within its internationally recognized borders . . .”). This affirmation by the Security Council, of which Russia is a permanent member, preceded the Russian recognition of South Ossetia as an independent state following the 2008 war. See *Sobranie Zakonodatel’sтва Rossiiskoi Federatsii [SZ RF]* [Russian Federation Collection of Legislation] 2008, No. 35, Item 4012.

⁵³ Dmitry Medvedev, President of Russ., Statement and Answers to Journalists’ Questions After the 22 Russia–EU Summit (Nov. 14, 2008), http://eng.kremlin.ru/text/speeches/2008/11/14/2126_type82914type82915_209207.shtml. See U.N. Charter art. 51.

bounds of peacekeeping.”⁵⁴ He then sought to differentiate NATO’s unsanctioned humanitarian intervention in Kosovo from Russia’s intervention in Georgia:

NATO’s actions in Kosovo followed dramatic and systematic abuse of human rights, culminating in ethnic cleansing on a scale not seen in Europe since the Second World War. NATO acted over Kosovo only after intensive negotiations in the Security Council and determined efforts at peace talks at Rambouillet. Special Envoys were sent to warn Milosevic in person of the consequences of his actions. None of this can be said for Russia’s use of force in Georgia.⁵⁵

Two months after this speech, Miliband responded to allegations of war crimes by Georgia during the war.⁵⁶ His legal argument centered on non-intervention: “The rights and the wrongs both of each side’s actions need to be investigated, but they mustn’t occlude the fact that a neighbour with eight hundred thousand people in uniform then invaded a sovereign country that’s recognised as part of the United Nations.”⁵⁷ Miliband’s focus on the importance of state sovereignty, without the attendant differentiation from the Kosovo conflict, appears to undermine NATO’s claims as to the appropriateness of the Kosovo intervention. Arguments about the relative size of the Russian and Georgian armies are also unconvincing when one takes into account the size of NATO forces compared to the FRY army.

In an August 11 press conference, Zalmay Khalilzad, the U.S. ambassador to the UN, suggested that Russia overstepped the boundaries of an acceptable intervention.⁵⁸ Khalilzad specifically criticized Russia for taking the conflict outside the disputed territory: “If the Russian intent as has been stated has been the return to status quo ante in South Ossetia, why start a second front from Abkhazia? Why attack the rest of Geor-

⁵⁴ David Miliband, British Foreign Sec’y, Protecting Democratic Principles (Aug. 27, 2008), <http://www.fco.gov/uk/en/newsroom/latest-news/?view=speech&id=20686811>.

⁵⁵ *Id.* The Rambouillet Conference involved a failed attempt to settle the Kosovo conflict in February 1999. See David Vesel, *The Lonely Pragmatist: Humanitarian Intervention in an Imperfect World*, 18 *BYU J. PUB. L.* 1, 44 (2003).

⁵⁶ Foreign & Commonwealth Office, Georgia: South Ossetia and War Crime Claims (Oct. 29, 2008), <http://www.fco.gov/uk/en/newsroom/latest-news/?view=News&id=%208294555>.

⁵⁷ *Id.*

⁵⁸ Zalmay Khalilzad, U.S. Ambassador to the United Nations, Remarks at the Security Council Stakeout (Aug. 11, 2008), *available at* 2008 WLNR 15082458 (“[W]e hope that Russia will join the broad consensus that’s emerging that this has gone for too long.”).

gia? And why attack the infrastructure of Georgia? Why threaten to attack the civilian airport of Tbilisi?”⁵⁹

Some members of the U.S. Congress also commenced legislative action in reaction to the war. Senator Hillary Clinton introduced a bill to establish a “Commission on the Conflict between Russia and Georgia”⁶⁰ to investigate the role of Russia, Georgia and the U.S. in the conflict. One House resolution, named the Stability and Democracy for Georgia Act of 2008, went a step further, expressly declaring Russia’s intervention in Georgia as illegal:

The United States condemns the attack on the sovereign territory of Georgia by the military of the Russian Federation in August 2008 in contravention of international law, including the United Nations Charter and the Sochi Agreement of 1992 that governed the conduct of Russian peacekeepers in . . . South Ossetia.⁶¹

Another bill called on the International Olympic Committee to designate a new host city for the 2014 Winter Olympics, which are to take place in Sochi, because Russian forces “have advanced into and attacked the territory of the Republic of Georgia, grossly exceeding any mandate of Russian peacekeepers in South Ossetia, and officials of the Government of the Russian Federation have sought to oust the democratically elected Government of the Republic of Georgia.”⁶²

