

# THE AUGUST 2008 BATTLE OF SOUTH OSSETIA: DOES RUSSIA HAVE A LEGAL ARGUMENT FOR INTERVENTION?

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## I. INTRODUCTION

The night of August 7, 2008, Georgia and the break-away government of South Ossetia, supported by Russian Federation forces, began an armed conflict for control of the South Ossetian region.<sup>1</sup> Almost immediately, Georgian forces sustained a series of defeats which forced them to retreat across the South Ossetian border into undisputed Georgian territory ceding military and administrative control of South Ossetia to South Ossetian and Russian Federation forces.<sup>2</sup> On August 16, 2008, after several days of intense fighting, President Mikheil Saakashvili of Georgia and Russian President Dmitry Medvedev signed a six-point ceasefire agreement brokered by French President Nicolas Sarkozy.<sup>3</sup>

Thereafter, Russia assumed temporary military control of the region.<sup>4</sup> This control was replaced on October 8, 2008 when Russia declared that it had completed the pullback of its “peacekeeping” forces in conformance with the final agreement made between President Medvedev and President Sarkozy on September 8, 2008.<sup>5</sup> Russia then handed over monitoring to the European Union Monitoring Mission (“EUMM”),<sup>6</sup> although as of September 2008, Russia planned to keep a force of 7,600 soldiers in the region to prevent any “repeat of Georgian aggression.”<sup>7</sup>

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1. HUMAN RIGHTS WATCH, UP IN FLAMES: HUMANITARIAN LAW VIOLATIONS AND CIVILIAN VICTIMS IN THE CONFLICT OVER SOUTH OSSETIA 22 (2009) [hereinafter HUMAN RIGHTS WATCH].

2. *Id.* at 23-25.

3. *Id.* at 25; *see also* Press Release, United Nations Secretary-General, Extremely Concerned About Impact of Georgian- Russian Conflict, Reminds Parties They Have Obligation to Protect Civilians, End Lawlessness, U.N. Doc. SG/SM/11748 (Aug.14, 2008), <http://www.un.org/news/press/docs/2008/sgsm/1748.doc.htm>.

4. HUMAN RIGHTS WATCH, *supra* note 1, at 26.

5. Press Release, Ministry of Foreign Affairs of the Russian Federation, Russian Peacekeeping Forces Withdrawn from the Territory of Georgia (Sept. 10, 2008), [http://www.mid.ru/Brp\\_4.nsf/arh/120D9CDC5A1FF5BBC3257523003F9EA0?OpenDocument](http://www.mid.ru/Brp_4.nsf/arh/120D9CDC5A1FF5BBC3257523003F9EA0?OpenDocument).

6. EU Monitoring Mission in Georgia, <http://www.eumm.eu/en/intro/> (last visited Sept. 25, 2009).

7. Conor Sweeney & Oleg Schedrov, *Russia Plans 7,600 force in Georgia Rebel Regions*,

The August 2008 conflict between Georgia, South Ossetia and Russia represents only the latest strife in a near two-decade disagreement between the South Ossetian autonomous oblast<sup>8</sup> and Tsibili, the Georgian capital, over who governs the region.<sup>9</sup> Control of the South Ossetian region has been internally debated since the dissolution of the Soviet Union.<sup>10</sup> Until the recent conflict, Georgia remained the de jure sovereign of the region.<sup>11</sup> This situation persisted despite the fact that South Ossetia has declared its independence in several referendums and has fought for self-determination through a hot and cold conflict with Georgia over the last twenty years.<sup>12</sup> Although Georgia does not currently have administrative control of the region, it acts as the international face of South Ossetia.<sup>13</sup> South Ossetia continues to assert its independence; however, Russia and Nicaragua are the only states who recognize the region as a sovereign State.<sup>14</sup>

In the wake of the August 2008 fighting, Russia rationalized its military intervention on two theoretical exceptions to the United Nations' prohibition on force: self-defense under Article 51 of the United Nations ("U.N.") Charter; and self-defense and humanitarian concerns under the "privileged interests" doctrine.<sup>15</sup> "Privileged interests" is a novel Russian term, fairly undefined in both its meaning and limits. Russia has stated that it merely means remembering "relationships with our old friends."<sup>16</sup>

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REUTERS, Sept. 9, 2008, .

8. HUMAN RIGHTS WATCH, *supra* note 1, at 16 (referring to the South Ossetian region as an "autonomous oblast."). An oblast is "[a] second-order administrative subdivision in Imperial Russia and the U.S.S.R.; a Russian province or region." 10 THE OXFORD ENGLISH DICTIONARY 646 (2d. ed. 1989).

9. HUMAN RIGHTS WATCH, *supra* note 1, at 16-20.

10. *Id.* at 16.

11. *Id.* at 9.

12. *Id.* at 16-20 *see also Regions and Territories: South Ossetia*, BRIT. BROADCASTING CORP. NEWS, [http://news.bbc.co.uk/2/hi/africa/country\\_profiles/3797729.stm](http://news.bbc.co.uk/2/hi/africa/country_profiles/3797729.stm). (Military confrontation between South Ossetian separatists (with aid from Russia) and Georgian forces started in January 1991, eventually leading to a ceasefire in June of 1992 and South Ossetia's "de facto" secession from Georgia. In 2004, after twelve years without violence, newly elected President Mikheil Saakashvili made it a priority to end South Ossetia's autonomy, leading to increased hostilities with Russia and skirmishes in August 2004 and a severance of relations between Russia and Georgia in November of 2006.").

13. Brian Whitmore, *One Year After 'Independence,' Abkhazia and South Ossetia in Legal Grey Zone*, RADIO FREE EUROPE, Aug. 26, 2009, [http://www.rferl.org/content/Year\\_After\\_Independence\\_Abkhazia\\_South\\_Ossetia\\_In\\_Legal\\_Gray\\_Zone/1808101.html](http://www.rferl.org/content/Year_After_Independence_Abkhazia_South_Ossetia_In_Legal_Gray_Zone/1808101.html).

14. Stephen Castle, European Union to Resume Russian Partnership Talks, *NY TIMES*, November 11, 2008, A13 (Russia also recognized the independence of the de facto republic Abkhazia, a region similarly considered part of Georgia by the international community).

15. Transcript of Response to Questions by Russian Minister of Foreign Affairs, Sergey Lavrov, During the Meeting with the Members of the Council on Foreign Relations, Ministry of Foreign Affairs of the Russian Federation, New York, Sept. 24, 2008, [http://www.un.int/russia/new/MainRoot/docs/off\\_news/021008/newen1.htm](http://www.un.int/russia/new/MainRoot/docs/off_news/021008/newen1.htm) [hereinafter Lavrov Transcript].

16. *Id.*

This comment explores Russia's arguments for intervention. By contextualizing these arguments within the legal framework of unilateral forcible intervention, it asks whether Russia's actions were a clear violation of international law, requiring international condemnation, or if they deserve consideration as a legitimate exercise of either self-protection or prevention of humanitarian abuses.

This comment deals principally with the norm and law of nonintervention, the limits of self-defense, and the emerging norm of "privileged interests." With this background, it explores whether Russia's military actions in Georgia in August 2008 are justifiable under international law. It begins with a history of the conflict in South Ossetia, explaining the actions which led to Russia's incursion into the region.<sup>17</sup> Next, the comment explores the development and limits of legal unilateral forcible intervention.<sup>18</sup> Finally, it critically reviews the justifications Russia asserted in the wake of August 2008 within the context of international law.<sup>19</sup>

## II. HISTORY OF THE AUGUST 2008 CONFLICT IN SOUTH OSSETIA

The August 2008 conflict did not spring up overnight. Rather, it developed from a nearly twenty-year buildup of political tensions, military posturing and small skirmishes that reflected the ebb and flow of a tenuous relationship between Russia and Georgia, with South Ossetia in the middle. August 2008 was in many ways the collapse of an already fragile dam.

### A. *Brief History of South Ossetia*<sup>20</sup>

Ossetia is a region straddling the Russian-Georgian border, separated into northern and southern regions by the Caucasus mountain chain<sup>21</sup> and defined by the historical and ethnic ties of its people.<sup>22</sup> Ethnic-Ossetians speak a language most closely related to Farsi.<sup>23</sup> This ethnic group has traditionally held good relations with Russia and the Soviet Union.<sup>24</sup> During the 18th and 19th centuries, Ossetians, unlike other ethnic groups, did not resist the expansion of the Russian Empire into their territory.<sup>25</sup> In addition, Ossetians sided with the Kremlin when

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17. *See infra* part II.

18. *See infra* part III.

19. *See infra* part IV; HUMAN RIGHTS WATCH, *supra* note 1, at 16-20.

20. *See infra* Ossetians, Map of South Ossetia, [http://ossetians.com/pictures/new/Georgian\\_South%20Ossetian.Map\\_map.jpg](http://ossetians.com/pictures/new/Georgian_South%20Ossetian.Map_map.jpg) (last visited Sept. 25, 2009) [hereinafter Map].

21. Global Security.org, <http://www.globalsecurity.org/military/world/georgia/images/south-ossetia-map03.jpg> (last visited Sept. 25, 2009) (map depicting the South Ossetia region).

22. *See Regions and Territories: South Ossetia, supra* note 12.

23. *Id.*

24. *Id.*

25. *Id.*

the Bolsheviks occupied Georgia during the early 1920s.<sup>26</sup> For this reason, Russia historically views the Ossetian population as loyal citizens of Russia.<sup>27</sup>



Following the Bolshevik Revolution in 1917 the Union of Soviet Socialist Republics (“USSR”) drew Ossetia’s current political boundaries, creating the South Ossetian Autonomous Region of Georgia and the North Ossetian region of Russia.<sup>28</sup> Since the USSR disbanded in the early 1980s, the north has been universally recognized as a region of the Russian Federation.<sup>29</sup> Likewise, until the August 2008 conflict, the international community universally considered Georgia the sovereign administrator of South Ossetia.<sup>30</sup> Even today, only the Russian Federation and Nicaragua consider South Ossetia a separate country.<sup>31</sup> The South Ossetian region is surrounded by undisputed Georgian territories to the south, east and west.<sup>32</sup>

Prior to the August 2008 conflict, the population of South Ossetia was approximately 70,000, consisting of twenty to thirty percent ethnic Georgians.<sup>33</sup> There were clear divisions in the region’s administration: Tshinvali (South

26. *Id.*

27. *Id.*

28. *Id.*

29. *Id.*

30. *Id.*

31. Press Release, Ministry of the Foreign Affairs of the Russian Federation, *supra* note 5; see also Michael Schwirtz & Olesya Vartanyan, Chavez Backs Moscow on Rebel Regions, N.Y. TIMES, Sept. 11, 2009, at A11.

32. See Map, *supra* note 20.

33. HUMAN RIGHTS WATCH, *supra* note 1, at 16.

Ossetia's de facto capital) and Ossetian-dominated villages were governed by de facto South Ossetia authority,<sup>34</sup> while Tbilisi (Georgia's capital) administered those villages in South Ossetia inhabited mainly by ethnic Georgians.<sup>35</sup>

In 1990, less than a decade after the dissolution of the USSR, the Republic of South Ossetia declared itself a separate state from Georgia, boycotting the election which brought Zviad Gamsakhurdia, a Georgian nationalist, to power.<sup>36</sup> As a result, the Georgian government declared an end to South Ossetia's status as an autonomous oblast, a move which led to armed conflict from 1991 to 1992.<sup>37</sup> This conflict was comprised of a series of skirmishes and guerilla warfare in which Russia occasionally intervened in support of the South Ossetia separatists.<sup>38</sup> Approximately one thousand people died, one hundred went missing and thousands were displaced.<sup>39</sup> During this conflict the United Nations Security Council received a number of letters from Georgian and Russian leaders detailing the unstable situation.<sup>40</sup> The Chairman of State Council of the Republic of Georgia called attention to the "mass executions of the Georgian civilian population, widespread torture, rape and other atrocities" in the North and Abkhaz secessionist regions.<sup>41</sup> The First Deputy Foreign Minister of Georgia argued that there was a "conspiracy between Abkhaz separatists . . . and reactionary forces from within the state structures of the Russian Federation."<sup>42</sup>

The conflict resulted in a ceasefire negotiated by Boris Yeltsin and Eduard Shevardnadze in Sochi, Russia.<sup>43</sup> The Sochi Agreement created a trilateral Joint Peacekeeping Force ("JPKF") comprised of five hundred peacekeepers each from Russia, Georgia, and North Ossetia, operating under a single JPKF commander nominated by the Russian Ministry of Defense and appointed by the Joint Control Commission ("JCC").<sup>44</sup> The 1991-1992 aggression left the authorities of South Ossetia with de facto control over most of South Ossetia, though "sizeable but territorially non-contiguous parts of territory within the former South Ossetian

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34. *Id.*

35. *Id.* (three valleys of South Ossetia were overwhelmingly populated by ethnic Georgians: Didi Liakhvi (north of Tskhinvali), Patara Liakhvi (northeast of Tskhinvali), and Froni (west of Tskhinvali)).

