

## RUSSIA RUNNING ROGUE?: HOW THE LEGAL JUSTIFICATIONS FOR RUSSIAN INTERVENTION IN GEORGIA AND UKRAINE RELATE TO THE U.N. LEGAL ORDER

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### I. INTRODUCTION

Following the Russian intervention in Georgia and Ukraine, much of the international community characterized Russia as a revisionist power that gives no heed to international law.<sup>1</sup> The Russian invasion provided a flashback to the Westphalian system<sup>2</sup> in its full-fledged military assault on Georgia and swift annexation of Crimea. The times have changed since the creation of the United Nations (UN), however. The UN Charter was thought “to save succeeding generations from the scourge of war . . . [and] to ensure, by the acceptance of principles and the institution of methods, that armed force shall not be used, save in the common interest.”<sup>3</sup> The question now becomes: how do Russia’s recent interventions relate to the UN legal order? The UN legal order, which Part II of this Comment defines in detail, provides states with a legal framework that arises from three

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<sup>1</sup> In response to Russia’s intervention in Georgia, former U.S. Secretary of State, Condoleezza Rice, declared that “Russia’s reputation as a potential partner in international institutions, diplomatic, political, security, economic, is frankly, in tatters.” *Georgia Conflict: Key Statements*, BBC NEWS, <http://news.bbc.co.uk/2/hi/7556857.stm> (last updated Aug. 19, 2008).

<sup>2</sup> The doctrine of state sovereignty derives from the 1648 Treaty of Westphalia, which defined sovereignty as “absolute and perpetual power.” Mikhail Antonov, *The Philosophy of Sovereignty, Human Rights, and Democracy in Russia* 5 (Nat’l Research Univ. Higher School Econ., Working Paper No. WP BRP 24/LAW/2013, 2013).

<sup>3</sup> See U.N. Charter preamble, art. 2, ¶ 4 (codifying the prohibition on the use of force); Thomas M. Franck, *Who Killed Article 2(4)?*, 64 AM. J. INT’L L. 809, 809 (1970) (internal quotation marks omitted); Sara McLaughlin Mitchell & Paul F. Diehl, *Caution in What You Wish For: The Consequences of a Right to Democracy*, 48 STAN. J. INT’L L. 289, 312 (2012).

sources: (1) the UN Charter; (2) Security Council Resolutions; and (3) General Assembly Resolutions.

Surprisingly to some, Russia purportedly values adherence to international law,<sup>4</sup> and, consequently, sets forth carefully crafted arguments to justify its actions in Georgia and Ukraine. Russia's perspective on the UN Legal Order brings a level of rigor to international law that manifests itself in strict interpretations of the relevant underlying legal principles. The problem remains that many other states do not share Russia's stringent perspective.

Like most states in the international system, Russia often behaves in accordance with its self-interest. On September 3, 2008, then-President Dmitry Medvedev announced that Russia had regions of "privileged interests" that "it will pay particular attention to."<sup>5</sup> Days later, President Medvedev further explained that Russia was not drawing spheres of influence, but would rather "work to extend [its] contacts with those nations with which [it has] traditionally been close, [and] with whom [it has] had warm relations."<sup>6</sup> Russia's foreign policy in 2008 also made it clear that Russia would oppose North Atlantic Treaty Organization (NATO) enlargement towards Russian borders, particularly noting concern with the incorporation of Ukraine and Georgia.<sup>7</sup>

Officially, Russia purports to attach great importance to international law.<sup>8</sup> Article 15 of the Russian Constitution states that "[t]he universally-recognized norms of international law and international treaties and agreements of the Russian Federation shall be a component part of its legal system."<sup>9</sup> Additionally, the significance of international law was one of the five principles on which Russia

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<sup>4</sup> See Vladimir Baranovsky, *Humanitarian Intervention: Russian Perspective*, 2 PUGWASH OCCASIONAL PAPERS, no. 1, 2001, at 13–14.

