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## The Distinct Cases of Kosovo and South Ossetia: Deciding the Question of Independence on the Merits and International Law

Ronald Thomas\*

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## **Abstract**

The cases of Kosovo and South Ossetia provide two opportunities for the community of nations to reconcile the rights of Serbia and Georgia with the rights of the peoples within their borders. Instead of doing so, other countries used these cases for ideological and political posturing and continued to do so as of the end of 2008. This Note will review Kosovo and South Ossetia and attempt to take the politics out of an inherently political decision-whether or not to recognize them as independent states. Part I of this Note will review how the United Nations has approached the issues of autonomy, borders, secession, and minorities. It will also provide background on the doctrines of self-determination and the rights of states. Part II will set out the facts-as they are generally accepted-of Kosovo and South Ossetia and consider the differing opinions regarding independence of the two areas. Part III will review those opinions in light of the goals and doctrines of the United Nations and how it has approached these issues in the past. The Note concludes that recognition of independence of the states should be driven by legal arguments rather than political or social alliances and that the goals of the United Nations are best served by being steadfast in promoting multi-ethnicity within political entities; Kosovo and South Ossetia should be recognized as autonomous regions within Serbia and Georgia, respectively. The Note also concludes that domestic as well as international legal structures must be in place to make autonomy workable.

## NOTE

# THE DISTINCT CASES OF KOSOVO AND SOUTH OSSETIA: DECIDING THE QUESTION OF INDEPENDENCE ON THE MERITS AND INTERNATIONAL LAW

*Ronald Thomas\**

### INTRODUCTION

It is doubtful that all Georgians would say, “we are all Georgians.”<sup>1</sup> Within the former Soviet nation of Georgia there are several other, non-Georgian ethnic groups, including the Ossetians and Russians of South Ossetia.<sup>2</sup> Similarly, Kosovar Albanians may object to being identified as “Serbian,” whether that term is used to describe an ethnicity or a state’s citizen.<sup>3</sup> As countries such as France and the Netherlands struggle to assimilate new ethnic groups into their societies and within their

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\* J.D., 2009, Fordham University School of Law; M.B.A., 2006, Fordham Graduate School of Business Administration; B.A., 1976, University of Denver. I would like to thank Professor Joseph Sweeney for his insightful direction on this project and Annie Chen for her thoughtful editing. I am also grateful to my colleagues at Time Inc. and William Stubing for their steadfast support, flexibility and encouragement.

1. See Posting of Robert Barnes to The Trail, <http://voices.washingtonpost.com/the-trail/> (Aug. 12, 2008, 14:24 EST) (reporting on the comment made by Senator John McCain, speaking to Georgian President Mikheil Saakashvili).

2. See *Georgia*, in THE WORLD FACTBOOK, <https://www.cia.gov/library/publications/the-world-factbook/geos/gg.html> (Sept. 29, 2009) (listing Azeris, Armenians, and Russians as the three major ethnic groups behind Georgians); Memorandum from Comm. for Human Rights & Ethnic Minorities of the Parliament of Georgia to Giorgi Topouria (Dec. 3, 1996), available at <http://www.sakartvelo.com/Files/Conflicts/minorities.html> (identifying other groups as Armenians, Azerians, Russians, Ossetians, Abkhazians, Greeks, Jews, and Kurds).

3. See, e.g., *Serbs, Ethnic Albanians Discuss Kosovo*, CHINADAILY, Oct. 10, 2003, [http://www.chinadaily.com.cn/en/doc/2003-10/15/content\\_272122.htm](http://www.chinadaily.com.cn/en/doc/2003-10/15/content_272122.htm) (characterizing the meeting sponsored by the United Nations (“UN”) in which Serb and Kosovar Albanian leaders “clashed” and refused to shake hands); see also *Albanians Flee Serbia for Kosovo*, BBC NEWS, Aug. 2, 1999, <http://news.bbc.co.uk/2/hi/europe/410402.stm> (reporting on the effective partitioning of Mitrovica, Kosovo, between Serbs and Albanians).

borders,<sup>4</sup> ethnic groups in former Soviet-bloc nations are struggling to avoid assimilation into countries whose borders were defined during the Cold War or earlier.<sup>5</sup>

At the end of the Second World War, nations united “to save succeeding generations from the scourge of war . . . .”<sup>6</sup> It may seem that defining political borders based on the geographic location of ethnic groups is the easiest path toward saving succeeding generations from constant fighting. However, defining those borders is no easy task, and as Kosovo and South Ossetia have shown, attempting to do so through unilateral declarations of independence is no savior from the scourge of war. Indeed, when “independence” means freedom from working with others of different ethnic backgrounds, the very concept of independence undermines the intent of the United Nations to “reaffirm faith in fundamental human rights, in the dignity and worth of the human person, in the equal rights of men and women and of nations large and small . . . .”<sup>7</sup> Conflict must be managed not only between people and between states, but between people *and* states.<sup>8</sup> The people-state conflict arises when the right of nations to maintain their recognized borders

4. See, e.g., Jumana Farouky, *The Many Faces of Europe*, TIME, Feb. 15, 2007, available at <http://www.time.com/time/magazine/article/0,9171,1590190,00.html> (describing the increasing Muslim population in Europe); see also James Taranto, *Our Culture is Better: The Weekend Review with Geert Wilders*, WALL ST. J., Nov. 29-30, 2008, at A11 (profiling the Dutch politician Geert Wilders and his views on Islamic culture as it fits within the Netherlands and Europe, distinguishing Islam and the Muslim people).

5. South Ossetia, part of the Georgian province of Shida Kartli, or Tskhinvali, was incorporated into Georgia with its current borders following the Bolshevik occupation of the 1920s. See *Regions and Territories: South Ossetia*, BBC NEWS, [http://news.bbc.co.uk/2/hi/europe/country\\_profiles/3797729.stm](http://news.bbc.co.uk/2/hi/europe/country_profiles/3797729.stm) (last visited July 14, 2009) [hereinafter *South Ossetia*]; see also Rafael Behr, *Fear of Russian “Protection” Spreads to Ukraine and the Baltic*, OBSERVER (London), Aug. 17, 2008, at 28, available at <http://www.guardian.co.uk/world/2008/aug/17/georgia.russia1> (noting that over 17% of Ukrainian citizens are ethnic Russians and reporting that Russia agitates on behalf of the ethnic Russians in Latvia and Estonia, many of whom were denied citizenship in those countries).

6. U.N. Charter pmb1.

7. *Id.*

8. See International Covenant on Civil and Political Rights, *opened for signature* Dec. 16, 1966, 999 U.N.T.S. 171 (entered into force Mar. 23, 1976) [hereinafter ICCPR]. Article 2, para. 3(a), for example, admonishes a state to remedy infringements upon a person’s rights and freedoms, even if the infringement was committed by an agent of the state, acting in an official capacity. *Id.* art. 2, para. 3(a).

clashes—or is believed to clash—with the right of citizens within those borders to exercise self-determination.<sup>9</sup>

The cases of Kosovo and South Ossetia provide two opportunities for the community of nations to reconcile the rights of Serbia and Georgia with the rights of the peoples within their borders. Instead of doing so, other countries used these cases for ideological and political posturing and continued to do so as of the end of 2008. This Note will review Kosovo and South Ossetia and attempt to take the politics out of an inherently political decision—whether or not to recognize them as independent states. Part I of this Note will review how the United Nations has approached the issues of autonomy, borders, secession, and minorities. It will also provide background on the doctrines of self-determination and the rights of states. Part II will set out the facts—as they are generally accepted—of Kosovo and South Ossetia and consider the differing opinions regarding independence of the two areas. Part III will review those opinions in light of the goals and doctrines of the United Nations and how it has approached these issues in the past. The Note concludes that recognition of independence of the states should be driven by legal arguments rather than political or social alliances and that the goals of the United Nations are best served by being steadfast in promoting multi-ethnicity within political entities; Kosovo and South Ossetia should be recognized as autonomous regions within Serbia and Georgia, respectively. The Note also concludes that domestic as well as international legal structures must be in place to make autonomy workable.

## I. *INTERNATIONAL LAW: AN EXERCISE IN APPLYING THE SOLID PRINCIPLES OF AMBIGUOUS DECLARATIONS TO AMBIGUOUS CIRCUMSTANCES*

### A. *The U.N. Mission*

#### 1. Self-Determination vs. Territorial Integrity

The United Nations (“U.N.”) Charter gives little clue as to how the founding international community intended to deal with situations such as Kosovo and South Ossetia. While the Charter

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9. See U.N. Charter art. 1, para. 2.

refers to “equal rights and self-determination of peoples,”<sup>10</sup> and the “territorial integrity” of states,<sup>11</sup> these principles do not provide guidance for resolving a situation in which a population seeks self-determination in a way that threatens the territorial integrity of a state. Resolutions from both the Security Council and the General Assembly augment the Charter and more directly address, without resolving, the tension between the rights of states and the rights of peoples within those states.<sup>12</sup> Less ambiguous is the overarching goal of the United Nations, expressed in article 1, paragraph 1 of the Charter: “to take effective collective measures for the prevention and removal of threats to the peace, and for the suppression of acts of aggression or other breaches of the peace . . . .”<sup>13</sup> With that overarching goal in mind, this Part reviews some of the relevant resolutions of the U.N. bodies. In addition, it reviews the history that led to the establishment of the United Nations. This history is an important key to understanding why and how the United Nations intends to avoid “breaches of the peace,” particularly as they relate to the tension between self-determination and territorial integrity in Kosovo and South Ossetia.

## 2. Resolutions on Self-Determination; Resolve on Secession

The concept of independence in the Charter focuses on the independence of former colonies or territories.<sup>14</sup> The United

10. *Id.* (declaring that one of the purposes of the organization is to develop relations among states based on the principles of equal rights and self-determination).

11. *Id.* at art. 2, para. 4 (mandating that member states refrain from actions that threaten the territorial integrity of other states).

12. *See, e.g.*, Declaration on Principles of International Law Concerning Friendly Relations and Co-operation Among States in Accordance with the Charter of the United Nations, G.A. Res. 2625, U.N. GAOR, 25th Sess., Supp. No. 28, at 121, 123-24 U.N. Doc. A/8082 (Oct. 24, 1970) [hereinafter “1970 Declaration”] (stating that states should actively promote, either singly or jointly, equal rights and self-determination and declaring that the establishment of independent states (from colonialism) is one method of promoting those goals); S.C. Res. 1462, ¶ 2, U.N. Doc. S/RES/1462 (Jan. 30, 2003) (reaffirming “the commitment of all Member States to the sovereignty, independence and territorial integrity of Georgia within its internationally recognized borders, and the necessity to define the status of Abkhazia within the State of Georgia in strict accordance with these principles”).

13. U.N. Charter art. 1, para. 1.

14. *See id.* arts. 73-91; *see also* JOHN A. PERKINS, *THE PRUDENT PEACE* 80 (1981) (noting that attention has focused on decolonization and that “[e]ven the 1970 Declaration does little to spell out how the principle of self-determination is to be implemented in noncolonial situations.”).

Nations does not, as a rule, condone redrawing borders for disputes arising from ethnic differences<sup>15</sup> and has resisted “external self-determination”—i.e., secession—leaning instead toward “internal self-determination” while maintaining the “territorial integrity” of existing states.<sup>16</sup> Nonetheless, the organization has not ruled out secession in colonial contexts.<sup>17</sup>

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15. See U Thant, 7 UN MONTHLY CHRON. 36 (1970) (declaring that the U.N. attitude against secession is unequivocal). Individual nations have likewise been hesitant to recognize unilateral declarations of independence. See, e.g., Johanna McGeary, *Freedom Fighters from Kosovo to Kurdistan, Rebels Vie for Independence: Here are the Reasons Some Succeed—and Some Don't*, TIME, Mar. 8, 1999, at 42 (registering no surprise that the 1999 peace conference in Rambouillet, France, produced only modest returns). Rather than addressing the issue of Kosovo's independence,

“The beauty of the interim accord is that no one has to give up their dreams,” explains U.S. negotiator Christopher Hill. “We’ve created this gray thing that one side will call an elephant and the other will call a mouse.” Trouble is, some members of the Albanian delegation saw through that and demanded a written guarantee of eventual independence. No way, said NATO. “Sure, they can ask for it,” Hill adds, “but getting it is another matter. Today, the international community does not support the idea of an independent Kosovo. It’s not a right they have.”

*Id.*

16. See U.N. Charter art. 2, para. 4 (mandating that member states refrain from actions that threaten the territorial integrity of other states); see also 1970 Declaration, *supra* note 12, Annex (declaring that the resolution is not to be construed to encourage the dismemberment of a state, with the caveat that the state must act “in compliance with the principle of equal rights and self-determination”). The Soviet Union's peace proposals expanded the meaning of “self-determination” to endorse the right to secession. See SIMON CHESTERMAN, THOMAS M. FRANCK & DAVID M. MALONE, *LAW AND PRACTICE OF THE UNITED NATIONS* 409 (2008); see also Jure Vidmar, *Montenegro's Path to Independence: A Study of Self-Determination, Statehood and Recognition*, 3 HANSE L. REV. 73, 75 (noting that Vladimir Ilyich Ulyanov-Lenin invoked self-determination, based on socialist political philosophy and “wedded the right of self-determination to the right to secession”). This long-standing wedding of self-determination and secession notwithstanding, Russia has vigorously fought against Chechnya's independence, an attitude supported by the international community's cool response to Chechnya's bid for autonomy. See CHESTERMAN, *supra*, at 442. The United Nations has condemned Russia's use of excessive force in Chechnya while also choosing to deny Chechnya's claims for independence. See *id.* at 443 (citing *Russia: UN Human Rights Chief Senses “Climate of Fear” In Chechnya*, RADIO FREE EUROPE/RADIO LIBERTY, <http://www.rferl.org/content/article/1066139.html> (last visited July 17, 2009)).

17. See, e.g., *Report of the International Law Commission on the Work of Its Thirty-First Session*, 34 U.N. GAOR Supp. (No. 10) at 25, U.N. Doc. A/34/10 (1979), reprinted in [1979] 2 Y.B. Int'l L. Comm'n 25, U.N. Doc. A/CN.4/SER.A/1979/Add.I(Part 2), available at [http://untreaty.un.org/ilc/publications/yearbooks/Ybkvolumes\(e\)/ILC\\_1979\\_v2\\_p2\\_e.pdf](http://untreaty.un.org/ilc/publications/yearbooks/Ybkvolumes(e)/ILC_1979_v2_p2_e.pdf) (recognizing that there may be cases “following a referendum on self-determination” that part of a state may detach itself from a larger state). The situation discussed in this document refers to part of a state annexing itself to another existing state, however, rather than becoming an independent state. It also does not discuss the

Such is the case with regards to self-determination, as in Resolution 1514 (XV), which recognizes the desire of a people to secede from an “alien” government.<sup>18</sup> Resolution 2625, “Declaration on Principles of International Law Concerning Friendly Relations and Co-operation Among States in Accordance with the Charter of the United Nations” (“1970 Declaration”), speaks with authority on the conduct of nations, proscribing external interference and balancing self-determination and territorial integrity.<sup>19</sup> Resolution 47/135, “Declaration on the Rights of Persons Belonging to National or Ethnic, Religious and Linguistic Minorities” (“Declaration on Minorities”), presupposes that there will be minorities within states and that those minorities may be subject to oppressive rule by the majority. It mandates that states shall not only protect, but promote the ethnic identity of the minorities within their borders.<sup>20</sup> At the same time, the declaration states that it shall not be construed as working against the sovereignty and territorial integrity of the state in which the minorities reside.<sup>21</sup> These resolutions, as a body of work, accept the possibility of

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nature of the referendum, i.e., whether the referendum must be held state-wide or in only the territory that is seceding. *See id.*

18. *See* G.A. Res. 1514 (XV), ¶ 1, U.N. GAOR, 15th Sess., Supp. No. 16, U.N. Doc. A/4684 (Dec. 14, 1960) (declaring that “[t]he subjection of peoples to alien subjugation, domination and exploitation constitutes a denial of fundamental human rights, is contrary to the Charter of the United Nations and is an impediment to the promotion of world peace and co-operation” and that “[a]ll armed action or repressive measures of all kinds directed against dependent peoples shall cease in order to enable them to exercise peacefully and freely their right to complete independence, and the integrity of their national territory shall be respected”).

19. *See* 1970 Declaration, *supra* note 12, at 123-24. John A. Perkins gives four sources for the 1970 Declaration’s authority: 1) the principles of the resolution are either explicitly or implicitly contained in the U.N. Charter; 2) the resolution went through a process that created consensus among the states; 3) the resolution explicitly states (in section 3) that it embodies the principles of the U.N. Charter, which are the principles of international law; and 4) the resolution incorporates paragraphs from some prior resolutions, sometimes with modifications, thus leading to the conclusion that the paragraphs in the Declaration have gone through a rigorous review process as law. PERKINS, *supra* note 14, at 66-67.

20. *See* G.A. Res. 47/135, art. 1, ¶ 1, U.N. Doc. A/RES/47/135 (Feb. 3, 1993) (“States shall protect the existence and the national or ethnic, cultural, religious and linguistic identity of minorities within their respective territories and shall encourage conditions for the promotion of that identity.”).

21. *See id.* art. 8, ¶ 4 (“Nothing in the present Declaration may be construed as permitting any activity contrary to the purposes and principles of the United Nations, including sovereign equality, territorial integrity and political independence of States.”).

secession, but do not define the circumstances that would justify secession, particularly in non-colonial contexts. They stress territorial integrity of states and also declare states' duties toward the minorities within their borders.

Between the founding of the United Nations and the breakup of the Soviet Union, new states were established primarily through the result of decolonization, with a few exceptions, such as Bangladesh, Pakistan, and Singapore.<sup>22</sup> Pakistan, created forty-five years before the Declaration on Minorities, is an example of a nation created out of concern for a minority population, in this case a minority of Muslims in a country with a Hindu majority.<sup>23</sup> If Britain hoped that independence for the Muslim people of India would help fulfill the mission of the United Nations and make future generations safe from the scourge of war, it would be disappointed; tensions continue, but rather than being an internal issue of minority rights, they are now an international issue concerning two nuclear-power states.<sup>24</sup> Pakistan could therefore be viewed as evidence that supports the United Nations' reluctance to create a new country based on a minority population.

The United Nations' hesitancy to accept secession as a solution to internal tensions<sup>25</sup> predates Pakistan, however, and

22. See *Tenth Report on Succession of States in Respect of Matters Other Than Treaties*, at 232-35, U.N. Doc A/CN.4/313 (1978) (documenting briefly the circumstances leading to the independence of the states, but focusing on the apportionment of property).