36. *Id.* at 16-17.

37. *Id.* at 16.

38. *Id.* at 17.

39. HUMAN RIGHTS WATCH, *supra* note 1, at 17.

40. UNITED NATIONS DEPARTMENT OF POLITICAL AFFAIRS, REPERTOIRE OF THE PRACTICE OF THE SECURITY COUNCIL, Supplement 1989-1992, 467-69, available at [http://www.un.org/en/sc/repertoire/89-92/CHAPTER%208/EUROPE/item%2018\\_Georgia\\_.pdf](http://www.un.org/en/sc/repertoire/89-92/CHAPTER%208/EUROPE/item%2018_Georgia_.pdf).

41. *Id.* at 468.

42. *Id.* at 468-69.

43. HUMAN RIGHTS WATCH, *supra* note 1, at 17.

44. *Id.*; see also *What Could Replace Russian Peacekeepers In Georgia's Breakaway Regions?*, Radio Free Europe Radio Liberty (Aug. 20, 2008), [http://www.rferl.org/content/What\\_Could\\_Replace\\_Russian\\_Peacekeepers\\_In\\_Breakaway\\_Regions/1192520.html](http://www.rferl.org/content/What_Could_Replace_Russian_Peacekeepers_In_Breakaway_Regions/1192520.html).

autonomous region, populated mainly by ethnic Georgians, remained under Georgian control.”<sup>45</sup>

During the late 1990s, the Russian government offered residents of South Ossetia and Abkhazia Russian citizenship and passports to facilitate their acquisition of Russian social services such as healthcare and pensions.<sup>46</sup> According to Amnesty International, these documents were the only method many South Ossetians possessed to travel internationally.<sup>47</sup>

In March 1997, leaders of the Organization for Security and Co-Operation in Europe (“OSCE”) produced the Lisbon Summit Declaration.<sup>48</sup> The declaration supported the “territorial integrity of Georgia within its internationally recognized borders” and criticized the “[d]estructive acts of separatists . . . including the decision to hold elections in . . . the Tskhinvali region/South Ossetia.”<sup>49</sup> In addition, the declaration stated, “[w]e are convinced that the international community, in particular the United Nations and the OSCE with participation of the Russian Federation as a facilitator, should continue to contribute actively to the search for a peaceful settlement.”<sup>50</sup>

In January 2004, after a twelve year period of relative peace, the newly elected Georgian President Saakashvili declared the restoration of Georgia’s territorial integrity (including Abkhazia and South Ossetia) a major priority in his administration.<sup>51</sup> The focus of this effort was a combined strategy to cease smuggling from Russia into South Ossetia (a major source of income for the de facto South Ossetian leadership) and provide humanitarian aid in order to win over the ethnic Ossetian population.<sup>52</sup> The anti-smuggling campaign led to renewed hostilities between Georgia and South Ossetia in August 2004, but never manifested outright warfare.<sup>53</sup>

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45. AMNESTY INTERNATIONAL, CIVILIANS IN THE LINE OF FIRE 7 (Amnesty International Publications 2009) [hereinafter AMNESTY INTERNATIONAL].

46. *Id.*; see also HUMAN RIGHTS WATCH, *supra* note 1, at 18 (citing Interview with Eduard Kokoity, President of Unrecognized South Ossetia, RIA Novosti (Nov. 29, 2007), available at <http://rian.ru/interview/2007/20071129/90125886.html>) (“by the end of 2007, according to the South Ossetian authorities, some 97 percent of residents of South Ossetia had obtained Russian Passports[.]”).

47. AMNESTY INTERNATIONAL, *supra* note 45, at 7.

48. Lisbon Document 1996, Organization for Security and Co-operation in Europe, Dec. 3, 1996, 36 I.L.M. 486.

49. *Id.* para. 20.

50. *Id.*

51. AMNESTY INTERNATIONAL, *supra* note 45, at 7.

52. HUMAN RIGHTS WATCH, *supra* note 1, at 18 (citing International Crisis Group (“ICG”), Georgia: Avoiding War in South Ossetia Europe Report No. 159, (Nov. 26, 2004) available at <http://www.crisisgroup.org/home/index.cfm?l=1&id=3128>).

53. HUMAN RIGHTS WATCH, *supra* note 1, at 19 (citing Institute for War and Peace Reporting (“IWPR”), *South Ossetia Crisis Abates*, Caucasus Reporting Service No. 236 (June 3, 2004); Institute for War and Peace Reporting, *South Ossetia Tensions Still High*, Caucasus Reporting Service No. 242 (July 14, 2004); Institute for War and Peace, *South Ossetia Conflict Heats Up*, Caucasus Reporting Service No. 246 (Aug. 12, 2004).).

In 2006, ninety-five percent of the South Ossetian population voted on an independence referendum which called for separation from Georgia.<sup>54</sup> In addition, South Ossetia's unrecognized President, Eduard Kokoity, or Kokoyez, won unsanctioned presidential elections twice in December 2001 and November 2006.<sup>55</sup> The second of these elections took place alongside a parallel election set up by the Georgian government. Two competing governments arose: Kokoity's South Ossetian administration and Dmitri Sanakoev's pro-Georgian administration, based in the ethnic Georgian village of Kurta.<sup>56</sup> After 2006, Sanakoev administered the ethnic-Georgian villages, while Kokoity maintained authority over the rest of South Ossetia.<sup>57</sup>

### ***B. Precipitating the August 2008 Conflict***

After the 2006 elections, tensions between Georgia and Russia grew continually worse. In September 2006, Moscow cut off all air, land and sea traffic to Georgia after it detained four alleged Russian spies.<sup>58</sup> As a response to Western countries' recognition of Kosovo in February 2008 and Georgia's continued efforts to join NATO, Russia deepened its connections with the de facto administrations of Abkhazia and South Ossetia in April 2008.<sup>59</sup> Georgia, in turn, suspended bilateral talks with Russia over Russia's membership in the World Trade Organization ("WTO").<sup>60</sup> Tbilisi proclaimed that it would oppose Russia's entering the WTO until Russia reversed its decision to establish legal connections with Abkhazia and South Ossetia.<sup>61</sup>

In March 2008, due to Tbilisi and Tskhinvali failure to renegotiate the 1994 JCC framework as Georgia desired, providing the EU, United States, and OSCE participation in the tripartite regime, Georgia asserted it would not deal "three against one."<sup>62</sup> In July 2008, Georgian forces, claiming they had been fired upon,

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54. *South Ossetians Vote for Independence*, GUARDIAN, Nov. 13, 2006, available at <http://www.guardian.co.uk/world/2006/nov/13/russia.georgia/print>.

55. *Regions and Territories: South Ossetia*, *supra* note 12, at 3.

56. HUMAN RIGHTS WATCH, *supra* note 1, at 19 (citing Simultaneous Polls in South Ossetia, CIVIL GEORGIA, Nov. 12, 2006, <http://www.civil.ge/eng/article.php?id=14061&search=Sanakoev>).

57. *Id.*

58. *Id.* at 20.

59. *Cf.* Steven Erlandger, NATO Duel Centers on Georgia and Ukraine, *N.Y. TIMES*, Dec. 1, 2008, at A8.

60. Associated Press, *Russia Backs Away From Some W.T.O. Commitments*, *N.Y. TIMES*, Aug. 26, 2008, at C6; *cf.* Steven Erlandger, NATO Duel Centers on Georgia and Ukraine, *N.Y. TIMES*, Dec. 1, 2008, at A8.

61. *Tbilisi Suspends Talks on Russia WTO Entry Terms*, CIVIL GEORGIA, Apr. 29, 2008, [http://www.civil.ge/eng/\\_print.php?id=17710](http://www.civil.ge/eng/_print.php?id=17710) ("Prior to Russia's decision to establish legal links with [South Ossetia and Abkhazia], Tbilisi claimed that it would agree to Russia's WTO accession if trade at two border crossing points - one in breakaway South Ossetia (Roki Tunnel) and another in breakaway Abkhazia (Gantiadi) - were legalised.")

62. HUMAN RIGHTS WATCH, *supra* note 1, at 19 (citing *Tbilisi Proposes New Negotiating Format for South Ossetia*, CIVIL GEORGIA, Mar. 1, 2008).

shot at nine residential homes in Tskhinvali and a nearby village with artillery fire.<sup>63</sup> Later that month, Russia flew four air force jets over Tskhinvali in violation of Georgia's airspace.<sup>64</sup> In response, Georgia recalled its foreign ambassador to Russia.<sup>65</sup>

On July 15th, the Georgian Army conducted a military exercise with U.S. forces.<sup>66</sup> Russia responded that same day with "Caucasus 2008," an eight thousand troop exercise near the Roki tunnel, a land bridge through the Caucasus Mountains that connects Russia to South Ossetia.<sup>67</sup> Georgia subsequently placed its entire artillery brigade in the city of Gori, just thirty kilometers from Tskhinvali.<sup>68</sup> Over the next few days, each side engaged in low-level skirmishes involving Georgian and South Ossetian police,<sup>69</sup> and Tbilisi continued to place military forces near the South Ossetia administrative border.<sup>70</sup>

### C. August 2008 War

By the morning of August 7, 2008, there were 12,000 Georgian troops, and seventy-five tanks and armored personnel amassed on the de facto South Ossetian border.<sup>71</sup> That night, Georgian forces began a massive shelling campaign on Tskhinvali and the surrounding villages, which lasted into the morning.<sup>72</sup> Georgia

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63. *Id.* at 21.

64. *Id.*

65. *Id.*

66. *Id.*

67. *Id.* at 19.

68. *Id.* at 21.

69. *Id.* at 21-22; see also *Georgia Suspects Russian Peacekeepers May Be Involved in Shelling- Agency*, BRIT. BROADCASTING CORP. WORLDWIDE MONITORING, Aug. 2, 2008; *Georgian Officials Blame Separatists for South Ossetia Shooting*, BRIT. BROADCASTING CORP. WORLDWIDE MONITORING, Aug. 1, 2008; *Georgian Village Under Attack in Georgia-Ossetia Conflict Zone- Tbilisi*, RUSS. & CIS MILITARY WKLY, Aug. 1, 2008; *North Ossetia Offers Help to Georgian Breakaway Republic*, BRIT. BROADCASTING CORP. WORLDWIDE MONITORING, Aug. 2, 2008; *Russia Behind Aggressive Proposal by S. Ossetia- Minister*, RUSS. & CIS MILITARY WKLY, Aug. 1, 2008; *Russia Urges Georgia, South Ossetia to Avoid Conflict Escalation*, BRIT. BROADCASTING CORP. WORLDWIDE MONITORING, Aug. 2, 2008; *Russian Peacekeepers Accuse Georgia of Attempts to Discredit Them*, BRIT. BROADCASTING CORP. WORLDWIDE MONITORING, Aug. 2, 2008; *South Ossetia, Georgia Accuse Each Other of Fueling Tensions Around Tskhivali*, RUSS. & CIS MILITARY WKLY, Aug. 1, 2008; *Tshinvali Being Shelled With Large-Caliber Guns- S. Ossetian Official*, BRIT. BROADCASTING CORP. WORLDWIDE MONITORING, Aug. 1, 2008.