The war also involved American presidential campaigns. On August 9, Barack Obama released a statement in which he accused Russia of “clear and continued violation of Georgia’s sovereignty and territorial integrity,” demanded that Russia withdraw ground troops from Georgia and accused Russia of launching a “cyber war against Georgian government websites.”⁶³ At a town-hall event on August 12, John McCain said: “The Russian government stated it was acting only to protect Ossetians, and yet, on Saturday, its bombing campaign encompassed the whole of Georgia. Hundreds of innocent civilians have been wounded and killed – possibly thousands.”⁶⁴

⁵⁹ *Id.* For a comprehensive report of the U.S. government’s official response to the war, see JIM NICHOL, CONG. RESEARCH SERV., RUSSIA-GEORGIA CONFLICT IN SOUTH OSSETIA: CONTEXT AND IMPLICATIONS FOR U.S. INTERESTS 24-29 (2008), <http://www.fpc.state.gov/documents/organization/112446.pdf>.

⁶⁰ S. 3567, 110th Cong. § 2 (2008).

⁶¹ H.R. 6911, 110th Cong. §2(1) (2008).

⁶² H.R. Con. Res. 421, 110th Cong. (2008).

⁶³ Barack Obama, Statement from Senator Barack Obama on Russia’s Escalation of Violence Against Georgia (Aug. 9, 2008), http://www.barackobama.com/2008/08/09/statement_from_senator_barack_3.php.

⁶⁴ Senator John McCain, Speech in York, PA. (Aug. 12, 2008), <http://www.lexisnexis.com/lawschool> (follow “Research Now!” hyperlink; then follow “News & Business” hyperlink; then follow “News, All (English, Full Text)” hyperlink; then

In Security Council deliberations early on August 8, the Russian representative suggested that it was Georgia that opted for war in spite of ongoing diplomatic efforts.⁶⁵ In the next meeting, the Georgian diplomat accused Russia of a “premeditated military intervention.”⁶⁶ Russia replied that Georgia’s “aggression has been carried out in violation of the fundamental principle of the Charter of the United Nations concerning the non-use of force.”⁶⁷ The Russian representative proceeded to describe to the Security Council alleged violations of international law by Georgia.⁶⁸

Several subsequent remarks in the Security Council appeared to suggest that humanitarian intervention without the UN’s approval ought not to be allowed. The British representative stated, “Humanitarian assistance cannot be used as a pretext for the presence of non-Georgian troops”⁶⁹ The Croatian representative added: “Although we understand and welcome the Russians’ role as peacekeepers and their call for a cessation of hostilities and a return to diplomacy, that cannot be a justification for the violation of Georgia’s territory, integrity and sovereignty.”⁷⁰ Later in the meeting, the Russian representative reiterated that ethnic cleansing was occurring in South Ossetia: “How else can we describe it when during the course of today a town of 70,000 inhabitants is being destroyed?”⁷¹

Statements to the Security Council at its August 19 meeting provide some of the clearest examples of Russia’s humanitarian justification for its offensive. In response to allegations that Russia was contributing to a humanitarian disaster in the war zone, the Russian representative said, “no one is undertaking a humanitarian operation as large as that of Russia in the conflict zone.”⁷² The representative noted that Russian forces fed the civilian population in Gori after Georgian authorities abandoned the city.⁷³

search “John McCain Addresses Crisis in Georgia”; then follow “State News Service” hyperlink). McCain finished his speech by saying, “today, we are all Georgians.” *Id.*

⁶⁵ U.N. SCOR, 63d Sess., 5951st mtg. at 2, U.N. Doc. S/PV.5951 (Aug. 8, 2008).

⁶⁶ U.N. SCOR, 63d Sess., 5952d mtg. at 2, U.N. Doc. S/PV.5952 (Aug. 8, 2008) [hereinafter 5952d mtg.].

⁶⁷ *Id.* at 3.

⁶⁸ *Id.* at 3-4.

⁶⁹ *Id.* at 6.

⁷⁰ *Id.* Croatia began NATO accession talks in April 2008. NATO, NATO Conducts Accession Talks with Alb. and Croat. (Apr. 25, 2008), <http://www.nato.int/docu/update/2008/04-april/e0425b.html>. It was admitted one year later. NATO, Ceremony Marks the Accession of Alb. and Croat. to NATO (Apr. 7, 2009), http://www.nato.int/cps/en/SID-A4A8AF95-E503177E/natolive/news_52902.htm.