<sup>5</sup> Michael Toomey, *The August 2008 Battle of South Ossetia: Does Russia Have a Legal Argument for Intervention?*, 23 TEMP. INT'L & COMP. L.J. 443, 473 (2009).

<sup>6</sup> *Id.* at 473–74 (internal quotation marks omitted).

<sup>7</sup> See Angelika Nußberger, *Russia*, in MAX PLANCK ENCYCLOPEDIA OF PUBLIC INT'L L. ¶ 21 (Rüdiger Wolfrum ed., online) (last updated Oct. 2013) [hereinafter, *Russia Max Planck*]; John J. Mearsheimer, *Why the Ukraine Crisis is the West's Fault*, 93 FOREIGN AFF., no. 5, 2014, at 77, 79.

<sup>8</sup> See Vladimir Putin, Address by President of the Russian Federation (Mar. 18, 2014), <http://en.kremlin.ru/events/president/news/20603> [hereinafter, *Putin's Speech*] (discussing how Russia behaved in accordance with international law with regard to the Crimean Crisis and how Western powers are hypocritical in their duplicitous perspective on international law); Baranovsky, *supra* note 4.

<sup>9</sup> KONSTITUTSIA ROSSIJSKOI FEDERATSII [KONST. RF] [CONSTITUTION] art. 15 (Russ.).

based its foreign policy in 2008.<sup>10</sup> This was reiterated in Russia's foreign policy in 2013, which was approved by President Vladimir Putin.<sup>11</sup> Russia often makes more of an effort to justify its actions under international law than many other states, including the United States.<sup>12</sup>

Russia's efforts to justify its actions, however, should not be misconstrued to imply that Russia always obeys international law. "International law emerges from states' pursuit of self-interested policies on the international stage. International law is, in this sense, *endogenous* to state interests. It is not a check on state self-interest; it is a product of state self-interest."<sup>13</sup> One reason for this might be that Russia's legal justifications may reflect state interests more so than strict adherence to international law. Even so, Russia's legal arguments are probative in the formation of customary international law.<sup>14</sup> Russia's unilateral attempts to break apart Georgian and Ukrainian territory represent recent test cases to study Russia's interpretation of international law and the law of foreign intervention specifically.

Adherence to the UN legal order<sup>15</sup> is important as the system effectuated many progressive developments in international law. In 1997, Russia and China issued a joint statement calling for a strengthened UN legal order.<sup>16</sup> The two states updated this document in 2005, recognizing the UN's role as "irreplaceable" in the international system.<sup>17</sup> So far, the UN legal order has achieved what it

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<sup>10</sup> The other principles include: (1) promoting a multipolar world; (2) maintaining friendly relations with other states; (3) paying particular attention to priority regions; and (4) protecting Russian citizens, no matter where they are. See *Russia Max Planck*, *supra* note 7, at ¶ 1.

<sup>11</sup> See Kontsepsiya vneshney politiki Rossiyskoy Federatsii [Concept of the Foreign Policy of the Russian Federation], UKAZY PREZIDENTA VLADIMIR PUTIN [Decree of Vladimir Putin] Feb. 12, 2013.

<sup>12</sup> In the Kosovo context, Russia invoked legal rhetoric in its public statements condemning Kosovar independence. The United States and the European Union, however, did not partake in legal analysis and instead merely repeated Kosovo's *sui generis* and non-precedential character. See Christopher J. Borgen, *The Language of Law and the Practice of Politics: Great Powers and the Rhetoric of Self-Determination in the Cases of Kosovo and South Ossetia*, 10 CHI. J. INT'L L. 1, 13 (2009).

<sup>13</sup> JACK L. GOLDSMITH & ERIC POSNER, *THE LIMITS OF INTERNATIONAL LAW* 13 (2005).

<sup>14</sup> See generally JEFFREY L. DUNOFF ET AL., *INTERNATIONAL LAW, NORMS, ACTORS, PROCESS: A PROBLEM-ORIENTED APPROACH* (2d ed., 2006) (examining customary international law formation).