70. HUMAN RIGHTS WATCH, *supra* note 1, at 22.

71. *Id.*

72. *Id.* at 22-23; see also *Olesya Vartanyan & Ellen Barry, Ex-Diplomat Says Georgia Started War With Russia*, *N.Y. TIMES*, Nov. 26, 2008, at A8 [hereinafter *Olesya Vartanyan & Ellen Barry*] (*claiming American Officials had encouraged Georgia to attack South Ossetia in 2008*); but see *Ellen Barry, Georgia: Ex-envoy's Account Disputed*, *NY TIMES*, Nov. 29, 2008, at A8 (*Former Georgian Envoy to Moscow stated that American officials had encouraged Georgia to attack South Ossetia in April 2008*). "President [Mikheil Saakashvili] countered that he 'did not seek a green light from anyone' before starting the campaign, which he said had prevented ethnic massacres and the toppling of his government. 'The decision was taken by us independently,' he said." [hereinafter *Ellen Barry*].



claimed that this was a response to South Ossetia's militia attacking Georgian peacekeepers and villages in South Ossetia, and to prevent Russia from entering South Ossetia through the Roki tunnel.<sup>73</sup>

The following morning, Georgian ground forces entered Tskhinvali and fought with groups of South Ossetian militia forces.<sup>74</sup> Several neighboring villages fell to Georgian forces.<sup>75</sup> Throughout the day, Russian ground forces entered South Ossetia through the Roki tunnel while their artillery and aircraft bombarded Georgian ground forces in Tskhinvali and the surrounding areas.<sup>76</sup> Russia also commenced aerial bombardment of undisputed Georgian territory.<sup>77</sup> By nightfall, Georgia claimed it had secured Tskhinvali, conflicting with Russia's assertion that it had surrounded the city.<sup>78</sup>

Between August 8th and 10th, Russia moved some 10,000 troops into South Ossetia along with significant artillery force.<sup>79</sup> On August 10th, after several failed attempts to take Tskhinvali, Georgia ordered its troops to fall back into Gori, which is undisputed Georgian territory.<sup>80</sup> On August 12th, Russian armed forces pursued Georgian troops into undisputed Georgian territory and moved toward Gori.<sup>81</sup> By August 15th, Russian troops advanced past Gori as far as Igoeti, forty-five kilometers from Tbilisi.<sup>82</sup> From the west, Russian forces occupied the Georgian cities of Poti, Zugdidi and Senaki, establishing checkpoints and roadblocks.<sup>83</sup>

In accordance with the August 16th ceasefire agreement brokered by French President Nicolas Sarkozy, Russian forces began a gradual withdrawal from Georgian territory.<sup>84</sup> This was not a universal pullback as Russia maintained peacekeeping forces until an international monitoring mechanism was established.<sup>85</sup> In addition, on August 26th, Russia recognized the independence of Abkhazia and South Ossetia despite strong objections from the United States and much of Europe.<sup>86</sup> Nicaragua's Sandinista government stood alone in supporting Russia's decision.<sup>87</sup> Russia also created a "buffer zone" consisting of military

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73. HUMAN RIGHTS WATCH, *supra* note 1, at 22-23; *see also* Ellen Barry, *supra* note 72.

74. HUMAN RIGHTS WATCH, *supra* note 1, at 23.

75. *Id.*

76. *Id.*

77. *Id.* at 24.

78. *Id.*

79. *Id.*

80. *Id.* at 24.

81. *Id.* at 25.

82. *Id.*

83. *Id.*

84. *Id.*

85. *Id.*

86. Philip P. Pan and Jonathan Finer, Russia Says 2 Regions in Georgia Are Independent, *WASH. POST*, Aug. 27, 2008, at A01 (reporting that the leaders of the U.S., Germany, Great Britain and France strongly denounced Russia's decision).

87. HUMAN RIGHTS WATCH, *supra* note 1, at 26.

checkpoints that formed a security area between Georgia and the South Ossetian de facto border.<sup>88</sup> Finally, in October, Russian forces withdrew from nearly all of South Ossetia as the EU and OSCE deployed observers into Georgia.<sup>89</sup>

#### **D. International Response to the Conflict**

The international community's reaction to Russia's intervention was decidedly negative. The EU cut off negotiations with Russia on a strategic partnership agreement on September 1, 2008, a freeze which the EU maintained until November 10, 2008.<sup>90</sup> NATO suspended formal communications and expressed disapproval over Russia's recognition of Abkhazia and South Ossetia.<sup>91</sup> Meanwhile, Western donors pledged \$4.5 billion to help Georgia recover from the summer's war with Russia, stating that this was "'a strong signal to the world' that its members [the European Commission and the United States] stand with Georgia."<sup>92</sup> This comment seeks to determine whether such a response was merited.

### **III. FORCIBLE INTERVENTION AND INTERNATIONAL LEGAL THEORY**

The legality of intervention, forcible or non-forcible,<sup>93</sup> is one of the most hotly contested issues of international law.<sup>94</sup> The question of when, if ever,

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88. *Id.* at 25.

89. *Id.* at 26.

90. *Stephen Castle*, European Union to Resume Russian Partnership Talks, *NY TIMES*, Nov. 11, 2008, at A13 ("concessions offered by Moscow, including the withdrawal of many Russian troops and Russian participation in the Geneva talks, were sufficient to merit a return to the negotiating table.").

91. Steven Erlanger, NATO Chief Defends Engaging with Russia, *NY TIMES*, Dec. 4, 2008, at A8 (reporting NATO reengagement after Russia's substantial compliance with the ceasefire agreement).

92. Ellen Barry, West Pledges \$4.5 Billion to Rebuild Georgia, *NY TIMES*, Oct. 23, 2008, at A12 (noting that the total donations exceeded the World Bank's target and occurred against a background of global economic crisis).

93. This comment only addresses the traditional form of intervention. Compare Lori Fisler Damrosch, *Politics Across Borders: Nonintervention and Nonforcible Influence Over Domestic Affairs*, 83 AM. J. INT'L L. 1, 3 (1989) (describing the traditional concept of intervention as "the use or threat of force against another state.") with *id.* at 13-37 (describing non-military intervention that includes nonforcible support for political candidates, parties, and movements and using economic leverage against a State).

94. The U.N. debate over the legality of collective intervention in South Africa to stop Apartheid is an example of how hotly such intervention is contested. The issue divided those who encouraged respect for state sovereignty against those who claimed the UN was required to intervene on the basis of human rights. By way of example, compare U.N. Charter art. 2 ¶ 7 ("Nothing 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 under the present Charter. . . .") with U.N. Charter arts. 55-56 (Article 55 details the U.N.'s approach to "promoting" facially domestic policy such as "higher standards of living" and "universal respect for, and observance of, human rights," while Article 56 seeks to compel member nations "to take joint and separate action in co-operation with the Organization for the purposes set forth in Article 56. This debate, which ultimately resulted in the U.N.

intervention qualifies as a legal act divides States, scholars, lawyers and academics.<sup>95</sup> The debate contrasts the right of States to be free from interference in their domestic matters<sup>96</sup> with the desire of States to prevent gross injustices from taking place within the borders of another State.<sup>97</sup> Proponents of intervention often cite horrific abuses of human rights, ethnic cleansing and deplorable poverty as requiring international aid beyond non-interventionist means.<sup>98</sup> Those who denounce unilateral efforts to protect human rights claim humanitarian intervention serves principally as a pretext for military aggression.<sup>99</sup> Regardless of the arguments made regarding when an intervention of any kind is legal, *forcible* intervention must first contend with the international legal restrictions on the use of force.<sup>100</sup>

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imposing Chapter VII binding sanctions in 1977, spanned a period of over thirty years.).

95. Compare GARY KLINTWORTH, *VIETNAM'S INTERVENTION IN CAMBODIA IN INTERNATIONAL LAW* 41-84 (AGPS Press 1989) (attempting to justify the 1978 invasion as legal humanitarian intervention), and Anthony D'Amato, *The Invasion of Panama Was a Lawful Response to Tyranny*, 84 AM. J. INT'L L. 516 (1990) (arguing U.S. 1986 invasion of Panama was a legal reaction to Noriega's history of human rights abuses) with Declaration of the South Summit, Havana, Cuba Apr. 10-14, 2000, para. 54, available at [http://www.g77.org/summit/Declaration\\_G77Summit.htm](http://www.g77.org/summit/Declaration_G77Summit.htm) ("We reject the so-called 'right' of humanitarian intervention, which has no legal basis in the United Nations Charter or in the general principles of international law.") and Movement of the Non-aligned Countries, XIII Ministerial Conference, Cartagena, Colombia, Apr. 8-9, 2000, Final Document, para. 263, available at <http://www.nam.gov.za/xiiiinconf/final4.htm> ("We reject the so-called 'right' of humanitarian intervention, which has no legal basis in the UN Charter or in the general principles of international law.") and Richard B. Bidler, *Kosovo and the "New Interventionism": Promise or Peril?* 9 J. TRANSNAT'L L. & POL'Y 153, 161 (1999) ("most scholars have rejected the claim that humanitarian intervention is a legitimate exception to the prohibition of the use of force in the UN Charter."); and MARY ELLEN O'CONNELL, *THE POWER & PURPOSE OF INTERNATIONAL LAW* 180 (Oxford University Press 2008) ("There are two primary factors that support the prohibition on humanitarian intervention: (1) the severe pragmatic difficulty of protecting human rights through war, and (2) the weakening of the legal regime for peace. . . .").

96. 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 [s]tate. . .").

97. See U.N. Charter arts. 55-56 (requiring members of the U.N. to take "joint and separate action" to "promote: . . . universal respect for, and observance of, human rights and fundamental freedoms for all without distinction as to race, sex, language, or religion. . .").

98. International Development Research Centre, *The Responsibility to Protect* (2001), available at <http://www.idrc.ca/openbooks/963-1/#rch4fn168>.

99. Ryan Goodman, *Humanitarian Intervention and Pretexts for War*, 100 AM. J. INT'L L. 107, 108-09 (2006) (listing seven influential international legal scholars who have shaped the perception that states exploit the humanitarian exception to the prohibition on the use of force).

100. *Military and Paramilitary Activities (Nicar. v. U.S.)*, 1986 I.C.J. 14, ¶ 34 (June 27) ("There can be no doubt that the issues of the use of force and collective self-defence . . . are issues which are regulated both by customary international law and by treaties, in particular the United Nations Charter.").

### A. *The Norm of Nonintervention*

When it comes to the unilateral actions of States,<sup>101</sup> nonintervention is law to most legal writers, analysts, and officials.<sup>102</sup> While State abuses of this norm and the limited ability of the international system to punish abusers have caused some to consider any rules restricting force as “mere rhetoric, at best idealistic aspirations, or worse as providing a pretext or ‘cover’ for aggression,”<sup>103</sup> the rule remains almost universally accepted in the international community.<sup>104</sup> The 1933 Montevideo Convention, a “convenient starting point”<sup>105</sup> for discussion of the nonintervention norm, asserts, “[n]o State has the right to intervene in the internal or external affairs of another.”<sup>106</sup> Additionally, the U.N. Charter declares, “[n]othing contained in the present Charter shall authorize the United Nations to intervene in matters which are essentially within the domestic jurisdiction of any state[.]”<sup>107</sup>

Proponents of justified unilateral forcible intervention must first surmount the high threshold created by international law for the legitimate use of force. The U.N. Charter requires that any act of international force by its members, including forcible intervention, must withstand Article 2(4) scrutiny.<sup>108</sup> Article 2(4) requires that, “[a]ll members shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any state, or in any other manner inconsistent with the Purposes of the United Nations.”<sup>109</sup> Because this provision was meant to outlaw war,<sup>110</sup> the Charter sets a high standard to justify any act of armed intervention. Indeed, the Article goes beyond simply

101. Because this article only analyzes the legitimacy of Russia’s intervention in South Ossetia, it confines its discussion to the legitimacy of unilateral intervention.

102. Oscar Schachter, *The Right of States to Use Armed Force*, 82 MICH. L. REV. 1620, 1620 (1984); see also *Military and Paramilitary Activities (Nicar. v. U.S.)*, 1984 I.C.J. 392, 424 (Nov. 26) (“Principles such as those of the non-use of force, non-intervention, respect for the independence and territorial integrity of States . . . continue to be binding as part of customary international law, despite the operation of provisions of conventional law in which they have been incorporated.”) (reaffirmed in *Military and Paramilitary Activities (Nicar. v. U.S.)*, 1986 I.C.J. 14, para. 174 (June 27)).

103. Schachter, *supra* note 102, at 1620. See also Charles Krauthammer, *The Curse of Legalism: International Law? It’s Purely Advisory*, NEW REPUBLIC, Nov. 6, 1989, at 46 (“If the leader of Iran decides, say, to contract for the killing of a British writer . . . what is to stop him?”).

104. Damrosch, *supra* note 93, at 6-7.

105. *Id.* at 7.

106. Convention on Rights and Duties of States art. 8, Dec. 26, 1933, 49 Stat. 3097, 164 L.N.T.S. 19 [hereinafter Montevideo Convention].

107. U.N. Charter art. 2 para. 7.

108. Damrosch, *supra* note 93, at 5; see also Schachter, *supra* note 102, at 1624-25 (“article 2(4) remains the most explicit Charter rule against intervention through armed force, indirect and direct, and it is pertinent to consider such action as falling within the scope of the prohibition.”).

