Fordham International Law Journal

Volume 32, *Issue* 5 2008 *Article* 4

Legal Case for Russian Intervention in Georgia

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Abstract

This Article examines the legal argument for Russia's military intervention in Georgia. 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. Finally, having weathered this crisis, Russia will increasingly construct its foreign policy arguments with an eye toward both following and shaping international law. Part I discusses the various legal documents Russia used in order to justify its intervention in Georgia. Part II gives a critique of the Russian intervention as a peace keeping operation to protect citizens. The article concludes questioning the circumstances in which nations may act unilaterally if international consensus is thwarted by deliberate political gridlock.

THE LEGAL CASE FOR RUSSIAN INTERVENTION IN GEORGIA

*Nicolai N. Petro**

INTRODUCTION

Now that some time has passed since the events of early August, it is possible to examine the legal argument for Russia's military intervention in Georgia *sine ira et studio*. While such arguments do not, of course, provide a full explanation for Russia's intervention—that would require an examination of Russia's economic, political and military ambitions in the Caucasus—they do tell us a great deal about the context within which foreign policy decisions are made. It is therefore striking that so few western analysts bothered to seriously consider the legal arguments Russia put forward for what it calls its "peace enforcement" operation, a term introduced by former United Nations ("U.N.") Secretary Boutros Boutros-Ghali sixteen years ago.[1]

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), 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.[2]

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

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1. *See* Boutros Boutros-Ghali, *Empowering the United Nations: Historic Opportunities to Strengthen World Body*, 71 FOREIGN AFFAIRS 93-94 (1992).

2. *See* Leonard Schapiro, *The Importance of Law in the Study of Politics and History*, *in* RUSSIAN STUDIES 29-44 (Ellen Dahrendorf ed., 1987).

the international legal system has become a fundamental ambition of Russian foreign policy.

I. *THE LEGAL DOCUMENTS*

Coming so soon after the latest review of Russia's foreign policy doctrine, the August crisis tested one of its central themes—Russia's commitment to international law.[3] Most observers however concluded that Russia's intervention, whatever legal justification might be sought, was in fact a triumph of *Realpolitik* over legality.

This is the view of two prominent legal authorities who have explicitly challenged Russia's claim that it acted on the basis of a "responsibility to protect," also known more colloquially as "R2P." One, Gareth Evans, was formerly Australia's foreign minister and co-chair of the international commission that worked out the R2P doctrine.[4] The other, Antonio Cassese, served as the first President of the International Criminal Tribunal for the Former Yugoslavia ("ICTY"), and is currently a professor of law at the University of Florence.[5] In order to address their specific criticisms, however, it is important to review the legal documents upon which Russia bases its case.

The rationale for Russian intervention is laid out by Russia's ambassador to the United Nations, Vitaly Churkin, in his letter of August 11, 2008 to the president of the U.N. Security Council.[6] In it Churkin cites the scale of the attack on Russian peacekeeping forces and Russian citizens, as well as statements of aggressive intent by Georgian political and military leaders to "demonstrate that we are dealing with the illegal use of military

3. *See generally* Dmitry Medvedev, *Kontseptsiya vneshnei politiki Rossiiskoi Federatsii [Concept of International Politics of the Russian Federation]*, MINISTRY OF FOREIGN AFFAIRS OF THE RUSSIAN FEDERATION, July 12, 2008, http://www.mid.ru/nsosndoc.nsf/0e9272befa34209743256c630042d1aa/d48737161a0bc944c32574870048d8f7?OpenDocument.

4. *See* Gareth Evans, *Putin Twists UN Policy*, THE AUSTRALIAN, Sept. 2, 2008, at 2, *available at* http://www.theaustralian.news.com.au/story/0,25197,24278542-17062,00.html.

5. *See* Antonio Cassese, *The Wolf that Ate Georgia*, PROJECT SYNDICATE, Sept. 8, 2008, http://www.project-syndicate.org/print_commentary/cassese5/English.

6. *See* Letter from Ambassador Vitaly Churkin, Permanent Representative of the Russian Federation to the United Nations, to the President of the Security Council (Aug. 11, 2008), U.N. Doc. S/2008/545, *available at* http://www.securitycouncilreport.org/atf/cf/%7B65BFCF9B-6D27-4E9C-8CD3-CF6E4FF96FF9%7D/Georgia%20S%202008%20545.pdf [hereinafter *Churkin Letter*].

force against the Russian Federation. In those circumstances, the Russian side had no choice but to use its inherent right to self-defen[s]e enshrined in Article 51 of the Charter of the United Nations."[7] Concluding his letter, Churkin pledges that Russia's use of force will be "strictly proportionate to the scale of the attack," aimed at defending both peacekeepers and citizens, and at preventing further attacks on them.[8]

As is well known, Article 51 of the United Nations Charter specifies that member nations have an "inherent right of individual or collective self-defense if an armed attack occurs," and that this right is in no way "impaired" by the Security Council's failure to act.[9] Its invocation, however, shall be immediately reported to the Security Council,[10] so by submitting this letter, Russia fulfilled these essential requirements of Article 51. The issue that remains in dispute is whether or not the shelling of Tskhinval by Georgian forces in the early evening of August 7, 2008 and the advance of its forces into South Ossetia shortly after midnight to "restore constitutional order in the entire region," as Georgian military commanders put it,[11] constitutes aggression.

Russian Foreign Minister Sergei Lavrov argues that Georgia's actions should be qualified as aggression based on United Nations General Assembly Resolution 3314 on the "Definition of Aggression."[12] The following two articles in that resolution are directly relevant to his argument.

Article 2 states, "[t]he First use of armed force by a State in contravention of the Charter shall constitute prima facie evidence of an act of aggression . . . ."[13] By the general consensus

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7. *Id.*

8. *Id.*

9. U.N. CHARTER art. 51.

10. *Id.*

11. *'Georgia Decided to Restore Constitutional Order in S.Ossetia'—MoD Official*, CIV. GEORGIA, Aug. 8, 2008, *available at* http://www.civil.ge/eng/article.php?id=18941&search=Kurashvili.

12. Definition of Aggression, G.A. Res. 3314 (XXIX), U.N. GAOR, 29th Sess., Supp. No. 31, U.N. Doc. A/9631 (Dec. 14, 1974), *available at* http://wwwl.umn.edu/humanrts/instree/GAres3314.html.

It should be noted that General Assembly resolutions are intended to provide guidance to the Security Council in determining the existence of an act of aggression, but are not considered binding. *See* YORAM DINSTEIN, WAR, AGGRESSION AND SELF-DEFENCE 129 (4th ed. 2005).

13. Definition of Aggression, *supra* note 12, art. 2.

of international observers, Georgia's shelling of the South Ossetian capital of Tskhinval was the first use of armed force by a state in this conflict.[14]

Article 3 states, "[a]n attack by the armed forces of a State on the land, sea or air forces, or marine and air fleets of another State" constitutes aggression.[15] Churkin argues that the attack on Russian peacekeepers, who were in South Ossetia in accord with agreements signed and ratified by Georgia, and alongside OSCE observers, constitutes an attack on Russia's armed forces.[16]

Georgia's counter claim that it has the right to use whatever military force it may deem fit to "restore constitutional order" in a separatist region because it is not a State, is contradicted by an explanatory note to Article 1, clarifying that the term "State" is used without prejudice to questions of recognition, or membership in the United Nations.[17] In addition, Article 5 stipulates

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14. The fact that Georgia initiated hostilities in Tskhinval, albeit "unavoidably," was finally acknowledged publicly by Saakashvili in his testimony last November to the committee of inquiry set up by the Georgian parliament. *See Saakashvili Testifies Before War Commission*, CIVIL GEORGIA, Nov. 28, 2008, cited in Johnson's Russia List 2008 (on file with Fordham International Law Journal).