⁷¹ 5952d mtg., *supra* note 66, at 10. This was evidently a reference to Tskhinvali.

⁷² 5961st mtg., *supra* note 42, at 11.

⁷³ *Id.*

With regards to the circumstances under which Russia entered the war, the representative noted that Russia sought the attention of the Security Council in the run-up to the conflict “as Russia warned the Council that Georgia was on the verge of unleashing a military adventure.”⁷⁴ Amid complaints that Russia was not withdrawing its troops fast enough after the signing of a six-point ceasefire, the representative said that Russian withdrawal “will be commensurate with . . . the return of Georgian troops to their places of permanent deployment: their barracks.”⁷⁵ The American representative questioned the validity of Russia’s argument of self-defense, stating that, “Russia has expanded its operations far beyond the conflict zone into areas that have nothing to do with South Ossetia.”⁷⁶ The French representative also condemned Russia on this point.⁷⁷

III. HUMANITARIAN INTERVENTION AND THE KOSOVO PRECEDENT

A. *Theory and History*

The primary goals of the United Nations, as stated in the UN Charter’s preamble, are “to save succeeding generations from the scourge of war” and “to establish conditions under which justice and respect for the obligations arising from treaties and other sources of international law can be maintained.”⁷⁸ To that end, the Charter has a general prohibition on the “threat or use of force against the territorial integrity or political independence of any state.”⁷⁹ Two exceptions are allowed: using force with the express consent of the Security Council⁸⁰ and “the inherent right of individual or collective self-defence if an armed attack occurs against a Member . . . , until the Security Council has taken measures necessary to maintain international peace and security.”⁸¹ While “there was no apparent discussion of the legality of unauthorized humanitarian intervention”⁸² at the two Charter drafting conferences, the *travaux préparatoires* strongly suggest that the framers wanted Security Council authorization for any military actions that do not fall within the rubric of self-defense.⁸³ In addition, the International Court of Justice has rejected the legality of

⁷⁴ *Id.* at 12.

⁷⁵ *Id.*

⁷⁶ *Id.* at 9.

⁷⁷ *Id.* at 6. The relevant words were: “Historical accounts will say that it was a series of provocations and reactions, but one thing is clear: Georgia’s actions were followed by a brutal and disproportionate reaction by Russia.” *Id.*

⁷⁸ U.N. Charter pmb. l.

⁷⁹ *Id.* art. 2, para. 4.

⁸⁰ *Id.* art. 42.

⁸¹ *Id.* art. 51.

⁸² BRIAN D. LEPARD, *RETHINKING HUMANITARIAN INTERVENTION: A FRESH LEGAL APPROACH BASED ON FUNDAMENTAL ETHICAL PRINCIPLES IN INTERNATIONAL LAW AND WORLD RELIGIONS* 345 (2002).

⁸³ *Id.* at 348-49.

unilateral humanitarian intervention. In a case involving U.S. activities in Nicaragua, the Court wrote, “while the United States might form its own appraisal of the situation as to respect for human rights in Nicaragua, the use of force could not be the appropriate method to monitor or ensure such respect.”⁸⁴

Because of the Charter’s heavy emphasis on state sovereignty,⁸⁵ it is difficult to justify unauthorized intervention within the textual framework.⁸⁶ One possibility is to appeal to other legal principles, such as the protection of human rights, but this can lead to a breakdown of the international legal order.⁸⁷ Another theory holds that states forfeit their sovereignty when they violate or allow others to violate human rights, especially those that constitute *jus cogens*.⁸⁸ A utilitarian argument would justify intervention when more people would be saved than killed as a result of the intervention.⁸⁹ Insofar as the UN Charter’s prohibition on the use of force has become a part of customary law, much of the debate comes down to the dissimilarity of the restrictive and extensive interpretations, with the latter more likely to approve of instances of unilateral humanitarian intervention.⁹⁰

During the Cold War, most humanitarian interventions were in the form of self-defense actions, and the intervening states were often criticized for pursuing political goals unrelated to human rights.⁹¹ By the

⁸⁴ Military and Paramilitary Activities (Nicar. v. U.S.), 1986 I.C.J. 14, 134 (June 27).

⁸⁵ See, e.g., U.N. Charter art. 1, para. 2, art. 2, para. 1, art. 2, para. 7.