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

110. Schachter *supra* note 102, at 1624 (explaining the term “war” is used “in its classic sense, that is, the use of military force to acquire territory or other benefits from another state.”).

outlawing war in its telling use of the word “force,” which is intended to be more inclusive of offensive State behavior.<sup>111</sup>

The Charter has several other articles that imply a respect for State immunity from outside intrusion. Articles 2(1) and 55 affirm the principles of sovereign equality and self-determination of peoples,<sup>112</sup> principles which the Organization devotes itself to in Article 1(2).<sup>113</sup> The recognition of the juridical and sovereign equality of States implicitly creates the right of States to be free from intervention.<sup>114</sup>

The U.N. General Assembly (“G.A.”) has further defined the norm of nonintervention in several declarations beginning with the Declaration on the Inadmissibility of Intervention in the Domestic Affairs of States and the Protection of Their Independence and Sovereignty.<sup>115</sup> This declaration requires States to “refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any StateFalse”<sup>116</sup> The G.A. also reaffirmed its commitment to the norms of juridical and sovereign equality of States and equal rights and self-determination of peoples.<sup>117</sup>

In 1970, the G.A. approved the Declaration on Principles of International Law Concerning Friendly Relations and Co-operation Among States in Accordance with the Charter of the United Nations,<sup>118</sup> which fleshed out and gave “legal character” to the norm of nonintervention.<sup>119</sup> This document is generally considered an authoritative interpretation of the U.N. Charter.<sup>120</sup> The Declaration provided a series of “rights and duties” for all States under the principle of nonintervention.<sup>121</sup> Rights include “territorial integrity”<sup>122</sup> and the “inalienable right of a State freely to determine its own political, economic, cultural, and social system[.]”<sup>123</sup> Duties include:

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111. *Id.*

112. U.N. Charter art. 2, para. 1 (“The organization is based on the principle of the sovereign equality of all its Members”); *id.* at art. 55 (“With a view to the creation of conditions of stability and well-being which are necessary for peaceful and friendly relations among nations based on respect for the principle of equal rights and self-determination of peoples, the United Nations shall promote . . .”).

113. U.N. Charter art. 1, para. 2 (“The Purposes of the United Nations are . . . [t]o develop friendly relations among nations based on respect for the principle of equal rights and self-determination of peoples, and to take other appropriate measures to strengthen universal peace.”).

114. Damrosch, *supra* note 93, at 8.

115. G.A. Res 2131 (XX), U.N. GAOR, 20th Sess., Supp. No 14, U.N. Doc. A/6014 (Dec. 21, 1965).

116. Damrosch, *supra* note 93, at 11.

117. *Id.*

118. G.A. Res. 2625 (XXV), U.N. Doc. A/8082 (Oct. 24, 1970).

119. Damrosch, *supra* note 93, at 8.

120. *Id.* at 9.

121. G.A. Res. 2625, *supra* note 118, at 338.

122. *Id.*

123. *Id.* at 339.

[T]he duty . . . to refrain . . . from the threat or use of force . . . to violate the existing internationally recognized boundaries of another State [;] . . . to refrain from armed intervention, subversion, military occupation or any other form of intervention and interference [;] . . . to refrain from the promotion, encouragement or support, direct or indirect, of rebellious or secessionist activities within other States, under any pretext whatsoever . . . [; and t]he duty of a State to refrain from the exploitation and the distortion of human rights issues as a means of interference in the internal affairs of States.<sup>124</sup>

These materials appear to prohibit almost every use of force in international relations. However, international law does provide limited exceptions to the prohibition on force and nonintervention.

### ***B. Exceptions to the Norm of Nonintervention***

Clearly, exceptions to the prohibition of unilateral force do exist. Indeed, even within Charter Article 2(4) (prohibiting force) exceptions or qualifications are evident.<sup>125</sup> Article 2(4) posits that force is not acceptable when “against the territorial integrity or political independence of any state, or . . . inconsistent with the Purposes of the United Nations.”<sup>126</sup> Put another way, any force which remains consistent with the purposes of the U.N., while not violating the territorial integrity or political sovereignty of another State, remains legal. Two questions immediately appear: What force is justified under the Charter; and how expansively should Article 2(4) be interpreted?

#### **1. Self-Defense**

One broad exception to the prohibition of force is self-defense under Article 51 of the U.N. Charter, which allows for “individual or collective” defense in the face of an armed attack.<sup>127</sup> Self-defense under Article 51 is considered customary international law.<sup>128</sup> Stanimir Alexandrov explains that self-defense entitles a State to use force “to protect the security of a State and its essential rights, in particular the rights of territorial integrity and political independence[, but not to] exact reparation for injury.”<sup>129</sup> Professor Mary Ellen O’Connell provides four conditions to determine when Article 51 self-defense allows one State to use “significant force” on another State’s territory: “1) [a] significant actual armed attack has occurred or is occurring; 2) [t]he response in self-defense is aimed at the armed attacker or those legally responsible for the attack; 3) [t]he response is necessary to defense; 4) [t]he response is proportional in the circumstances.”<sup>130</sup>

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124. *Id.* at 338.

125. Schachter, *supra* note 102, at 1625-26.

126. *Id.* at 1625; U.N. Charter art. 2, para. 4.

127. U.N. Charter art. 51.

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

129. STANIMIR A. ALEXANDROV, *SELF-DEFENSE AGAINST THE USE OF FORCE IN INTERNATIONAL LAW* 17 (Kluwer Law International 1996).

130. MARY ELLEN O’CONNELL, *THE POWER & PURPOSE OF INTERNATIONAL LAW* 171

The first requirement, an actual armed attack, is both the clearest restriction on self-defense and the most open to objective testing, making this an especially difficult requirement for States to overlook.<sup>131</sup> However, most scholars reject requiring a State to first absorb an attack before asserting self-defense and argue that convincing evidence of an imminent attack can satisfy the requirement.<sup>132</sup> The problem, of course, is that any anticipatory self-defense is prone to error in assessing the imminent attack.<sup>133</sup> Should a State make a mistake in assessing the danger, and commence a military operation on the basis of self-defense, its operation violates the proportionality requirement.<sup>134</sup>

In *Nicaragua v. United States*, the International Court of Justice (“I.C.J.”) defined what constitutes an actual attack:

There appears now to be general agreement on the nature of the acts which can be treated as constituting armed attacks. In particular, it may be considered to be agreed that an armed attack must be understood as including not merely action by regular armed forces across an international border, but also “the sending by or on behalf of a State of *armed bands, groups, irregulars or mercenaries, which carry out acts of armed force against another State of such gravity as to amount to*” (*inter alia*) *an actual armed attack conducted by regular forces, “or its substantial involvement therein”*. This description, contained in Article 3, paragraph (g), of the Definition of Aggression annexed to General Assembly resolution 3314 (XXIX), may be taken to reflect customary international law.<sup>135</sup>

Despite some attempts to redefine the armed attack requirement to allow for preemptive force without a specific finding of an imminent threat, the U.N. Charter intends that those in fear of an armed attack should use the mechanism of the UNSC to deal with any such perceived danger.<sup>136</sup> Clearly, to justify unilateral force under Article 51, requires either an actual or imminent attack.<sup>137</sup>

The next requirement, State responsibility, is less explicit than the requirement for an armed attack, and its conditions are found in general international law, rather than the terms of Article 51.<sup>138</sup> Basically, the State whose territory is the target of self-defense inspired force must be legally responsible for the attack.<sup>139</sup> In *Prosecutor v. Tadic*, the International Criminal Tribunal for the Former Yugoslavia posits that control exists “when a State . . . has a role in

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(Oxford University Press 2008).

131. *Id.* at 172.

132. *Id.* at 172-73.

133. *Id.* at 175.

134. *Id.* (providing the example of Israel’s preemptory attack on Egypt in 1967).

135. Military and Paramilitary Activities (Nicar. v. U.S.), 1986 I.C.J. 14, para. 195 (June 27) (emphasis added).

136. O’CONNELL, *supra* note 130, at 178-79.

137. U.N. Charter art. 51.

138. O’CONNELL, *supra* note 130, at 181.

139. *Id.*

[organizing], coordinating, or planning the military actions of the military group, in addition to financing, training and equipping or providing operational support to that group.”<sup>140</sup>

The final two requirements for a justified use of force in self-defense (and indeed any use of force internationally) are the requirements of necessity and proportionality.<sup>141</sup> In *Legality of the Threat or Use of Nuclear Weapons*, the I.C.J. held “there is a ‘specific rule whereby self-defense would warrant only measures which are proportional to the armed attack and necessary to respond to it, a rule well established in customary international law.’ This dual condition applies equally to Article 51 of the U.N. Charter, whatever the means of force employed.”<sup>142</sup>

The requirement of necessity is “not controversial as a general proposition,”<sup>143</sup> but its application to particular cases can be difficult.<sup>144</sup> Generally, States are required to pursue peaceful means of resolving any conflict before reacting with force, unless attempting a peaceful resolution is futile.<sup>145</sup> One is compelled to conclude that the need to respond with force is present whenever a State is directly attacked.<sup>146</sup>

Finally, the requirement of proportionality means that States cannot respond to any attack with devastating force. Rather they are required to limit their countermeasures to address the specific harm inflicted by the offending State.<sup>147</sup> Should the response in self-defense greatly outweigh the attack by the provocateur, international opinion will most likely condemn the reprisal more than the primary act.<sup>148</sup>

## 2. Territorial Disputes

Some States maintain that the Article 2(4) restriction on force should not apply to territorial disputes when States attempt to reclaim land held prior to colonization. In 1961, India sent troops into Goa, which was then held under Portuguese authority.<sup>149</sup> India’s U.N. representative claimed there was no legal

140. Prosecutor v. Tadic, Case No. IT-94-1-A, Judgment, ¶ 137 (July 15, 1999) (emphasis in original).

141. O’CONNELL, *supra* note 130, at 186.

142. *Legality of the Threat or Use of Nuclear Weapons*, Advisory Opinion, 1996 I.C.J. 226, at para. 41 (July 8) (quoting *Military and Paramilitary Activities (Nicar. v. U.S.)*, 1986 I.C.J. 14, para. 176 (June 27)).

143. Schachter, *supra* note 102, at 1635.

144. *Id.*; see also U.N. Charter, art. 33, para.1 (“The parties to any dispute, the continuance of which is likely to endanger the maintenance of international peace and security, shall, first of all, seek a solution by negotiation, enquiry, mediation, conciliation, arbitration, judicial settlement, resort to regional agencies or arrangements, or other peaceful means of their choice.”).

145. Schachter, *supra* note 102, at 1635.

146. *Id.* at 1635-36 (providing as an example the Iran Hostage crisis during which the U.S. embassy in Tehran was seized).

147. *Id.* at 1637.

148. *Id.*

149. *Id.* at 1627.



boundary between Goa and India as it had been illegally possessed for four hundred and fifty years.<sup>150</sup> Likewise when Iraq invaded Iran in 1981 at the beginning of the Iran-Iraq War, the Iraqi government claimed it was merely retaking an area Iran illegally gained in 1937.<sup>151</sup> Essentially, the argument proposed by these invading countries is that they are not asserting force “against the territorial integrity or political independence of any state[.]”<sup>152</sup> Rather, the boundaries they crossed were created by colonizing forces in a violation of the inherent rights of self-determination,<sup>153</sup> and the invading states are now simply seeking to restore their illegally divided territory.

This argument, however, runs counter to the strong normative value of *uti possedetis*-colonial boundaries become international boundaries when a political subdivision or colony achieves independence.<sup>154</sup> The I.C.J. specifically addressed what effect should be given to preexisting boundaries after decolonization in *Libya v. Chad*.<sup>155</sup> The I.C.J. unequivocally reaffirmed the principle holding, “[o]nce agreed, the boundary stands, for any other approach would vitiate the fundamental principle of the stability of boundaries, the importance of which has been repeatedly emphasized by the Court.”<sup>156</sup>

In addition to this normative roadblock, such a large exception to Article 2(4) as permitting the repossession of former land would encourage the spread of international force, contravening the entire purpose of the Charter.<sup>157</sup> While some States have expressed sympathy in the past to those attempting to reclaim “illegally occupied” territories, Article 2(4) is still held to apply to these disputes, and most nations reject the exception to the prohibition of force.<sup>158</sup>

### 3. Humanitarian Intervention and Intervention to Protect Human Rights

Several international lawyers have proposed unilateral humanitarian intervention and intervention to protect human rights as two other exceptions to Article 2(4).<sup>159</sup> Though often the law of human rights and humanitarian law are thought interchangeable, there are marked distinctions between them.<sup>160</sup>

150. U.N. SCOR, 16th Sess., 987th mtg. at 10-11, U.N. Doc. S/PV.987 (Dec. 18, 1961).

151. Schachter, *supra* note 102, at 1627 (citing Ministry of Foreign Affairs of the Republic of Iraq, *The Iraq-Iran Dispute* (1980)); *see also* T. ISMAEL, IRAQ AND IRAN 24-27 (1982).

152. Schachter, *supra* note 102, at 1627 (citing U.N. Charter, art. 2, para. 4).

153. U.N. Charter, art.1 para. 2; U.N. Charter art. 55.

154. BLACK'S LAW DICTIONARY 1582 (8th ed. 2004).

155. Territorial Dispute (*Libya v. Chad*), 1994 I.C.J. 6 (Feb. 3).

156. *Id.* at 37.

157. Schachter, *supra* note 102, at 1628.

158. *Id.* at 1627-28.