Few western analysts now doubt that Georgia's actions preceded and precipitated Russia's response. *See, e.g.*, Ralf Beste et al., *Did Saakashvili Lie? The West Begins to Doubt Georgian Leader*, SPIEGEL ONLINE (F.R.G.), Sept. 15, 2008, http://www.spiegel.de/international/world/0,1518,druck-578273,00.html; Nikolas Busse, *Invasion? Provokation? Die Nato sucht nach Antworten, [Invasion? Provocation? NATO Searches for Answers]* FRANKFURTER ALLGEMEINE ZEITUNG (F.R.G.), Sept. 6, 2008, http://www.faz.net/s/Rub97F2F5D596354F4BBE619038133D791F/Doc~EA1AE2D16FFC9447CA2A2519DB6769EA8~ATpl~Ecommon~Scontent.html; Charles Clover et al., *Countdown in the Caucasus: Seven Days that Brought Russia and Georgia to War*, FIN. TIMES (U.K.), Aug. 26, 2008, at 7, *available at* http://www.ft.com/cms/s/0/af25400a-739d-11dd-8a66-0000779fd18c.html; Paul Reynolds, *Georgia and Ukraine 'Shouldn't Join Nato,'* BBC NEWS, Sept. 18, 2008, http://news.bbc.co.uk/2/hi/europe/7623240.stm; *see also* Manfred Ertel et al., *Road to War in Georgia: The Chronicle of a Caucasian Tragedy*, SPIEGEL ONLINE (F.R.G.), Aug. 25, 2008, http://www.spiegel.de/international/world/0,1518,druck-574812,00.html; Brian Rohan, *Saakashvili "Planned S. Ossetia Invasion": Ex-minister*, REUTERS, Sept. 14, 2008, http://www.reuters.com/article/wtMostRead/idUSLD12378020080914?pageNumber=2&virtualBrandChannel=0&sp.

15. Definition of Aggression, *supra* note 12, art. 3(b).

16. *See PBS NewsHour: Russia, Georgia Agree to Terms of Cease-fire Deal* (PBS television broadcast Aug. 12, 2008), *transcript available at* http://www.pbs.org/newshour/bb/europe/july-dec08/georgiadeal_08-12.html [hereinafter *PBS NewsHour*]; *see also* Robert Misik, *Georgische Verschwörungstheorien: US-Falken als Kriegszündler [Georgian Conspiracy Theories: U.S. Hawks as War Igniters]*, DIE TAGESZEITUNG (F.R.G.), Sept. 13, 2008, http://www.taz.de/1/politik/europa/artikel/1/us-falken-als-kriegszuendler/?type=98.

17. Definition of Aggression, *supra* note 12, art. 1.

that, "[n]o consideration of whatever nature, whether political, economic, military or otherwise, may serve as a justification for aggression" and, "[a] war of aggression is a crime against international peace. Aggression gives rise to international responsibility."[18]

Relying on these definitions, Russia argues that South Ossetia had the right to defend itself against Georgia's efforts to change the status quo by force, and to appeal for international assistance after it had been attacked.[19]

All the more so since General Assembly Resolution 3314 explicitly condemns the use force to suppress rebellious regions, and stipulates that any territorial or other advantage gained from such use of force should be considered unlawful.[20]

In the case of South Ossetia, it can further be argued that the prohibition on the use of force should be accorded greater weight, since the peacekeeping forces were there in accord with agreements signed by Georgia and had international standing. The latter is reflected in point three of the 1994 Joint Control Commission ("JCC") memorandum, where the Commission on Security and Cooperation in Europe ("CSCE") Mission in Georgia is listed as "taking part in the work of the JCC."[21] In 1996 The Organization for Security and Co-operation in Europe ("OSCE") representative Ambassador Dieter Boden also signed the Moscow Memorandum, which listed the OSCE as "a party assisting in its implementation."[22]

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18. *See id.* art. 5.

19. *See, e.g.*, Clover et al., *supra* note 14; *PBS NewsHour*, *supra* note 16.

20. *See* Definition of Aggression, *supra* note 12, art. 5(3) ("No territorial acquisition or special advantage resulting from aggression is or shall be recognized as lawful."); *see also id.* at Annex ("[r]eaffirming the duty of States not to use armed force to deprive peoples of their right to self-determination, freedom and independence, or to disrupt territorial Integrity.").

21. *See Polozhenie 'O Smeshannoi kontrolnoi komissii po uregulirovaniyu gruzino-osetinskogo konflikta' [Regulation "On the Joint Control Commission for Resolving the Georgian-Ossetian Conflict]*, Oct. 31, 1994, http://www.caucasica.org/docs/detail.php?ID=1330&PHPSESSID=85ce24d286e083a2941a5edb041f4078&print=Y& [hereinafter Polozhenie] (available only in Russian, translated by the author).

22. *See Memorandum O merakh po obespecheniyu bezopasnosti i ukrepleniyu vzaimnogo doveriya mezhdu storonami gruzino-osetinskogo konflikta [Memorandum on Measures to Guarantee Security and strengthen mutual trust between the parties in the Georgian-Ossetian Conflict]*, SOUTH OSSETIAN JOINT CONTROL COMMISSION OFFICIAL SITE, May 16, 1996, http://sojcc.ru/soglashenia/96.html [hereinafter Memorandum] (available only in Russian, translated by the author); *see also* TIM POTIER, CONFLICT IN NAGORNO-KARABAKH, ABKHAZIA AND SOUTH OSSETIA: A LEGAL APPRAISAL 134-35 (2001), *available at* http://

Georgia was still a party to these accords in August 2008. While the Georgian parliament did periodically pass resolutions calling for withdrawal from these accords, as late as June 2008, Alexandre Lomaia, the Secretary of Georgia's National Security Council, said that Tbilisi had no intention of doing so.[23] It was not until August 27, 2008 that Georgia's Prime Minister, Lado Gurgenidze, formally ended Russian peacekeeping operations in Georgia, and instructed the Foreign Ministry to notify Russia of Tbilisi's intention to withdraw from the 1992 Sochi Agreement.[24]

This Agreement, sometimes known as the Dagomys Agreement, is the foundational document that guided the actions of the four parties in this conflict: Russia, Georgia, North Ossetia, and South Ossetia.[25] In the intervening years it has been supplemented by more than eighty protocols, memoranda, agreements, and other accompanying documents, available online on the official website of the South Ossetian Joint Control Commission.[26]

Three of these documents specify the competencies of the peacekeepers and military observers in the region: the JCC declaration of June 6, 1994 ("[o]n the basic principles in the activities of military contingents and groups of military observers, intended for the normalization of the situation in the zone of the Georgian-Ossetian conflict,")[27] and two memoranda of October

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karabakh-doc.azerall.info/ru/law/law031-1.php (documenting the OSCE's extensive involvement in the conflicts in the region); *see generally* Konstantin Cheremnykh, *Dieter Boden's Moment of Truth*, Jan. 15, 2008, RPMONITOR, http://www.rpmonitor.ru/en/en/detail.php?ID=7933 (detailing Ambassador Boden's personal diplomatic initiatives).

23. *See Government Formally Scraps Russian Peacekeeping*, CIV. GEORGIA, Aug. 29, 2008, http://www.civil.ge/eng/article.php?id=19341 (last visited Jan. 29, 2009).

24. *See id.*

25. *See Soglashenie 'O printsipakh uregulorovaniya gruzino-osetinskogo konflikta' [Agreement "On the Principles for the Resolution of the Georgian-Ossetian Conflict"]*, June 24, 1992, http://www.caucasica.org/docs/detail.php?ID=1329&PHPSESSID=85ce24d286e083a2941a5edb041f4078&print=Y& [hereinafter Soglashenie] (available only in Russian).

26. South Ossetian Joint Control Commission Official Site, http://sojcc.ru (last visited Jan. 30, 2009).

27. *Polozhenie 'Ob osnovnykh printsipakh deyatelnosti voennykh kontingentov i grupp voennykh nablyudatelei, prednaznachennykh dlya normalizatsii situatsii v zone gruzino-osetinskogo konflikta' [Regulation "On the Basic Principles of the Activities of Military contingents and Groups of Military Observers, Intended for the Normalization of the Situation in the Zone of the Georgian-Ossetian Conflict"]*, MINISTRY OF FOREIGN AFFAIRS OF THE RUSSIAN FEDERATION, June 4, 2004, *available at* http://www.mid.ru/BRP_4.NSF/0/2bd92ad3afa09703c3256ea90022457f?OpenDocument [hereinafter Ministry of Foreign Affairs] (available only in Russian, translated by the author).