⁸⁶ See, e.g., DAVID CHANDLER, FROM KOSOVO TO KABUL: HUMAN RIGHTS AND INTERNATIONAL INTERVENTION 55 (2002) (arguing that U.N. Charter art. 2, para. 7 “established that states, rather than abstract human rights, would be the legal subjects of the international post-war system”).

⁸⁷ See FLETCHER & OHLIN, *supra* note 9, at 134 (“Once the Charter and the international system is weakened or delegitimized, it is weakened in all situations, including cases of less justifiable use of force, such as brute aggression. Once people start arguing that Article 51 is not the sole standard for justifying the use of force, the door is opened for all kinds of arguments about the use of force.”).

⁸⁸ *Id.* at 135.

⁸⁹ *Id.* at 134-35.

⁹⁰ See Olivier Corten, *The Controversies Over the Customary Prohibition on the Use of Force: A Methodological Debate*, 16 EUR. J. INT’L L. 803 (2005). The extensive approach is closely related to policy-oriented jurisprudence, “which tends to justify a very broad range of grounds for the use of force . . .” *Id.* at 809. Compare Peter Hilpold, *Humanitarian Intervention: Is There a Need for a Legal Reappraisal?*, 12 EUR. J. INT’L L. 437, 449-50 (2001) (arguing for a restrictive interpretation of Article 51 of the U.N. Charter), with W. Michael Reisman, Comment, *Kosovo’s Antinomies*, 93 AM. J. INT’L L. 860, 860 (1999) (asserting that some events demand unilateral action when the legal mechanisms don’t work, since the U.N. Charter is not a “suicide pact”).

⁹¹ See Jonathan I. Charney, Comment, *Anticipatory Humanitarian Intervention in Kosovo*, 93 AM. J. INT’L L. 834, 836 (1999).

beginning of the 1990s, the deadlock in the Security Council had loosened, and it appeared that the formal legal framework might actively work to check human rights abuses around the world.⁹² The Council used humanitarian justifications to allow armed intervention in Somalia⁹³ and Sierra Leone,⁹⁴ though both of these countries were failing or failed states at the time. In some other situations, such as with Liberia and the Central African Republic, the Council only gave retroactive authorization to interventions after they had already begun.⁹⁵

B. *NATO's Intervention in Kosovo: Theories of Justification*

The situation in Kosovo proved to be a major challenge to the Security Council's sole authority to sanction force that does not constitute self-defense. While many Western powers readily admitted that NATO's 1999 strike was patently inconsistent with the United Nations Charter, they took great pains to demonstrate that the intervention was anything but unilateral, and that Kosovo was a special situation calling for drastic measures.⁹⁶ Furthermore, Belgium argued that it was under a legal obligation to intervene,⁹⁷ while the Netherlands claimed that the UN Charter is not the sole source of international law and that there is a generally accepted rule that states cannot terrorize their own citizens.⁹⁸ Some scholars have compared NATO's actions to an arguably acceptable norm of domestic legal systems: "Perhaps humanitarian intervention should be regarded in the same light as an example of civil disobedience. Although international law says that intervention to stop genocide is illegal, it's a

⁹² Anne Orford, *Muscular Humanitarianism: Reading the Narratives of the New Interventionism*, 10 EUR. J. INT'L L. 679, 680 (1999).

⁹³ Vesel, *supra* note 55, at 23; see S.C. Res. 794, U.N. Doc. S/RES/794 (Dec. 3, 1992).

⁹⁴ Vesel, *supra* note 55, at 28; see S.C. Res. 1270, U.N. Doc. S/RES/1270 (Oct. 22, 1999).

⁹⁵ LEPARD, *supra* note 82, at 337. Retroactive authorization appears to be inconsistent with the text of the Charter, which implies that the Security Council's decision must be prior in time to the military action. See U.N. Charter art. 42; Fernando R. Tesón, *The Vexing Problem of Authority in Humanitarian Intervention: A Proposal*, 24 WIS. INT'L L.J. 761, 765 (2006) ("In Sierra Leone in 1997, the Security Council issued a retroactive authorization in apparent disregard of the common wisdom that authorization to use force should take place *before* the operation.").

⁹⁶ IAN CLARK, *LEGITIMACY IN INTERNATIONAL SOCIETY* 213 (2005).

⁹⁷ Antonio Cassese, *A Follow-Up: Forcible Humanitarian Countermeasures and Opinio Necessitatis*, 10 EUR. J. INT'L L. 791, 792 (1999).