159. *See, e.g.*, KLINTWORTH, *supra* note 95, at 41 (attempting to justify the 1978 invasion in Cambodia as humanitarian intervention); D'Amato, *supra* note 95, at 516-24 (arguing that the U.S. 1986 invasion of Panama was a legal reaction to Noriega's history of human rights abuses).

160. Theodor Meron, *The Humanization of Humanitarian Law*, 94 AM. J. INT'L L. 239, 240 (2000).

Humanitarian law includes the wartime laws (*jus in bello*)<sup>161</sup> and the laws governing the “steps to wars”<sup>162</sup> (*jus ad bellum*).<sup>163</sup> The primary objective of humanitarian law is to promote morality in armed conflict and rational self-interest between parties to minimize damage and casualties.<sup>164</sup> Yet, “as long as the rules of the game are observed, it is permissible to cause suffering, deprivation of freedom, and death.”<sup>165</sup> Generally, the four Geneva Conventions dictate what can and cannot be done under international humanitarian law.<sup>166</sup>

Human rights law, which is distinct from humanitarian law, proceeds from the belief that human dignity should be protected in all circumstances.<sup>167</sup> For example, unlike the rules of humanitarian law, human rights law does not permit any person to be imprisoned, deprived of life or subjected to other punishment unless sentenced by a competent court.<sup>168</sup> Generally, human rights principles have been codified in three documents collectively known as the International Bill of Rights: (1) The Universal Declaration of Human Rights,<sup>169</sup> (2) International Covenant on Civil and Political Rights,<sup>170</sup> and (3) Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment.<sup>171</sup>

161. BLACK’S LAW DICTIONARY, *supra* note 154, at 876.

162. Meron, *supra* note 160, at 240.

163. *Id.*; BLACK’S, *supra* note 154, at 876.

164. Meron, *supra* note 160, at 240.

165. *Id.*

166. Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field, Aug. 12, 1949, 6 U.S.T. 3114, 75 U.N.T.S. 31; Geneva Convention for the Amelioration of the Condition of the Wounded, Sick and Shipwrecked Members of Armed Forces at Sea, Aug. 12, 1949, 6 U.S.T. 3217, 75 U.N.T.S. 85; Geneva Convention Relative to the Treatment of Prisoners of War, Aug. 12, 1949, 6 U.S.T. 3316, 75 U.N.T.S. 135; and Geneva Convention Relative to the Protection of Civilian Persons in Time of War, Aug. 12, 1949, 6 U.S.T. 3516, 75 U.N.T.S. 287.

167. Meron, *supra* note 160, at 240.

168. *Id.*

169. G.A. Res. 217A, U.N. GAOR, 3d Sess., 1st plen. mtg., U.N. Doc. A/810 (Dec. 10, 1948) (non-binding declaration of the General Assembly, which includes the following relevant provisions: Article 1 (Freedom and equality of individuals in dignity and rights), Article 2 (no distinctions based on race, religion, sex, etc.), Article 4 (life, liberty and security), Article 5 (no torture or cruel and unusual punishment), Article 7 (equality before the law and equal protection), Article 8 (right to remedy for violation of fundamental rights), Article 9 (no arbitrary arrest, detention, exile), Article 30 (nothing should allow State to use this Declaration to engage in destruction of any rights and freedom set forth herein)).

170. G.A. Res. 2200A (XXI), U.N. GAOR, Supp. No. 16, U.N. Doc. A/6316 (Dec. 16, 1966) (International Covenant on Civil and Political Rights, (ICCPR))(a formally binding covenant, establishing an international institution, the Human Rights Committee, which receives and reviews reports from parties concerning compliance with the treaty’s provisions, issues general comments articulating its interpretation of treaty articles and receives complaints from individuals concerning violations of the treaty. ICCPR provides for limited derogation from its provisions: in times of public emergency which threaten the life of a nation, States may take measures derogating from their obligations to the extent strictly required by the exigency, but cannot do so to discriminate on the basis of race, colour, sex, language, or social origin. No derogation is permitted from Article 6 (right to life), Article 7 (ban on torture), Article 8 (slavery), Article 11 (debt imprisonment), Article 15 (ex post facto crimes), Article 16 (legal personality), or Article 18 (freedom of thought, conscience, and religion; any state exercising derogation shall

Despite the distinctions between humanitarian and human rights law, when legal scholars attempt to describe the legitimacy of an intervention based on humanitarian principles, inevitably they assert the desire to protect human rights.<sup>172</sup> This is because any intervention said to be for humanitarian reasons naturally is based on principles of human rights law in its attempts to prevent overwhelming loss of human life, degradation, and impoverishment.<sup>173</sup> Human rights laws and humanitarian laws are therefore often conflated when discussing the legality of such an intervention.<sup>174</sup>

The I.C.J., weighing in on humanitarian intervention, has refused to legalize any *unilateral* military force for the purpose of preserving humanitarian law.<sup>175</sup> In *Nicaragua vs. United States*, the I.C.J. took the view that any unilateral State assistance must be “limited to the purposes hallowed in practice, namely to prevent and alleviate human suffering, and to protect life and health and to ensure respect for the human being without discrimination to all in need.”<sup>176</sup> Based on this qualification, the I.C.J. rejected the use of force as ever being a method of ensuring respect for and protecting human rights.<sup>177</sup> Rather, the court pointed to the protection afforded by monitoring organizations and international conventions as the appropriate remedy for human rights abuses.<sup>178</sup>

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communicate this to other participating States)).

171. G.A. Res. 39/46, U.N. GAOR, Supp. No. 51, U.N. Doc. A/39/5 (Dec. 10, 1984) (created to strengthen norms against torture. Notably, Article 1 defines torture as intentional infliction of severe pain and suffering (physical or mental) to obtain information or a confession. It does not include pain or suffering arising from, inherent in or incidental to lawful sanctions (handcuffs; confinement; death penalty); Article 2 requires signatories to take effective legislative, administrative, judicial measures to prevent torture and notes that exceptional circumstances do not justify any relaxation of these norms, and that no public authority may be invoked to commence torture; Article 4 makes provisions in criminal law punishable by appropriate penalties; Article 10 requires proper training for law enforcement; Article 11 requires that signatories review interrogation techniques; Article 14 allows redress and rehabilitation of victims, and; Article 16: asks the signatories to endeavor to prevent abuses that do not rise to level of Article 1 torture).

172. See, e.g., David J. Scheffer, *Toward a Modern Doctrine of Humanitarian Intervention*, 23 U. TOL. L. R. 253, 264 (1991-92) (defining “classical . . . ‘humanitarian intervention’” as “those instances in which a nation unilaterally uses military force to intervene in the territory of another state for the purpose of protecting a sizable group of indigenous people from life-threatening or otherwise unconscionable infractions of their *human rights* that the national government inflicts or in which it acquiesces.”) (emphasis added).

173. *Id.* at 265 (explaining that the purpose of unilateral humanitarian intervention should be “alleviating the mass suffering of people for whom no other alternative realistically exists.”).

174. See Meron, *supra* note 160, at 242-75 (explaining the interrelation between human rights law and humanitarian law and how human rights jurisprudence is “humanizing” the law of war).

175. See generally *Military and Paramilitary Activities (Nicar. v. U.S.)*, 1986 I.C.J. 14, paras. 267-68 (June 27).

176. *Id.*

177. *Id.* at para. 252.

178. *Id.* at para. 267.

The U.N., however, has used *its own* military power to prevent human rights abuses. In 1991, the UNSC authorized a forcible humanitarian intervention in northern Iraq to prevent the post-Gulf War repression of the Kurdish civilian population.<sup>179</sup> In its wake, Professor David Scheffer offered a new definition of *non-forcible* humanitarian intervention supporting this resolution, but one that ironically allows for the use of military force.<sup>180</sup> He argues that the U.N. aid effort, which used allied military intervention to create a security zone, but did not directly authorize military intervention, should be encouraged:<sup>181</sup> “Article 2(7) is inapplicable where member-states are continuing to take enforcement measures under “the cease fire resolution.”<sup>182</sup> An important aspect of this intervention, however, is that it was based on an “agreement negotiated with Iraqi authorities to establish the logistics of the humanitarian effort through Iraq.”<sup>183</sup> The G.A. clarified in Resolution 46/182 that intervention was only justified in this case because Iraq consented to it. The G.A. stated, “humanitarian assistance should be provided with *the consent* of the affected country and in principle on the basis of an appeal by the affected country.”<sup>184</sup> According to Scheffer, consent from an administering government makes any intervention noncontroversial in international law.<sup>185</sup> Therefore, the UNSC’s actions were not truly an intervention “as a legal doctrine” since consent was given.<sup>186</sup> Scheffer states only non-consensual intervention (such as the instant case) poses difficulties in terms of international law.<sup>187</sup>

The protection and rescue of a State’s own nationals in imminent peril in a foreign country is a more circumscribed version of unilateral humanitarian intervention, and one which may be more applicable in the present case.<sup>188</sup> Examples include: “the Belgian action in Stanleyville in 1961[;] the U.S. moves in the Dominican Republic in 1965[;], the Israeli rescue effort in Entebbe[;] the unsuccessful U.S. attempt in 1980 to liberate the hostages in Iran[;] and the more successful “rescue of Americans in Grenada in 1983.”<sup>189</sup> Schachter explains that although all of these actions were considered violations of territorial sovereignty, many governments and scholars accept the need to rescue the countries’ nationals

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179. S.C. Res. 688, paras. 1-8, U.N. Doc. S/REA/688 (Apr. 5, 1991).

180. Scheffer, *supra* note 172, at 268.

181. *Id.*

182. *Id.* (quoting DAVID J. SCHEFFER, *Use of Force After the Cold War: Panama, Iraq, and the New World Order*, in RIGHT V. MIGHT: INTERNATIONAL LAW AND THE USE OF FORCE 146-47 (2d. ed. 1991))

183. *Id.*

184. G.A. Res. 46/182, U.N. GAOR, 78th plen. mtg., U.N. Doc. A/RES/46/182 (Dec. 19, 1991) (emphasis added).

185. Scheffer, *supra* note 172, at 265 (“Where a government invites or consents to the provision of international humanitarian assistance or to the armed intervention of a foreign force in its territory for humanitarian purposes, the legal basis for such action is established and is essentially non-controversial.”).

186. *Id.*

187. *Id.* at 265-66.

188. Schachter, *supra* note 102, at 1629.

189. *Id.*

as a justification for the use of force.<sup>190</sup> However, such actions come with requirements: an emergency need to save nationals' lives; a failure of the sovereign to protect them; and measures of protection proportional to the object of protecting them against injury.<sup>191</sup>

Despite the work of these scholars, there remains strong opposition to a humanitarian exception to the prohibition on unilateral force. The Group of Seventy-Seven and the members of the Non-Aligned Movement both have rejected the right of unilateral humanitarian intervention.<sup>192</sup> Many legal scholars have also rejected the exception.<sup>193</sup> O'Connell argues that the U.N. Charter itself does not permit unilateral humanitarian/human rights intervention.<sup>194</sup> She explains that the two primary reasons for prohibiting such force are "(1) the severe pragmatic difficulty of protecting human rights through war, and (2) the weakening of the legal regime for peace."<sup>195</sup> In addition, providing such an exception gives countries that act aggressively a pretext for their attacks, which derogates the U.N.'s purpose of preventing conflict.<sup>196</sup> The weight of legal opinion remains against permitting the unilateral use of force for humanitarian reasons.<sup>197</sup>

#### 4. Concluding on Exceptions

Obviously, exceptions to the rule against unilateral forceful intervention are rare. Self-defense in the face of armed attack allows for the use of force, but the requirements of an actual armed attack, a State responsible for the attack, and a necessary and proportional response to the attack, present large obstacles to a

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190. *Id.*

191. *Id.* at 1629-30.

192. Declaration of the South Summit, U.N. GAOR, 55th Sess., at para. 54, U.N. Doc. A/55/74 (May 12, 2000)

("We reject the so-called 'right' of humanitarian intervention, which has no legal basis in the United Nations Charter or in the general principles of international law."); Movement of the Non-aligned Countries, XIII Ministerial Conference, Cartagena, Colombia, Apr. 8-9, 2000, Final Document, 40-41, <http://www.nam.gov.za/xiiiinconf/minconf.pdf>.

193. Bidler, *supra* note 95, at 161 ("[M]ost scholars have rejected the claim that humanitarian intervention is a legitimate exception to the prohibition of the use of force in the U.N. Charter."); O'CONNELL, *supra* note 130, at 180 (pointing out factors that support a prohibition on humanitarian intervention).

194. O'CONNELL, *supra* note 130, at 180-81 (stating that the U.N. Secretary General's High Level Panel on U.N. Reform reaffirmed the prohibition on the unilateral use of force in 2004, while the U.N. World Summit in 2005 reconfirmed that states do not have a right to unilateral humanitarian intervention).