23. See generally CENTRAL INTELLIGENCE AGENCY, *THE CIA WORLD FACTBOOK 2010: PAKISTAN*, <https://www.cia.gov/library/publications/the-world-factbook/geos/pk.html#Intro> (last visited July 14, 2009) (providing an overview of the creation of Pakistan and the conflict between India and Pakistan); see also Girilal Jain, *India, Pakistan and Kashmir*, in *INDIAN FOREIGN POLICY: THE NEHRU YEARS* 42, 48-49 (B.R. Nanda ed., 1976) (questioning the role of the British government in the demand for partition of India and Pakistan; suggesting that the Muslim elites "defined the community's identity in religious and not in territorial terms" because "it offered them solace in the period of their political and economic decline;" and noting that after partition "over one-third of the Muslims were bound to be left in India").

24. See B.R. NANDA, *INDIAN FOREIGN POLICY: THE NEHRU YEARS* 1, 8 (1976); see also Zahid Hassain, *Pakistani Firing Exposes Rift Over Mumbai Probe*, *WALL ST. J.*, Jan. 9, 2009, at A5 (characterizing the effect on bombings in Mumbai as escalating tensions between the two rival nuclear powers); Anthony Spaeth, *Looking Down the Barrel*, *TIME*, Jan. 14, 2002, at 28, available at <http://www.time.com/time/world/article/0,8599,190848,00.html> (reporting that both countries were ready to go to war in 2002 after thirty years of an easing of tensions).

25. See Thant, *supra* note 15 (observing that "the United Nations has never accepted and does not accept and I do not believe it will ever accept the principle of secession of a part of its Member State.").

may be a legacy of the League of Nations. The League's Commission of Rapporteurs stated its philosophy when it rejected the Aaland Islands' petition to break from Finland and realign themselves with Sweden: Conceding to the desires of minorities, the Commission declared, was a threat to stability.<sup>26</sup> Michael Bothe, Professor of Public Law at Johann Wolfgang Goethe Universität, Frankfurt, and Dr. Thilo Marauhn, Professor of International Law at Justus Liebig Universität, Gießen, offer this explanation for caution regarding secession: "If each ethnic conflict became an issue about the right to external self-determination, this might enhance the divisive character of these conflicts and, eventually, international law might contribute to the deepening of the ditches between parts of the populations who would then live better together rather than separately."<sup>27</sup> Another negative outcome was suggested by Irakli Alasania, Georgia's Ambassador to the United Nations, who warned at a press briefing after the hostilities in South Ossetia, "If [violent actions for independence] are now accepted by the international community, it will mean that foreign sponsored groups around the world can use violence and ethnic cleansing to achieve their ends and be rewarded with independence."<sup>28</sup> If true, this would

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26. See Frederic L. Kirgis, Jr., *The Degrees of Self-Determination in the United Nations Era*, 88 AM. J. INT'L L. 304, 304 (1994) (quoting the Commission's belief that secession by minorities or other factions within states would promote instability, even when the majority of the people in the area in question would vote to realign itself). The Commission did allow for the exceptional case when the state from which a minority is looking to secede is either unable or unwilling to provide necessary freedoms to the minority. See John Dugard & David Raič, *The Role of Recognition in the Law and Practice of Secession*, in SECESSION: INTERNATIONAL LAW PERSPECTIVES 94, 107 (Marcelo G. Kohen ed., 2006) (quoting the *Commission of Rapporteurs in the Aaland Island Dispute*, League of Nations Doc. B7.21/68/106 (1921)). For an indication of how the Aaland Islands have fared despite the Commission's refusal to recognize the realignment, see Fredrik Dahl, *Finland's Aaland Islands May Stay Outside the EU*, WALL ST. J., Oct. 10, 1994 (describing the Aaland Island's political and economic autonomy within Finland, with some exceptions, such as taxation); John Pomfret, *Plan Offers Self-Rule for Croatia Serbs: Idea Floated to End Stalemate in Bosnia*, WASH. POST, Oct. 19, 1994, at A38 (reporting that a peace plan for Croatia "borrowed liberally from other autonomy deals in Europe, such as one for ethnic Swedes inhabiting the Aaland Islands").

27. Michael Bothe & Thilo Marauhn, *UN Administration of Kosovo and East Timor: Concept, Legality and Limitations of Security Council-Mandated Trusteeship Administration*, in KOSOVO AND THE INTERNATIONAL COMMUNITY: A LEGAL ASSESSMENT 217, 239 (Christian Tomuschat ed., 2001).

28. H.E. Irakli Alasania, Permanent Representative of Georgia to the United Nations, Statement at Press Briefing (Aug. 26, 2008), available at <http://www.reliefweb.int/rw/RWB.NSF/db900SID/EDIS-7HWLAD?OpenDocument>.

run counter to the United Nations' respect for law and order,<sup>29</sup> and its overarching goal of establishing and maintaining peace would be defeated. The United Nations' hesitancy to accept secession, then, may be well-founded.

### 3. The League of Nations and Structures Begun at the End of World War I

#### a. Redrawing Borders and Recognizing States Through Caprice or Principle

Along with a reluctance to accept secession, the United Nations inherited from its post-World War I legacy state borders that were drawn "without benefit of an integrating intelligence at the top or of the broader perspective that the presence of enemy delegates would have given."<sup>30</sup> U.S. President Woodrow Wilson went to Paris at the end of World War I with his Fourteen Points, including those dealing with national self-determination.<sup>31</sup> His concept of self-determination did not translate into independence for all nationalities. On the one hand, point XI called for economic independence and territorial integrity for the Balkan states based on "established lines of allegiance and nationality."<sup>32</sup> President Wilson's following point, however, declared that the nationalities falling under Turkish rule should be allowed not independence, but security and autonomy.<sup>33</sup> The other delegates in Paris did not, or for domestic political

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29. See CHESTERMAN, *supra* note 16, at 20 (stating that "respect for the rule of law internationally is at the heart of the Charter . . .").

30. ARTHUR WALWORTH, *WILSON AND HIS PEACEMAKERS* 104 (W.W. Norton & Co. 1986).

31. See Woodrow Wilson, President of the United States, Address to Congress (Jan. 8, 1918), in *THE PAPERS OF WOODROW WILSON* 536 (Arthur S. Link et al. eds., 1984) available at [http://wwi.lib.byu.edu/index.php/President\\_Wilson%27s\\_Fourteen\\_Points](http://wwi.lib.byu.edu/index.php/President_Wilson%27s_Fourteen_Points) [hereinafter Fourteen Points]. Of particular current interest is point V (calling for an approach to the resolution of questions of sovereignty that is based on a balance of the interests of the existing government and the populations within the states), point IX ("A readjustment of the frontiers of Italy should be effected along clearly recognizable lines of nationality."), point X ("The peoples of Austria-Hungary . . . should be accorded the freest opportunity to autonomous development."), and point XI (advocating for independence of Balkan states). *Id.*

32. *Id.*

33. *Id.*

purposes would not, follow Wilson's Points.<sup>34</sup> As a result, the final Treaty of Versailles resolutely forbade borders to be drawn with ethnicities in mind, when the states containing those ethnicities were among the losing parties of the World War. Specifically, the Treaty forbade German Austrians from uniting with Germany.<sup>35</sup> Wilson himself, not following "recognizable lines of nationality" that point IX called for, ceded German South Tyrol to Italy.<sup>36</sup> Despite any good intentions he had, therefore, even Woodrow Wilson carried on the tradition whereby "the law of recognition, in respect of states, was inferable only from the ill defined practices of individual states which were as much the product of caprice as of regard for principle."<sup>37</sup>

b. The Issue of Minorities: Championing Rights and Exploiting Nationalistic Sentiments

Whether carefully or capriciously drawn, the borders of new states were bound to include minority peoples, and there is little in the League Covenant that addresses the rights of minority peoples within established or newly formed countries.<sup>38</sup> The exception is article 22, paragraph 6, which acknowledges—

34. See, e.g., WALWORTH, *supra* note 30, at 403 ("Although [British Prime Minister Lloyd George and French Prime Minister Georges Clemenceau] had just given [American Norman] Davis to understand that they agreed upon the necessity of telling their peoples the facts, actually they were unwilling to face the political consequences of such a course."); see also JOHN MAYNARD KEYNES, *THE ECONOMIC CONSEQUENCES OF THE PEACE* 47 (Harcourt, Brace & Howe 1920) (describing the "blind passions of 'anti-German' resentment with which the public of all allied countries were still inspired" and providing evidence that any concerns of Lloyd George and Clemenceau had might have been well-founded).

35. See Treaty of Versailles art. 80, July 28, 1919, 225 Consol. T.S. 118, available at <http://history.sandiego.edu/gen/text/versaillestreaty/ver031.html> ("Germany acknowledges and will respect strictly the independence of Austria, within the frontiers which may be fixed in a Treaty between that State and the Principal Allied and Associated Powers; she agrees that this independence shall be inalienable, except with the consent of the Council of the League of Nations."); see also KEYNES, *supra* note 34, at 51-52 (suggesting that the wording of the Treaty with regards to Austria and Germany were designed to appeal to Wilson's sensibilities while giving France its desired veto over any unification).

36. See generally Fourteen Points, *supra* note 31.

37. MALBONE W. GRAHAM, *THE LEAGUE OF NATIONS AND THE RECOGNITION OF STATES* 1, 1 (William S. Hein 2005) (1933).

38. See League of Nations Covenant, art. 22(6) (stating that some regions are integral parts of the larger state, "subject to the safeguards . . . in the interests of the indigenous population.").

foreshadowing the words of Bothe and Marauhn<sup>39</sup>—that some territories are best incorporated into larger entities “owing to . . . their small size, or their remoteness from the centres of civilisation, or their geographical contiguity to the territory of the Mandatory [newly formed, independent state] . . . subject to the . . . interests of the indigenous population.”<sup>40</sup> For the most part, it was the “Minority Treaties” that addressed the issue of minority peoples in the newly formed states. One example is the Treaty of Saint-Germain-en-Laye, in which the Sudetenland, with its sizable German-speaking population, was ceded to Czechoslovakia.<sup>41</sup> This was done despite the principles of Wilson’s Fourteen Points regarding drawing borders along ethnic lines and despite warnings from the U.S. Commission to the Paris Peace Conference of conditions of the German minority in their new state. These conditions, reviewed next, seem to parallel the circumstances of minorities in South Ossetia and Kosovo.

The U.S. Commission warned that granting Czechoslovakia all the territory it was demanding would create a situation where discontented Germans would be living within the state of Czechoslovakia but with sympathetic Germans right over the border,<sup>42</sup> as is the case with Kosovar Albanians in Kosovo or Russians in South Ossetia.<sup>43</sup> The Commission also reported that Czechoslovakian soldiers had fired on German crowds in several towns, and that these were acts that would not be easily forgiven and would be resented by the Germans on both sides of the border.<sup>44</sup> Britain’s Lord Runciman visited the Sudetenland and

39. See generally Bothe & Marauhn, *supra* note 27 (suggesting that there are cases where nations may benefit by working as a unit rather than separately).

40. League of Nations Covenant, art. 22(6).

41. See Treaty of Peace with Austria (St. Germain-en-Laye), art. 27, ¶ 6, Sept. 10, 1919 (describing the revised border).

42. See Alfred de Zayas, *Anglo-American Responsibility for the Expulsion of the Germans, 1944-48*, in *ETHNIC CLEANSING IN 20TH CENTURY EUROPE*, 239, 245 n.11 (Steven Bela Vardy et al. eds., 2000), available at [http://www.ostdeutsches-forum.net/en/PDF/Zayas\\_Anglo-American-EN.pdf](http://www.ostdeutsches-forum.net/en/PDF/Zayas_Anglo-American-EN.pdf) (quoting ARCHIBALD COOLIDGE, 12 PAPERS RELATING TO THE FOREIGN RELATIONS OF THE UNITED STATES 273, available at <http://digital.library.wisc.edu/1711.dl/FRUS.FRUS1919Parisv12>).

43. See CENTRAL INTELLIGENCE AGENCY, THE CIA WORLD FACTBOOK: GEORGIA (providing map of Georgia, including South Ossetia and Russia); CENTRAL INTELLIGENCE AGENCY, THE CIA WORLD FACTBOOK: KOSOVO, <https://www.cia.gov/library/publications/the-world-factbook/geos/kv.html> (last visited July 14, 2009) (providing map and brief history of Kosovo).

44. See De Zayas, *supra* note 42, at 245 n.11 (quoting Archibald Coolidge:

reported back to his government the oppression that the Germans were experiencing in Czechoslovakia.<sup>45</sup> Among the conditions that raised concerns for him were the large number of non-German-speaking Czechoslovakian officials and police dispatched to German districts; Czechoslovakian agricultural colonists settling in the midst of German populations as the result of land reform; state contracts being allocated more heavily to Czechoslovakian rather than German firms; and state work and relief programs favoring Czechoslovakian over German citizens.<sup>46</sup> The minorities in Kosovo and South Ossetia have similarly alleged abuses of the governing majority.<sup>47</sup>

The developments that concerned the U.S. Commission and Runciman combined a number of forces that moved the world toward its Second World War: A humiliated former great power in a depressed global economy used the mis-governance of a minority population in a newly created state as an excuse to regain some of the territory and countrymen it had lost when it collapsed two decades earlier. Championing the rights of the minority Germans in Czechoslovakia took on nationalistic and ethnic characteristics, and what began as a concern for the rights of minority populations ended as a devastating conflict.

### c. Alliances: Choosing Sides to Determine Self-Determination

At the end of the nineteenth century, some thought that devastating conflicts were a thing of the past with globalization

For the Bohemia of the future to contain within its limits great numbers of deeply discontented inhabitants who will have behind them across the border tens of millions of sympathizers of their own race will be a perilous experiment and one which can hardly promise success in the long run.)

45. *See id.*, at 243 (quoting Lord Runciman).

46. *See Id.*

47. *See* Juliane Kokott, *Human Rights Situation in Kosovo 1989-1999*, in *KOSOVO AND THE INTERNATIONAL COMMUNITY: A LEGAL ASSESSMENT* 23 (Christian Tomuschat ed., 2001) (discussing the confiscation of Albanian property, the closing of minority schools, mass dismissal of Albanians from their jobs, and the destruction of religious and cultural monuments); SABRINA PETRA RAMET, *BALKAN BABEL: THE DISINTEGRATION OF YUGOSLAVIA FROM THE DEATH OF TITO TO THE WAR FOR KOSOVO* 308 (1999) (listing evidence of Albanian repression during the Presidency of Slobodan Milošević, including the termination of Albanian-language schools; the firing of Albanians from jobs; the confiscation of land; and the arrest and beating of Albanians); Clifford J. Levy, *Russia Declares Its Recognition of Two Enclaves*, *N.Y. TIMES*, Aug. 27, 2008, at A1 (providing a limited view of South Ossetian life under Georgian rule, including road checkpoints and having to provide documentation "under the hostile gaze of soldiers.").

replacing nationalism and ethnic pride.<sup>48</sup> That globalization, though, included alliances that quickly devolved into the Great War after a regional dispute in the Balkans brought in players from around the globe.<sup>49</sup> The alliances did not end with World War I, and when Germany invaded Czechoslovakia to claim the Sudetenland and allegedly to liberate the ethnic Germans from Czechoslovakian oppression, it set in motion tensions and aggression that would result in its second major defeat of the twentieth century. The resulting devastation reinvigorated the desire for an organization of nations that would prevent the scourge of war from recurring. Eliminating, or at least mitigating, alliances appears to have been part of that organization's purpose,<sup>50</sup> manifest in article 103 of the U.N. Charter, which gives the United Nations supremacy over any conflicting obligations and alliances between member states.<sup>51</sup>

Self-determination may complicate the task of eliminating alliances, as Robert Lansing, the U.S. Secretary of State during the formation of the League of Nations, suggested when he contemplated "the confusions that could arise from devotion to the general principle of self-determination. To what political unit should it be applied,' he queried, 'to a race, to a region, or

48. See, e.g., STEFAN ZWEIG, *DIE WELT VON GESTERN: ERINNERUNGEN EINES EUROPÄERS*, 14-18, 225-29 (S. Fischer Verlag ed., 1990) (reflecting on the societal advances of the late nineteenth and early twentieth centuries and a certain pan-European nationality); see also KEYNES, *supra* note 34, at 9-26 (providing a primarily economic, but also social, examination of Europe before World War I: "What an extraordinary episode in the economic progress of man that age was which came to an end in August, 1914!").

49. See generally Bainbridge Colby, *For Certain Peace: Alliances Have Failed So Regularly, a League of Nations Deserves a Trial*, N.Y. TIMES, Jan. 12, 1919 (advocating a League of Nations to supplant an oft-failed policy of alliances); *World War I: Alliance System*, THECORNER.COM, <http://www.thecorner.org/hist/wwi/alliance.htm> (last visited July 14, 2009) (describing the various pre-World War I alliances, starting with Germany's alliance with Austria and Russia intended to isolate France and leading eventually to the Italy-Germany, Austria-Italy alliances and Britain-France alliance, among others).

50. See United Nations Alliance of Civilizations, Mission Statement, *available at* <http://www.unaoc.org/content/view/39/187/lang,english/> (last visited Mar. 25, 2009) (describing one of its missions to be "to help counter the forces that fuel polarization and extremism").

51. See 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.").

to a community?’”<sup>52</sup> Lansing’s concern implied that states may not agree on how to apply the principle of self-determination. Differences in application of the principle could result not only in confusion but in potential conflict as different states ally themselves with groups seeking self-determination or with other states seeking to suppress secessionist desires of minorities.

In the aftermath of the Cold War, it may have seemed that such concern was moot.<sup>53</sup> Early in the United Nations’ decade of international law, running from 1990 to 1999, the Special Committee on the Charter of the United Nations and on the Strengthening of the Role of the Organization (“Special Committee on the Charter”) issued a report, with one of its purposes being to ensure that the United Nations would maintain and strengthen its relevance.<sup>54</sup> Perhaps it seemed that its relevance, as expressed in the Charter’s preamble,<sup>55</sup> was waning as the Cold War imploded and traditional aggressors became good global citizens.<sup>56</sup> During the Cold War, the Security Council was essentially paralyzed in the face of regional conflicts that “pitt[ed] proxies of the superpowers against each other.”<sup>57</sup> The United Nations nonetheless appears to have maintained its relevance, as Kosovo and South Ossetia threaten to pit superpowers and their allies against one another again as

52. WALWORTH, *supra* note 30, at 109 (quoting then-U.S. Secretary of State Robert Lansing).

53. See, e.g., Jane Perlez, *After the Cold War: Views from Africa; Stranded by Superpowers, Africa Seeks an Identity*, N.Y. TIMES, May 17, 1992, at A1 (describing the predicament of African countries that could no longer rely on Washington-Moscow rivalries to bring African countries to the top of the global economic agenda).