⁹⁸ *Id.* at 795. These views are closely related to the so-called "Clinton Doctrine" of humanitarian intervention. See Daniel H. Joyner, *The Kosovo Intervention: Legal Analysis and a More Persuasive Paradigm*, 13 EUR. J. INT'L L. 597, 598 (2002).

case where civil disobedience of the law is morally justified.”⁹⁹ Another author argues that humanitarian intervention is consistent with the aims of the Charter, since “the use of military action to protect a beleaguered population may advance humane values without significant danger to stability.”¹⁰⁰

Another theory focuses not so much on the Security Council’s failure to authorize an intervention but on its acquiescence, perhaps even retroactive approval, of the events that transpired. This theory is premised on the claim that relatively few states maintained that the NATO action in FRY was illegal (among them, Russia, China and India) and that a draft resolution to condemn NATO failed by a vote of twelve to three.¹⁰¹ In addition, a resolution passed by the Council at the end of the intervention did not provide any criticism of NATO’s use of force.¹⁰² Of course, had NATO asked the Security Council for explicit authorization to bomb the FRY, an approving vote would likely have been vetoed by Russia and possibly China, lending less credibility to any claims of a legal strike.¹⁰³

Yet another school of thought seeks to distinguish the operations of NATO, a large transatlantic military alliance, from the actions of a single state, as was the case in the Ossetia war.¹⁰⁴ The view holds that “[t]he collective character of the organization provided safeguards against abuse by single powerful states pursuing egoistic national interests.”¹⁰⁵ In addition, Professor Wedgwood notes that the Kosovo events might be partially justified under Article 53 of the UN Charter,¹⁰⁶ which allows the Security Council to work with regional agencies. She points to the Council’s deference to regional organizations during peacekeeping actions in

⁹⁹ FLETCHER & OHLIN, *supra* note 87, at 133-34. See also Thomas M. Franck & Nigel S. Rodley, *After Bangladesh: The Law of Humanitarian Intervention by Military Force*, 67 AM. J. INT’L L. 275, 304 (1973).

¹⁰⁰ Wedgwood, *supra* note 9, at 833.

¹⁰¹ Cassese, *supra* note 97, at 792.

¹⁰² *Id.*; see S.C. Res. 1244, U.N. Doc. S/RES/1244 (June 10, 1999).

¹⁰³ See Louis Henkin, Comment, *Kosovo and the Law of “Humanitarian Intervention,”* 93 AM. J. INT’L L. 824, 825 (1999).

¹⁰⁴ See Cassese, *supra* note 97, at 794 (“[S]tates . . . placed emphasis, either explicitly or implicitly, upon the fact that they regarded their action as justified only because it was not taken by one state but by a group of states acting unanimously within the framework of an intergovernmental organization.”); Wedgwood, *supra* note 9, at 833 (“NATO can claim the legitimacy of a nineteen-nation decision process, and the normative commitments of a democratic Europe that even Yugoslavia wishes to join.”)

¹⁰⁵ Henkin, *supra* note 103, at 826.

¹⁰⁶ Wedgwood, *supra* note 9, at 832; U.N. Charter art. 53, para. 1 (“The Security Council shall, where appropriate, utilize such regional arrangements or agencies for enforcement action under its authority. But no enforcement action shall be taken under regional arrangements or by regional agencies without the authorization of the Security Council . . .”).

Africa in the 1990s, often followed by implicit approval.¹⁰⁷ This view is undermined by a General Assembly resolution that states, “No State or group of States has the right to intervene, directly or indirectly, for any reason whatever, in the internal or external affairs of any other State.”¹⁰⁸ Furthermore, the Council’s refusal to condemn unsanctioned interventions by regional bodies during their early stages may simply be a political move, and “[s]uch a political stance is not tantamount to a consensual reinterpretation of Article 53 that would eliminate a legal requirement of Council authorization.”¹⁰⁹