31, 1994.[28]

Article 1 of the 1994 JCC declaration on basic principles states that it is the responsibility of the peacekeepers "to control the situation in the conflict zone and areas contiguous to it."[29] Article 3 specifies that peacekeepers shall:

> [T]ake measures toward the introduction and support of a heightened security regime in the conflict zone, and if necessary in contiguous areas; oversee the fulfillment of the accords on withdrawal of heavy equipment and arms from the conflict zone; prevent the introduction into the conflict zone of military groups, and other unauthorized formations, capable of destabilizing the situation through their actions.[30]

Furthermore, the unified command of the JCC is to be headed by a senior Russian military officer, who has sole authority on the use of military force in the event of a violation of the cease fire,[31] as well as on the decision to pursue "criminal elements beyond the conflict zone,"[32] and on the placement of forces.[33]

The October 1994 memoranda reiterate the obligation of all sides to decide contentious issues "exclusively through peaceful means"[34] and reaffirm that the head of the peacekeeping force is responsible for taking "all measures necessary for the preservation of peace and order, preventing the renewal of armed conflict, and the disarmament of unlawful militarized formations."[35]

Finally, in the Moscow Memorandum of May 16, 1996—"Measures to Guarantee security and strengthen mutual trust between the parties in the Georgian-Ossetian Conflict"—the four parties again "foreswear the use or threat of the use of force, and

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28. *See Soglashenie 'O dalneishem razvitii protsessa mirnogo uregulirovaniya gruzino-osetinskogo konflikta i o Smeshannoi kontrolnoi kommissii (SKK)' [Agreement "On the Further Development of the Process of Peaceful Resolution of the Georgian-Ossetian Conflict and of the Joint Control Commission (SKK)"]*, Oct. 31, 1994, *available at* http://www.caucasica.org/docs/detail.php?ID=1330&PHPSESSID=85ce24d286e083a2941a5edb041f4078&print=Y& [hereinafter Dalneishem] (available only in Russian); *see also* Polozhenie, *supra* note 21.

29. Ministry of Foreign Affairs, *supra* note 27, art. 1 (translated by the author).

30. *Id.* art. 3 (translated by the author).

31. *Id.* art. 1 (translated by the author).

32. *Id.* art. 4 (translated by the author).

33. *Id.* art. 5 (translated by the author).

34. Dalneishem, *supra* note 28, at point 5 (translated by the author).

35. Polozhenie, *supra* note 21, at point 10 (translated by the author).

political, economic or other forms of pressure on one another," and stipulate that the conflict zone is to be demilitarized.[36]

At his news conference of August 28, 2008, deputy chief of the General Staff of the Russian Armed Forces, Anatoly Nogovitsyn, referred to Article 3 of the 1994 JCC declaration on basic principles as the legal basis for all actions taken by the Russian peacekeepers, including their deployment in the security zone.[37] Since these accords were binding on Georgia at the time, Russia argues that the response of the Russian forces to Georgia's attack was legal,[38] a point conceded by some Western analysts.[39]

In an interview with the German news magazine *Spiegel*, for example, Daniel-Erasmus Khan, professor of international law at the University of the German Armed Forces in Munich, notes that regimes like Abkhazia and South Ossetia that have established their *de facto* independence over many years, are typically considered protected from the use of force and have the right to self defense.[40] Likewise, Germany's military attaché in Moscow, Brigadier General Heinz G. Wagner, argued that "without a doubt" Russia was justified in responding to the Georgian attack on the peacekeepers who "on the basis of their armament and equipment were not in a position to protect or to even defend themselves."[41] And, on August 20, 2008, one of Russia's leading independent newspapers, *Kommersant*, quoted the newly ap-

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36. Memorandum, *supra* note 22 (translated by the author).

37. *General explains Russian troops' presence outside conflict zones in Georgia,* BBC MONITORING, Aug. 28, 2008, cited in Johnson's Russia List 2008 (on file with Fordham International Law Journal).

38. *See Churkin Letter*, *supra* note 6; Russian President Speaks with BBC (BBC network broadcast Aug. 26, 2008), *available at* http://news.bbc.co.uk/2/hi/europe/7582706.stm.

39. *See infra* notes 40-42; *see also* Jon Swain, *Georgia Fired First Shot, Say UK Monitor,* THE TIMES ONLINE (London), Nov. 9, 2008, http://www.timesonline.co.uk/tol/news/world/europe/article5114401.ece (according to two British military officers, subsequently identified as former British Army captain Ryan Grist and former RAF wing commander Stephen Young, Georgian forces were firing rockets at civilian areas in South Ossetia prior to any Russian military action).

40. *See generally* Dietmar Hipp, *Russland durfte Suedossetien zu Hilfe eilen [Russia Had the Right to Rush to the Aid of South Ossetia],* DER SPIEGEL (F.R.G.), Aug. 13, 2008, http://www.spiegel.de/politik/ausland/0,1518,571853,00.html.

41. *Deutscher Brigadegeneral: 'Russen Reagierten Angemessen in Georgien' [German Brigadier General: 'Russians Responded Appropriately in Georgia'],* FRANKFURTER ALLGEMEINE ZEITUNG (F.R.G.), Aug. 24, 2008, http://www.faz.net/s/Rub97F2F5D596354F4BBE619038133D791F/Doc~E165540C383384391A3E84BC63A0469EC~ATpl~Ecommon~Sspezial.html.

pointed U.S. Ambassador to Russia, John Beyrle, as saying that Russia "responded to attacks on Russian peacekeepers in South Ossetia, legitimately."[42] Originally posted on the U.S. Embassy's website, his remarks were later disavowed by Washington.[43]

Others, like the vice president of the International Crisis Group, Alain Délétroz, distinguish between the initial rebuff of Georgian aggression within the boundaries of South Ossetia, which they consider perfectly legitimate, and the subsequent illegal extension of peace enforcement activities into the territory of Georgia proper.[44] The Sochi agreements, however, clearly make it the sole responsibility of the Russian military commander to take "all measures necessary" to end hostilities both within the conflict zone and, if necessary, in areas contiguous to it.[45]

The limited scope of Russia's intervention in the areas contiguous to the conflict zone is confirmed by the circumscribed deployment of Russian troops within the original security zone and the areas contiguous to it, referred to as the "buffer zone."[46] Of the 17,000 troops that Russia had in the conflict zone at the height of this conflict, according to North Atlantic Treaty Organization ("NATO") sources roughly 1000 or less than 6% were deployed in both the security and buffer zones).[47] Russia's strictly defensive posture is also apparent in the limited scope of the attacks on Georgian military infrastructure within the buffer zone, ignoring militarily significant targets deeper within Georgia.[48] Clearly, if Russia had wanted to occupy the entire country,

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42. Conor Sweeney, *Russia's First Georgia Move Legitimate: U.S. Envoy*, REUTERS, Aug. 22, 2008, http://www.reuters.com/article/GCA-Georgia/idUSLM47889020080822.

43. *Cf.* Helene Cooper et al., *How a Squabble Became a Showdown*, N.Y. TIMES, Aug. 18, 2008, at A1 (indicating that while the State Department maintained a balanced tone, many in Washington were openly supportive of Georgia and critical of Russia).

44. *See International Crisis Group: "Nam Trudno Ponyat, Pochemu Rossiya Ne Dala Gruzii Kulakom Po Nosu, No v Predelakh Yuzhnoi Ossetii" [It is Difficult for us to Understand why Russia did not Punch Georgia in the Nose, but within the Borders of South Ossetia]*, REGNUM NEWS AGENCY (Russ.), Oct. 6, 2008, http://www.regnum.ru/news/1064733.html?forprint.

45. *See* Ministry of Foreign Affairs, *supra* note 27, art. 1.

46. *See* Laura Canali, *I Russi in Georgia*, *infra* note 49.

47. *See* Busse, *supra* note 14.

48. *See id.*; *see also Michael Schwirtz, Anne Barnard & Andrew E. Kramer*, Russian Forces Capture Military Base in Georgia, N.Y. TIMES, Aug. 12, 2008, at A13 ("Russia insisted that it had not entered Gori. This appeared to be confirmed by American officials in Washington, who said that Russian units had stopped near the boundary with South Ossetia."). Western reporters visiting the buffer zone after the end of combat operations often expressed surprise at the relative lack of damage, particularly in

it could have done so with little difficulty after the collapse of the Georgian Army on August 11, 2008.

Map 1: Russians in Georgia[49]

This map indicates the demilitarized zone (yellow), security zone (orange) and buffer zone (red perimeter) established by Russians on August 25, 2008, along with new checkpoints in and around Abkhazia and South Ossetia.



Poti. *See, e.g.*, Borzou Daragahi, *There are few signs of damage by Russia in western Georgia; A tour by journalists finds that Moscow's military seems to have used force minimally*, L.A. TIMES, Aug. 19, 2008, at A3.

49. Laura Canali, *I Russi in Georgia*, *in* LIMES: ITALIAN REVIEW OF GEOPOLITICS, http://temi.repubblica.it/limes/i-russi-in-georgia (last visited Jan. 30, 2009).

II. *THE CRITIQUE OF RUSSIAN INTERVENTION*

With this essential background, let us turn to Gareth Evans's and Antonio Cassese's critiques of Russia's "peace enforcement" actions.