54. See G.A. Res. 44/23, U.N. Doc. A/RES/44/23 (Nov. 17, 1989) (declaring the period as the United Nations Decade of International Law); see also *Report of the Special Committee on the Charter of the United Nations and on the Strengthening of the Role of the Organization*, U.N. GAOR, 45th Sess., Supp. No. 33, at 4, U.N. Doc. A/45/33 (1990) (reporting that one representative “noted that there was a general agreement on the need to enhance the role of the Organization” given the “improvement in the international climate”).

55. See U.N. Charter pmb. (“[T]o save succeeding generations from the scourge of war, which twice in our lifetime has brought untold sorrow to mankind, and . . . to promote social progress and better standards of life in larger freedom . . .”).

56. See Perlez, *supra* note 53 (reviewing the post-cold war Soviet-American operation cooperation that helped end the Angolan civil war).

57. CHESTERMAN, *supra* note 16 at 21.

each side advances its agenda by pursuing—or resisting—statehood for the two territories.<sup>58</sup>

#### 4. The State of Statehood

The United Nations never adopted a Declaration on the Rights and Duties of States, but the debate during drafting of the Declaration makes clear that the prevailing sentiment was that any reference to a state meant a state that already existed.<sup>59</sup> The Treaty of Versailles, on the other hand, dealt with newly created states, limited to those territories that belonged to the defeated parties of World War I.<sup>60</sup> There were three elements to be considered for statehood: 1) the proposed state was for identifiable peoples; 2) disputed borders were to be determined by plebiscite; and 3) ethnic groups too small or dispersed were to be granted the protection of special minorities, supervised by the League of Nations.<sup>61</sup> Noteworthy is the fact that this scheme “did not provide a legal basis to all populations seeking more than a certain degree of participation in the governance of their territories.”<sup>62</sup> Hence, a Kurdish delegation was unsuccessful in making its case for a Kurdish state to the San Francisco Conference in 1945, despite the fact that the people was identifiable, and the territory was within a definable area and by no means too small.<sup>63</sup> The size of its territory, in fact, covering

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58. See MARK MACKINNON, *THE NEW COLD WAR* 99 (2007) (describing the Russia-Georgia relationship in personal as well as national terms).

59. See *Summary Record of the 24th Meeting*, [1949] I Y.B. INT'L L. COMM'N 171-72, U.N. Doc. A/CN.4/SR.24 (debating the meaning of “State” in the phrase, “Every State has the right to exist and to preserve its existence.”).

60. See Anthony Whelan, *Wilsonian Self-Determination and the Versailles Settlement*, 43 INT'L & COMP. L.Q. 99, 108-09 (1994) (explaining that the conquered territories were the only ones over which the Allies had authority); see also CHESTERMAN, *supra* note 16, at 409 (noting that there was no move to address statehood claims of the victors' colonies).

61. See Whelan, *supra* note 60, at 100-01 (suggesting that Wilson's concern for oppressed ethnic nationalities influenced the three elements); see also Treaty of Versailles, *supra* note 35, art. 22 (identifying specific territories and suggesting the appropriate—in the view of the Allies—governance for them).

62. CHESTERMAN, *supra* note 16, at 410 (citing the denial for self-determined realignment to Sweden of the Aaland Islands as an example of limitations on sovereignty).

63. See *History of Kurdistan*, LIVELEAK.COM, [http://www.liveleak.com/view?i=135\\_1200571325](http://www.liveleak.com/view?i=135_1200571325) (last visited July 14, 2009) (chronicling the history of the Kurdish region); *The Creation of a Kurdish State in the Middle East*, Walworth Barbour American International School in Israel, <http://www.wbais.org/~timemun/issues/td2.htm> (last

portions of Iran, Iraq, Syria, and Turkey<sup>64</sup> may have worked against it, since these other states had conflicting claims to the area.

While a people's separate, identifiable culture, language and religion do not guarantee its right to external self-determination, as seen in the Kurdistan case, a state's historical claim to a territory does not guarantee its right to that territory, as viewed by the United Nations. The International Court of Justice made note of this when, considering the Philippines' claim over North Borneo, Judge *ad hoc* Franck wrote, "historic title, no matter how persuasively claimed on the basis of old legal instruments and exercises of authority, cannot except in the most extraordinary circumstances prevail in law over the rights of non-self-governing people to claim independence and establish their sovereignty through the exercise of bona fide self-determination."<sup>65</sup> Judge *ad hoc* Franck observed that the people of North Borneo had chosen to associate "with other peoples in their region with whom they fe[lt] ties of ethnic association, heritage, language, religion, culture, economic relationship, and ideals and objectives."<sup>66</sup> In this case, the people won their right to disengage from the established state; the state, therefore, lost its case for territorial integrity.

#### a. Pays Sans Frontières<sup>67</sup>

The Kurdistan case demonstrates that Kosovo and South Ossetia are not outliers with regards to the disconnect between

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visited July 14, 2009) (describing the World War II Allies acceptance of Turkey's borders after its takeover of some Kurdish areas); *see also* akaKurdistan.com, Story Map, <http://www.akakurdistan.com/kurds/stories/index.html> (last visited July 14, 2009) (showing a map of the proposed state).

64. *See* David Romano, *Safe Havens as Political Projects: The Case of Iraqi Kurdistan*, in STATES WITHIN STATES: INCIPIENT POLITICAL ENTITIES IN THE POST-COLD WAR ERA 154 (Paul Kingston & Ian Spears eds., 2004). *See also* *Who are the Kurds?*, WASHINGTONPOST.COM, <http://www.washingtonpost.com/wp-srv/inatl/daily/feb99/kurdprofile.htm> (last visited Feb. 6, 2009) (giving a general background of the people).

65. CHESTERMAN, *supra* note 16, at 431-32. For Judge *ad hoc* Franck's opinion, see *Sovereignty over Pulau Ligitan & Pulau Sipadan*, Application by the Philippines for Permission to Intervene, 2001 I.C.J. 575, 652 (Oct. 23) (separate opinion of Judge *ad hoc* Franck) *available at* <http://www.icj-cij.org/docket/files/102/7712.pdf> [hereinafter "Franck Opinion"].

66. Franck Opinion, *supra* note 65, at 657 (quoting the U.N. Secretary-General's finding); CHESTERMAN, *supra* note 16, at 433-34.

67. "Countries Without Borders."

political boundaries and ethnic make-up or aspirations. The political boundaries of states do not always reflect a logical boundary based on the ethnicity of the populations who live in a given area.<sup>68</sup> Lands that were conquered, colonized, and subsequently granted independence reflect this phenomenon.<sup>69</sup> As African nations formed from former colonies, for example, they maintained, for the most part, the arbitrary political borders that their erstwhile colonizers had drawn many years earlier without consideration of the continent's populations.<sup>70</sup> Political borders, as a result, cut across and split some ethnic groups, while throwing together other, disparate groups.<sup>71</sup> Despite calls for redrawing the borders in Africa,<sup>72</sup> the political boundaries have held.<sup>73</sup>

Two examples illustrate how the international community resists territories' petitions for recognition as independent states.

68. See S. JAMES ANAYA, *INDIGENOUS PEOPLES IN INTERNATIONAL LAW* 107-08 (Oxford University Press 2004) (1996) (finding that the colonial territorial unit was maintained during the decolonization process); see also *Rush-Bagot Pact, 1817 and Convention of 1818*, U.S. DEP'T OF STATE, <http://www.state.gov/r/pa/ho/time/jd/91716.htm> (last visited July 14, 2009) (providing a brief overview of the settlement of the U.S.-Canadian border at the forty-ninth parallel for much of the Western part of the countries).

69. See ANAYA, *supra* note 68, at 108; ROBERT H. JACKSON, *QUASI-STATES: SOVEREIGNTY, INTERNATIONAL RELATIONS, AND THE THIRD WORLD* 41 (1990) (noting that "[t]he sovereigns have changed and the Europeans have left but the territorial jurisdictions they created are exactly as before in most cases.").

70. See ANAYA, *supra* note 68, at 107-08 (noting that redressing historical violations of self-determination takes into account new political orders based on the artificial colonial boundaries); see also Lydia Polgreen, *Qaddafi, as New African Union Head, Will Seek Single State*, N.Y. TIMES, Feb. 3, 2009, at A9 (reporting on Libyan President Muammar el-Qaddafi's vision of taking the various African states, with their arbitrary post-colonial borders, and shaping them into one unified state).

71. See ANAYA, *supra* note 68, 108 (finding that the colonial territorial unit was maintained during the decolonization process).

72. See, e.g., Jonathan I. Charney, *Self-Determination: Chechnya, Kosovo, and East Timor*, 34 VAND. J. TRANSNAT'L L. 455 (2001) (suggesting that the international community should review its self-determination policy in non-colonial situations); *Africa's Outdated Colonial Boundaries Must Be Redrawn*, U. PENN. PLAIN DEALER, Sept. 26, 1994, at 7B (arguing that a new generation of Africans are comfortable with their ethnic and tribal background and should redraw national borders rather than live with violence that springs from tribalism).

73. See, e.g., U.S. Dep't of State, *Background Note: Nigeria*, <http://www.state.gov/r/pa/ei/bgn/2836.htm> (last visited July 19, 2009) (relating the evolution of Nigeria from a colony of the United Kingdom to an independent country with multiple ethnic regions, and the unsuccessful attempt of one of them, Biafra, to establish its own independence).

The first, Kurdistan, has already been discussed. The territories of the Somalis, an African example, presents an essentially opposite case. Britain's "Bevin Plan" of the 1940s proposed, but failed, to unite the territories of the Somali people into a single, independent nation.<sup>74</sup> In 1960, Britain granted independence to Somaliland and shortly after, Italy granted independence to its former colony, Somalia.<sup>75</sup> The two newly dependent states briefly attempted unification, but Somaliland soon recognized that such an arrangement was not to its benefit.<sup>76</sup> In the meantime, however, the United Nations had recognized Somalia as the unified two former colonies.<sup>77</sup> When Somaliland attempted to claim its independence from Somalia, its declaration fell on deaf international ears.<sup>78</sup> Hence, to the international community, Somaliland continues as part of Somalia, even though the two provinces had been separate colonies belonging to two different empires at the time of their independence.<sup>79</sup> Matt Bryden,

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74. See Ismail Ali Ismail, *Ethiopia and Somalia: Missed Opportunities and Some Challenges*, WARDHEERNEWS.COM, July 6, 2005, [http://wardheernews.com/articles/July/7\\_Somalia%20&%20Ethiopia\\_Geeldoon.htm](http://wardheernews.com/articles/July/7_Somalia%20&%20Ethiopia_Geeldoon.htm) (describing what the author views as the unfortunate selection of Italy as the administrative trustee during the decolonizing period rather than Britain, which, the author believes, could have unified the region).

75. See Matt Bryden, *State-Within-a-Failed-State: Somaliland and the Challenge of International Recognition*, in STATES WITHIN STATES, *supra* note 64 (providing a chronology and commentary on the independence, unification and attempted separation of Somalia and Somaliland); see also *Timeline: Somalia*, BBC NEWS, <http://news.bbc.co.uk/2/hi/africa/1072611.stm> (last visited Feb. 6, 2009) (listing the main events in Somalia's history).

76. See generally Bryden, *supra* note 75. Somaliland argues that the unification was not consummated, because rather than a single treaty, significantly different documents were signed by the two legislatures. *Id.*

77. See *id.*; see also *Somalia*, U.N. ECON. COMM'N FOR AFRICA, [http://www.uneca.org/aisi/NICI/country\\_profiles/Somalia/somab.htm](http://www.uneca.org/aisi/NICI/country_profiles/Somalia/somab.htm) (last visited July 14, 2009) (noting that the Republic of Somaliland is not recognized by any government, although it maintains a stable existence).

78. See Bryden, *supra* note 75; see also Press Release, Security Council, Security Council Statement Reaffirms Council's Commitment to Peace in Somalia, U.N. Doc. SC/6985 (Nov. 1, 2001) (reaffirming the Security Council's commitment to Somalia's "sovereignty, territorial integrity, political independence and unity."). Djibouti, the former French Somaliland, or more formally, the French Territory of Afars and Issas, avoided this by not gaining its independence, as Djibouti, until 1977. See CENTRAL INTELLIGENCE AGENCY, THE CIA WORLD FACTBOOK 2010: DJIBOUTI, <https://www.cia.gov/library/publications/the-world-factbook/geos/dj.html> (last visited July 14, 2009). At the time of independence, the people of Djibouti rejected unification with Somalia. See Bryden, *supra* note 75, at 171. Britain had granted Kenya, with its Somali-inhabited territory, independence in 1963. See *id.*

79. Respecting the integrity of international borders at the moment of independence is consistent, not only with U.N. practice, but with the charter of the

author and former director of International Crisis Group's Horn of Africa Project, suggests that an independent Somaliland should be recognized, since peace has not resulted from combining the two countries after the end of their respective colonial periods.<sup>80</sup> He feels that the recent history of Somaliland as a functioning entity supports its independence movement.<sup>81</sup> The United Nations seems uninterested in pursuing such a path.<sup>82</sup>

These examples of Kurdistan and Somaliland demonstrate the reluctance of the United Nations to redraw borders to match demographics, the desires of minorities for independence, or even populations that want to correct an ill-conceived unification.<sup>83</sup> They also demonstrate very different situations of a similar problem with independence movements: While Kurdistan would unite a people divided across political units, Somaliland would divide what appears to be a single people into multiple political units. Both cases highlight the need to define a "people."

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African Union as well. See Bryden, *supra* note 75, at 170; see also African Union Constitutive Act art. 4(b) (declaring as one of its principles "respect of borders existing on achievement of independence.").

80. See Bryden, *supra* note 75, at 171-72 (describing the Somali government's violence toward Somaliland and explaining it as the reason for Somaliland's separation from Somalia). See generally Abdulazez Al-Motairi, *Somaliland Recognition & UN Trusteeship on Southern Somalia: The Only Solution to Somalia*, AMERICAN CHRONICLE, Dec. 21, 2008, <http://www.americanchronicle.com/articles/view/85630> (citing an abuse of power against tribes and communities for a conflict that the author feels can be resolved only through recognition of Somaliland).

81. See Bryden, *supra* note 75, at 171-72 (suggesting that the timing of its petition for independence is causing a forced unification based on a technicality). See generally Al-Motairi, *supra* note 80 (calling on the world to recognize Somaliland, which attempted to gain recognition shortly after the failed attempt at integration with Italian Somalia).

82. See, e.g., U.N. ECON. COMM'N FOR AFRICA, *supra* note 77 (confirming that Somaliland is not recognized by any state); Press Release, Security Council, Security Council Statement Reaffirms Council's Commitment to Peace in Somalia, U.N. Doc. SC/6985 (Nov. 1, 2001) (characterizing Somaliland leadership as one of the groups opposed to a peace initiative).

83. See S.C. Res. 541, U.N. Doc S/RES/541 (Nov. 18, 1983) (deploring "the declaration of the Turkish Cypriot authorities of the purported secession of part of the Republic of Cyprus"); Thant, *supra* note 15, at 36 (articulating his belief that the United Nations will never accept secession of a part of a member state).

## b. What Is a “People?”

The United Nations, while not recognizing political borders redrawn by ethnic demographics, recognizes in the Charter that peoples within political borders have a right to self-determination.<sup>84</sup> This right is bestowed upon a “people” that is distinguishable from the population of the larger state in which the people live.<sup>85</sup> “People” is otherwise undefined and therefore left to case-by-case and ad hoc analysis. Scholars and statesmen have offered various suggestions for defining a “people.” Dr. Gerd Seidel, Faculty of Law at Humboldt Universität, Berlin, uses, first, a subjective requirement: The group in question must identify itself as a people.<sup>86</sup> Judge Juliane Kokott, Court of Justice of the European Communities, articulates objective elements “such as a separate culture, possibly a separate language or ethnic origins different from the majority population in the State.”<sup>87</sup> Author John A. Perkins notes, however, that Switzerland, its separate linguistic communities notwithstanding, is one people.<sup>88</sup> The U.S. Supreme Court gave a context-driven definition:

[W]hile the word “people” may mean the entire body of the inhabitants of a state; or the state or nation collectively in its

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84. U.N. Charter art. 1, para. 2 (stating that one of the purposes of the United Nations is “[t]o develop friendly relations among nations based on respect for the principle of equal rights and self-determination of peoples . . .”). This recognition of self-determination does not extend to a contiguous unit when the demographic territory extends across multiple political states, as in the case of Kurdistan.

85. See Kokott, *supra* note 47, at 6 (citing KARL DOEHRING 333 VÖLKERRECHT: EIN LEHRBUCH (1999)).

86. See Gerd Seidel, *A New Dimension of the Right of Self-Determination in Kosovo?*, in KOSOVO AND THE INTERNATIONAL COMMUNITY: A LEGAL ASSESSMENT 205 (Christian Tomuschat ed., 2001) (analyzing the definition of a “people” as related to the inhabitants of Kosovo and requiring that the group identify itself as a people). See generally Sophia Kishkovsky, *Conflict Tests Ties Between Georgian and Russian Orthodox Churches*, N.Y. TIMES, Sept. 6, 2008, at A5 (describing the reaction of the Russian and Georgian Orthodox Churches, which see the two groups as having “centuries of political and economic ties”).

87. Kokott, *supra* note 47, at 6.

88. See PERKINS, *supra* note 14, at 77; see also, Stanislav V. Chernichenko & Vladimir S. Kotliar, *Ongoing Global Legal Debate on Self-Determination and Secession: Main Trends*, in SECESSION AND INTERNATIONAL LAW: CONFLICT AVOIDANCE—REGIONAL APPRAISALS 75, 78 (Julie Dahlitz ed., 2003) (“a common language, for instance, is not necessarily inherent in a people”). He also argues that “[a] group does not necessarily constitute a ‘people’ by its own definition.” *Id.* at 81. This suggests that the subjective criterion is not a necessarily overriding one.

political capacity; or the ruling power of the country; its meaning . . . taken in connection with the words “colony” and “district,” covers in our judgment any insurgent or insurrectionary “body of people acting together, undertaking and conducting hostilities,” although its belligerency has not been recognized.<sup>89</sup>

Such a definition may not be what the United Nations had in mind, but it is a propos to the current discussion. It is the “acting together” and “conducting hostilities” against the recognized state that create a tension within the U.N. framework; for while the self-determination of the “people” is to be respected, so is the “territorial integrity”<sup>90</sup> of the state, leading to conflicts such as those within Kosovo and South Ossetia.