NATO members sent out conflicting signals over whether they wanted their action in Kosovo to have a precedential effect. While Germany stressed that the intervention was justified yet must not set a precedent,¹¹⁰ other members’ public statements suggest that “they would nevertheless in future envisage resort once again to forcible countermeasures, without the authorization of [the Security Council], whenever faced with similar humanitarian tragedies, and as a last resort in the event of inaction on the part of the Security Council.”¹¹¹ This all suggests that NATO was painfully aware that its intervention stood on shaky legal ground, and that the Kosovo situation could in the future be exploited to justify military actions by other states or organizations that would be incompatible with NATO’s political goals. Evidently, NATO realized that the international legal framework, in existence since the end of World War II and affirmed by nearly every state in the world, was standing in the way of a worthwhile cause and that some type of solution was necessary to end what some perceived to be a mass violation of human rights. Once unauthorized humanitarian intervention was identified as the solution, NATO endeavored to limit any future application by reserving exclusive rights to its use.¹¹² This solution can easily be viewed as unfair or even arrogant. Thus, the “justification” for Kosovo, along

¹⁰⁷ Wedgwood, *supra* note 9, at 832.

¹⁰⁸ G.A. Res. 2625 (XXV), at 123, U.N. GAOR, 25th Sess., Supp. No. 28, U.N. Doc. A/8028 (Oct. 24, 1970). For a discussion of the legal authority of this Resolution, see Joyner, *supra* note 98, at 600 n.7.

¹⁰⁹ LEPARD, *supra* note 82, at 353.

¹¹⁰ Cassese, *supra* note 97, at 792-93.

¹¹¹ *Id.* at 794-95. With regards to Kosovo, Cassese concludes that, “the matter is too delicate and controversial to warrant the contention that the evolution of international law in this area may result from a single episode.” *Id.* at 797. *But see* Henkin, *supra* note 103, at 828 (arguing that the Kosovo incident “may reflect a step toward a change in the law, part of the quest for developing ‘a form of collective intervention’ beyond a veto-bound Security Council”).

¹¹² See, e.g., Pratap Bhanu Mehta, *From State Sovereignty to Human Security (Via Institutions?)*, in HUMANITARIAN INTERVENTION 259, 274 (Terry Nardin & Melissa S. Williams, eds., 2006) (“[S]tates that engage in intervention are more comfortable that intervention is not a threat to peace and security so long as they are the ones doing it.”).

with what actually happened in FRY, helps to explain why Western powers' objections to Russia's actions in Ossetia fundamentally ignore the problematic state of the international law of war after 1999.

C. *The Impacts of the Intervention in Kosovo*

One of the main objections to unilateral interventions is that "without formal institutional determinations of whether the circumstances really warrant unilateral action, the action is likely to be taken, rhetoric aside, in the self-interest of the intervener."¹¹³ While it might be possible to claim that NATO's actions were purely altruistic, the actual intervention was severely limited in its ability to stop human-rights violations because NATO was unwilling to put its soldiers on the ground, in harm's way,¹¹⁴ perhaps due to the results of the mission in Somalia.¹¹⁵ Instead, "NATO stepped up its show of force by expanding its target list to include infrastructure within the FRY. These new targets included civilian-use facilities such as bridges, factories, electricity grids, and water treatment plants."¹¹⁶ In fact, in April 1999, while the bombing of the FRY was continuing, the UN High Commissioner for Human Rights issued various reports that directly condemned the manner in which NATO was conducting its operations, drawing upon the principles of proportionality and legality.¹¹⁷ As one scholar notes, "[i]f the intervention was predicated, as it was by NATO, upon overwhelming humanitarian necessity, one must wonder how an intervention constructed solely of dropping bombs could quickly improve the plight of the Kosovars."¹¹⁸

What transpired was a violent process that took the battle to the capital, far outside Kosovo, a process that might have led to more killings of Kosovo Albanians than would have otherwise occurred, and that had, as its ultimate goal, the destruction of as much of the FRY as was necessary to drive Belgrade to capitulation.¹¹⁹ Such a criticism closely parallels the charges thrown at Russia during its war with Georgia, when Russia was accused of orchestrating a disproportionate response, expanding the con-

¹¹³ W. Michael Reisman, *Unilateral Action and the Transformations of the World Constitutive Process: The Special Problem of Humanitarian Intervention*, 11 EUR. J. INT'L L. 3, 16 (2000).

¹¹⁴ LEPARD, *supra* note 82, at 375 ("[NATO members'] persistent lack of interest in deploying ground troops prior to the formal adoption of a peace agreement demonstrated that concerns about casualties could easily outweigh any apparent moral imperative of preventing possible genocide.").

¹¹⁵ FLETCHER AND OHLIN, *supra* note 87, at 133.

¹¹⁶ Vesel, *supra* note 55, at 45.

¹¹⁷ See Cassese, *supra* note 97, at 796 n.22.