195. *Id.*

196. *But see* Goodman, *supra* note 99, at 120 ("The available evidence suggests that if a revisionist state is encouraged to portray humanitarian concerns as the basis for escalating hostilities, the road to aggressive war may be diverted. . .").

197. O'CONNELL, *supra* note 130, at 181 ("At the 2005 UN World Summit in New York, it was reconfirmed that states do not have the unilateral right to intervene for humanitarian purposes. There must be an armed attack to trigger the right to respond with armed force.").

claim of self-defense.<sup>198</sup> In addition, some arguments can be made with regard to territorial dispute intervention or human rights/humanitarian intervention, but most legal commentators maintain that any unilateral actions to repossess land and prevent human degradation and loss cannot be legal.<sup>199</sup> Nonetheless, in the wake of the August 2008 crisis, Russia asserted two legal arguments for its unilateral intervention: self-defense and humanitarian/human rights intervention.<sup>200</sup>

#### IV. RUSSIA'S LEGAL JUSTIFICATIONS

In the immediate aftermath of August 7, 2008, Russia attempted to justify its military intrusion under two legal rationales: self-defense and "privileged interests," which this comment considers under models of self-defense and humanitarian assistance.<sup>201</sup>

In the wake of the August 2008 intervention, Russia asserted that it had a right to intervene based on the principle of self-defense.<sup>202</sup> However, Russian territory was not attacked, so Russia's self-defense argument must rely on its assertion that protecting Russian citizens attacked outside of Russia amounts to a valid act of self-defense.<sup>203</sup> These citizens are composed of two groups: members of the Russian military acting as peacekeepers under the Sochi Agreement and "passportized" South Ossetians.<sup>204</sup> This latter group is comprised of South Ossetians whom the Russian government has provided with passports since the late 1990s, a move criticized by U.S. Secretary of State Condoleezza Rice as an attempt to justify future intervention on the basis of protecting Russian citizens.<sup>205</sup>

Russian Foreign Minister Lavrov clarified the traditional self-defense argument when he stated, "we [intervened] on the very firm legal basis of Article 51 of the Charter; the article providing the right of self-defense . . . our military serving as peacekeepers were attacked; when you attack the military of a country, you attack a country."<sup>206</sup> As precedent for this expansive view of self-defense, Lavrov referred to President George H.W. Bush's actions in Panama in 1989.<sup>207</sup> At that time, the United States authorized its own unilateral use of force claiming it

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198. See discussion *supra* Parts III.B.1-2.

199. See discussion *supra* part III.B.

200. Lavrov Transcript, *supra* note 15, at 7.

201. See *id.* As noted in more detail below, although Russia's explanation of the normative value of "privileged interests" is, at best, nebulous, and at worst, megalomaniacal, I choose for the purposes of this comment to view Russia's definition in its terms, which would most reasonably be viewed as a legal exercise of force: a desire to intervene with its neighbors for the purposes of preserving human rights in the region.

202. *Id.* at 4, 7.

203. Interview by Charlie Rose with Sergei Lavrov, Russian Foreign Minister, Sept. 25, 2008, [hereinafter Charlie Rose Interview].

204. See discussion *supra* note 46 and accompanying text.

205. Condoleezza Rice, U.S. Sec'y of State, Speech at German Marshall Fund on U.S.-Russia Relations (Sept. 18, 2008), <http://www.america.gov/st/texttrans-english/2008/September/20080918155132eaifas0.4152033.html> [hereinafter Rice Speech].

206. Charlie Rose Interview, *supra* note 203.

207. Lavrov Transcript, *supra* note 15, at 5.

was a legitimate exercise of self-defense based upon the death of one American serviceman, the wounding of another,<sup>208</sup> and the brutal beating of a third serviceman.<sup>209</sup>

Russia's other justifications lie in an ambiguous term it has used to describe a facet of its foreign policy: "privileged interests."<sup>210</sup> According to Russia, "privileged interests" means developing reciprocal, friendly and mutually advantageous relationships with countries that have past and current connections to Russia.<sup>211</sup> Foreign Minister Lavrov frames this situation as one where Russia is merely remembering relationships with its "old friends."<sup>212</sup> Russia asserts these relationships exist with those countries that host Russian businesses, those who send their citizens to study in Russian universities, and those that host Russian emigrants and ethnic Russians.<sup>213</sup> Invoking Cold War imagery, Secretary of State Condoleezza Rice condemned "any Russian attempt to consign sovereign nations and free peoples to some archaic 'sphere of influence.'"<sup>214</sup>

Understanding "privileged interests" within the framework of legal unilateral intervention is difficult because the doctrine has yet to be defined with clarity. However, the above comments by Foreign Minister Lavrov appear to invoke two arguments regarding legal exceptions to the prohibition on force: (1) intervention on the basis of self-defense of ethnic Russians abroad and (2) intervention on the basis of protecting human rights/providing humanitarian assistance in the region of "privileged interests."<sup>215</sup> Therefore, this article attempts to reconcile "privileged interests" with these exceptions to explore whether this doctrine provides legal validity for Russia's aggressive actions.

#### *A. Article 51 Self-Defense*

The primary legal justification Russia put forth to support its intervention during the August 2008 crisis was self-defense.<sup>216</sup> Article 51 retains for Members "the inherent right of individual or collective self-defence if an armed attack

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208. U.N. SCOR, 44th Sess., 2889th mtg., at 31, U.N. Doc. S/PV. 2889 (Dec. 20, 1989) ("In accordance with Article 51 of the United Nations Charter, United States forces have exercised their inherent right of self-defence under international law by taking action in Panama in response to armed attacks by forces under the direction of Manuel Noriega.") [hereinafter UNSC Record].

209. *Id.* at 32.

210. Lavrov Transcript, *supra* note 15, at 3-5 (stating that on August 31, 2008, President Medvedev put forth a set of five principles to govern Russian foreign policy going forward. These were: (1) the observation of international law; (2) multipolarity; (3) non-confrontational approaches; (4) Russia's privileged interests; and (5) protecting Russian citizens with "all means available.").

211. *Id.* at 4.

212. *Id.*

213. *Id.*

214. Rice Speech, *supra* note 205, at 4-5.

215. *See* Lavrov Transcript, *supra* note 15, at 7.

216. *Id.* at 2.

occurs . . .”<sup>217</sup> Foreign Minister Lavrov argued that an attack on Russian peacekeepers on August 7th constituted an attack on the Russian Federation, thereby giving Russia the right to defend itself.<sup>218</sup> Lavrov used the U.S. invasion of Panama in 1989 to justify this definition of self-defense.<sup>219</sup> He explained forcible intervention was necessary to protect Russian citizens from Georgian oppression.<sup>220</sup>

### 1. The U.S. Invasion of Panama

During a meeting in New York on September 24, 2008 with members of the Council on Foreign Relations, Foreign Minister Lavrov invoked the 1989 U.S. invasion of Panama as an example of the propriety of Russia’s expansive definition of self-defense.<sup>221</sup> This invasion, therefore, provides a helpful starting point for the debate on the legality of Russia’s actions under international law.

On December 15, 1989, the Panamanian legislative body declared Panama in a “state of war” with the United States.<sup>222</sup> This declaration was in response to U.S. economic sanctions that had been in effect against Panama since 1988.<sup>223</sup> Though the United States did not immediately consider Panama’s rhetoric a serious threat,<sup>224</sup> the tone changed a day later when a U.S. Marine officer was killed by members of the Panamanian Defense Force, another soldier was wounded, a third was beaten and his wife interrogated and threatened with sexual abuse.<sup>225</sup> In response, on December 20, 1989, President George H.W. Bush ordered U.S. military forces to Panama.<sup>226</sup> President Bush explained that this was a response to General Manuel Noriega “declar[ing] his military dictatorship to be in a state of war with the United States and publicly threaten[ing] the lives of Americans in Panama.”<sup>227</sup>

The goals of this military action, codenamed Operation Just Cause, were in part “to safeguard the lives of American citizens, to help restore democracy, to protect the integrity of the Panama Canal Treaties and to bring Gen. Manuel Noriega to justice.”<sup>228</sup> United States Ambassador to the U.N. Thomas R. Pickering

217. U.N. Charter art. 51.

218. Charlie Rose Interview, *supra* note 203.

219. Lavrov Transcript, *supra* note 15, at 5.

220. *Id.* at 6-7.

221. *Id.* at 5.

222. Ved P. Nanda, *Agora: U. S. Forces in Panama: Defenders, Aggressors or Human Rights Activists?: The Validity of United States Intervention in Panama under International Law*, 84 AM. J. INT’L L. 494, 496 (1990).

223. *Id.*

224. *Id.* (quoting *Noriega Gets New Powers, Title in Panama*, CHI. TRIB., Dec. 16, 1989, at 8C (Deputy Secretary of State Eagleburger called it “a charade and nonsense”).)

225. *Id.* at 497; *see also Fighting in Panama: The President; a Transcript of Bush’s Address on the Decision to Use Force in Panama*, N.Y. TIMES, Dec. 21, 1989, at A19 [hereinafter *Fighting in Panama*].

226. *Id.*

227. *Id.*

228. *Noriega’s Surrender: The President; Text of Bush Announcement on the General’s*



asserted the goal of safeguarding American lives as justification for intervention under Article 51 of the U.N. Charter.<sup>229</sup> In support of this action, Ambassador Pickering stated that Panama's recent actions were only the worst in what was a:

[S]ystematic campaign to harass and intimidate United States and Panamanian employees of the Panama Canal Commission and the United States forces. In the last year alone there have been over 300 violations of United States military bases by armed Panamanian Defence Forces personnel. Over 400 United States personnel have been detained, and 140 United States personnel have been endangered.<sup>230</sup>

The U.S. intervention was swift and devastating. Operation Just Cause eventually consisted of twelve thousand American troops added to the approximately twelve thousand U.S. military personnel already stationed in Panama.<sup>231</sup> The attack resulted in twenty-six American deaths and over seven hundred Panamanian deaths, most of which were civilians.<sup>232</sup>

## 2. International Response to the U.S. Invasion of Panama

On December 23, 1989, the UNSC voted on a draft resolution demanding the immediate withdrawal of U.S. forces from Panama.<sup>233</sup> The draft resolution, presented by Algeria, Colombia, Ethiopia, Malaysia, Nepal, Senegal and Yugoslavia, demanded a cessation of U.S. intervention by armed forces under Article 2(4) of the Charter of the U.N.<sup>234</sup>

Ambassador Pickering once again asserted self-defense as the legitimate principle upon which the United States based its actions, stating, "in those cases where all else fails, . . . States have the right to defend themselves where force is being used against them and *their citizens* in particular."<sup>235</sup> "The United States therefore argued that self-defense was broad enough that a State-directed attack on U.S. citizens anywhere in the world entitled the U.S. to commence military action when diplomatic action proved inadequate.

The Security Council Resolution was vetoed by three permanent members of the council – France, the United Kingdom, and the United States.<sup>236</sup> Notably, the Soviet Union<sup>237</sup> *voted in favor of the resolution* and expressed its "very deep regret

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*Surrender*, N.Y. TIMES, Jan. 4, 1990, at A12.

229. UNSC Record, *supra* note 208, at 31 (stating that, by taking action in Panama, the United States was exercising the inherent right of self-defense in accordance with Article 51 of the U.N. Charter and international law).

230. *Id.* at 34.

231. Nanda, *supra* note 222, at 497.

232. *Id.*

233. U.N. SCOR, 44th Sess., 2902d mtg. at 18-20, U.N. Doc. S/PV.2902 (Dec. 23, 1989) [hereinafter UNSC Vote].

234. S.C. Draft Res. 21048, U.N. Doc. S/21048 (Dec. 22, 1989).

235. UNSC Vote, *supra* note 233, at 9.

236. *Id.* at 18-20. Additionally, Canada, as a non-permanent member of the Security Council, voted against the resolution.