### c. Origins and Implications of the Self-Determination–Territorial Integrity Tension

The tension between self-determination and territorial integrity did not originate with the United Nations. It goes back at least as far as the Treaty of Westphalia of 1648, which ushered in the rise of the modern state.<sup>91</sup> Concurrent with this political development was the development of naturalist thinking, in which European theorists began viewing natural law not as a universal moral code, but rather as two sets of natural rights, those of the individual and those of the state.<sup>92</sup> Gerd Seidel reasons that peoples hold the right to self-determination, while states hold all other fundamental rights.<sup>93</sup> Self-determination, then, cannot lead to secession without either the assent of the state or the infringement of the state’s rights. Noting the fact that there is no *terra nullius* in today’s world, Seidel suggests two conclusions to be drawn regarding secession: 1) only extreme

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89. *United States v. The Three Friends*, 166 U.S. 1, 62-63 (1897) (referring to insurgents in Cuba against Spain, and dealing with the vessel the *Three Friends*, which was used in filibustering activity).

90. U.N. Charter art. 2, para. 4.

91. See, e.g., ANAYA, *supra* note 68, 19-20 (describing the Treaty of Westphalia and the emergence of the modern state). But see Daniel Nexon, *Zeitgeist? The New Idealism in the Study of International Change*, 12 REV. INT’L POL. ECON., 700, 706-07 (arguing that the Treaty of Westphalia reflected changes that were already underway and that state sovereignty was a movement not concurrent with the treaty).

92. See ANAYA, *supra* note 68, at 20 (discussing the effect of the individual/state dichotomy on the tradition of Western liberal thought).

93. See Seidel, *supra* note 86, at 203.

circumstances can legally and admissibly allow a secession that would impair the territorial integrity and political unity of an existing state, and 2) a state cannot rely on its legal interests to prevent a secessionist movement, if the state has denied a people within its borders the right to self-determination and if it has discriminated against a portion of its population.<sup>94</sup>

Seidel uses the term “state” to refer to the political unit. Murat Belge, the Turkish scholar, recognizes “state” and “nation” as separate concepts.<sup>95</sup> The Swiss diplomat Emmerich de Vattel merged the terms in the eighteenth century, using them interchangeably,<sup>96</sup> but some distinguish the terms “state” and “nation.” Belge observes, for example, that “[t]o set up a state is easy, but to create a nation is extremely difficult.”<sup>97</sup> The distinction between the two is important when attempting to determine the legal status of a people vis-à-vis states. Self-

94. See *id.* at 207-210 (considering the circumstances that justify secession and applying them to Kosovo, finding that “[d]ue to its persistent policy of refusing to grant autonomy and due to the reprisals against the Kosovo Albanians, Belgrade forfeited its chance of keeping Kosovo under Yugoslav sovereignty.”); see also Dugard & Raič, *supra* note 26, at 94-95, 106 (referring to implicit provisions in the 1970 Declaration and Vienna Declaration “that States are entitled to resist attempts at unilateral secession by peoples within their borders if they are carried out in the absence of special circumstances”). Dr. Seidel apparently would argue that whatever special circumstances allowed the break-up of Yugoslavia should also allow the further break-up of Serbia. See Seidel, *supra* note 86, at 214 (“[T]he people of Kosovo has the same right as the other peoples of the former Yugoslavia to secede from the Yugoslav State . . .”). He likewise would hold Kosovo Albanians to the same standard regarding minority rights. In defending against the argument that Kosovar Albanians might abuse minorities in Kosovo, if given independence, Seidel counters that the international community should “demand that the Kosovo Albanians respect the minority rights they themselves fought for.” *Id.* at 214.

95. See Sabrina Tavernise, *On the Bosphorus, a Scholar Tells of Sultans, Washerwomen and Snakes*, N.Y. TIMES, Oct. 25, 2008, at A5 (contrasting the national identity of the Ottomans with the emphasis on “Turkishness” of the state).

96. See ANAYA, *supra* note 68, at 20-21. Franz Tamayo, Bolivian delegate to the League of Nations, “endeavored to differentiate between communities attaining statehood and those merely possessing the attributes of nationhood.” GRAHAM, *supra* note 37, at 25.

97. Sabrina Tavernise, *supra* note 95. Mr. Belge was referring specifically to the creation of modern Turkey after World War I. *Id.* The country’s founder, Mustafa Kemal Atatürk looked toward the European model, disassembled the six hundred-year-old structure of the Ottoman state, changed the alphabet to Latin characters and crushed the religious hierarchy. As a result, the political boundaries were set, but the national identity, as reflected in language, culture and religion was suppressed. See Sabrina Tavernise, *In Turkey, Bitter Feud Has Roots in History*, N.Y. TIMES, June 22, 2008, at A6.

determination is a manifestation of a people seeing itself as a distinct nation; secession is a desire of a people to cease being part of an existing political state.<sup>98</sup> Professor S. James Anaya, special rapporteur on the situation of human rights and fundamental freedoms of indigenous people, suggests that the concept of the nation-state came from a mutually reinforcing merger of “nation,” which developed as a sociological identity, and “state,” which developed as a political community, supported by a bureaucracy and defined by its territory.<sup>99</sup> Belge recognizes the reality of the difference,<sup>100</sup> as does the United Nations, which implicitly requires that states allow their peoples to express nationhood through self-determination.<sup>101</sup>

The cultural, sociological, and ethnic entity, organized into a political community is, according to Vattel, independent of all other states and “should be left in the peaceable enjoyment of that liberty which she inherits from nature.”<sup>102</sup> Within Vattel’s understanding of the natural law of states is the belief that society has the duty to 1) procure for its citizens the “necessities, the comforts, and the pleasures of life,” 2) make its citizens safe with regards to property and justice, and 3) protect its citizens from external violence.<sup>103</sup> Accepting these as duties of the state leads to the question of whether the state loses its rights when it fails in these duties. This is perhaps especially true when the state fails to procure for its citizens’ justice and security against violence—

98. The difference between self-determination and secession can be seen in the minutes of the fifty-fourth session of the International Convention on the Elimination of all Forms of Racial Discrimination. After some discussion about the Committee’s traditional opposition to secession, which it defined as the “fragmentation of States,” it decided to welcome only “the right to self-determination, without specifying whether it would take the form of autonomy or secession.” International Convention on the Elimination of all Forms of Racial Discrimination, ¶¶ 69-74, Mar. 19, 1999, 660 U.N.T.S. 195.

99. See ANAYA, *supra* note 68, at 21 (citing David Beetham, *The Future of the Nation State*, in *THE IDEA OF THE MODERN STATE* (Gregor McLennan et al. eds., 1984); J.H. SHENNAN, *LIBERTY AND ORDER IN EARLY MODERN EUROPE: THE SUBJECT AND THE STATE, 1650-1800*, at 3 (1986)).

100. See Tavernise, *supra* note 95 and accompanying text (noting the difficulty in creating a nation versus a state).

101. See, e.g., G.A. Res. 53/144, pmbll., Annex, para. 4, U.N. Doc. A/RES/53/144/Annex (Mar. 8, 1999).

102. ANAYA, *supra* note 68, at 21 (quoting EMMERICH DE VATTEL, *THE LAW OF NATIONS, OR THE PRINCIPLES OF NATURAL LAW* (Classics of International Law Series, 1916) (Charles G. Fenwick trans. of 1758 ed.)).

103. *Id.* at 20-21 (reviewing Vattel’s concepts of the rights and obligations of states).

the source of which may be internal as well as external. Vattel's definition also leaves open the question of how homogeneous the culture, society and ethnicity must be for the social unit to be identified as a state.

The status of a state's rights when it fails in its duties to its citizens is subject to interpretation. So, too, is the definition of a cultural, sociological, and ethnic entity. These ambiguities provide the international community with various options when reviewing cases such as Kosovo and South Ossetia. The international community can a) defend the individual rights of a cultural or ethnic group; b) uphold the rights of a political entity; or c) attempt a reconciliation between the group and the entity (the people and the state). Without a clear definition of a people or clear consequences when a state is derelict in its duties, other states have leeway in selecting the option that best serves their own political objectives. The United Nations, with its many members and their many political objectives, can, in theory, become a neutral arbiter of conflicts such as those of Kosovo and South Ossetia. It can either help them become independent nation-states, or insist that they remain within larger, existing states. Before deciding which outcome to support, the United Nations must first determine whether it has jurisdiction to involve itself in a people-state conflict resolution. It must then apply the Charter, the resolutions of the Security Council and General Assembly, and any applicable treaties to the specific facts of a case. Part II reviews each case in turn. Following a review of the facts, Part III will suggest how the international community should address each case, focused on international legal goals, rather than politics.

## II. *THE CASES OF KOSOVO AND SOUTH OSSETIA*

### A. *Kosovo*

#### 1. Two Claims to One Territory

During the six hundred years between the battle of Kosovo on the Field of the Blackbirds in 1389 and the abolition of Kosovo's autonomy in Serbia in 1989, the Albanian population

became the distinct majority in the region of Kosovo.<sup>104</sup> It was the Ottoman Empire, though, and not the Albanian population, that was responsible for the emigration of ethnic Serbs from Kosovo. When the Serbian principality was founded in 1830, Kosovo was not included in the territory.<sup>105</sup> Not until the founding of the Albanian State in 1912/13 was Kosovo, by that time predominantly populated by Albanians,<sup>106</sup> incorporated, not into Albania, but into the Serbian principality.<sup>107</sup> After World War I, Wilson allowed Italy to expand its borders eastward by absorbing territories that had populations of Slovene and Croat majorities.<sup>108</sup> The remaining territory, the Kingdom of Serbs, Croats and Slovenes—to be renamed Yugoslavia in 1929<sup>109</sup>—included Kosovo and its 400,000 Albanians.<sup>110</sup> Including Kosovo worked toward fulfilling the Serbian plan of a Greater Serbia that would include lands where Serbs currently lived as well as lands where they may have lived or ruled in the past.<sup>111</sup> The League of

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104. See Kokott, *supra* note 47, at 2.

105. See *id.*

106. See Spiritus-temporis.com, Demographic History of Kosovo - Ottoman Rule, available at <http://www.spiritus-temporis.com/demographic-history-of-kosovo/ottoman-rule.html> (last visited Feb. 11, 2009) (citing GUSTAV WEIGAND, ETHNOGRAPHIE VON MAKEDONIEN (1924) and providing snapshots of the demographics of Kosovo from the fifteenth to early twentieth centuries).

107. See Kokott, *supra* note 47, at 2; see also Library of Cong., Places in the News: Kosovo, [http://www.loc.gov/today/placesinthenews/archive/2008arch/20080219\\_kosovo.html](http://www.loc.gov/today/placesinthenews/archive/2008arch/20080219_kosovo.html) (last visited July 14, 2009) (providing a brief history of Kosovo, including the pre and post-World War I period).

108. See CAROLE ROGEL, THE BREAKUP OF YUGOSLAVIA AND ITS AFTERMATH 6 (Greenwood Press, rev. ed. 2004) (2004) (noting that Britain and France promised Italy territorial compensation for joining the Entente); STEVE TERRETT, THE DISSOLUTION OF YUGOSLAVIA AND THE BADINTER ARBITRATION COMMISSION: A CONTEXTUAL STUDY OF PEACE-MAKING EFFORTS IN THE POST-COLD WAR WORLD 20-21 (2000) (providing a history of the area and the formation of Yugoslavia); see also Treaty of Peace with Austria, *supra* note 41, art. 27, ¶¶ 2, 4 (regarding the frontiers of Austria with Italy and the Serb-Croat-Slovene State).

109. See ROGEL, *supra* note 108, at 72 (describing the country's construction after World War I); TERRETT, *supra* note 108 at 21-22 (attributing the name change to King Alexander).

110. See ROGEL, *supra* note 108, at 72 (describing Serbian nation building in the early twentieth century); see also RAMET, *supra* note 47 at 302 (referring to the 1912 conference of Britain, France, Germany, Austria-Hungary, Italy, and Russia that discussed territorial changes in the Balkans); *Places in the News: Kosovo*, *supra* note 107 (mentioning the defeat of the Serbs in 1389).

111. See ROGEL, *supra* note 108, at 72 (characterizing Serbian nation building as a manipulation of nationalism to further gains in wealth); see also TERRETT, *supra* note 108, at 21 (noting that Slovenia and Croatia perceived the Serbian Radical Party's passage of the 1921 founding constitution as a move toward attempts to create a Greater

Nations denied the 1921 Kosovar petition to merge into Albania,<sup>112</sup> and neither World War II nor Tito's National Liberation Movement helped Kosovar Albanians achieve their goal.<sup>113</sup> The opportunity, and apparently the desire, for Kosovo to merge with Albania grew more remote after Yugoslavia split ideologically from the Soviet Union and Kosovo was cut off from Albania, which began associating with Russia and, later, China.<sup>114</sup> Beginning in 1963, the status of Kosovo within Yugoslavia improved, becoming a province and, with the 1974 Constitution, equal to that of the other seven units of the Yugoslav federation.<sup>115</sup>

By the time the Serbs coerced a constitutional amendment that essentially abolished the autonomy of the Kosovo province in 1989,<sup>116</sup> the United Nations had long established the right of self-determination, at least in the context of post-colonialism.<sup>117</sup> The Kosovar Albanians, once incorporated into the Serbian

Serbia); *Flashback to Kosovo War*, July 10, 2006, BBC, <http://news.bbc.co.uk/2/hi/europe/5165042.stm> ("Serbs consider Kosovo the cradle of their culture, religion and national identity.").

112. See ROGEL, *supra* note 108, at 72 (explaining that the Kosovars were unhappy with the situation and that Serbia was encouraging the Albanians to emigrate to Turkey). See generally G. Richard Jansen, *Albanians and Serbs in Kosovo: An Abbreviated History an Opening for the Islamic Jihad in Europe*, available at <http://lamar.colostate.edu/~grjan/kosovohistory.html> (last visited July 14, 2009) (providing an overview of the region and the implication for global jihad).

113. See ROGEL, *supra* note 108, at 72-73 (describing both Serbs and Kosovars as being disappointed with the Yugoslav state); see also TERRETT, *supra* note 108, at 24 (reporting Tito's demand for "a Yugoslav 'policing' role in Albania, purportedly to defend against the civil war in Greece though also to prevent unity between Albania and Kosovo.").

114. See ROGEL, *supra* note 108, at 73 (implying that the Kosovars might not have wanted to join Albania's ideological associations with Russia and China); see also CENTRAL INTELLIGENCE AGENCY, *THE CIA WORLD FACTBOOK 2010: ALBANIA*, <https://www.cia.gov/library/publications/the-world-factbook/geos/al.html> (last visited July 14, 2009) (placing the Albanian alliance with the Soviet Union from 1944 to 1960 and its alliance with China from 1960 to 1978).

115. See ROGEL, *supra* note 108, at 73 (noting that while the development was pleasing to the Albanians, the Serbs "fumed" at seeing their influence waning); see also TERRETT, *supra* note 108, at 26 (observing that the constitution's granting of autonomous-region status to Kosovo (and Vojvodina) was an irritant to Serb nationalists).

116. See Kokott, *supra* note 47, at 5 (describing the acceptance of the constitution by Kosovo's parliament as being influenced by "massive military and police pressure").

117. See U.N. Charter art. 1, para. 2; see also Declaration on the Granting of Independence to Colonial Countries and Peoples, G.A. Res. 1514 (XV), U.N. Doc. A/4358 (Dec. 14, 1960); see also *supra* notes 16-18 and accompanying text (discussing the U.N. policy on self-determination and secession).

principality, and later into Yugoslavia, could be considered a separate people within the state, using Judge Kokott's definition.<sup>118</sup> As Kokott notes about the Kosovar Albanians, their culture, religion, language and ethnicity are different from the Serbs.<sup>119</sup> They were not, however, a former colony, putting unilateral secession out of reach, based on the U.N. Charter and subsequent resolutions.<sup>120</sup>

Author Sabrina Petra Ramet suggests that through its various compositions, Yugoslavia may have lacked the fundamentals to be a state, arguing that it fell short in its mode of selecting leaders, division of power, political succession, and its very justification for being.<sup>121</sup> Its legitimacy as a state would, in turn, affect the legitimacy of intervention by the international community: If Yugoslavia was, indeed, a legitimate state, Kosovo's fight for independence would be a purely internal dispute, and the U.N. Charter would normally not bless intervention.<sup>122</sup> On the other hand, if it was not a legitimate state with legitimate territory, other states could more easily recognize the units that had made up Yugoslavia as independent entities.

Complicating either scenario is the fact that two competing factions, the Serbs and Albanians, claim the territory of Kosovo. Adding to this complexity is the history of violence between Serbs and Albanians in Kosovo, with each reporting violence perpetrated by the other. Serbs reported Albanian violence

118. See Kokott, *supra* note 47, at 6-7 (“[T]heir culture including their religion is different [from the Serbs] as they are Muslims, not Serbian Orthodox, their language is not Serbian, but Albanian, and they are ethnically different from the Serbs.”).

119. See *supra* note 118 and accompanying text (applying objective criteria to Kokott's definition of a “people”).

120. See, e.g., World Conference on Human Rights, June 14-25, 1993, *Vienna Declaration and Programme of Action*, ¶ 2, U.N. Doc. A/CONF.157/23 (July 12, 1993) (“[T]his shall not be construed as authorizing or encouraging any action which would dismember or impair, totally or in part, the territorial integrity or political unity of sovereign and independent States . . .”). See generally SECESSION AND INTERNATIONAL LAW: CONFLICT AVOIDANCE—REGIONAL APPRAISALS (Julie Dahlitz ed., 2003) (exploring the views among members of the United Nations regarding secession).

121. See RAMET, *supra* note 47, at 298-99 (suggesting that the constant state of turmoil in both the Kingdom of Yugoslavia and Communist-era country was caused, in part, by its disputable status as a state).