First, Evans argues that the protection of Russian citizens is not a valid rationale for intervention.[50] R2P, he says, may only be invoked if a state is unable or unwilling to act to protect its own citizens, but not to protect one's citizens in another country, particularly if there is reason to suspect that citizenship may have been granted with an eye toward making just such a claim.[51] Cassese makes a similar point, saying, "South Ossetians have Russian nationality only because Russia recently bestowed it on them unilaterally."[52]

Some 50-80% of Abkhaz, and perhaps as many as 95% of South Ossetians hold Russian citizenship, along with their own.[53] How did this unusual situation come about?

When the first fighting erupted between Georgia and its two separatist enclaves in 1991, the entire region was still part of the Union of Soviet Socialist Republics ("USSR") and all its inhabitants were Soviet citizens.[54] A Russian law passed in 1992, however, permitted all residents of ex-Soviet republics to apply for Russian citizenship, providing that they were not already citizens of another republic.[55] Many Akbkhaz and South Ossetians argue that they were not because their armed struggle for independence had begun before Georgia had declared its own independence from the USSR.[56]

The citizenship process, however, was a fairly arduous one requiring frequent trips to Russia.[57] Since residents of Abkhazia

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50. *See* Evans, *supra* note 4.

51. *See id.*

52. *See* Cassese, *supra* note 5.

53. *See* George Hewitt, *Abkhazia: Land in Limbo*, OPEN DEMOCRACY, Oct. 10, 2006, at *3, http://www.opendemocracy.net/node/3983/pdf; Stephen Shenfield, *The Georgian-Abkhaz Conflict: Past, Present, Future*, JRL RES. & ANALYTICAL SUPPLEMENT, May 2004, at *21, http://www.cdi.org/russia/johnson/8226.cfm ("[i]t is believed that in between 50 and 80 percent of Abkhazia's population hold Russian passports.").

54. *See* POTIER, *supra* note 22, at 14.

55. *See* GEORGE GINSBERGS, FROM SOVIET TO RUSSIAN INTERNATIONAL LAW: STUDIES IN CONTINUITY AND CHANGE 152 (1998).

56. *See generally* Clifford J. Levy, *Russia Declares Its Recognition of Two Enclaves*, N.Y. TIMES, Aug. 27, 2008, at A1.

57. *See* Alexander Osipovich, *Controversial Passport Policy Led Russians into Georgia:*

and South Ossetia were *de facto* being denied travel documents by the Georgian government, the process was made simpler for them by allowing them to apply to submit "emergency applications" through the Abkhaz foreign ministry in Sukhum.[58]

The strong preference for Russian citizenship is no doubt part of an emotional backlash to the fighting of the early 1990s, but has been exacerbated by the application of economic and political sanctions to force Abkhazia and South Ossetia to reintegrate back into Georgia.[59] Without a valid passport, local residents could not travel abroad, could not collect pensions, could not access any social or public medical services.[60] As living conditions in these regions deteriorated, Tbilisi reasoned that the local residents would have no choice but to relocate to Russia, or accept Georgian authority.[61]

Sergei Bagapsh, then Abkhazia's prime minister, described meeting with Georgia's president Eduard Shevarnadze in 1998

Analysts, GEORGIAN DAILY, Aug. 21, 2008, http://georgiandaily.com/index.php?option=com_content&task=view&id=6373&Itemid=68.

58. *See id.* at 224-26.

59. *See* JIM NICHOL, CONG. RESEARCH SERV., RUSSIA-GEORGIA CONFLICT IN SOUTH OSSETIA: CONTEXT AND IMPLICATIONS FOR U.S. INTERESTS 4-6 (2008), *available at* http://fas.org/sgp/crs/row/RL34618.pdf.

60. *See 'Passport Policy Led Russia Into Georgia,'* INDEPENDENT ONLINE (S. Afr.), Aug. 21, 2008, http://www.iol.co.za/index.php?click_id=3&art_id=nw20080821100247324C633608&set_id=1.

61. *See* Anna Matveeva, *Georgia: Peace Remains Elusive in Ethnic Patchwork*, *in* SEARCHING FOR PEACE IN EUROPE AND EURASIA: AN OVERVIEW OF CONFLICT PREVENTION AND PEACEBUILDING ACTIVITIES 416, 418-22.

Russia did adhere to the Commonwealth of Independent States ("CIS") sanctions imposed on Abkhazia in 1996. *See id.* at 422.

These sanctions, however, allowed for the provision of humanitarian, economic, and educational assistance to Abkhazia, in keeping with the protocol of May 8, 1997 on the Dniester region. *See id.* at 423; Letter from Ambassador Sergei Lavrov, Permanent Representative of the Russian Federation to the United Nations, to the Secretary-General, Annex I (Jan. 31, 1996), U.N. Doc. A/51/62, *available at* http://www.un.org/documents/ga/docs/51/plenary/a51-62.htm.

It was not until March 2008 that Russia pulled out of the Decision on the Concept for Prevention and Settlement of Conflicts in the Territory of States Members of the CIS, citing "a change in the circumstances." *See* Letter from Ambassador Vitaly Churkin, Permanent Representative of the Russian Federation to the United Nations, to the President of the Security Council (Mar. 10, 2008), U.N. Doc. S/2008/168, *available at* http://www.securitycouncilreport.org/atf/cf/%7B65BFCF9B-6D27-4E9C-8CD3-CF6E4FF96FF9%7D/Georgia%20S2008%20168.pdf.

Most analysts see the move as retaliation for the U.S.-led recognition of the independence of Kosovo. *See, e.g.*, Levy, *supra* note 56; *see generally* Modest Kolerov, *Free Russia Foundation's Kolerov on NATO, Possible Conflicts in Caucasus*, VREMYA NOVOSTEI (Russ.), Apr. 30, 2008 (available only in Russian).

to resolve the passport crisis.[62] "Nobody cares about our need to import medicines," he complained.[63] According to Bagapsh, however, Shevardnadze angrily refused to issue any Georgian passports to Abkhaz, suggesting they make do with U.N. travel documents.[64] Bagapsh told him that, in that case, "We will ask Russia to help—and in five years most of our citizens will have Russians [sic] passports."[65] This is precisely what happened.

Through the 1990s most of those who applied for dual citizenship did so mainly to receive basic state benefits, like pensions, and to be able to travel abroad.[66] This changed in 2002 when Russian citizenship laws became more stringent.[67] June of 2002 alone, saw some 150,000 Abkhaz apply for Russian citizenship, just before the new law came into effect.[68]

Not many years later, Alexander Ankvab, Abkhazia's new prime minister, explained why so many Abkhaz prefer Russian citizenship to Georgian as follows:

> Russia helped us to survive . . . When our passports, because of the position of the Georgian authorities, lost their legal status and our citizens could not leave the country . . . our elderly could not get a Georgian pension, even in the laughable amount of 10-60 rubles, but today from Russia 25,000 pensioners receive 40 million rubles in pension. More than a hundred seriously ill received free medical care in Moscow. This year Abkhazia received 200,000 free textbooks from Russia.[69]

Tbilisi applied similar pressure on South Ossetia, with the result that they too have become, as to the deputy speaker of the

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62. *See* Zygmunt Dzieciolowski, *Abkhazia: Wedded to Independence*, OPEN DEMOCRACY, Aug. 21, 2008, http://www.opendemocracy.net/russia/article/akhazia-wedded-to-independence.

63. *Id.*

64. *See id.*

65. *Id.*

66. *See* Shenfield, *supra* note 53, at *6, *see also* GINSBERGS, *supra* note 55, at 224-36.

67. *See* Oxana Shevel, Between Identify and Real-Politik: Russian Citizenship Policy Dilemmas 9-14 (paper presented at the American Political Science Ass'n 2008 Annual Meeting, Aug. 8, 2008), *available at* http://www.fas.harvard.edu/~postcomm/papers/2008-09/081208_Shevel.pdf.

68. *See* Osipovich, *supra* note 57.

69. Sergei Leskov, *Premier Abkhazii Aleksandr Ankvab: 'Rossiya pomogla nam vyzhit' [Abkhaz Premier Aleksandr Ankvab: 'Russia helped us survive']*, IZVESTIA (Russ.), Oct. 19, 2006, http://www.izvestia.ru/politic/article3097667/index.html (available only in Russian, translated by author).