¹¹⁸ Vesel, *supra* note 55, at 46. Serb attacks against Kosovars increased in intensity after NATO began bombing FRY. *Id.*

¹¹⁹ See Charney, *supra* note 91, at 840.

flict outside the disputed territory and seeking to overthrow the central government in Tbilisi.

In addition, the magnitude of the human-rights abuse in Kosovo prior to the beginning of NATO's actions did not clearly suggest that a humanitarian intervention was necessary. The event that has been primarily cited is the massacre of Kosovars in Racak on January 15, more than two months before NATO began its assault.¹²⁰ Taking into account Racak and the Kosovar displacement within the FRY, Professor Jonathan Charney wrote that, "This is not a circumstance involving ongoing widespread grave violations of international criminal law."¹²¹ Thus, it was reasonable for countries such as Russia and China to believe that the Security Council had no grounds to authorize a military incursion in 1999 and that it was more worthwhile to continue diplomatic talks, despite the disappointment at Rambouillet.

Furthermore, the run-up to Kosovo included highly exaggerated death tolls as part of the "manipulation of victims' rights."¹²² U.S. officials claimed that the FRY's forces killed as many as 100,000 or even 225,000 ethnic Albanian men, with the lowest NATO estimates being 10,000.¹²³ In 2000, the International Criminal Tribunal for Yugoslavia (ICTY) determined that between 2000 and 3000 people died.¹²⁴ In essence, this situation is very similar to the early claims by the South Ossetian government, which were adopted by Russia, of more than 2000 deaths in the Georgian shelling of Tskhinvali. In both wars, exaggeration of casualties was used to justify unauthorized interventions.

IV. APPRAISAL

After NATO's action in Kosovo, the law of humanitarian intervention was in a state of disorder. The world's most powerful military alliance attempted to carve out an exception to the prohibition on the use of force, grounded in both treaty and custom. Outside the scope of self-defense and action explicitly authorized by the Security Council, NATO formulated a justification for the use of force in the event of deadlock within the formal legal framework. Nevertheless, NATO's justifications for the specific situation of Kosovo have many drawbacks, as stated

¹²⁰ *Id.*

¹²¹ *Id.* Charney concludes that: "[T]he Kosovo intervention reflects the problems of an undeveloped rule of law in a morally dangerous situation. It was actually an 'anticipatory humanitarian intervention' based on past actions of the FRY regime and future risks." *Id.* at 841.

¹²² CHANDLER, *supra* note 86, at 73.

¹²³ *Id.*

¹²⁴ *Id.*; see also Jonathan Steele, *Serb Killings 'Exaggerated' by West*, THE GUARDIAN, Aug. 18, 2000, at 3, available at <http://www.guardian.co.uk/world/2000/aug/18/balkans3>.

above, and are very problematic to the extent they can be used as precedent.

While Russia did not specifically characterize its actions in Georgia as a humanitarian intervention, it used the language of human rights in defending its operations. By calling attention to the number of people believed to have been killed in Tskhinvali, by starting a criminal investigation into charges of genocide, and by asserting to the Security Council that it was the sole international actor that could protect Ossetians from Georgia's aggression, Russia acted much like NATO did in 1999. Ostensibly, Russia also believed that it was acting in self-defense due to the presence of people holding Russian passports in South Ossetia. However, the doctrine of self-defense does not extend this far. The ICJ has stated "[i]n the case of individual self-defence, the exercise of this right is subject to the State concerned having been the victim of an armed attack."¹²⁵ There is no record of Georgian troops crossing from South Ossetia into North Ossetia, and thus the Russian claims of self-defense are unjustified. Furthermore, it is rather difficult for Russia to claim that attacking the city of Gori was allowed under the mandate granted to it by the Sochi Agreement, since under the Supremacy Clause of the UN Charter,¹²⁶ the principles of state sovereignty and non-intervention must prevail over any contradictory agreements. Thus, Russia's actions in Ossetia are inarguably inconsistent with international law insofar as they are justified by a claim to self-defense. But Russia's assertion that it acted to protect Ossetian lives from the possibility of ethnic cleansing or genocide is in a different legal dimension and must be analyzed with Kosovo in mind.

Russia brought the Ossetia situation to the attention of the Security Council, but like NATO in 1999, Russia never asked for a vote to authorize an intervention. The Russian delegation knew that the close ties between Georgia and the United States made the possibility of a veto highly likely, or that a vote would not even reach the veto stage due to weak support from the Security Council's elected members. Russia emphasized that diplomacy was not working and that armed force was the only solution.