122. See U.N. Charter art. 2, para. 7 (“Nothing contained in the present Charter shall authorize the United Nations to intervene in matters which are essentially within the domestic jurisdiction of any state or shall require the Members to submit such matters to settlement under the present Charter; but this principle shall not prejudice the application of enforcement measures under Chapter VII.”).

toward Serbs, leading to the emigration of the latter from Kosovo between 1877 and 1912 as well as more recently.<sup>123</sup> Once Serbs had regained control of the territory, however, and despite the Treaty for the Protection of Minorities, the Serbs, partly as a result of following President Slobodan Milošević's vision of a Greater Serbia, deprived Kosovar Albanians of rights, including Albanian-language schools and publications.<sup>124</sup> In addition, Serbs confiscated Albanian land and made plans to forcefully transfer Albanian families from Kosovo to Turkey.<sup>125</sup>

## 2. Authority to Intervene

The U.N. Charter, reinforced by the 1970 Declaration, commands that member states refrain from threatening or using force against the territorial integrity of another state and refrain from interfering with the purely domestic affairs of other states.<sup>126</sup> In the case of Serbia and Kosovo, the territory was well

123. See RAMET, *supra* note 47, at 302, 306 (citing Serbian complaints of violent confiscations of land and plundering of churches by the Albanians in the nineteenth and early twentieth centuries and of Albanian rape and genocide of the Serbian people in the 1980s). Albanian officials had denounced violence, but disappointments in the West's lifting of sanctions on Serbia and the failure to provide for Kosovo in the Dayton Peace Accords helped the Kosovo Liberation Army ("KLA") institutionalize terror. Actions such as attacks on Serbian police weakened the position of moderates such as Ibrahim Rugova. See *id.* at 309; see also Kokott, *supra* note 47, at 3-4 (referring to Kosovar Albanian terror as an impetus for Serb emigration from the area in the 1990s); Nicholas Wood, *Kosovo Smolders After Mob Violence*, N.Y. TIMES, Mar. 24, 2004, at A10 (describing the violence perpetrated by each side on the other). The Security Council condemned "all terrorist acts by any party," specifically citing the KLA. See S.C. Res. 1244, ¶¶ 9(b), 15 U.N. Doc. S/RES/1244 (June 10, 1999) (deciding that the international security presence in Kosovo should "[d]emiliariz[e] the Kosovo Liberation Army (KLA) and other armed Kosovo Albanian groups" and demanding "that the KLA and other armed Kosovo Albanian groups end immediately all offensive actions").

124. See RAMET, *supra* note 47, at 303 (describing the Belgrade government's program of "denationalization" of the area); see also TERRETT, *supra* note 108, at 29 (attributing the repression of Kosovar Albanian's political and cultural rights to Milošević's exploitation of Serbian nationalist ambitions and observing that Milošević's impassioned nationalistic speech "enraged his mentor, [then] Serbian President Ivan Stambolic"). But see Kokott, *supra* note 47, at 3 (discussing the 1981 demonstrations of Kosovar Albanians and the resulting brutal police reaction, providing evidence that ethnic tensions existed without the prompting of Milošević).

125. See RAMET, *supra* note 47, at 303 (explaining that the plans to transfer Albanians were not carried out, due to the intervention of World War II).

126. See U.N. Charter art. 2, para. 4; see also 1970 Declaration, *supra* note 12, at 122 ("Nothing in the foregoing paragraphs shall be construed as authorizing or encouraging any action which would dismember or impair, totally or in part, the territorial integrity or political unity of sovereign and independent States . . .").

defined; the question was whether the territory contained two states or one. Was Kosovo part of Serbia? The actions of the League of Nations and the United Nations answered that question in the affirmative: Kosovo was part of Serbia, and Kosovar Albanian leaders accepted this opinion as late as 1999 at the Rambouillet, France, peace conference.<sup>127</sup> If Kosovo was part of Serbia, the Serbian-Albanian conflict was a domestic matter and was ordinarily out of the jurisdiction of the United Nations. Chapter VII of the U.N. Charter, though, gives the United Nations authority to take measures when there is a “threat to the peace, breach of the peace, or act of aggression . . . .”<sup>128</sup> The chapter neither permits nor prohibits the United Nations from invoking Chapter VII when the breach to the peace stems from a purely domestic matter. Thus, whether or not Kosovo was part of Serbia and the conflict was completely domestic, the United Nations could, and did, act under its Chapter VII authority when it issued Security Council Resolutions 1160 and 1199. Resolution 1160 called for a solution that recognized the rights of the Kosovar Albanians and expressed support for greater autonomy and self-administration for Kosovo.<sup>129</sup> Although the Resolution does not explicitly say so, the Security Council’s authority for the Resolution derives from Chapter XI of the U.N. Charter.<sup>130</sup> Article 73 of that chapter would seem to address only a colonial situation in which a territory is expected to eventually become independent.<sup>131</sup> The article, however, goes only so far as to describe “peoples [who] have not yet attained a full measure of

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127. See RAMET, *supra* note 47, at 317-18 (describing the “inauspicious circumstances” of the conference and the Albanian willingness to sign an agreement that offered autonomy rather than independence in order to retain Western support). See generally Tony Karon, *Kosovo: Chronicle of a Mess Foretold*, TIME.COM, Apr. 2, 1999, <http://www.time.com/time/arts/article/0,8599,22596,00.html> (suggesting that moderate ethnic Albanian leader Ibrahim Rugova wanted to prevent further destruction of Kosovo, but that the warring sides ultimately signed on to the agreement to avoid the wrath of the North Atlantic Treaty Organization (“NATO”).

128. U.N. Charter art. 39.

129. S.C. Res. 1160, ¶¶ 4-5, U.N. Doc. S/RES/1160 (Mar. 31, 1998) (calling on Belgrade and the Kosovar Albanians to enter into a dialog that would have as its goal greater Kosovo autonomy while maintaining the territorial integrity of the Federal Republic of Yugoslavia).

130. See U.N. Charter arts. 73-74 (listing the responsibilities in administering territories).

131. See U.N. Charter art. 73 (referring to “territories whose peoples have not yet attained a full measure of self-government . . .”).

self-government . . . .”<sup>132</sup> Such a description would apply to Kosovo, or more specifically, to the Kosovar Albanians. The responsibilities of the governing entity are listed in the subparagraphs of the article and include respecting the people’s culture; helping the people to advance politically and economically; promoting education; and protecting them from abuses.<sup>133</sup> Using Gerd Seidel and Judge Juliane Kokott as guides, the Kosovar Albanians would seem to qualify as a “people,”<sup>134</sup> with Serbia<sup>135</sup> having responsibility for protecting the rights of the Albanian minority. Seidel notes, too, that Kosovar Albanians could claim minority rights under article 27 of the International Covenant on Civil and Political Rights (“ICCPR”).<sup>136</sup>

Whether Serbia failed in its responsibility and whether there are mitigating factors that should keep Kosovo within Serbia are questions that will be reserved for Part III of this Note. For now, it is sufficient to say that other states have allied themselves with either Serbia or the Kosovar Albanians. While the United States, European Union, and nations of the North Atlantic Treaty Organization (“NATO”) enthusiastically endorsed the proposal

132. *Id.*

133. *See id.* (recognizing “the principle that the interests of the inhabitants of these territories are paramount”).

134. *See supra* notes 86, 87, 119 and accompanying text (noting that the Kosovar Albanians recognize themselves as a separate people and have a separate culture, language, and ethnic origin). Seidel offers this caveat, however: “We must remember . . . that we cannot be sure whether the criteria we encounter are acknowledged by all States.” Seidel, *supra* note 86, at 205.

135. To avoid confusion, the governing country will be referred to as Serbia, rather than attempting to follow the progression resulting from the breakup of the Socialist Federal Republic of Yugoslavia, through the Federal Republic of Yugoslavia.

136. Seidel, *supra* note 86, at 205-06 (noting that “the existing minority rights and the right to self-determination overlap in Kosovo.”); *see also* ICCPR, *supra* note 8, art. 27 (“In those states in which ethnic, religious or linguistic minorities exist, persons belonging to such minorities shall not be denied the right, in community with the other members of their group, to enjoy their own culture, to profess and practise their own religion, or to use their own language.”). Yugoslavia offered notifications of derogations from articles 12 (freedom of movement) and 21 (right to assembly) between 1989 and 1990. *See* ICCPR Declarations and Reservations, Yugoslavia, n.1, available at [http://www.unhchr.ch/html/menu3/b/treaty5\\_asp.htm](http://www.unhchr.ch/html/menu3/b/treaty5_asp.htm); *see also* Office of the U.N. High Comm’r for Human Rights, *Status of Ratifications of the Principal International Human Rights Treaties* 10 (June 9, 2004), available at <http://www.unhchr.ch/pdf/report.pdf> (listing Serbia and Montenegro as successor signatories as of April 27, 1992); *Montenegro Gets Serb Recognition*, BBC NEWS, <http://news.bbc.co.uk/2/hi/europe/5083690.stm> (last visited July 14, 2009) (describing Serbia-Montenegro as the “last vestige” of the former Yugoslav federation and reporting Montenegro’s split from Serbia).

for Kosovo's independence advanced by U.N. special envoy Marti Ahtisaari, the Federation of Russia warned that allowing independence would set a dangerous precedent for separatists elsewhere.<sup>137</sup> Secretary of State Condoleezza Rice succinctly stated the U.S. position by saying, "Kosovo will never again be part of Serbia. It's not possible."<sup>138</sup> States have therefore set up new alliances.

One alliance, the European Union Rule of Law Mission in Kosovo ("EULEX"), has apparently not foreclosed any possibility, undertaking its mission to strengthen the police, judicial and customs systems within Kosovo<sup>139</sup> while managing to do so with

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137. See Yuri Zarakhovich, *Will Russia Block Kosovo Independence?*, TIME.COM, May 23, 2007, <http://www.time.com/time/world/article/0,8599,1624851,00.html> (adding that Russia also endorses Trans-Dniestria's efforts to break away from Moldova); see also Chernichenko & Kotliar, *supra* note 88, at 86 (suggesting that military intervention on behalf of secessionists "comes very close to advancing the controversial concept of 'humanitarian intervention' which practically all the [participants of the Moscow Conference held under the auspices of the Consortium on International Dispute Resolution] condemned as illegitimate and contrary to the U.N. Charter").

138. Zarakhovich, *supra* note 137. The language and sentiment of the Secretary of State seem to parallel those of Dr. Seidel when he compares Serbia and Kosovo to spouses ripe for divorce. See Seidel, *supra* note 86, at 213 ("Just as hostile spouses cannot be forced to continue their relationship, Serbs and Kosovars cannot be compelled to continue to live together within the boundaries of a single State."). Zarakhovich suggests there may be another reason for the Secretary's and the West's position, namely attempting to show that the West is friendly toward the Muslim world and playing that to Russia's disadvantage. See Zarakhovich, *supra* note 137 ("The issue also has implications for the image of the protagonists in the Islamic world: Helping Muslim Albanians win independence may help the Western powers repair their image in the Muslim world, whereas resisting the Albanians' secession will cause a lot of bad blood in the Muslim world for Russia."). In this view, the West's motive for improved relations with the Muslim world is arguably one of security. See, e.g., Victoria Burnett, *Convictions and Key Acquittals End Madrid Bomb Trial*, N.Y. TIMES, Nov. 1, 2007, at A3 (reporting on the trial of Islamic radicals for the 2004 bombing of commuter trains in Madrid); John Cloud, *3 Lessons from London*, TIME, July 18, 2005, at 38 (analyzing the 2005 London bus and subway bombings and concluding that while mainstream Muslims may have hardened against jihadists, the movement is so far-flung that it will be difficult to find them or exert effective pressure on them). The London and Madrid bombings, however, occurred despite the West's support of the Muslim population in Kosovo in the late 1990s. See generally *Flashback to Kosovo's War*, *supra* note 111 (explaining the NATO air strikes against Serbia as an effort to end Serbia's persecution of the Kosovar Albanians).

139. See generally Arbana Vidishiqi, *Kosovo at Another Crossroads*, RADIO FREE EUROPE/RADIO LIBERTY, Nov. 20, 2008, [http://www.rferl.org/Content/commentary\\_Kosovo\\_Another\\_Crossroads/1351205.html](http://www.rferl.org/Content/commentary_Kosovo_Another_Crossroads/1351205.html) (characterizing the mission as one to "mentor police, the judiciary, and customs officials" while remaining neutral—or ambiguous—toward Kosovo's status); *The Strategy*, EULEX KOSOVO, <http://www.eulex-kosovo.eu/?id=27> (last visited July 14, 2009) (describing the functional, non-political

the acceptance of both Kosovo and Serbia.<sup>140</sup> The mission was set up, after initial opposition from both sides,<sup>141</sup> to work within Security Council Resolution 1244, which reaffirmed the territorial integrity of Serbia and the “substantial autonomy and meaningful self-administration of Kosovo.”<sup>142</sup> Although the European Council acknowledges its “European perspective,” the mission establishing EULEX refers only to “implementing a settlement defining Kosovo’s future status.”<sup>143</sup> The plan acknowledges the challenge of ensuring Serbian-minority human rights within Kosovo.<sup>144</sup> The two sides have differing interpretations of the plan, with the Serbs believing the plan will respect Serbian territorial integrity and Kosovo believing EULEX will help it move toward independence.<sup>145</sup> It appears, then, that the initiative is built on an agreement based on conflicting perceptions and that alliances are still active in the region, leaving an unsure future, but a present that is arguably less antagonistic than the past.

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aspects of the mission: “monitoring, mentoring and advising” the police, judiciary and customs).

140. See *Jeremic: EULEX Deployed on Serbia’s Terms*, RADIO SRBIJA, Dec. 3, 2008, [http://glassrbije.org/E/index.php?option=com\\_content&task=view&id=5391&Itemid=26](http://glassrbije.org/E/index.php?option=com_content&task=view&id=5391&Itemid=26) [hereinafter “RADIO SRBIJA, *Jeremic*”] (reporting that Serbian Foreign Minister Vuk Jeremic finds the current plan does not infringe upon the sovereignty and territorial integrity of Serbia); *Kosovo PM: EULEX in Accordance with the Constitution and Ahtisaari Plan*, NEW KOSOVA REPORT, Dec. 5, 2008, <http://www.newkosovareport.com/200812041465/Politics/Kosovo-PM-EULEX-in-accordance-with-the-Constitution-and-Ahtisaari-Plan.html> [hereinafter “Kosovo PM”] (expressing support for the mission as long it is implemented in accordance with the constitution that Kosovo unilaterally adopted).

141. See generally Fatos Bytyci & Benet Koleka, *Kosovo Again Opposes EULEX Plan; Albania Airs Doubts*, REUTERS, Nov. 25, 2008, <http://www.reuters.com/article/latestCrisis/idUSLP686174> (reporting on the opposition from Kosovo and Serbia and that perceptions of the mission may not match the intention of U.N. Secretary General Ban Ki-moon).

142. S.C. Res. 1244, *supra* note 123, pmb1.

143. Council Joint Action on the European Union Rule of Law Mission in Kosovo, EULEX KOSOVO, ¶ 7, O.J. L 42/92 (2008) [hereinafter “Council Joint Action, EULEX KOSOVO”].

144. See generally *id.*

145. Compare RADIO SRBIJA, *Jeremic*, *supra* note 140 (“He repeated that Ahtisaari’s plan has been buried in the [Security Council] and that the plan of the UN Secretary General which does not infringe upon the sovereignty and territorial integrity of Serbia is in effect now.”), with Kosovo PM, *supra* note 140 (“[O]n behalf of the government, [Prime Minister Hashim Thaçi] expressed once again the support for EULEX but under the condition that this mission be implemented in accordance with the Ahtisaari Plan and the Kosovo Constitution.”).

B. *South Ossetia*

## 1. The Majority of South Ossetia

Russia had earlier promised Abkhazia, Georgia, to treat any recognition of Kosovo's independence as a precedent for recognizing the independence of other unrecognized states, presumably including Abkhazia and South Ossetia.<sup>146</sup> Conflating Kosovo and South Ossetia is an easy and understandable temptation. The Matryoshka configuration of Soviet Union-Georgia-South Ossetia seems to nest in the same way as Yugoslavia-Serbia-Kosovo, with the largest unit breaking into smaller units and the smallest units trying to declare their independence from the middle units.<sup>147</sup> In addition, both Kosovo and South Ossetia have seen a shift in demographics, with the minority of the governing state being a majority in the would-be independent province.<sup>148</sup>

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146. See *Abkhazia Calls on Russia to Be Consistent on Kosovo Status*, GLOBAL NEWS WIRE, Dec. 24, 2007 (noting that prior to Kosovo's recognition by the international community, Russia had taken the position that recognizing Kosovo's independence would "entail[] the recognition of other unrecognized states"); Marc Champion, *Georgian Incident Deepens Russia Rift—Accusations are Traded Over Helicopter Attack as U.N. Wraps Up Probe*, WALL ST. J., July 5, 2007, at A8 (reporting on a U.N. investigation of a helicopter attack that Georgia claimed was authored by Russia); *Russia: UN Hypocritical Over Abkhazia and South Ossetia Independence*, RUSSIA TODAY.COM, Aug. 29, 2008, <http://www.russiatoday.com/news/news/29648> (reporting Russia's allegations that the United States and some European states had promised NATO protection if Georgia launched an attack on South Ossetia). Russia claimed additional hypocrisy on the part of the United States. In response to U.S. criticism of Russia entering Georgia during the August 2008 war, Ambassador Churkin replied, "I would like to ask the distinguished representative of the United States [about] Weapons of Mass Destruction. Have you found them in Iraq yet or are you still looking for them?" *Id.*

147. For a study of the dissolution of Yugoslavia, see TERRET, *supra* note 108 (exploring the issues of self-determination and the role of the international community in intra-State conflicts). Compare CENTRAL INTELLIGENCE AGENCY, THE CIA WORLD FACTBOOK 2010: SERBIA, <https://www.cia.gov/library/publications/the-world-factbook/geos/rb.html> (last visited July 14, 2009) (chronicling the breakup of Yugoslavia, with Serbia and Montenegro briefly remaining as the Federal Republic of Yugoslavia, but with Montenegro completely breaking from Serbia in 2006 and the insurgency of Kosovar Albanians attempting to break from Serbia in 1998), with CENTRAL INTELLIGENCE AGENCY, THE CIA WORLD FACTBOOK 2010: GEORGIA, *supra* note 2 (describing Georgia's independence after the dissolution of the Soviet Union, and the subsequent complications of the breakaway provinces of South Ossetia and Abkhazia).

148. Compare CENTRAL INTELLIGENCE AGENCY, THE CIA WORLD FACTBOOK 2010: GEORGIA, *supra* note 2 (identifying the Kosovo population as 88% Albanian, 7% Serbs), with *South Ossetia*, *supra* note 5 (reporting that the 70,000 South Ossetians are "mostly" Ossetian). *But cf.* GlobalSecurity.org, *South Ossetia—Background*,

There are differences, however, in the origins of their demographics. Ossetians crossed the mountains into what is now South Ossetia to escape the Russian expansion of the eighteenth and nineteenth centuries, while their northern countrymen tended to align themselves with the Russians.<sup>149</sup> Ossetians now make up a majority of the population of South Ossetia, but probably with a smaller percentage than Albanians have in Kosovo.<sup>150</sup> The South Ossetian majority held a unilateral referendum on independence that split along ethnic lines, with Ossetians voting for independence and South Ossetian Georgians voting to remain with Georgia.<sup>151</sup> The Ossetians, being the majority, won, but such a unilateral referendum for secession is not recognized by the United Nations, as the Security Council noted when Georgia's other would-be independent province, Abkhazia, conducted a similar referendum.<sup>152</sup>

## 2. The Abkhazia Analogy

Many Security Council Resolutions regarding Abkhazia are useful in reviewing the South Ossetian situation. Due to relative calm until August 2008,<sup>153</sup> the United Nations Observer Mission

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<http://www.globalsecurity.org/military/world/war/south-ossetia-3.htm> (last visited July 14, 2009) ("South Ossetia includes many all-Georgian villages, and the Ossetian population is concentrated in the cities of Tskhinvali and Java.").