South Ossetian parliament put it, "101% Russian citizens."[70]

Since the use of economic sanctions is explicitly prohibited by Article 4 of the Sochi Agreement,[71] and by Article 1 of the Moscow Memorandum of May 16, 1996,[72] it would be a perverse form of protection that punishes them twice: first, for having been denied Georgian citizenship, then again for having accepted Russian citizenship in order to survive.

Evans also argues that the threat posed by Georgia to the South Ossetian population was not "of a nature and scale as to make legitimate its use of military force."[73] Cassese makes a very similar claim, saying that neither genocide nor ethnic cleansing seem to have occurred, and that even "if war crimes were perpetrated, they do not justify a military invasion."[74]

The total number of civilian casualties from the war has not yet been finalized.[75] To date, however, various investigations have identified between 159 and 365 casualties by name. According to South Ossetian Prosecutor General Taimuraz Khugayev, there are still approximately two hundred burial sites left to exhume in South Ossetia, and fifty in North Ossetia, which could bring the total civilian casualty figure among South Ossetians to over five hundred.[76] While this is a significant figure for a population that numbers only a few tens of thousands, most Western observers are reluctant to call it genocide.

It is worth noting, however, that the United Nations' "Convention on the Prevention and Punishment of the Crime of Genocide," adopted on December 9, 1948, offers a rather broad

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70. Fabrice Node-Langlois, *Quatorze Année de Peurs en Ossétie du Sud [Fourteen Years of Fear in South Ossetia]*, LE FIGARO (France), June 7, 2006, at 6.

71. *See* Soglashenie, *supra* note 25, art. 4 ("[t]he parties consider it unacceptable to apply economic sanctions and blockades, any other impediments on the free transit of goods, services and people and pledge to guarantee the conditions for humanitarian assistance to the population.") (translated by author).

72. *See* Memoradum, *supra* note 22, art. 1.

73. Evans, *supra* note 4.

74. Cassese, *supra* note 5.

75. *See generally* List of South Ossetian Residents Killed During the Georgian-South Ossetian Military Conflict, The White Book: South Ossetian Tragedy http://www.whitebook2008.com/list.html (last visited Jan. 23, 2009).

76. *See* Yana Amelina, *Tbilisi Will Answer for Bloodshed*, STRATEGIC CULTURE FOUNDATION, Oct. 18, 2008, http://en.fondsk.ru/article.php?id=1683; *see also Georgia, l'ordine di Medvedev: "Basi russe in Abkhazia e Ossezia del Sud" [Georgia, Medvedev's order: "Russian Bases in Abkhazia and South Ossetia"]*, CORRIERE DELLA SERA (Italy), Sept. 9, 2008, http://www.corriere.it/esteri/08_settembre_]09/georgia_basi_russe_4f8985c4-7e61-11dd-8ebb-00144f02aabc.shtml.

definition. It designates as genocide any of the following acts committed with "intent to destroy, in whole or in part, a national, ethnical, racial or religious group," including: (a) "[k]illing members of the group"; (b) "[c]ausing serious bodily or mental harm to members of the group"; and (c) "[d]eliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part."[77]

Whether or not the policies of the current Georgian leadership constitute genocide, they do follow in the path set by Georgia's first independent president Zviad Gamsakhurdia of driving the "non-native" Abkhaz and South Ossetians populations out of the region to make room for the return of the Georgian ethnic population. Gamsakhurdia called this creating a "Georgia for Georgians," adding that "subversive minorities" like the South Ossetians "should be chopped up, they should be burned out with a red-hot iron from the Georgian nation. . . . We will deal with all the traitors, hold all of them to proper account, and drive [out] all the evil enemies and non-Georgians. . .!"[78] Some scholars have taken note of certain similarities between Gamsakhurdia's ethnic cleansing policies and those of the late Serbian president Slobodan Milosevic.[79]

In 2004, as the newly elected president of Georgia, Mikheil Saakashvili rehabilitated Gamsakhurdia, hailing him as a "great statesman and patriot."[80] Even after the war in August, 2008, Saakashvili shows little sign of recognizing the right of Ossetians or Abkhaz to exist, commenting to a French journalist that: "Ossetia is a fiction . . . . The Georgians have always comprised the majority of the population. Stalin did not create these Abkhaz and Ossetian autonomies within Georgia to please Georgia. On the contrary, he did not trust it. Stalin knew what he was doing;

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77. Convention on the Prevention and Punishment of the Crime of Genocide, G.A. Res. 260A(III), Art. 2, 78 U.N.T.S. 277 (Dec. 9, 1948), *available at* http://www.hrweb.org/legal/genocide.html.

78. Robert English, *Georgia: The Ignored History*, 55 N.Y. REV. OF BOOKS No. 17, ¶ 11 (Nov. 6, 2008), *available at* http://www.nybooks.com/articles/22011.

79. *See id.*; *see also* Robert H. Donaldson & Joseph L. Nogee, *The World Can Look Very Different from Other Side*, TULSA WORLD, Aug. 24, 2008, at G4, *available at* http://www.tulsaworld.com/opinion/article.aspx?subjectID=65&articleID=20080824_65_G4_Russia489763.

80. English, *supra* note 78.

he needed these levers."[81]

Such attitudes seem fairly widespread among the Georgian elite. They have been echoed by leading opposition figures, such as Nino Burjanidze, and even by the Catholicos-Patriarch of All Georgia, Ilya II.[82] Caucasus expert Donald Rayfield puts it very bluntly. When it comes to granting Abkhazia or South Ossetia independence, he says, "I don't know of any Georgian politician with the courage to say anything along those lines, or with the self-assurance not to believe he or she will be killed for saying it. But if one does not appear, then what has happened in August 2008 will happen again."[83]

Ultimately, only the opening of state archives will reveal whether or not Georgian forces were indeed ordered to terrorize the Ossetian population in this particular instance, although there is evidence that senior military officials did threaten the Abkhaz with physical elimination for their rebellion in 1992.[84] It is clear from the Ossetian response—some 17,000 fled north to Russia in the first hours of the attack, swelling to over 35,000 by the end of the week—that they regarded the possibility of the restoration of Georgian sovereignty to be a dire threat to their existence.[85] This begs the question: if the flight of nearly half an

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81. Piotr Smolar, *M. Saakachvili: "La Russie est tellement vulnerable!" [Interview with M. Saakashvili: "Russia is so vulnerable!"]*, LE MONDE (France), Sept. 19, 2008, *available at* http://www.ambassadegeorgie.fr/index.php?option=com_content&task=view&id=124&Itemid=33.

82. *See* Nick Coleman, *As Saakashvili fights on, Georgia's 'iron lady' waits in wings*, AGENCE FRANCE PRESSE, Sept. 24, 2008, *available at* http://www.haaba.com/node/189405/pdf; Francois d'Alancon, *Ilia II: 'Il n'y aura pas de paix en Georgie sans justice' [Ilia II: 'There will be no peace without justice in Georgia']*, LA CROIX (France), Sept. 19, 2008, *available at* http://www.la-croix.com/article/index.jsp?docId=2350162&rubId=1094#.

83. Donald Rayfield, *The Georgia-Russia conflict: lost territory, found nation*, OPENDEMOCRACY.NET, Aug. 18, 2008, http://www.opendemocracy.net/node/45806/pdf.

84. Georgian newspapers reported on August 25, 1992, that the commander of Georgian forces in Abkhazia, Gia Karkarashvili, issued an ultimatum threatening all 97,000 Abkhaz with death in the conflict, if it would prevent separatism. The Abkhaz web site "Circassian World" has placed the video of his remarks online; a similar threat was apparently made by the head of Georgia's wartime administration, Giorgi Khaindrava, on the pages of *Le Monde Diplomatique* in April 1993. *See* Gia Karkarashvili, *The Georgian Commander-in-Chief on TV threatens the Abkhazian nation with genocide*, Aug. 24, 1992, http://circassianworld.blogspot.com/2008/10/video-gia-karkarashvili-georgian.html (video posted Oct. 30, 2008).