237. As the successor to the U.S.S.R. in the U.N., the Russian Federation is required to

at the triple veto, which *undermines the efforts of the Security Council to halt the interventionist acts of the United States.*<sup>238</sup> On December 29, 1989, a majority of the General Assembly voted in favor of a nearly identical resolution to condemn the invasion as a flagrant violation of international law.<sup>239</sup> While not binding on States, this general condemnation operates as an example of *opinio juris* on the subject.<sup>240</sup>

### 3. Reactions From International Legal Community

After the end of Operation Just Cause, legal writers were split in their opinions of whether the U.S. intervention was justified in Panama.<sup>241</sup> Anthony D'Amato, then-editor of the American Journal of International Law, argued that the United States did not violate the territorial integrity of Panama as prohibited by Article 2(4) of the U.N. Charter because "there was never an intent to annex part or all of Panamanian territory" and "[b]efore and after the intervention, Panama was and remains an independent nation."<sup>242</sup> D'Amato argued the illegitimate nature of General Noriega's government required intervention under human rights law.<sup>243</sup> He stated that when a tyrannical ruler has subjected a people to autocratic rule, human rights law demands intervention.<sup>244</sup>

Professor Ved P. Nanda recognized that a rescue operation of one's nationals might be permissible in certain circumstances, but he opposed the invasion of Panama because it did not satisfy the minimum standards required to exert force in self-defense.<sup>245</sup> Further, he contended that even when the minimum standard is met, it only justifies "a limited and temporary unilateral intervention, only as a last resort, and only when it meets the twin criteria of necessity and proportionality in the use of force . . ."<sup>246</sup> Necessity was not present because the situation in Panama did not demonstrate sufficient "imminent danger to U.S. citizens."<sup>247</sup> Neither was a "full-scale invasion" proportional to the danger perceived by the United States.<sup>248</sup> Professor Nanda argued for this vision of self-defense on the basis of the I.C.J. decision in *Nicaragua v. United States*.<sup>249</sup>

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maintain respect for the international relations of the former Soviet Union.

238. UNSC Vote, *supra* note 233, at 26 (emphasis added).

239. G.A. Res. 44/240, U.N. Doc. A/RES/44/240 (Dec. 29, 1989).

240. BLACK'S LAW DICTIONARY, *supra* note 154, at 1125 (defining *opinio juris* as "[t]he principle that for conduct or a practice to become a rule of customary international law, it must be shown that nations believe that international law (rather than moral obligation) mandates the conduct or practice.").

241. For a detailed account of the invasion, see THOMAS DONNELLY, MARGARET ROTH, & CALEB BAKER, *OPERATION JUST CAUSE: THE STORMING OF PANAMA* (Lexington Books, 1991).

242. D'Amato, *supra* note 95, at 520.

243. *Id.* at 519-20.

244. *Id.* at 519.

245. Nanda, *supra* note 222, at 496.

246. *Id.*

247. *Id.* at 497.

248. *Id.*

249. *Id.* at 495-96.

#### 4. Nicaragua v. United States

*Nicaragua v. United States*<sup>250</sup> is probably the most important legal decision regarding the propriety of exerting armed force against a sovereign nation for the purpose of self-defense. This decision followed a series of events beginning in the late 1970s. In 1979, the Sandinistas, a quasi-Marxist revolutionary group, overthrew Nicaraguan President Anastasio Somoza's dictatorship.<sup>251</sup> Quickly, the Sandinistas developed a friendly relationship with Communist Cuba, receiving medical experts, teachers, and technical experts for assistance in restructuring Nicaragua.<sup>252</sup> In addition, the Sandinistas began sending arms to like-minded revolutionary movements in El Salvador.<sup>253</sup> Despite this, the Carter Administration attempted to maintain a "cordial" relationship with the Sandinista government based on mutual self-interest.<sup>254</sup>

##### a. History Behind *Nicaragua v. United States*

In 1981, when Jimmy Carter left office and Ronald Reagan became President, relations between the United States and Nicaragua began to collapse.<sup>255</sup> The United States expanded support to groups of Nicaraguan counterrevolutionaries, known as the Contras, in their efforts to overthrow the Sandinista government.<sup>256</sup> The United States provided training, weapons, and cash to the Contras.<sup>257</sup> In addition, by July 1982, the CIA had developed a well-trained and well-equipped army called the Nicaraguan Democratic Force (FDN), which totaled 4,500 soldiers.<sup>258</sup> This group attacked Nicaraguan border towns, economic targets and army posts from Honduras.<sup>259</sup>

On April 9, 1984, Nicaragua filed suit against the United States in the I.C.J.<sup>260</sup> The United States argued that the I.C.J. did not have jurisdiction over the case and that the suit should be dismissed.<sup>261</sup> When the I.C.J. determined that it did have jurisdiction, the United States declined to participate any further,<sup>262</sup> yet the court

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

251. JEFFREY L. DUNOFF, STEVEN R. RATNER & DAVID WIPPMAN, INTERNATIONAL LAW NORMS, ACTORS, PROCESS: A PROBLEM ORIENTED APPROACH 917 (2d ed. 2006).

252. William M. LeoGrande, *The United States and Nicaragua*, in NICARAGUA AND THE UNITED STATES 37, 39 (Andrew C. Kimmens ed., 1987).

253. DUNOFF ET AL., *supra* note 251, at 917; *see also* LeoGrande, *supra* note 252, at 39.

254. LeoGrande, *supra* note 252, at 37-39.

255. *Id.* at 39.

256. *Id.* at 44-46.

257. *Id.* at 44-45.

258. *Id.* at 54.

259. *Id.*

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

261. Military and Paramilitary Activities (Nicar. v. U.S.), 1984 I.C.J. 392, para. 9 (Nov. 26).

262. Military and Paramilitary Activities (Nicar. v. U.S.), 1986 I.C.J. 14, paras. 10, 17 (June 27).

proceeded to examine the merits of the case.<sup>263</sup> Though the United States did not participate in the merits litigation, its response to the issues of jurisdiction and admissibility made its position clear.<sup>264</sup> In that response, the United States justified its intervention on the basis of Article 51 of the U.N. Charter, arguing that the right of collective self-defense applied to its actions in Nicaragua because Nicaragua had threatened El Salvador, Honduras, and Costa Rica.<sup>265</sup>

**b. Legal Opinion of the I.C.J.**

The I.C.J. rejected the U.S. claim of collective self-defense and held that a State could not rely on individual or collective self-defense, absent an armed attack on that State or a request for assistance from a third-party State that had suffered an armed attack.<sup>266</sup> The I.C.J. then defined “armed attack” as a State’s sending either its regular forces or armed bands, groups, irregulars, or mercenaries to carry out an armed attack on another state.<sup>267</sup>

Applying this definition to the case at hand, the I.C.J. found that the United States could not assert a right to self-defense without having sustained an attack on its own borders<sup>268</sup> and could not assert a right to collective self-defense in the absence of an invitation by States that had been directly attacked.<sup>269</sup> As to Nicaragua’s claims, the court found that the United States had “committed a prima facie violation of [the principle of the non-use of force] by its assistance to the Contras in Nicaragua, by organizing or encouraging the organization of irregular forces or armed bands . . . for incursion into the territory of another States, and participating in acts of civil strife . . . in another State.”<sup>270</sup>

**c. Reactions from the International Legal Community**

Some international lawyers criticized *Nicaragua v. United States*, while others hailed it. Anthony D’Amato criticized the decision and accused the judges of “hav[ing] little idea about what they are doing.”<sup>271</sup> He argued that the I.C.J. asserted the norm of nonintervention as customary international law while failing to give proper effect to the manner in which such law is formed.<sup>272</sup> Traditionally, customary international law involves two components: state practice and *opinio juris*.<sup>273</sup> *Opinio juris sive necessitatis* is “[t]he principle that for conduct or a

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263. DUNOFF ET AL., *supra* note 251, at 918.

264. Military and Paramilitary Activities (Nicar. v. U.S.), 1986 I.C.J. 14, para. 24 (June 27).

265. DUNOFF ET AL., *supra* note 251, at 918.

266. Military and Paramilitary Activities (Nicar. v. U.S.), 1986 I.C.J. 14, paras. 195, 199 (June 27).

267. *Id.* para.195.

268. *Id.*

269. *Id.* para. 199.

270. *Id.* para. 228.

271. Anthony D’Amato, *Trashing Customary International Law*, 81 AM. J. INT’L L. 101, 102 (1987).

272. *Id.* at 102-05.

273. *Id.* at 102-03.

practice to become a rule of customary international law, it must be shown that nations believe that international law (rather than moral obligation) mandates the conduct or practice.”<sup>274</sup> Therefore, D’Amato argued that for nonintervention to be part of customary international law, the court would have to demonstrate a substantial State practice conforming to the norm of nonintervention and the belief that nonintervention is the law.

Despite the court’s outward adherence to the formula for customary international law, D’Amato accused the court of lacking supporting research for its claim that nonintervention is customary international law.<sup>275</sup> The I.C.J., D’Amato claimed, ignored state practice that demonstrated increasingly liberal justifications for intervention, such as the preservation of human rights.<sup>276</sup> He argued that instead of performing a traditional analysis of customary law by looking to state practice, the I.C.J. simply “took the bait” and used an incorrect analysis of political documents, treaties, and Article 2(4) of the U.N. Charter to support its conclusions.<sup>277</sup>

Indeed, the I.C.J. acknowledged that, despite its finding that non-intervention is customary international law, “examples of trespass against this principle are not infrequent.”<sup>278</sup> However, the court found the enormous quantity of *opinio juris* statements supporting the principle more persuasive than the state violations of it.<sup>279</sup> Based on the statements of the international community, including those of the U.S., the I.C.J. determined that “acts constituting a breach of the customary principle of non-intervention will also, if they directly or indirectly involve the use of force, constitute a breach of the principle of non-use of force in international relations.”<sup>280</sup>

Most authors, however, approved of the court’s proactive stance with regard to framing international norms. Professor Herbert Briggs hailed the decision as “provid[ing] convincing evidence of the high judicial quality of the court and its Members.”<sup>281</sup> Richard Falk called the court’s decision “a moment of genuine jurisprudential triumph”<sup>282</sup> and praised its fairness, technical competence, legal reasoning, and choice of an approach favorable to state equality and sovereignty.<sup>283</sup> Professor Francis Boyle went further, claiming his only disagreement with the court’s holding was “its failure to hold the United States Government fully

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274. BLACK’S LAW DICTIONARY, *supra* note 154, at 1125.

275. D’Amato, *supra* note 271, at 102.

276. *Id.* at 104.

277. *Id.* at 102-04.

278. Military and Paramilitary Activities (Nicar. v. U.S.), 1986 I.C.J. 14, para. 202 (June 27).

279. *Id.* paras. 205-09.

280. *Id.* para. 209.

281. Herbert W. Briggs, “The International Court of Justice Lives up to its Name,” in *Appraisals of the I.C.J.’s Decision: Nicaragua v. United States*, 81 AM J. INT’L L. 78, 78 (Jan. 1987).

282. Richard Falk, *The World Court’s Achievement*, 81 AM. J. INT’L L. 106, 106 (1987).

283. *Id.* at 106-08.

responsible for the violations of the laws and customs of warfare committed by the Contra forces in Nicaragua.”<sup>284</sup>

Regardless of popular opinion, the I.C.J. made clear that a principle of nonintervention is not only supported by the Charter of the U.N. and by numerous other multilateral treaties, but that it is binding customary international law. Therefore, the I.C.J. universally condemns forcible intervention except in the rare instance of self-defense from an armed attack on the territory of a state asserting individual or collective self-defense.

## **B. Privileged Interests**

As a second justification for intervention, Russia asserted its “privileged interests” doctrine. Russia’s “privileged interests” appear to be a complex amalgam of its desires to reap economic benefits, protect military interests, and provide humanitarian aid to its Balkan neighbors in the region. However, this article is concerned only with the doctrine’s application to the exceptions to the prohibition on unilateral forcible intervention.

### **1. Similar USSR Justifications for Intervention**

The USSR’s history informs the current Russian argument for intervention under the concept of “privileged interests.” In 1956, the USSR intervened in Hungary and advanced “Fraternal Assistance” as a justification.<sup>285</sup> The USSR used Proletarian internationalism to justify its invasion of Budapest later that year.<sup>286</sup> In the early 1960s, it changed the term “Proletarian internationalism” to “socialist internationalism” to “justify resort to force[.]”<sup>287</sup> Socialist internationalism “governed relationships within the socialist camp, and provided a legal rationale for Soviet hegemony by requiring that socialist states structure their domestic and foreign policies with special deference to the needs of the camp as a whole.”<sup>288</sup>

In 1968, Leonid Brezhnev advanced the Brezhnev Doctrine, similar to the Monroe<sup>289</sup> and Truman Doctrines<sup>290</sup> of the United States, and argued that all

284. Francis A. Boyle, *Determining U.S. Responsibility for Contra Operations Under International Law*, 81 AM. J. INT’L L. 86, 86 (1987).

285. GlobalSecurity.org, Russian Privileged Interests, <http://www.globalsecurity.org/military/world/russia/privileged-interests.htm> (last visited Oct. 20, 2009) [hereinafter GlobalSecurity].

286. *Id.* Proletarian internationalism is a Marxist theory which instructs the working class in different countries to act together on the basis of a common class interest, rather than remaining loyal to their respective national governments. It was applied in the 1950s and 1960s by the USSR to Warsaw Pact countries, “require[ing] that national interests, as determined by the member states, were subordinated to the more important international interests of the whole socialist community, as determined by the then-Soviet Union.” Colonel James P. Terry, *Moscow’s Corruption of the Law of Armed Conflict: Important Lessons for the 21st Century*, 53 NAVAL L. REV. 73, 124-26 (2006).