149. See *South Ossetia*, *supra* note 5 (describing the history of the Ossetians, the creation of South Ossetia, and the Ossetian relationship with Russia).

150. See sources cited *supra* note 148; see also *Georgia: A Toponymic Note Concerning South Ossetia*, PERMANENT COMMITTEE ON GEOGRAPHICAL NAMES ¶¶ 10-11 (2007), available at <http://www.pcn.org.uk/Georgia%20-%20South%20Ossetia-Jan07.pdf> (estimating that Ossetians make up about 67% of South Ossetia, based on the last Soviet census of 1989, and noting that the total population is estimated at 70,000 as of 2007, compared to 98,000 in 1989).

151. *South Ossetia*, *supra* note 5 (noting that the November 2006 referendum was unrecognized).

152. See S.C. Res. 1287, ¶ 5, U.N. Doc. S/RES/1287 (Jan. 31, 2000) (reiterating that the Security Council "considers unacceptable and illegitimate the holding of self-styled elections and referendum in Abkhazia, Georgia"); see also *SECESSION: INTERNATIONAL LAW PERSPECTIVES*, *supra* note 26, at 1, 16 (citing Anjouan and Somaliland of examples of the international community not recognizing secession referenda, and noting that while the will of the people is a necessary condition for independence, it is not a sufficient condition to establish the right to independence).

153. See Molly Corso & Kakha Jibladze, *Uneasy Calm Prevails in South Ossetia Conflict Zone*, EURASIANET.ORG (Feb. 16, 2006), <http://www.eurasianet.org/departments/insight/articles/eav021606.shtml> (describing the fear and tension of the local population); see also MACKINNON, *supra* note 58, at 98 (reporting that Georgian President Shevardnadze had negotiated a 1992 settlement with South Ossetia).

in Georgia (“UNOMIG”) maintained no presence in South Ossetia,<sup>154</sup> and there were similarly few Security Council resolutions specifically on South Ossetia until 2008. The resolutions on Abkhazia, however, can illuminate the positions of the United Nations regarding South Ossetia’s relationship with Georgia. Particularly pertinent to this Note are the resolutions’ repeated statements that the political status of Abkhazia must be defined within the parameters of Georgia’s sovereignty, independence, and territorial integrity.<sup>155</sup> Absent specific resolutions, Abkhazia is a good model for projecting the Security Council’s attitude toward a Georgia-South Ossetia separation. It is also a good model for reviewing Russia’s role in the independence movement, since Russia is one of only two countries, as of the time of this writing, that have recognized Abkhazia and South Ossetia as independent states.<sup>156</sup> When the Russian ambassador to the United Nations, Vitaly Churkin, formally recognized the provinces’ independence, he differentiated them from the Russian province of Chechnya, which has its own aspirations to independence,<sup>157</sup> by claiming that Russia had not stripped Chechnya of its autonomy, whereas Georgia had done so in the case of Abkhazia and South Ossetia.<sup>158</sup> Analysis of Chechnya is beyond the scope of this Note,

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154. See The Secretary-General, *Report of the Secretary-General on the Situation in Abkhazia, Georgia*, ¶ 7, U.N. Doc. S/2008/631 (Oct. 3, 2008) (describing the limitation of the United Nations Observer Mission in Georgia’s (“UNOMIG”) mandate).

155. See, e.g., S.C. Res. 1462, *supra* note 12, ¶ 2 (reaffirming “the commitment of all Member States to the sovereignty, independence and territorial integrity of Georgia within its internationally recognized borders, and the necessity to define the status of Abkhazia within the State of Georgia in strict accordance with these principles”).

156. The only other countries to recognize Abkhazia and South Ossetia are Nicaragua and Venezuela. See Guy Faulconbridge & Michael Stott, *Venezuela’s Chavez Draws Closer to Moscow*, REUTERS, Sept. 10, 2009, <http://www.reuters.com/article/worldNews/idUSTRE5891W020090910?> (recognizing as of Sept. 10, 2009); *Ties Severed with Nicaragua*, L.A. TIMES, Nov. 30, 2008, at A12 (recognizing as of Sept. 3, 2008).

157. See Zarakhovich, *supra* note 137 (implying Russia’s encouragement of the separatist movements in Georgia may be due to Georgia’s pro-NATO position).

158. See *Russia Hands UN Sec Gen Official Letter of Recognition of Abkhazia and South Ossetia, Explains Position*, REGNUM NEWS AGENCY, Aug. 27, 2008, <http://www.regnum.ru/english/1046774.html> (reporting Ambassador Churkin’s claims that Abkhazia and South Ossetia have not been sources of terrorist threats to Georgia as Chechnya has been to Russia). Recognizing independence of all the factions fighting would probably mean recognizing Chechnya’s independence from the Federation of Russia, unless Russia could distinguish it from the other cases. Notably, the North Caucasus region of the Federation of Russia is simultaneously experiencing inter-ethnic fighting. See

but reviewing Abkhazia's history and relationship with Georgia is instructive because of the similar circumstances of South Ossetia.

Despite Abkhazia's declaration of independence in 1992, the United Nations and the Organization for Security and Cooperation in Europe ("OSCE") continue to recognize Abkhazia as an autonomous region of Georgia, rather than as an independent state.<sup>159</sup> South Ossetia has had a similar fate. The initial optimistic and hopeful welcoming of Georgia into the United Nations on July 6, 1992, in which the President of the Security Council recognized Georgia's commitment "to the peaceful settlement of disputes and the non-use of force"<sup>160</sup> quickly gave way to the utilitarian language, in July 1993, of a Council that was dealing with a tenuous cease-fire between the central government of Georgia and the province of Abkhazia.<sup>161</sup> The cease-fire, signed almost a year earlier in Moscow, ensured the territorial integrity of the Republic of Georgia.<sup>162</sup> The parties to the agreement included the Federation of Russia,<sup>163</sup> and the

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GlobalSecurity.org, Independent Abkhazia, <http://www.globalsecurity.org/military/world/war/Abkhazia-4.htm> (last visited July 14, 2009) [hereinafter "*Independent Abkhazia*"]; see also Tony Karon, *Has Georgia Overreached in Ossetia?*, TIME, Aug. 9, 2008, [http://www.time.com/time/specials/packages/printout/0,29239,1832294\\_1832295\\_1831073,00.html#](http://www.time.com/time/specials/packages/printout/0,29239,1832294_1832295_1831073,00.html#) (reporting that Georgians had been displaced from South Ossetia and that Georgia had signed a cease-fire agreement in the 1990s that left the region "effectively autonomous").

159. See CHESTERMAN, *supra* note 16, at 443-44 (noting that Abkhazia continued to be recognized as part of Georgia despite its declaration of independence); see also *supra* note 152 and accompanying text (discussing the Security Council's rejecting the legitimacy of Abkhazia's referendum for independence).

160. S.C. Res. 763, U.N. Doc. S/RES/763 (July 6, 1992) ("Georgia's solemn commitment to uphold the Purposes and Principles of the Charter of the United Nations, which include the principles relating to the peaceful settlement of disputes and the non-use of force, is noted with great satisfaction by the members of the Council.").

161. See S.C. Res. 849, U.N. Doc. S/RES/849 (July 9, 1993) (requesting that member states provide observers for the implementation of the cease-fire agreement).

162. See President of the Security Council, *Note by the President of the Security Council*, U.N. Doc. S/24542 (Sept. 10, 1992) [hereinafter "S.C. President's Note"] (announcing that the "Moscow Agreement" ensured the territorial integrity of Georgia); see also Department of Political Affairs, *REPertoire OF THE PRACTICE OF THE SECURITY COUNCIL, SUPPLEMENT 1989-1992*, at 467, U.N. Doc. ST/PSCA/1/Add.11 (2007), available at [http://www.un.org/Depts/dpa/repertoire/89-92/CHAPTER%208/EUROPE/item%2018\\_Georgia\\_.pdf](http://www.un.org/Depts/dpa/repertoire/89-92/CHAPTER%208/EUROPE/item%2018_Georgia_.pdf) [hereinafter "REPertoire OF PRACTICE"] (assessing the situation in Georgia and commenting on the statement by the President).

163. See *REPertoire OF PRACTICE*, *supra* note 162 (reporting that the agreement was signed by the President of the Federation of Russia).

territory of Georgia was understood to include both Abkhazia and South Ossetia.<sup>164</sup>

After the collapse of the Soviet Union, Abkhazia was populated by about forty-four percent Georgians, eighteen percent Abkhaz and sixteen percent Russians.<sup>165</sup> Days after the United Nations welcomed Georgia, the Abkhazian Supreme Council declared effective independence from Georgia, a gesture that no country recognized.<sup>166</sup> In August 1992, fighting began in earnest between Georgia and the independence faction in Abkhazia. By September 10 of that year, the Security Council seemed reasonably satisfied that a political settlement would be found.<sup>167</sup> It reaffirmed the internationally recognized borders of Georgia and essentially treated the issue as one of ethnic minorities.<sup>168</sup> At the same time, it recognized the “legitimate authorities in Abkhazia.”<sup>169</sup> By October 1, 1992, however, the cease-fire had collapsed and full fighting resumed, with both sides claiming human rights abuses.<sup>170</sup> For the next sixteen years, the Security Council repeatedly drafted resolutions that at various times called upon Abkhazia to improve human rights

164. The agreement specifically involved Abkhazia, but referred to Georgia’s internationally recognized borders. *See id.*

165. *See Independent Abkhazia*, *supra* note 158; *see also* НАСЕЛЕНИЕ АБХАЗИИ (The Population of Abkhazia), <http://www.ethno-kavkaz.narod.ru/rnabkhazia.html> (last visited Feb. 11, 2009) (giving the breakout as forty-six percent Georgian, eighteen percent Abkhaz, fourteen percent Russian, and fifteen percent Armenian).

166. *See* David Losaberidze et al., *Local Government in Georgia*, in *DEVELOPING NEW RULES IN THE OLD ENVIRONMENT: LOCAL GOVERNMENTS IN EASTERN EUROPE, IN THE CAUCASUS AND IN CENTRAL ASIA* 295, 309-10 (Igor Munteanu & Viktor Popa eds., 2001), available at <http://lgi.osi.hu/publications/2001/84/Ch5-Georgia.pdf> (noting that on July 23, 1992, “the Abkhaz Supreme Council reinstated the Abkhaz Constitution of 1925, implying the secession of Abkhazia from Georgia”).

167. *See* S.C. President’s Note, *supra* note 162, para. 1 (expressing “satisfaction with the efforts of the participants of the meeting aimed at achieving an immediate cease-fire, overcoming the crisis situation and creating conditions for a comprehensive political settlement . . .”).

168. *See id.* para. 2 (reaffirming “the inadmissibility of any encroachment upon the principle of territorial integrity and upon Georgia’s internationally recognized borders, and the necessity of respecting the rights of all ethnic groups in the region.”).

169. *Id.*

170. *Independent Abkhazia*, *supra* note 158, para. 3 (reporting that each side accused the other of ceasefire violations); *see also* President of the Security Council, *Letter by the President of the Security Council*, U.N. Doc. S/24633 (Oct. 7, 1992) (noting that the situation had deteriorated considerably and that fighting had resumed); *Letter by the President of the Security Council*, U.N. Doc. S/24641 (Oct. 8, 1992) (relaying reports from reliable sources in Abkhazia of “mass executions of the Georgian civilian population, widespread torture, rape and other atrocities”).

within its territory, to open a human rights office in Sukhumi, to provide education in the native tongue of Georgians, and to allow refugees to return to their homes.<sup>171</sup>

### 3. South Ossetia: Its Petition for Independence and Its Occupation

Like Abkhazia, South Ossetia had attempted to declare its independence from Georgia in 1990.<sup>172</sup> That attempt, like its 1920 attempt, was rebuffed.<sup>173</sup> A 1992 referendum was not recognized by the international community, and a 2006 referendum was similarly rejected by the United Nations, the European Union, OSCE, NATO, and the Federation of Russia.<sup>174</sup> These entities recognized that the lack of ethnic Georgian participation and the lack of recognition of the referendum by the central Georgian government, made the referendum suspect at best and likely illegal.<sup>175</sup>

171. See, e.g., S.C. Res. 1462, *supra* note 12, ¶ 15 (calling on Abkhaz authorities to provide law enforcement and provide Georgians with native-language education); S.C. Res. 1615, ¶ 21, U.N. Doc. S/Res/1615 (July 29, 2005) (calling on the Abkhazians to open the Gali branch of the human rights office); S.C. Res. 1781, ¶ 7, U.N. Doc. S/Res/1781 (Oct. 15, 2007) (calling on both sides to resolve the issue of refugees and internally displaced persons); see also Kira Kay, *Citizens of Abkhazia Strive to Shape Sovereign Nation*, ONLINE NEWSHOUR, Aug. 21, 2008, [http://www.pbs.org/newshour/bb/europe/july-dec08/abkhazia\\_08-21.html](http://www.pbs.org/newshour/bb/europe/july-dec08/abkhazia_08-21.html) (interviewing several Abkhazians who did not recognize Abkhazia as part of Georgia and reporting on the use of Russian currency in business transactions).

172. See *U.S. Supports Peaceful Resolution in South Ossetian Conflict*, AMERICA.GOV, Apr. 1, 2008, [http://www.america.gov/st/texttran-english/2008/April/20080401160643\\_xjsnommis0.2964398.html](http://www.america.gov/st/texttran-english/2008/April/20080401160643_xjsnommis0.2964398.html) [hereinafter "AMERICA.GOV, *South Ossetian Conflict*"] (noting that the contemporary conflict dates back to 1920 when South Ossetia attempted to declare independence from Georgia, then a Soviet Republic).

173. See *id.* (stating that Georgia responded firmly and negatively toward South Ossetia's September 1990 declaration of independence).

174. See Vladimir Socor, *Moscow's Fingerprints All Over South Ossetia's Referendum*, 3 EURASIA DAILY MONITOR, Nov. 15, 2006, available at [http://www.jamestown.org/single/?no\\_cache=1&tx\\_ttnews%5Btt\\_news%5D=32238](http://www.jamestown.org/single/?no_cache=1&tx_ttnews%5Btt_news%5D=32238) (reporting that Moscow conceded that the referendum would not lead to immediate international recognition of South Ossetia as an independent state, but would be an exercise that could not be ignored); see also Photini Pazartzis, *Secession and International Law: The European Dimension*, in SECESSION: INTERNATIONAL LAW PERSPECTIVES, *supra* note 26, at 355, 368 (describing the reaffirmation by the international community, particularly the Organization for Security and Co-operation in Europe ("OSCE"), of territorial integrity with respect to the states created after the Soviet break-up).

175. See *South Ossetia Referendum and the Follow-Up*, CTR. SEC. INT'L STUD., Nov. 17, 2006, available at [http://www.csis.ro/articles/former\\_soviet\\_space\\_1.html](http://www.csis.ro/articles/former_soviet_space_1.html) (reporting that a separate, simultaneous referendum against independence was held by the ethnic

The peacekeeping forces in South Ossetia, on the other hand, were legal, having been recognized by the Security Council.<sup>176</sup> They were not, however, U.N. peacekeeping forces, possibly leading to their ultimate failure. UNOMIG was established by Security Council Resolution 858 in August 1993 with a six month mandate to observe and work with disputing parties—but only in Abkhazia, not in South Ossetia.<sup>177</sup> The actual peacekeepers in Abkhazia were made up of forces from the Commonwealth of Independent States.<sup>178</sup> John Boonstra, a writer for Better World Campaign, observes that these forces were the very parties involved in the conflict: “In practice [having peacekeepers drawn from the Commonwealth of Independent States] means that Georgians, Ossetians, and Russians, with very little neutral oversight, will be supervising their own peace accord.”<sup>179</sup> The “very little neutral oversight” refers to the unarmed UNOMIG observers—136 in total and all originally deployed to Abkhazia, with none allocated to South Ossetia. In South Ossetia, the Joint Peacekeeping Forces group was made up of Georgians, Russians, and Ossetians, with South Ossetians

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Georgians); *see also* *South Ossetia, Kosovo and Sustainability*, INT’L RELATIONS & SEC. NETWORK, Nov. 20, 2006, available at <http://www.isn.ethz.ch/isn/Current-Affairs/Security-Watch/Detail/?ots591=4888CAA0-B3DB-1461-98B9-E20E7B9C13D4&lng=en&id=52730> (calling Moscow’s position “more ambiguous”).

176. *See* S.C. Res. 858, ¶ 6, U.N. Doc. S/RES/858 (Aug. 24, 1993) (welcoming “the proposed deployment of mixed interim monitoring groups of Georgian/Abkhaz/Russian units designed to consolidate the cease-fire, and request[ing] the Secretary-General to facilitate cooperation between the United Nations observers and these units within their respective mandates”).

177. *See id.* (establishing UNOMIG of eighty-eight military observers and minimal staff for a period of six months, with the possibility of extensions).

178. *See id.* ¶ 6; *see also* UNOMIG’s Mandate, U.N. Observer Mission in Geor., available at <http://www.unomig.org/glance/mandate/> (describing its mission and its working relationship with the Commonwealth of Independent States (“CIS”).

179. John Boonstra, *A U.S.-UN History Lesson in Georgia*, UN DISPATCH, available at [http://www.undispatch.com/archives/2008/10/a\\_us-un\\_history.php#more](http://www.undispatch.com/archives/2008/10/a_us-un_history.php#more). Tensions between Georgians and Russians can be traced back at least to the 1921 Red Army invasion and the Soviet government’s 1922 declaration of South Ossetia as an Autonomous Oblast within Georgia. *See generally* AMERICA.GOV, *South Ossetian Conflict*, *supra* note 172 (describing the genesis of the contemporary conflict between South Ossetia and Georgia as South Ossetia’s attempt to declare itself an independent Soviet Republic).

serving within the North Ossetian contingent.<sup>180</sup> All were under Russian command.<sup>181</sup> The OSCE monitored the situation and facilitated negotiations, overseeing a period of relative calm.<sup>182</sup>

#### 4. Georgian-South Ossetian Violence

The relative calm began to crack once Mikheil Saakashvili replaced Eduard Shevardnadze as president.<sup>183</sup> Saakashvili, interested in reigning in the breakaway regions and having made a campaign promise to recover them,<sup>184</sup> began regulating South Ossetian trade, prompting the South Ossetians to close highways, and detain Georgian troops within the region.<sup>185</sup> Tensions eased after an August 2004 cease-fire agreement, but rose again, not only between Georgia and South Ossetia but within South Ossetia itself as Saakashvili recognized a South Ossetian government that would accept autonomy within Georgia rather than independence.<sup>186</sup> Violence escalated and, in 2006, U.S.