85. *See generally Georgia-South Ossetia crisis timeline*, RUSSIA TODAY, Aug. 9-17, 2008, www.russiatoday.com (search for "timeline"); *Vse bezhentsy Yuzhnoi Osettii, razmeshchennye na yuge Rossii, vernulis nazad [All Refugees of Southern Ossetia, from the South of Russia, have*

ethnic population, who had been labeled "ungrateful guests" and "Indo-European swine" by the country's former president, is not considered ethnic cleansing, then what is?[86]

Next, Evans argues that Russian actions cannot be deemed humanitarian intervention because no U.N. Security Council resolution preceded it, giving it legal authority. Cassese agrees with this and adds that the 1992 agreement authorizes only the monitoring of internal tensions, not the massive use of military force. While Georgia may have been reckless in introducing troops, it did not, he says, breach international law by sending its troops into South Ossetia.[87]

But as Kristina Jeffers notes, consent-based peacekeeping does not require Security Council approval. Rather, it falls under Chapter VI of the Charter, which provides for a first resort to regional agencies in situations that may threaten regional peace and security.[88] Such regional organizations include the Commonwealth of Independent States ("CIS"),[89] the Collective Security Treaty Organization ("CSTO"), and the Shanghai Cooperation Organization, all of which have condemned Georgia's actions as aggression and, to varying degrees, have supported Russia's active role in supporting regional stability in the Caucasus.[90]

Nor has a U.N. resolution always preceded legitimate action. The Economic Community of West African States Monitoring Group ("ECOMOG"), a West African multilateral military

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Returned], NEWSRU.COM (Russ.), Aug. 30, 2008, http://txt.newsru.com/arch/russia/30aug2008/usr.html.

86. *See* Jonathan Littell, *Carnet de route en Georgie, [Travelogue in Georgia]*, LE MONDE (France), Oct. 3, 2008.

87. *See* Cassese, *supra* note 5.

88. *See* Kristina Jeffers, Misreading Moscow: Toward a New Interpretation of Russian Peacekeeping in the Early 1990s (2006) (unpublished M.A. Thesis, Fletcher School of Law and Diplomacy, Tufts University), *available at* http://fletcher.tufts.edu/research/2006/Jeffers.pdf.

89. On March 24, 1994 the Commonwealth of Independent States ("CIS") was granted observer status at the United Nations. Jeffers, *supra* note 88, at 13.

90. *See* "Press Conference With South Ossetia's President Eduard Kokoity, Abkhazia's President Sergei Bagapsh and Transdniestria's President Igor Smirnov;" FEDERAL NEWS SERVICE, Nov. 17, 2006, cited in Johnson's Russia List (on file with Fordham International Law Journal); *Glava MID Rossii Sergei Lavrov dal intervyu polskomu telekanalu [Russian Foreign Ministry Head, Sergei Lavrov, interviewed on Polish television]*, ROSSIISKAYA GAZETA (Russ.), Sept. 10, 2008, http://www.rg.ru/2008/09/10/lavrov-interview-anons.html; Natalya Litvinova, *ODKB predosteregaet NATO [CSTO warns NATO]*, Sept. 6, 2008, http://osinform.ru/8517-odkb-predosteregaet-nato-ot.html.

force set up in 1990 to help end the Liberian civil war, never received approval of its mission in Liberia, though it was subsequently congratulated by the United Nations Security Council for its efforts.[91] Nor has France typically waited for a Security Council resolution before any of its many interventions in Chad.[92] The point being that, Russia's actions to stem the humanitarian catastrophe, appear to have been in good faith, and undertaken with every expectation of subsequent international approval.

It is also hard to support the argument that Georgia did not breach international law, when General Assembly Resolution 3314 specifically states, in Article 5, that "[n]o consideration of whatever nature, whether political, economic, military or otherwise, may serve as a justification for aggression." Indeed, an inquiry by the Parliamentary Assembly of Europe recently found that (point 5):

> [T]he start of shelling of Tskhinvali by the Georgian military, on August 2008, initiated a new level of escalation, namely that of open and full-fledged warfare. The use of heavy weapons and cluster munitions, creating grave risks for civilians, constituted a disproportionate use of armed force by Georgia, albeit within its own territory, and as such a violation of international law and Georgia's commitment to resolve the conflict peacefully.[93]

Nor is Cassese accurate in his description of the 1992 Sochi agreement, as being nothing more than an agreement on the "monitoring of internal tensions, not massive use of military force."[94] The instruments by which these it would be implemented, and the responsibilities of the respective parties, are all clarified in the subsequent accords already mentioned, most no-

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91. *See generally* S.C. Res. 1071, U.N. Doc. S/RES/1071 (Aug. 30, 1996); *see also* Jeffers, *supra* note 88, at 14 n.33.

92. *See, e.g.*, Vincent Munié, *Central African Republic: France's Long Hand*, ALLAFRICA, May 29, 2008, http://allafrica.com/stories/200805290721.html; *Republic of Chad and the Central African Republic*, GLOBAL POLICY FORUM, http://www.globalpolicy.org/security/issues/chadcaridx.htm (last visited Oct. 20, 2008).

93. Luc Van der Brande et al., *The Consequences of the War between Georgia and Russia*, Parliamentary Assembly of the Council of Europe, Committee on the Honouring of Obligations and Commitments by Member States of the Council of Europe (Monitoring Committee), Doc. 11724 (Oct. 1, 2008), *available at* http://assembly.coe.int/Main.asp?link=/Documents/WorkingDocs/Doc08/EDOC11724.htm.

94. *See* Cassese, *supra* note 5.

tably Articles 1 and 3 of the 1994 JCC declaration on basic principles, that make it the responsibility of the senior Russian military officer in charge of the peacekeepers to "prevent the introduction into the conflict zone of military groups, and other unauthorized formations, capable of destabilizing the situation through their actions."[95] Once attacked by 13,000 Georgian troops, common sense would seem to dictate that the 588 Russian peacekeepers stationed in South Ossetia had the right to reinforcements sufficient to fulfillment this mandate.[96]

Moreover, Evans is again wrong when says that "no effort was made by Russia to seek Security Council approval."[97] Russia called the first of three emergency meetings of the Security Council at 5:15 GMT on August 8.[98] With the backing of the United States and Great Britain, however, Georgia objected to a three-sentence resolution that would have called on all sides "to renounce the use of force," and the meeting adjourned after forty-five minutes without taking action.[99]

In fact, in the days and weeks leading up to the attack, Russia sought international involvement not just from the United Nations, but from a wide variety of international organizations, including the EU and the OSCE.[100] The Russian delegation had been working within the Security Council to get Abkhazia, Georgia, and South Ossetia to sign a legally binding agreement on

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95. Ministry of Foreign Affairs, *supra* note 27.

96. *See* Helena Bedwell & Alex Nicholson, *Abkhazia Seeks Recognition, Russian Troops in Georgia*, BLOOMBERG.COM, Aug. 20, 2008, http://www.bloomberg.com/apps/news?pid=newsarchive&sid=atzbkPai3Y20; Giorgi Lomsadze, *Georgia: Flaws Found in Tbilisi's War Planning and Operations*, EURASIANET.ORG, Sept. 15, 2008, http://www.eurasianet.org/departments/insight/articles/eav091508_pr.shtml.

97. *See* Evans, *supra* note 4.

98. *See generally* Transcript of Security Council meeting 5951, Aug. 8, 2008, *available at* http://www.undemocracy.com/securitycouncil/meeting_5951. For more information on the development of events, see *Time line: Georgia-Ossetia armed conflict, August 8*, RUSSIA TODAY, Aug. 9, 2008, http://www.russiatoday.com/news/news/28664; Tony Karon, *Has Georgia Overreached in Ossetia?*, TIME, Aug. 9, 2008, http://www.time.com/time/world/article/0,8599,1831073,00.html.

99. Mark Ames, *Georgia Gets Its War On . . . McCain Gets His Brain Plaque . . .*, EXILEDONLINE.COM, Aug. 9, 2008, http://exiledonline.com/georgia-gets-its-war-onmccain-gets-his-brain-plaque.

100. In an August 10 interview with the BBC, Russian foreign minister Sergei Lavrov called on the U.S., the EU, France, Germany, The Organization for Security and Co-operation in Europe ("OSCE") and other members of the international community to join in peacekeeping efforts. *Russia calls on international community to join peace efforts in S. Ossetia*, ITAR-TASS (Russ.), Aug. 10, 2008, cited in Johnson's Russia List, http://www.cdi.org/russia/Johnson/ (on file with Fordham International Law Journal).

the non-use of force. This request, however, was repeatedly rejected by President Saakashvili, most recently on July 17, 2008.[101] In the very first days of August, Georgia's deputy foreign minister was invited to Moscow to seek a way to defuse the increasingly tense situation, and Russia agreed to sponsor an international peace conference on August 15 in Berlin, with the participation of all parties, including the United States.[102]

After the attack, Russia also appealed directly for assistance to the Russia-NATO Council, a forum created to help resolve conflicts which might arise between Russia and NATO, but, as with Russia's other efforts to obtain an immediate ceasefire, this one was thwarted by the United States.[103] When Evans argues that Russia's legal position is weakened by the fact that it attacked inside Georgia proper after Georgia had signed a ceasefire agreement presented by OSCE mediators, he fails to mention that Georgia was only willing to accept a ceasefire when its military incursion faltered.[104] In sum, a careful review of the diplomatic record both before and after August 8 reveals that Russia went to significant lengths to obtain international intervention, and intervened unilaterally only when its efforts to obtain a ceasefire were blocked for political reasons.