287. *Id.* at 126.

288. *Id.* at 121 (internal quotations omitted).

289. The Monroe Doctrine, first delineated by President James Monroe on December 2,

capitalist states and all dissenters in socialist states were a threat to the security of the USSR.<sup>291</sup> The Brezhnev Doctrine therefore justified military aid to “fraternal countr[ies]” to deal with such a threat.<sup>292</sup> Adhering to this doctrine, the USSR intervened in Afghanistan in 1979 to secure its client state.<sup>293</sup> However, a decade later, the USSR’s departure from Afghanistan signaled the end the Brezhnev Doctrine’s vitality.<sup>294</sup>

## 2. Defining Privileged Interests

Because “privileged interests” is a novel term, its precise meaning is unclear.<sup>295</sup> On September 3, 2008, Russian President Medvedev explained that “Russia, like any other state, has certain regions it will pay particular attention to. These are regions of our privileged interests. We are going to have special, cordial, long-term relations with the states in these regions.”<sup>296</sup> Presumably, the term applies to the states of the former Soviet Union.<sup>297</sup> It may also apply to the members of the Warsaw Treaty Organization,<sup>298</sup> those nations that the USSR effectively controlled after its victory in World War II or even those territories previously controlled by the Czars, including Finland and Poland.<sup>299</sup>

Possibly more important to the breadth of “privileged interests” is what Russia believes it is entitled to do under this doctrine. In a September 12, 2008 speech, President Medvedev explained the implications of the doctrine.<sup>300</sup> He claimed that, rather than drawing spheres of political influence, Russia would

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1823 in his State of Union Address to Congress, outlined a new international policy in the United States’ relations with Europe. Monroe stated that the Western Hemisphere was not to be further colonized by European countries. In exchange, the United States would not interfere with existing European colonies or in the internal concerns of European countries. For text of the relevant part of Monroe’s address, *see* Avalon Project, Monroe Doctrine; Dec. 2, 1823, *available at* [http://avalon.law.yale.edu/19th\\_century/monroe.asp](http://avalon.law.yale.edu/19th_century/monroe.asp).

290. The Truman Doctrine was a United States’ post-WWII international policy created by President Harry Truman with the help of his aide and advisor George F. Kennan. The doctrine espoused the containment of the growing Soviet-communist threat by providing political, military and economic assistance to countries fighting communist incursions. ELIZABETH EDWARDS SPALDING, *THE FIRST COLD WARRIOR: HARRY TRUMAN, CONTAINMENT, AND THE REMAKING OF LIBERAL INTERNATIONALISM* 61-79 (2006).

291. GlobalSecurity, *supra* note 285.

292. *Id.*

293. *Id.*

294. *Id.*

295. *Id.*

296. *Id.*

297. GlobalSecurity, *supra* note 285.

298. The original signatories to the Warsaw Treaty were the USSR, Albania, Bulgaria, Czechoslovakia, the German Democratic Republic, Hungary, Poland, and Romania. U.S. Department of State, *The Warsaw Treaty Organization*, 1955, <http://www.state.gov/r/pa/ho/time/lw/90304.html> (last visited Nov. 6, 2009).

299. GlobalSecurity.org, *supra* note 285.

300. Dmitry Medvedev, Speech to the Valdai Club (Sept. 12, 2008), transcript *available at* [http://eng.kremlin.ru/speeches/2008/09/12/1644\\_type82912type82917type84779\\_206409.shtml](http://eng.kremlin.ru/speeches/2008/09/12/1644_type82912type82917type84779_206409.shtml).

“work to extend [its] contacts” with “those nations with which [it has] traditionally been close, [and] with whom [it has] had warm relations[.]”<sup>301</sup> Medvedev explained that the 2008 crisis in Georgia, and Russia’s intervention therein, was a result of previous Russian silence on the matter.<sup>302</sup> Russia, he stated, should have acted to preserve the interests of its people before the seventh of August.<sup>303</sup> President Medvedev compared the effect of the Georgian crisis on Russia to the attacks of September 11, 2001 on the United States.<sup>304</sup> Medvedev painted Georgia as an aggressor striking its citizenry with terroristic violence.<sup>305</sup>

Russia has also employed the doctrine of “privileged interests” to justify an aggressive economic policy. For example, it has recently feuded with Ukraine over natural gas prices.<sup>306</sup> In December 2008, then Prime Minister Putin insisted that Ukraine pay back some \$2.4 billion in debt on Russian natural gas shipments and threatened to cut supply if Ukraine failed to comply.<sup>307</sup> Grigory N. Perepelitsa, director of the Foreign Policy Research Institute, compared Russia’s natural gas policy to its use of “privileged interests” in South Ossetia by observing: “[t]here it was tanks, here it is gas.”<sup>308</sup>

### 3. Viewing “Privileged Interests” in the Framework of Exceptions to Non-intervention

Russia contends that the “privileged interests” doctrine includes the ability to assert a certain dominion over countries who host Russian citizens.<sup>309</sup> Some scholars believe that this allows for the protection or rescue of a state’s own nationals in imminent peril in a foreign country.<sup>310</sup> Russia, however, would seemingly expand this doctrine by also claiming the right to intervene on behalf of “passportized” ethnic Ossetians, an ethnic group that has held traditionally good relations with Russia and the Soviet Union.<sup>311</sup> Shielding these ethnic Ossetians from abuse is a possible expansion of the recognized rationale of intervention under the limited purpose of protecting citizens abroad.<sup>312</sup> Thus, if Russia views ethnic Russians and those peoples with strong historical ties to Russia in the same light as it views its citizens, the circumscribed version of unilateral humanitarian

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301. *Id.*

302. *Id.*

303. *Id.*

304. *Id.*

305. *Id.*

306. Michael Schwartz, *Economy is Subject as Putin is Peppered*, N.Y. TIMES, Dec. 5, 2008, at A6.

307. *Id.*

308. Andrew E. Kramer & James Kantner, *Gas Dispute Runs Deeper Than Pipes*, Experts Say, N.Y. TIMES, Jan. 14, 2009, at A10.

309. Lavrov transcript, *supra* note 15.

310. Schachter, *supra* note 102, at 1629.

311. Kramer and Kantner, *supra* note 308.

312. Schachter, *supra* note 102, at 1629.



intervention and self-defense can be manipulated to support Russia's claim that it had a responsibility to protect Ossetians.<sup>313</sup>

Another view of "privileged interests" that aligns with legal exceptions to the prohibition on force is a State's asserted responsibility to prevent violations of human rights and humanitarian law. Russian Foreign Minister Sergey Lavrov expressed the humanitarian goals of the doctrine with relation to South Ossetia, stating that Russia would protect its citizens "wherever they are" and "with all means available."<sup>314</sup> He framed Russia's intervention in South Ossetia as a decision to protect Russian citizens from "bloody aggression" rather than to stand idly by.<sup>315</sup> Indeed, one Russian strategy in the aftermath of the South Ossetian conflict was to report human rights violations occurring in Georgia.<sup>316</sup> On August 10, 2008, President Medvedev openly accused Georgia of the crime of genocide and ordered the Russian Federation Prosecutor's Office to document Georgian war crimes to provide the basis for prosecution.<sup>317</sup>

Despite the seemingly revolutionary and hostile nature of the term, some scholars believe that the use of the term "privileged interests" does not signal a radical shift in Russian politics, but instead merely defines of a twenty-year policy of encouraging international multipolarity and Russian dominance in the area of the former USSR.<sup>318</sup> However, clearly Russia used this term as part of its legal justification for using force in Georgian territory and would not make a similar argument with respect to areas outside of the former USSR and previous Russian.

### ***C. Russia's Legal Arguments Fail***

Russia's arguments attempting to legally justify its intervention fail for several reasons. First, there was no actual armed attack on Russian territory; the situation in South Ossetia merely threatened peacekeepers and "passportized" citizens. In addition, States are required to attempt peaceful resolutions to conflicts before international law permits them to use force.<sup>319</sup> In the wake of an armed attack on Russian citizens in Georgia, Russia exercised no options to bring the South Ossetian conflict to a peaceful resolution. Rather, within hours of Georgia's attack on South Ossetia's de facto boundary, Russia intervened with devastating military force.<sup>320</sup> Had Russia reported the human rights violations in Georgia

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313. Kramer and Kantner, *supra* note 308.

314. Lavrov transcript, *supra* note 15.

315. *Id.*

316. HUMAN RIGHTS WATCH, *supra* note 1, at 70.

317. *Id.* But see *id.* at 71 (determining based on available evidence that while Georgia is guilty of violating international humanitarian law, it is not guilty of genocide).

318. JEFFREY MANKOFF, RUSSIAN FOREIGN POLICY: THE RETURN OF GREAT POWER POLITICS 31-32 (2009).

319. Schachter, *supra* note 102, at 1636-37.

320. HUMAN RIGHTS WATCH, *supra* note 1, at 23.

before intervening instead of using them as an *ex post facto* justification,<sup>321</sup> perhaps its argument for intervention would have a more solid legal foundation.

Second, it is unlikely that the “passportized” South Ossetians qualify as Russian citizens for purposes of legitimizing Russian aggression. In *The Nottebohm Case (Liechtenstein v. Guatemala)*, the I.C.J. commented on the legitimacy of providing passports to persons who have little connection to the naturalizing country.<sup>322</sup> The Court held:

These facts clearly establish, on the one hand, the absence of any bond of attachment between Nottebohm and Liechtenstein and, on the other hand, the existence of a long-standing and close connection between him and Guatemala, a link which his naturalization in no way weakened. That *naturalization was not based on any real prior connection* with Liechtenstein, nor did it in any way alter the manner of life of the person upon whom it was conferred in exceptional circumstances of speed and accommodation. In both respects, it was lacking in the genuineness requisite to an act of such importance, if it is to be entitled to be respected by a State in the position of Guatemala. It was granted without regard to the concept of nationality adopted in international relations.<sup>323</sup>

Therefore, Russia cannot adopt Georgian citizens merely by providing them passports, and intervention on behalf of these illegitimate citizens is, in turn, illegitimate.

Third, Russia’s actions were totally disproportionate to their purported aim of protecting Russian citizens and passport holders abroad. Even assuming Russia had the right to enter South Ossetian territory, in line with a self-defense and humanitarian aid argument, its actions in attacking undisputed Georgian territory, including the bombing of Gori and Tkviavi, the use of cluster munitions, and the attack of civilian homes and civilians fleeing the conflict zone, are not in proportion to its stated goal of protecting Russian citizens.<sup>324</sup> As when the United States asserted this argument for intervention in Panama, a temporary intervention on the basis of self-defense is justified “only [as] a limited and temporary unilateral intervention, only as a last resort, and only when it meets the twin criteria of necessity and proportionality in the use of force[.]”<sup>325</sup> While states have a right to protect their citizens abroad, when their first move is to pursue military invasion, the entire meaning of Article 2(7) is made null.

## V. CONCLUSION

Russia’s forcible intervention was a violation of international law. Nearly all scholars and states agree that a prohibition on unilateral forcible nonintervention is customary international law.<sup>326</sup> Russia’s actions in South Ossetian and Georgian

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321. *Id.* at 70.

322. *Nottebohm Case (Liech. v. Guat.)*, 1955 I.C.J. 4, at para. 59 (Apr. 6, 1955).

323. *Id.* para. 67 (emphasis added).

324. HUMAN RIGHTS WATCH, *supra* note 1, at 93-119.

325. Nanda, *supra* note 222, at 496.

326. Schachter, *supra* note 102, at 1620.

territory exceed the boundaries of any acceptable form of the self-defense or humanitarian intervention. If these arguments were taken as reasonable expansions, it would lead to undesirable results for the entire global community. As Louis Henkin wrote, “our decentralized international political system” requires that the norms of the U.N. Charter be “clear, sharp, and comprehensive; as independent as possible of judgments of degree and of issues of fact; and as invulnerable as can be to self-serving interpretations and to temptations to conceal, distort, or mischaracterize events.”<sup>327</sup> Henkin further explained that expanding the occasions that would permit military intervention, which “go to the heart of international order and implicate war and peace in the nuclear age . . . would undermine the law of the Charter and the international order established in the wake of world war.”<sup>328</sup>

The U.N. Charter was meant to prevent war by creating only a small window for aggression under self-defense, and it created no such exception for unilateral aggression on the basis of human rights/humanitarian law. Based on the international reaction to both the U.S. invasion of Panama in 1986 and to Russian aggression in 2008, the world is not ready to accept Russia’s reasons for intervention.

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327. LOUIS HENKIN, *The Use of Force: Law and U.S. Policy*, in RIGHT V. MIGHT: INTERNATIONAL LAW AND THE USE OF FORCE 37, 60 (Louis Henkin et al., eds., 1989).

328. *Id.*