180. AMERICA.GOV, *South Ossetian Conflict*, *supra* note 172 (describing the elements of the June 1992 Sochi Agreement and the make-up of the Joint Peacekeeping Forces group).

181. *Id.*; see also U.K. FOREIGN & COMMONWEALTH OFF., COUNTRY PROFILE: GEORGIA, <http://www.fco.gov.uk/en/about-the-fco/country-profiles/europe/georgia/?profile=politics&pg=7> (last visited July 14, 2009) (profiling Georgia, including the situations in Abkhazia and South Ossetia).

182. See AMERICA.GOV, *South Ossetian Conflict*, *supra* note 172.

183. See *id.* (providing an overview of Georgian-South Ossetian relations after Saakashvili's election and his subsequent closing of a South Ossetian market used for unregulated trade and describing the reasons for and reaction to President Saakashvili's action in this area).

184. See Karon, *supra* note 158 (contrasting President Saakashvili's agenda to restore control in South Ossetia to Russia's agenda of "stoking the fires of secession in Georgia").

185. See AMERICA.GOV, *South Ossetian Conflict*, *supra* note 172, (explaining the deterioration of relations in 2004 after the relative cessation of hostilities following the Sochi Agreement). The international community may find Georgia's actions acceptable since it is not uncommon for central governments or organizations to regulate trade. See, e.g., U.S. CONST. art. I, § 8 (granting Congress the power "[t]o regulate commerce with foreign nations, and among the several states, and with the Indian tribes"); Ernest A. Young, *Protecting Member State Autonomy in the European Union: Some Cautionary Tales from American Federalism*, 77 N.Y.U. L. REV. 1612, 1634-35 (2002) (noting that the European Court of Justice has ruled that administrative regulations enacted by the European Commission takes precedence over national legislation).

186. See AMERICA.GOV, *South Ossetian Conflict*, *supra* note 172, (describing two de facto administrations in South Ossetia, one accepting autonomous status for South Ossetia and one rejecting it). See generally, Ellen Barry, *Georgia's Public, and Battered, Face in a Separatist Republic*, N.Y. TIMES, Nov. 1, 2008, at A8 (profiling ethnic Ossetian Dmitri Sanakoev, his inability to win the "hearts and minds" of South Ossetians, and citing his

Ambassador Julie Finley went before the OSCE and expressed concern over the shooting down by South Ossetian militia of a Georgian helicopter carrying Georgia's Defense Minister.<sup>187</sup> In June 2008, Finley again addressed the OSCE, this time looking for a condemnation of an alleged attack by a Russian fighter plane that downed a Georgian Unmanned Aerial Vehicle over Georgian airspace.<sup>188</sup> The allegation was supported by a report by UNOMIG and other analyses.<sup>189</sup> If this last event was murky, murkier still were the events in August 2008 that led up to the Georgia-Russia conflict.

Saakashvili claims that he began firing missiles into South Ossetia to "restore constitutional order,"<sup>190</sup> despite warnings from allies that he should refrain from taking military action.<sup>191</sup>

autobiography that suggests that the opposing de facto government of Eduard Kokoity is inciting ethnic tensions).

187. See *Restraint Urged for Parties in Georgia-South Conflict*, AMERICA.GOV, Sept. 14, 2006, <http://www.america.gov/st/washfile-english/2006/September/20060914172542xlrenneF0.7395855.html> (reporting that the Ambassador condemned the attacks as criminal, but praising the OSCE for its quick investigation of the incident and other, similar attacks).

188. See *Finley Statement in Vienna Addressing Abkhazia and South Ossetia*, AMERICA.GOV, June 11, 2008, <http://www.america.gov/st/texttrans-english/2008/June/20080611143806xjsnommis0.4999506.html> (providing the Ambassador's remarks in which she also calls on the organization to think creatively to ease tensions).

189. *Id.* ("UNOMIG's report, as well as the independent analysis of all available data by a team including U.S. experts and representatives of other countries, leads to one clear conclusion: on April 20, a Russian fighter plane shot down a Georgian UAV ['unmanned aerial vehicle'] over Georgia's sovereign airspace.").

190. Karon, *supra* note 184 (quoting the Saakashvili administration).

191. See *id.* ("NATO officials had repeatedly warned the Georgian government against launching any attempt to resolve the dispute through military means."). *But see* Andrew E. Kramer, *For a President With a Penchant for Flourishes, a Rebuke in the Boom of Artillery*, N.Y. TIMES, Aug. 12, 2008, at A12 ("The Bush administration, with its broad assurances of support for Georgia, has come in for strong criticism in Georgia for having emboldened Mr. Saakashvili to challenge Russia."). It is also suggested that Saakashvili sees the South Ossetian conflict as "a struggle . . . between Russia and expanding Western influence in the states of the former Soviet Union." *Id.* The United States has found managing the relationship with Saakashvili difficult. See Marc Champion et al., *U.S. Ally Proves Volatile Amid Dispute with Russia—Georgian President Says West Ignored Pleas for Support*, WALL ST. J., Aug. 30, 2008, at A6 (describing the personal as well as political ties that Saakashvili has with the United States); see also C.J. Chivers & Ellen Barry, *Accounts Undercut Claims by Georgia on Russia War*, N.Y. TIMES, Nov. 7, 2008, at A1 (finding that the accounts of independent military observers could not settle questions of the extent of Ossetian shelling of Georgian villages); Karon, *supra* note 158 (suggesting that some may view Saakashvili's actions as a way to force NATO into action on his behalf). *But see* Marc Champion, *British Monitor Complicates Georgian Blame Game*,

The Russians convened the Security Council, looking for a resolution condemning Georgia's actions, but failed to pass a resolution that appeased all members.<sup>192</sup> Afterward, Russian forces fought back in both South Ossetia and Georgia proper, with Russian President Dmitri Medvedev justifying the attacks as an obligation to defend the life and honor of Russian citizens.<sup>193</sup>

The manner of Russian activity in South Ossetia was and is not limited to military force. Moscow's mayor, Yuri M. Luzhkov, has made frequent visits to South Ossetia, pledging "more than [US]\$100 million [for] houses, schools and shopping centers."<sup>194</sup> Luzhkov's activities in South Ossetia and elsewhere "unnerves Russia's pro-Western neighbors because he flouts diplomatic rules that prohibit aid to separatists."<sup>195</sup> The mayor's activities, and even Russia's conflict with Georgia would not be of concern for this Note, were it not for Russia's justification for recognizing Abkhazia and South Ossetia as independent states. Russia claims that Georgia has stripped the regions of their autonomy,<sup>196</sup> and that claim should not be preemptorily dismissed, since a repression of autonomy could justify secession. Georgia's allies, as noted above, have likewise questioned Saakashvili's actions and judgments.<sup>197</sup> On the other hand, the veracity of Russia's claim should be tested. The actions of the Federation of Russia—and of the city of Moscow—may give insight into the objectivity of the country's position. Part III of this Note sorts through the claims and facts and applies the law to determine whether independence should be recognized.

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WALL ST. J., Dec. 19, 2008, at A9 (reporting on one monitor who went absent without leave across Russian lines, leading to questions of objectivity).

192. Karon, *supra* note 184 ("The United State and others objected to language that appeared to exempt Russia from condemnation over the use of force.").

193. *See id.* (adding that Russia would not let those responsible for deaths in Georgia's attacks on the South Ossetian city of Tskhinvali go unpunished).

194. Clifford J. Levy, *Mayor of Moscow Exports Russia's New Nationalism*, N.Y. TIMES, Oct. 26, 2008, at A1.

195. *Id.*

196. *See supra* note 158 and accompanying text (contrasting Georgia's administration of South Ossetia with Russia's administration of Chechnya).

197. *See supra* note 191 and accompanying text (warning Saakashvili to refrain from taking military action).

### III. *APPLYING INTERNATIONAL LAW TO THE DISTINCT CASES OF KOSOVO AND SOUTH OSSETIA*

The international community should focus on resolving the conflicts in Kosovo and South Ossetia between the peoples' right to self-determination and the states' right to territorial integrity. Every action of the international community should be to reconcile the conflict in each case rather than to use each case as a proxy for today's superpowers. Alasania's reference to "foreign sponsored groups"<sup>198</sup> alludes to a return to the Cold War situation when the Security Council was essentially paralyzed from taking action in regional conflicts due to the superpowers forming alliances and using the regions as proxies.<sup>199</sup> To free the regions from this burden, it is necessary to establish their rights to statehood without regard to the political agendas of superpowers and their allies. Yet, this alone will not achieve the goal of the United Nations to suppress acts of aggression or other breaches of the peace. The end of this Part will review what the international community must do to promote peace within the territories regardless of their status as autonomous regions or independent states.

To avoid the mistake of conflating the two cases, this Part will review Kosovo and South Ossetia in turn. The conclusion in both cases is that the international community should continue to recognize each as an autonomous region within the larger state, rather than recognizing them as independent states. Applying the same principles and coming to similar results does not mean, however, that the conclusion of one case dictates the outcome of the other. They are distinct cases and they come to the same results by analyzing their own facts. In the case of Kosovo, certain facts qualify this conclusion. That case will be discussed first.

#### A. *Kosovo's Case for Independence*

The language of the League of Nations Commission was firm in its denial of the Aaland Island's petition for breaking

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198. See *supra* note 158 and accompanying text (contrasting Russia's treatment of Chechnya with Georgia's treatment of Abkhazia and South Ossetia).

199. See *supra* note 57 and accompanying text.

from Finland so that it could join with Sweden.<sup>200</sup> The “wishes and good pleasure” of minorities, the Commission declared, should not be allowed to destroy order and stability.<sup>201</sup> It may be argued that order and stability have long been absent in the Balkans and that Kosovo independence may actually bring about their return. While such a result is possible, it is no more than conjecture. The example of separating Pakistan from India shows that independence will not necessarily bring peace to a region.<sup>202</sup> In that case, India at least assented to the breakup, whereas in the current case, Serbia is adamantly opposed to breaking up its internationally-recognized territory. Acceptance by both the minority region and the larger state from which it wants to break does not guarantee a perfect and peaceful solution, but it should be a prerequisite for secession.

The need for mutual acceptance can be overridden by egregious abuses of minority rights, however. The state responsible for those minority abuses must be warned that its behavior is unacceptable and that failing to remedy the problem will result in the international community recognizing a unilateral referendum on secession by the minority region. Both the referendum and recognition of the result should be driven by the U.N. Security Council rather than by individual states or regions within states. All states should then back the final decision of the Security Council. This process is, of course, subject to the veto of its permanent members. The veto will likely result in few changes to the status quo of borders. Maintaining the status quo is not necessarily a bad result because the member states will then be forced to support efforts to protect the rights of minorities. This is not a revisit of the failed negotiations of the 1990s<sup>203</sup> as long as states accept and support the process. Following the process should also alleviate the concern that recognizing Kosovo’s independence would provide

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200. See *supra* note 26 and accompanying text (stating that bending to the desires of minorities was a threat to stability).

201. *Id.* (conceding that secession could be considered when the State cannot or will not protect the minority’s rights).

202. See *supra* note 23 and accompanying text (observing that internal issues of minority rights have evolved into international tensions between two nuclear powers).

203. See *supra* notes 127-29 and accompanying text (describing the resolutions for and unsuccessful attempts at a peaceful solution that called for the respect of minority rights of Kosovar Albanians and the territorial integrity of Serbia).

an excuse for future secessionist movements, since the process does not reward unilateral or violent actions.

Lacking a legitimate referendum for the break-up of Serbia and Kosovo, the international community should look at whether Serbia failed in its responsibility to protect its minority population. The answer to this query is that not only did Serbia fail to protect the population, but it instigated, particularly through the leadership of Slobodan Milošević, much of the suffering endured by the Albanians.<sup>204</sup> Ramet describes the conditions for Kosovar Albanians in the period from 1988 to 1997, which include the termination of Albanian-language education; the reduction of the province's autonomy; the firing of Albanians from jobs; the confiscation of land; and the arrest and beating of Albanians.<sup>205</sup> Kokott adds that the Academy of Sciences and Arts of Kosovo was discontinued and its property was confiscated; there was enactment of discriminatory laws; and religious and cultural monuments were destroyed.<sup>206</sup> Neither the U.N. Charter, nor the 1970 Declaration, nor the ICCPR, suggests that past Albanian offenses<sup>207</sup> may be used as a defense for this derogation of their rights. Kosovar Albanians' right to self-determination does not derive from Serbian abuses, and it does not disappear because of Albanians' own abuses toward Serbs. The right instead derives from the Charter, declarations, and resolutions that clearly and repeatedly express the right.<sup>208</sup> It exists without the need for some external trigger, such as oppressive government actions. The government, though, also has rights.<sup>209</sup> Yugoslavia, rather than Serbia, was a party to the ICCPR,<sup>210</sup> but that does not deprive Serbia, now recognized as a state,<sup>211</sup> of its rights, including territorial integrity. A state's rights

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204. *See supra* notes 47, 124 and accompanying text (providing examples of alleged abuses).

205. *Id.*

206. *Id.*

207. *See supra* notes 123 and accompanying text (recounting alleged abuses of Serbs by Albanians).

208. *See supra* notes 129-33 and accompanying text (citing the U.N. Charter and Security Council Resolution 1160, expressing the right of self-determination of peoples, particularly, in the case of the Security Council Resolution, the Kosovar Albanians).

209. *See supra* note 126 and accompanying text (citing the command of the U.N. Charter that member states recognize other states' territorial integrity).

210. *See supra* note 136 and accompanying text (discussing the rights of Albanians under the ICCPR and Serbia's relation to the treaty).

211. *See id.* (regarding the Serb-Montenegro split).

are inviolable except when, according to Dr. Seidel, a state deprives a people residing within its territory of the right to self-determination, at which point the state may be susceptible to secession of the territory.<sup>212</sup>

Seidel argues that Serbia did, indeed, forfeit its right to territorial integrity through its brutal oppression of the Kosovar Albanians.<sup>213</sup> Belgrade failed to grant and maintain autonomy for Kosovo.<sup>214</sup> Seidel believes that “Belgrade could have prevented the Kosovo secessionist movement from materializing.”<sup>215</sup> There is support for this belief. The Albanians had followed the “Ghandian counsel” of Ibrahim Rugova and resisted the use of violence.<sup>216</sup> Belgrade kept up the oppression, however, until the Kosovo Liberation Army (“KLA”) began perpetrating terrorist actions in 1997 that signaled the shift toward a more violent Albanian response.<sup>217</sup>

The Albanians’ own use of violence to gain independence does not necessarily remove any right to secession that may exist, even though the KLA terrorist actions were illegal and should be condemned.<sup>218</sup> The violence that may deprive Kosovo of a right to secede is its violent actions toward its own minority Serbs when the Albanians had power. Seidel recognizes the concern that if Kosovo is given independence, Kosovo’s Albanian majority will oppress the eight percent minority population, as the Albanians once did when they had more autonomy.<sup>219</sup> Seidel’s answer to this is that the international community should “demand that the Kosovo Albanians respect the minority rights they themselves fought for.”<sup>220</sup> He also counters that the mere possibility of

212. *See supra* note 94 and accompanying text (citing Seidel’s reasoning for when secession may be an internationally acceptable option).

213. *See id.* (describing the conditions in Kosovo that make Serbia susceptible to Kosovo secession).

214. *See id.* (arguing that Belgrade’s policies toward Kosovo justified secession).

215. *Id.*

216. *See supra* note 123 and accompanying text (describing the events that led to the shift from non-violent to violent resistance against the Milošević regime).

217. *See id.* (suggesting that such actions as attacks on the Serbian police undermined the more moderate Albanian leader Ibrahim Rugova).

218. *See id.* (noting that the Security Council did, indeed, condemn “the KLA and other armed Kosovo Albanian groups”).

219. *See id.* (noting, but casting doubts on, reports of Albanian rape and abuse of Kosovar Serbians in the 1980s).

220. *See supra* note 94 and accompanying text (reviewing the duties of the state toward its minority populations).

future minority abuse should not deprive Kosovo of independent statehood.<sup>221</sup> That would be true if violence toward and oppression of minorities were only theoretical. Instead, the Kosovar Albanians have indeed oppressed the Serbian minority within its territory and have recently done so.<sup>222</sup> It is therefore difficult to argue that Serbian oppression should deprive Serbia of a right to territorial integrity, but Kosovar oppression should have no similar sanction.

Seidel further argues that “the people of Kosovo [have] the same right as the other peoples of the former Yugoslavia to secede from the Yugoslav State.”<sup>223</sup> That argument ignores the claim that Serbia has to the territory. The Serbian claim may be countered by the fact that Albanians have lived in the territory now for centuries and that the world community should recognize the reality of the region.<sup>224</sup> Such claims and counter-claims are destined to allow neither side to make progress. While not a precedent, the Aaland Islands are a model for what can happen over time if both sides move past their disappointments and respect one another; the claims do not disappear, but they become less important as the business of life moves the citizens forward to a peaceful and content resolution that might have once seemed anathema to them.<sup>225</sup>

Seidel presents a compelling, but unconvincing argument for Kosovo’s independence.<sup>226</sup> He analogizes the Serb-Albanian hostilities to those of spouses with irreconcilable differences.<sup>227</sup> The analogy has only limited applicability. Hostile spouses are

221. *See id.* (noting that an independent Kosovo would include an eight percent Serbian minority that has historically been abused by Kosovar Albanians).

222. *See supra* note 124 and accompanying text (discussing the violence each side has committed on the other).

223. *See supra* note 94 and accompanying text (arguing that the Kosovo people should be allowed to exercise that right given that the fall of Milošević has not changed the Serbian government’s treatment of the Kosovar Albanians).

224. *See supra* notes 104-07 and accompanying (following the demographic shifts in Kosovo).

225. *See supra* note 26 and accompanying text (suggesting a long-term positive outcome can result after the international community denies to recognize the will of people of an autonomous region and reporting that the Aaland Islands acted as a model for the Croatian peace plan).

226. *See supra* notes 94, 212 and accompanying text (reviewing Seidel’s arguments for Kosovo independence).

227. *See supra* note 138 and accompanying text (suggesting that the hostilities justify a split).

generally free to move apart; there is no such opportunity for Kosovo and Serbia. Achieving the international goal of peace and security requires mutual respect. This will be a challenge whether the two partners are within a single internationally recognized border or two; the better solution is to resolve the internal minority issues rather than breaking the country into ever-smaller, independent pieces that will still contain minorities and ethnic tensions.