Finally when considering the issue of the proportionality of Russia's response to the crisis, it is relevant to note that Georgia

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101. *See Germany to Mediate in Russia-Georgia Crisis Over Abkhazia*, DEUTSCHE WELLE, July 17, 2008, http://www.dw-world.de/dw/article/0,,3489457,00.html?maca=en-rss-en-all-1573-rdf; *Georgia pokes holes in German peace plan*, THE LOCAL, July 18, 2008, http://www.thelocal.de/national/20080718-13135.html; United Nations Department of Public Information, *Press conference by Russian Federation* (Aug. 26, 2008), http://www.un.org/News/briefings/docs/2008/080826_Russia.doc.htm; *Russia asks U.S. help with Georgia*, UPI.COM, Aug. 4, 2008, http://www.upi.com/Top_News/2008/08/04/Russia_asks_US_help_with_Georgia/UPI-73041217858519 [hereinafter *Russia asks U.S. help with Georgia*]

102. See Russia counts on U.S. help in Georgia-S.Ossetia standoff, RIA NOVOSTI, Aug. 4, 2008, http://en.rian.ru/world/20080804/115654886.html; Georgia to meet South Ossetia rebels for landmark talks: official, TEHRAN TIMES, Aug. 7, 2008, http://www.tehrantimes.com/index_View.asp?code=174826; *Georgia denies it prepares armed operation against South Ossetia*, ITAR-TASS (Russ.), Aug. 4, 2008, http://www.itar-tass.com/eng/level2.html?NewsID=12923526&PageNum=0.

103. *See Moscow recalls bid for Russia-NATO Council emergency meeting*, RIA NOVOSTI, Aug. 18, 2008, http://en.rian.ru/russia/20080818/116113982.html; *Russia asks U.S. help with Georgia*, *supra* note 101.

104. *See* Tony Karon, *supra* note 98; *The Georgian War—minute by minute, August 9*, RUSSIA TODAY, Aug. 9, 2008, http://www.russiatoday.com/news/news/28770; *The Georgian war minute by minute—August 12*, RUSSIA TODAY, Aug. 13, 2008, http://www.russiatoday.com/news/news/28860; Transcript of Security Council meeting 5951, *supra* note 98.

declared that it was in a state of war with Russia on August 9 and launched a full mobilization of its military and reserves, while Russia did neither.[105] It is also difficult to argue that Russia's military response was disproportionate when, according to NATO sources, Russia entered the conflict with roughly 8000 troops to Georgia's 13,000.[106]

CONCLUSION

The uncertainty surrounding the actual sequence of events, along with initial Western reporting that, it is now widely acknowledged, uncritically favored Georgia, led many analysts to paint a rather simplistic picture of "Russian aggression."[107] As more details of this latest Georgian campaign have come to light, this initial narrative has been called into question.[108] Similarly, it is time to revise the dismissive attitude taken toward Rus-

105. *See* Peter Walker, *Georgia declares 'state of war' over South Ossetia*, GUARDIAN.CO.UK, Aug. 9, 2008, http://www.guardian.co.uk/world/2008/aug/09/georgia.russia2.

106. *See* Busse, *supra* note 14; Giorgi Lomsadze, *supra* note 96.

107. *See* Mark Ames, *The Cold War That Wasn't*, THE NATION, Oct. 22, 2008, http://www.thenation.com/doc/20081103/ames; Mary Dejevsky, *Russia the bad guys? Who are the West trying to kid?*, THE INDEPENDENT, Aug. 15, 2008, http://www.independent.co.uk/opinion/commentators/mary-dejevsky/mary-dejevsky-russia-the-bad-guys-who-are-the-west-trying-to-kid-897498.html; Glenn Greenwald, *The Russia/Georgia conflict and the tactics of 2002*, SALON.COM, Oct. 25, 2008, http://www.salon.com/opinion/greenwald/2008/10/25/georgia; Anatol Lieven, *Lunch with Putin*, THE NATIONAL INTEREST, Sept. 17, 2008, http://www.nationalinterest.org/Article.aspx?id=19894; *Moscow Blog: The mess in Georgia*, BUSINESS NEW EUROPE, Aug. 19, 2008, http://www.businessneweurope.eu/story1205; *Prezident Chekhii prizval ne 'plyt na modnoi volne:' Rossiya—ne aggressor, a Gruziya—ne zhertva, [President of Czechia implores 'do not swim on fashionable wave:' Russia is not the aggressor, and Georgia is not the victim]*, NEWSRU.COM (Russ.), Aug. 15, 2008, http://txt.newsru.com/arch/world/15aug2008/klaus_print.html; Megan Stack, et al., *Georgian displays his media savvy*, L.A. TIMES, Aug. 20, 2008, at A2, *available at* http://articles.latimes.com/2008/aug/20/world/fg-media20. Germany's Konrad Adenauer Foundation sponsored a lively post-mortem discussion between Russian and Western journalists that revealed vastly different views not just on the war itself, but on the legitimacy of journalistic partisanship. *See* Morits Gatmann, *Russians, Germans Disagree over War*, KOMMERSANT, Oct. 13, 2008, http://www.kommersant.com/p1040152/Russia_Georgia_South_Ossetia_conflict_journalism.

108. *See* C.J. Chivers & Ellen Barry, Accounts Undercut Claims By Georgia on Russia War, N.Y. TIMES, Nov. 7, 2008, at A1, *available at* http://www.nytimes.com/2008/11/07/world/europe/07georgia.html?_r=1&scp=1&sq=Georgia%20Claims%20on%20Russia%20War&st=cse; *Did Saakashvili Lie? The West Begins to Doubt Georgian Leader*, SPIEGEL ONLINE (F.R.G.), Sept. 15, 2008, http://www.spiegel.de/international/world/0,1518,578273,00.html; Ralf Beste et al., *Russia and the West: The Cold Peace*, SPIEGEL ONLINE (F.R.G.), Sept. 1, 2008, http://www.spiegel.de/international/world/0,1518,575581,00.html; Tim Whewell, *South Ossetia: The Plaything of Russia—or Georgia?*, NEW

sia's legal and humanitarian arguments for intervention in this case.

Far from being an example of vigilante justice, Russia's peace enforcement actions in South Ossetia appear to have been a reluctant application of force to uphold its peacekeeping mandate in the region. In the months preceding the attack, Russia sought to have all parties sign a binding treaty disavowing the use of force. Before intervening, Russia desperately sought international support for an immediate ceasefire. When that failed, Russia asked that international forces be sent to the region to rebuff Georgian aggression. Russia acted unilaterally only when all these efforts failed and the ethnic cleansing of the population of South Ossetia appeared imminent. Even then, Russia sought to adhere strictly to the confines of its original peacekeeping mandate.

In this context, the broader issue warranting discussion is this: under what circumstances may nations act unilaterally if international consensus is thwarted by deliberate political gridlock? Russia's recent actions highlight the serious shortcomings of the present international system and set a new standard of action for the compulsory application of international law in the absence of prior consent, which will be much debated.

The failure of Western analysts to consider the legal aspects of Russia's response, and Russia's *bona fide* efforts to grapple with its peacekeeping obligations in this conflict, have added significantly to the intensity of the moral outrage felt by Russians at the Western defense of Georgia. As Fëyodor Lukyanov, editor of Russia's leading foreign policy journal, *Russia in Global Affairs*, recently put it,

> Russia has been genuinely shocked by this foreign reaction and by the one-sided support that Georgian President

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STATESMAN, Nov. 20, 2008, at 34, *available at* http://www.newstatesman.com/print/2008 11200017.

Several senior Georgian officials, until recently close to President Saakashvili, including former defense minister, Irakly Okruashvili and former ambassador to Russia, Erosi Kitsmarishvili, have described plans for an invasion as having been drawn up well before August and aimed at conquering both South Ossetia and Abkhazia. *See* Littell, *supra* note 86; *Saakashvili Hoped To Crush S. Ossetian Resistance and Attack Abkhazia—View*, ITAR-TASS (Russ.), Oct. 4, 2008, http://www.itar-tass.com/eng/; Brian Rohan, *Saakashvili "Planned S. Ossetia Invasion": Ex-Minister*, REUTERS.COM, Sept. 14, 2008, http://www.reuters.com/article/wtMostRead/idUSLD12378020080914?pageNumber=2&virtualBrandChannel=0&sp.