A claim that an action by a multinational force such as NATO is more legitimate than one by a single country ignores the state of the world's alliances and marginalizes formally non-aligned states such as Russia. With the end of the Cold War and the disintegration of the Warsaw Pact, Russia saw many of its former members join NATO while itself remain-

¹²⁵ *Military and Paramilitary Activities (Nicar. v. U.S.)*, 1986 I.C.J. 14, 103 (June 27).

¹²⁶ U.N. Charter art. 103 ("In the event of a conflict between the obligations of the Members of the United Nations under the present Charter and their obligations under any other international agreement, their obligations under the present Charter shall prevail.").

ing independent of the alliance.¹²⁷ Due to this situation, any military action taken by Russia without Security Council approval would necessarily be unilateral, unless Russia were to undertake a burdensome effort to create a “coalition of the willing,” as the U.S. did prior to the invasion of Iraq in 2003.

Antonio Cassese, the first president of ICTY, has proposed “certain strict requirements” that must be met for the use of force when the Security Council is deadlocked due to a veto.¹²⁸ Cassese writes that, “[a]mongst other things, it must be a *collective* reaction of states to *systematic* massacres amounting to serious crimes against humanity.”¹²⁹ Here again is the emphasis on multilateralism, the belief that the more states that are involved in the intervention, the less likely they are to get it wrong. Under Cassese’s rule, both the Kosovo and Ossetia interventions would likely fail the test, unless one can make the case that the Racak incident of 1999 involves “systematic massacres.”

The point here is not to claim that Russia’s assault on Georgia was legal or humane, because the events of summer 2008, much like the events of spring 1999, were patently disallowed by the UN Charter, which serves as the foundation of contemporary international law. As stated in the HRW report, some of Russia’s actions were inconsistent with how a humanitarian intervener should rightly behave, and any claims of this type, along with the acts of Georgian forces, must be investigated, and the perpetrators must be brought to justice. The point, rather, is that the Russo-Georgian War occurred amid a murky legal landscape in light of what had transpired in Kosovo. Thus, condemnation of Russia’s actions must take into account the possibility of Kosovo’s precedential force – that is, that NATO’s intervention might have permanently weakened the authority of the Security Council and the moral high ground of states that do not wish to share with other states the right of unauthorized humanitarian intervention.

¹²⁷ NATO’s first post-Cold War enlargement occurred in 1999, when former Warsaw Pact members Hungary, Poland and Czech Republic joined the military alliance. NATO, NATO enlargement (Apr. 2, 2009), <http://www.nato.int/issues/enlargement/index.html>. In 2004, NATO added seven other Eastern European countries, including former Soviet states Lithuania, Latvia and Estonia. *Id.*

¹²⁸ Cassese, *supra* note 97, at 798.

¹²⁹ *Id.* (emphasis added). Notably, during the Kosovo intervention, Tony Blair laid out a list of criteria as part of the so-called “Doctrine of the International Community.” Tony Blair, British Prime Minister, Speech at the Chicago Economic Club: The Blair Doctrine (Apr. 22, 1999), http://www.pbs.org/newshour/bb/international/jan-june99/blair_doctrine4-23.html. Although the need for collectivity does not occur in any of the criteria, it appears from the context of Blair’s speech and the title of the doctrine that the standard would only apply to multilateral actions. *Id.*

V. CONCLUSION

During the conflict of August 1999, a former Greek diplomat told the Wall Street Journal that, "Russia wants to serve up to the West a text-book copy of what the West did to Serbia, but of course it's a ghastly parody."¹³⁰ In this paper, I have attempted to show how the two conflicts bring up similar issues of international law and how they are important to the evolution of the law of war. Surely, the Kosovo and Ossetia incidents signal the willingness of powerful states and blocs to work outside the UN Charter in the defense of certain values and political goals, but it would be wrong to say that a new rule of law has blossomed as a result of these episodes. Rather, a new international norm might be in the process of development. In the coming decades, states might believe that the purpose of Security Council deliberations is not to ask for approval to invade another country but to justify an invasion that has already begun. Much depends on how states react to future alleged breaches of human rights that occur within the purely domestic spheres of other states.

¹³⁰ Marc Champion et al., *Russia Widens Attacks on Georgia*, WALL ST. J., Aug. 11, 2008, at A1, A11.