After several failed attempts, the latest plan for EULEX appears to be focused on the challenge of governing rather than the politics of recognition.<sup>228</sup> The Serbian and Kosovar interpretations of the plan may be at odds,<sup>229</sup> but for now, it is probably best that the international community allow each side its own interpretation and let peace take hold. Nations should refrain from posturing and insisting on one interpretation, that is, independence or autonomy.<sup>230</sup> Practical issues that arise from the different interpretations should be addressed on an ad hoc basis.

The international community should also review its motives for recognizing Kosovo's independence. Sympathy toward the Albanians is understandable after the violence they have endured. There may be another motive, though, for recognition of Kosovo. Some have suggested that the West may view its support of the Muslim Albanians as a way to improve its image in the Islamic world.<sup>231</sup> This may seem like good foreign policy, but it is contrary to maintaining the integrity of Serbia's territory, and there is evidence that actions supporting Kosovo do not necessarily prevent anti-West activity by militant Islamists. The NATO attacks on Yugoslavia in the 1990s that helped Muslims in both Bosnia and Kosovo apparently did little to prevent Islamist attacks on NATO member states in the following decade.<sup>232</sup> It is

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228. See *supra* note 139 and accompanying text (describing the functional, non-political aspects of the European Union Rule of Law Mission ("EULEX") mission in Kosovo).

229. See *supra* note 145 and accompanying text (describing the Kosovo mission of EULEX from the Serbian and Kosovar viewpoints).

230. See *supra* note 15 and accompanying text (discussing the 1999 Rambouillet agreement that avoided explicitly addressing Kosovo independence).

231. See *supra* note 138 and accompanying text (implying that the West is attempting to win Muslim favor at the expense of Russia).

232. See *id.* (relating the NATO support of the Albanians and the subsequent terrorist attacks on Western targets).

also bad policy to bend international law, hoping for a quid pro quo. Bending law is unlikely to produce satisfactory results in the long run, and doing so destroys the credibility a nation needs to be an impartial arbiter of disputes.

Much of the hatred between the Serbs and Albanians was inflamed during the reign of Slobodan Milošević.<sup>233</sup> It will likely take years, if not generations, for passions to cool and for energy to be redirected toward productively building the region. On the other hand, if the Serbs and Kosovar Albanians see that they have an audience and partisan allies, they will have less incentive to put down their passions or their guns, believing that their patrons will help them win a better deal. The international community should therefore step back from allying itself with one side or the other. It should instead follow the philosophy articulated in the U.N. Charter and subsequent resolutions. It should follow a process that supports that philosophy, one that advocates self-determination and autonomy for Kosovo, respect for Serbia's territorial integrity, and recognition of the rights of minorities. Forming alliances, pitting the West against Russia, is unproductive, unnecessary, and irrelevant to the actual needs of the Serbian and Kosovar peoples.

There is a caveat to the conclusion expressed above. The international community should now concentrate on EULEX's practical mission of establishing peace and security for the citizens and refrain from making assertions regarding Kosovo's independence. As part of its mission, EULEX should help Serbia and Kosovo to develop an internal structure that will suppress and eliminate the hatred that Milošević and others inflamed. That is discussed further in Section C.

### B. *South Ossetia's Case for Independence*

States need objectivity and credibility to address South Ossetia's claim for independence. Political interests have strained both. The West has struggled, not always successfully, to separate personality from politics when dealing with Mikheil Saakashvili.<sup>234</sup> Russia has taken positions not supported by facts,

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233. *See supra* note 124 and accompanying text (reviewing the role of Milošević in exacerbating Serb-Albanian tensions).

234. *See supra* note 191 and accompanying text (discussing the difficulty of reigning in Saakashvili and the personal ties he has with the United States and U.S. politicians);

but rather based on a tit-for-tat reasoning stemming from the West's recognition of Kosovo.<sup>235</sup> Ambassador Churkin answered U.S. criticism of Russia's incursion into Georgia, a sovereign state, by invoking the U.S. incursion into Iraq.<sup>236</sup> The comparison is inapt; a defense for robbing a bank is not that one's neighbor has also robbed a bank.

Other evidence that raises doubt about Russia's objectivity and accuracy is its assessment of Abkhazia's lack of autonomy,<sup>237</sup> which appears to run counter to the reports that the Security Council relied upon when drawing up its resolutions regarding Abkhazia.<sup>238</sup> Those resolutions reveal a territory that must have had significant autonomy: The Security Council repeatedly called upon Abkhazia to improve human rights within its territory, to open a human rights office in Sukhumi, to provide education in the native tongue of Georgians, and to allow refugees to return to their homes.<sup>239</sup> These were all apparently in the control of Abkhazia. Abkhazia also held elections and a referendum, although the Security Council deemed these unacceptable and illegitimate.<sup>240</sup> In August 2008, reporters visited a relatively calm Abkhazia and found a territory that considered itself independent of Georgia.<sup>241</sup> While the world did not recognize Abkhazia as an independent state, many of its citizens did. The Abkhaz population was in the majority, and

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*see also supra* note 1 and accompanying text (quoting 2008 Presidential Candidate John McCain at the beginning of the Georgia-Russia conflict in South Ossetia).

235. *See supra* note 146 and accompanying text (reviewing Russia's promise to recognize Abkhazia and South Ossetia as independent states if the West recognized Kosovo as an independent state).

236. *See id.* (quoting Ambassador Churkin's rhetorical question regarding weapons of mass destruction, which were the reason given for the U.S. invasion of Iraq).

237. *See supra* note 158 and accompanying text (indicating possible evidence of Russia's motives for its position).

238. *See supra* note 171 and accompanying text (citing some of the Security Council Resolutions calling on Abkhazia to take action regarding human rights within its territory).

239. *See id.* (citing the Security Council Resolutions calling on Abkhazia to take actions that are indicative of autonomy).

240. *See supra* note 152 and accompanying text (discussing the invalidity of a unilateral referendum).

241. *See supra* note 171 and accompanying text (citing journalist Kira Kay's report interviewing Abkhazians who seemed to consider Abkhazia *de facto* independent).

ethnic Georgians had no representation in the Abkhaz government.<sup>242</sup>

The Russian assertion regarding Georgia stripping South Ossetia of autonomy would similarly surprise journalists who saw Georgia as having made an uneasy peace with the province, from which several thousand ethnic Georgians were displaced.<sup>243</sup> The uneasy peace gave way to fighting between Georgia and Russia in South Ossetia.<sup>244</sup> The purpose of this Note is not to determine whether Russia was an illegal aggressor in the conflict; the conflict provides, rather, additional evidence that must be reviewed to determine whether the actions of Georgia with regards to South Ossetia give rise to forfeiture of Georgia's right to its territorial integrity and whether the international community should recognize South Ossetia's independence.

First, it must be determined if the population, or a significant part of the population, of South Ossetia is a "people" with a right to self-determination.<sup>245</sup> The task is more difficult here than in Kosovo. The Russian and Georgian Orthodox Churches see enough similarities to regret that "Orthodox Russians are bombing Orthodox Georgians," two groups sharing "centuries of political and economic ties."<sup>246</sup> The languages differ, but as the Switzerland example illustrates, linguistic differences do not necessarily create distinct "peoples."<sup>247</sup> To external eyes, then, it may be difficult to see the Ossetians as a "people" distinct from Georgians for the purposes of self-determination. Difficulties aside, the question has already been resolved by the parties themselves. Georgia has previously granted South Ossetian rights to self-determination. As a result, since the two concerned parties have already agreed on this issue,

242. *See id.* (reporting that Abkhazia has a thirty-five member parliament, although ethnic Georgians do not have representation).

243. *See supra* note 158 and accompanying text (reporting on the humanitarian crisis in Georgia).

244. *See id.* (reporting Moscow's readiness, in the context of its disapproval of Georgia's move toward NATO and the recognition of Kosovo, to help South Ossetian secessionists in case of an attack from Georgia).

245. *See supra* Part I.B. (exploring the definition of a "people").

246. *See supra* note 86 and accompanying text (exploring the definition of a "people").

247. *See supra* note 88 and accompanying text (noting that John A. Perkins has observed that language in Switzerland does not necessarily differentiate groups of a population as separate peoples).

it is not necessary to dwell on whether or not the designation is appropriate.

Having put aside the question of whether the South Ossetians can be defined as a people, three issues remain. The first is whether or not Georgia used force against South Ossetia. If it did use force, the second issue to consider is whether that force was legal. If the force was not legal, the final issue is whether or not the use of force gives rise to South Ossetia's unilateral declaration of independence from the rest of Georgia.

The definition of force in this case is relatively easy, because the question concerning all, including the international community, is whether Georgia used *military* force on South Ossetia. The answer is undoubtedly "yes." There seems to be little or no argument that on August 8, 2008, Georgia's President, Mikhail Saakashvili "shelled South Ossetia and launched a ground invasion deep into the territory."<sup>248</sup> Whether or not this was justified under Chapter VII of the U.N. Charter—that is, legal—is a more difficult question. Skirmishes had been occurring between Georgia and Ossetian separatists,<sup>249</sup> but military observers and monitors in the area cannot corroborate reports of South Ossetian attacks that supposedly prompted the Georgian shelling and ground invasion.<sup>250</sup> Without evidence of attacks, one doubts that Georgia had to resort to military action rather than going to the United Nations for assistance. Assuming there were no attacks, Georgia could either have made a mistake or intentionally shelled its own South Ossetian population. The latter possibility would rise to the level of illegality. Unless the Georgian attacks were sustained, however—and not intentionally provoked by outside forces—it would be difficult to use them as an excuse for secession. Rather, the international community should condemn the attacks and give Georgia the opportunity to cease hostilities and make reparations, where appropriate.

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248. See *supra* note 158 and accompanying text (referring to the hostilities in South Ossetia in August 2008 and the resulting humanitarian crisis).

249. See *supra* note 191 and accompanying text (conjecturing that Saakashvili's invasion was intended to force NATO's hand in the situation, presumably on the side of Saakashvili).

250. See *id.* (questioning facts of lead-up to August 2008 war). The facts may never be known. For the current analysis, the assumptions made are those that are most unfavorable to Georgia in order to determine if Georgia's actions would rise to the level that would justify South Ossetian independence.

In trying to justify independence for South Ossetia, a better argument might be found in Georgia's closing down of an unregulated trade market in South Ossetia,<sup>251</sup> which some might view as an affront to South Ossetia's autonomy. The problem with this argument, though, is that regulation does not necessarily mean a lack of autonomy or self-determination. In the United States, for example, the federal government regulates interstate and foreign trade while states have autonomy in many other areas.<sup>252</sup> Similarly, in the European Union, member states maintain their autonomy while subjecting themselves to EU regulations, particularly regarding trade.<sup>253</sup> The test for the international community should be whether Georgia treats all regions equally in its setting of regulations. If it does not, it should be given the opportunity to remedy the situation before secession is considered.

Georgia's treatment of South Ossetia is in need of improvement, but it does not provide South Ossetia with a case for independence. Lacking a valid referendum on South Ossetia's independence that represents all of Georgia, the international community should not recognize South Ossetia as an independent state. The international community should instead call on Georgia to address any human rights abuses that have apparently taken place, and it should monitor the actions of the Georgian government with regards to South Ossetia. The international community should also be clear to the South Ossetian leadership that it will recognize South Ossetia as an autonomous region within Georgia, and that it, too, must be respectful of the rights of the minorities within its region.

### C. *Domestic Law Must Address Ethnic Tensions to Support the Goals of International Law*

The two preceding sections ended by acknowledging the ethnic tensions in each of the territories. These tensions may

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251. *See supra* note 183 and accompanying text (noting the differing approach toward South Ossetia taken by Saakashvili versus that of former President Shevardnadze).

252. *See supra* note 185 and accompanying text (citing the U.S. Constitution and the right of the federal government to regulate commerce interstate and international commerce).

253. *See id.* (referring to the European Court of Justice holding that regulations enacted by the European Commission takes precedence over national legislation).

have been inflamed by political leaders,<sup>254</sup> but they exist even without bad leadership.<sup>255</sup> As noted above, when rival states form alliances and appeal to ethnic or nationalistic passions, they are failing to live up to the principles of the United Nations and are exacerbating rather than healing breaches of the peace. The international community should abide by international law itself, and it should help the regions to develop a domestic law structure that resolves ethnic tensions. Oscar Ruebhausen, accepting the Yale Law School Association Medal in 1978, noted that lawyers are among the architects of society.<sup>256</sup> Lawyers from the international community should help lawyers within Serbia and Georgia build the legal architecture that supports the better impulses of man, and tear down that which shelters his worse nature.

Ambassador Churkin implied that the United States is in no position to be lead architect, given its history.<sup>257</sup> On the contrary, the United States is in a unique position to help because of its history. Forty years ago, fire hosing of protesters against racial inequality<sup>258</sup> and fire bombing of churches out of racial animosity<sup>259</sup> did not give much hope for an integrated American society. By 2008, however, an event that once would have led to violence, the election of an African-American President, instead led to celebration—even by the losing party.<sup>260</sup> American society has changed, and law was there to support that change.

254. See *supra* notes 124, 186, 204 and accompanying text (discussing the role that politicians play in exacerbating ethnic tensions).

255. See *supra* notes 123, 153 and accompanying text (reporting distrust and violence of one ethnic group toward another).

256. Oscar Ruebhausen, Acceptance Speech at Yale Law School, 1978, *reprinted in* 25 YALE L. REPORT 12 (1978).

257. See *supra* note 146 and accompanying text (citing the Ambassador's comment regarding U.S. intervention in Iraq).

258. See, e.g., Civil Rights: Birmingham, Alabama, [http://www.africanaonline.com/civil\\_rights\\_birmingham.htm](http://www.africanaonline.com/civil_rights_birmingham.htm) (last visited July 14, 2009).

259. See, e.g., Rev. Albert D'Orlando, FIRST CHURCH NEW ORLEANS, [http://www.firstuuno.org/mainwebsite\\_html/dorlando.html](http://www.firstuuno.org/mainwebsite_html/dorlando.html) (last visited July 14, 2009).

260. See John McCain, U.S. Senator and Candidate for U.S. President, Concession Speech After 2008 Presidential Campaign (Nov. 5, 2008), *available at* <http://www.politico.com/news/stories/1108/15303.html> (noting that a black dining at the White House was once met with outrage, recognizing the historic significance of the election in which his opponent, an African-American, won and viewing it as a demonstration of the distance the country had traveled from old injustices).

There are poor architects, to be sure, and the work of poor architects must sometimes be torn down to rebuild better structures. It took architects like Harry Truman and Hubert Humphrey, for instance, to tear down segregation in the military.<sup>261</sup> That old, segregated military was recently on display in New York. Coincidental to the election of the United States' first African-American President was a revival of the musical play, *SOUTH PACIFIC*, in which a segregated military fights for ideals it does not quite manifest. Although the military's segregation is not discussed in the play, an officer bitterly observes that hatred of other ethnicities are inflamed by a clan mentality that believes "[y]ou've got to be taught before it's too late . . . to hate all the people your relatives hate."<sup>262</sup>

Oscar Hammerstein's words reflect the same urgency of a twisted philosophy that is expressed by the warring parties in Kosovo and South Ossetia.<sup>263</sup> For nation-building and the creation of peaceful states, governments must help all of their peoples to unlearn inherited animosities that are aggressively taught as part of ethnic culture. It can be done. In Europe, while some states struggle to assimilate new ethnic groups into their societies,<sup>264</sup> others talk of political leadership coming from new generations of non-European immigrants. The German Green Party is now led by a second generation Turk.<sup>265</sup> Germany also has the ninth largest Jewish population in the world.<sup>266</sup> It may not yet be true that "we are all Georgians," but if Turks and Jews can say, "We are German," it should be possible for South

261. See generally TrumanLibrary.org, Desegregation of the Armed Forces, [http://www.trumanlibrary.org/whistlestop/study\\_collections/desegregation/large/index.php?action=chronology](http://www.trumanlibrary.org/whistlestop/study_collections/desegregation/large/index.php?action=chronology) (last visited July 14, 2009).

262. Oscar Hammerstein II, *You've Got to Be Carefully Taught* in *SOUTH PACIFIC* 145-46 (Albert Sirmay ed., Williamson Music 1949).

263. See *supra* note 4 and accompanying text (citing the fears of Westerners of a Europe subdued by Islamists); see also, Corso, *supra* note 153 (quoting one participant: "They need to be met with strength. They don't need negotiations. They [participant's side] need to either shoot them or beat them."). Others, perhaps less carefully taught, were more optimistic that if the Russian troops left, the two factions would be at peace. *Id.*

264. See *supra* note 4 and accompanying text (giving as examples France and the Netherlands).

265. See Judy Dempsey, *Germany's Green Party Elects First Ethnic Turk as Leader*, N.Y. TIMES, Nov. 17, 2008, at A9.

266. See World Jewish Population, <http://www.simpletoremember.com/vitals/world-jewish-population.htm> (last visited July 14, 2009).

Ossetians to someday say, “We are Georgian,” and for Kosovar Albanians to say, “We are Serbian.” This may not be possible or comfortable for them right now, but there are examples for them to follow and international law to support their better impulses.

*CONCLUSION: SAME OBJECTIVES, SEPARATE CASES, SIMILAR OUTCOMES*

The international community should not recognize either Kosovo or South Ossetia as independent states at this time. This conclusion does not conflate the two cases; the two cases, each decided on its own merits, happen to have similar outcomes. Ambiguities in international law may blur the distinctions of the cases, and some have suggested that the international community should clarify the right to self-determination in non-colonial contexts to make conclusions less prone to politics.<sup>267</sup> A better solution would be to base decisions on principles, allowing flexibility as new circumstances arise. This does not guarantee the “right” decision, but it would at least help parties work through the right process and help the international community from rushing toward risky political alliances. The task ahead for Kosovo and South Ossetia will be difficult, because of ethnic tensions, often inflamed by political leaders. However, ethnic groups that are now warring managed to live together in the past,<sup>268</sup> implying that they can do so in the future. Nations should unite in helping Serbia and Georgia remain united themselves, free from breaches of peace and the scourge of war. This help is possible by stepping back from fractious alliances and stepping up to the task of developing a structure of law that supports the rights of all citizens within the unified countries.

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267. See *supra* note 72 and accompanying text (citing Jonathan I. Charney, who argues that clarification may help prevent both secessionist groups and the mother state from taking provocative actions).

268. See Dan Bilefsky, *13 Years After Peace Accord, Fear Grows of New Ethnic Conflict in Divided Bosnia*, N.Y. TIMES, Dec. 14, 2008, at A6 (explaining that the three ethnicities were once closely entwined, including intermarriage).