> Mikheil Saakasvili [sic] has received from the West, despite violating every conceivable humanitarian norm of civilized conduct. Moscow sees this as more than just a double standard, but as unabashed cynicism . . . . Russia is now inclined not only to reject completely a path determined by Western values, but actually to deny that such values even exist.[109]

Not since the NATO bombing of Yugoslavia in 1999 has a single issue so united Russians. Many opposition politicians, human rights activists, and even the jailed oligarch Mikhail Khodorkovsky, have broadly supported President Medvedev in opposing President Saakashvili's methods.[110] For Russian pundits and policymakers, the West's ability to turn a blind eye to Georgian aggression reveals once and for all the amoral character of Western diplomacy; because of its willingness to turn international law from what—now Russian Prime Minister—Vladimir Putin once termed a "stone wall" behind which the weak can find shelter[111] into just another tool in the arsenal of state power.

But even as Russian elites opine that they have lost all illusions about how the United States and its allies operate, the Russian foreign minister describes the supremacy of international law as "Russia's ideology in the area of international relations."[112] The events of last August, according to Lavrov, force Russia to redouble its efforts to ensure that international legal standards are determined by a broader, more geographically and culturally diverse array of states, and strive to make the mechanisms for its implementation more effective.[113] In fulfil-

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109. *See* Fëdor Lukyanov, *Seven Theses Prompted by Russia-Georgia Conflict*, RADIO FREE EUROPE/RADIO LIBERTY, Aug. 26, 2008, http://www.rferl.org/content/Seven_Theses_Prompted_Russia_Georgia_Conflict/1193933.html.

110. *See Khodorkovskii odobril deistviya Medvedeva v Yuzhnoi Osetii [Khodorkovskii Endorsed Medvedev's Actions in South Ossetia]*, OBSHCHAYA GAZETA (Russ.), Sept. 11, 2008, http://og.ru/news/2008/09/11/41296.shtml; Fred Weir et al., *Roots of Georgia-Russia Clash Run Deep*, CHRISTIAN SCIENCE MONITOR, Aug. 12, 2008, at 1, *available at* http://www.csmonitor.com/2008/0812/p01s08-woeu.html; *Russia's Use of Force in South Ossetia Is Justified, Says Party Leader*, INTERFAX (Russ.), Aug. 10, 2008, http://www.interfax.com/.

111. See Vladimir Putin, Vystuplenie i diskussiya na Miunkhenskoi konferentsii po voprosam politiki bezopasnosti [Speech and Discussion at the Munich Conference on the Issues of Security Policy], KREMLIN.RU (Russ.), Feb. 10, 2007, http://www.kremlin.ru/appears/2007/02/10/1737_type63374type63376type63377type63381type82634_118097.shtml.

112. *See* Lavrov for Need of Common View of Contemporary History by RF, US, ITAR-TASS (Russ.), Oct. 13, 2008 (on file with Fordham International Law Journal).

113. *See* Sergey Lavrov, Russian Minister of Foreign Affairs, Address at the Foreign

ling this task, he feels that Russia can rely on the support of many other rising global powers, which may well explain why, outside the West, its actions in Georgia have been met by more understanding than condemnation.

For the benefit of Western readers, Kishore Mahbubani, the Dean of Public Policy at the National University of Singapore, explains why:

> [M]ost of the world is bemused by western moralising on Georgia . . . . It shows how isolated is the western view on Georgia: that the world should support the underdog, Georgia, against Russia. In reality, most support Russia against the bullying west. The gap between the western narrative and the rest of the world could not be greater . . . . *The Financial Times* headline of August 18, 2008 proclaimed: 'West in united front over Georgia.' It should have read: 'Rest of the world faults west on Georgia.'[114]

The slide in perceptions to which Mahbubani refers has been documented statistically in the erosion of international support for U.S. diplomatic efforts to define human rights. Only a decade ago, the U.S. view of human rights was supported by 77% of U.N. members; today it is approved by less than a third.[115]

It may still be possible to reverse this trend, and avert the growing isolation of Western legal norms by initiating an honest dialogue on basic principles. In fact, Russian president Dmitry Medvedev made just such an appeal during his first official trip to the West, saying:

> Russian and European democracy share common roots. We share the same set of values and the same sources of law: Roman, Germanic and French law. I have said in the past that democracy is always shaped by history and by the national set-

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Ministry's MGIMO University on the Occasion of the New Academic Year (Sept. 1, 2008), available at http://www.sras.org/sergey_lavrov_at_mgimo; Dmitry Medvedev, Vystuplenie na Konferentsii po mirovoi politike [Speech at Conference on World Politics], KREMLIN.RU (Russ.), Oct. 8, 2008, http://www.kremlin.ru/appears/2008/10/08/1619_type63374type63377type82634_207422.shtml.

114. Kishore Mahbubani, *The West is strategically wrong on Georgia*, FINANCIAL TIMES (U.K.), Aug. 20, 2008, http://www.ft.com/cms/s/0/c65798bc-6ec6-11dd-a80a-0000779fd18c.html.

115. Ian Traynor, *Haemorrhaging of western influence at UN wrecks attempts to push human rights agenda*, THE GUARDIAN (U.K.), Sept. 18, 2008, at 21, *available at* http://www.guardian.co.uk/world/2008/sep/18/unitednations.china.

> ting. We have a common history and we share the same humanitarian values. This common thinking is the foundation that enables us to speak not just the same legal or business language today but, I hope, also the same political language.[116]

It is highly significant that Russia sees itself as part of European civilization in this unfolding global dialogue, for it is the only European member of the select group of "BRIC" countries—Brazil, Russia, India, and China—that seem destined to become the driving forces in global economic development before the middle of this century.[117] So long as Russia feels that it has some say in framing and applying these European standards, it will be an advocate for these standards in international law. But, while reaffirming Russia's commitment to dialogue with Europe, Foreign Minister Sergei Lavrov also issued the following warning:

> To us, the CIS space is not a 'chessboard' for playing geopolitical games. This is a common civilizational area for every people living here, one that keeps our historic and spiritual legacy alive. Our geography and economic interdependence give tangible competitive advantages to all of the Commonwealth countries. . . . The response of some western countries to the South Ossetia crisis . . . vividly illustrates a deficit of morality. Those incapable of siding with the truth and justice simply cannot, no matter how hard they try, represent the whole of European civilization, not to speak of the incompatibility of that approach with other civilizations and cultural tra-

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116. Dmitry Medvedev, Russian President, *Responses to Questions from German Political, Parliamentary and Civic Leaders*, KREMLIN.RU, June 5, 2008, http://www.kremlin.ru/eng/text/speeches/2008/06/05/2239_type82914type84779_202294.shtml.

117. Muriel Motte, *Les 'bric' Tiennent Leurs Promesses [The BRIC countries Keep Their Promises]*, LE FIGARO (Fra.), Oct. 23, 2006, http://www.lefigaro.fr/eco-entreprises/20061023.FIG000000280_les_bric_tiennent_leurs_promesses.html.

Even among even this select group, however, Russia is distinguished by the fact that its current spending is not financed by foreign-held debt, its population is almost entirely debt free, and it spends a higher percentage of its GDP on research and development than any of the other BRIC nations. *See* Ilmira Malikova, *Zhizn v zaimy [Life in Debt]*, STRANA.RU (Russ.), May 31, 2006, http://www.strana.ru/text/stories/01/12/06/2171/282967.html; Yekaterina Dranitsyna, *Forum Evokes Russian Resourcefulness*, ST. PETERSBURG TIMES (Russ.), June 16, 2006, http://www.sptimes.ru/index.php?action_id=2&story_id=17920; Michael Peel & Stefan Wagstyl, *Investors in Russia confident despite tensions*, FIN. TIMES, June 14, 2007, http://www.ft.com/cms/s/0/75b0905e-19c6-11dc-99c5-000b5df10621.html?nclick_check=1.

ditions.[118]

The danger is that, by failing to give Russia's humanitarian and legal arguments the recognition they are due, not only do we risk undermining the credibility of the West's commitment to international legal principles, we also risk alienating one of the West's strongest potential allies in a critical future struggle—the struggle over which civilizations will define the legal and moral standards of the twenty-first century.

118. Sergey Lavrov, Russian Minister of Foreign Affairs, Address, *supra* note 113.