<sup>15</sup> See *infra* Part II.

<sup>16</sup> DIRECTORATE-GENERAL FOR EXTERNAL POLICIES OF THE UNION, *THE POSITIONS OF RUSSIA AND CHINA AT THE UN SECURITY COUNCIL IN THE LIGHT OF RECENT CRISES*, EUROPEAN PARLIAMENT BRIEFING PAPER (Mar. 2013), [http://www.europarl.europa.eu/RegData/etudes/note/join/2013/433800/EXPO-SEDE\\_NT%282013%29433800\\_EN.pdf](http://www.europarl.europa.eu/RegData/etudes/note/join/2013/433800/EXPO-SEDE_NT%282013%29433800_EN.pdf).

<sup>17</sup> *Id.* (citing *China, Russia Issue Joint Statement on World Order*, PEOPLE'S DAILY

set out to do: lessen the likelihood of major wars. The UN legal order made the prohibition on the threat or use of force non-derogable, except in particular circumstances.<sup>18</sup> The drafters of the UN Charter desired to create a collective security system to foster international stability.<sup>19</sup> The rise of the UN legal order is associated with the growing rights of individuals under international law.<sup>20</sup> Therefore, the maintenance of the UN legal order is important to sustain the positive developments.<sup>21</sup> A state acting outside of that system can create potentially dangerous precedent.

Russia's voting behavior in the Security Council reflects its perspective on international law and the UN legal order in particular. Russia is a Permanent Five (P5) Member in the Security Council and thereby enjoys veto power over the passage of resolutions. The Security Council is the cornerstone of the UN's collective security system because it is specifically tasked with maintaining international peace and stability.<sup>22</sup> Thus, the Security Council serves as the UN's authoritative body interpreting the UN Charter and the law of international intervention.<sup>23</sup> Russia's conduct and voting record within the Security Council demonstrates the legal parameters Russia requires for intervention in foreign states. Because Russia intervened in Georgia and Ukraine, these parameters must be analyzed to comprehensively understand the nuance in Russia's legal arguments

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ONLINE, [http://en.people.cn/200507/01/eng20050701\\_193636.html](http://en.people.cn/200507/01/eng20050701_193636.html) (last updated July 4, 2005)).

<sup>18</sup> See U.N. Charter art. 2, ¶¶ 4, 7; U.N. Charter art. 51; ALBRECHT RANDELZHOFFER, *THE CHARTER OF THE UNITED NATIONS: A COMMENTARY*, Article 2(4), at 106–28 (Simma ed., 1994); Ulf Linderfalk, *The Effect of Jus Cogens Norms: Whoever Opened Pandora's Box, Did You Ever Think About the Consequences?*, 18 EUR. J. INT'L L. 853, 856 (2007) (explaining how the prohibition on the use of force is a *jus cogens* norm defined as “a norm accepted and recognized by the international community of States as a whole as a norm from which no derogation is permitted”).

<sup>19</sup> See Eugenia López-Jacoiste, *The UN Collective Security System and its Relationship with Economic Sanctions and Human Rights*, 14 MAX PLANCK Y.B. U.N. L. 273, 275 (2010).

<sup>20</sup> See e.g., IAN BROWNLIE, *PRINCIPLES OF PUBLIC INTERNATIONAL LAW* (7th ed., 2008); 60 *Ways the United Nations Makes a Difference*, UNITED NATIONS, [http://www.un.org/wcm/webdav/site/visitors/shared/documents/pdfs/Pub\\_United%20Nations\\_60%20ways.pdf](http://www.un.org/wcm/webdav/site/visitors/shared/documents/pdfs/Pub_United%20Nations_60%20ways.pdf) (last visited Dec. 17, 2015) (discussing how UN human rights bodies investigate individual human rights abuses).

<sup>21</sup> It is important to note, however, that although the UN legal order is not synonymous with international law, it incorporates and codifies many legal norms.

<sup>22</sup> See U.N. Charter art. 39.

<sup>23</sup> The four components of the UN legal order this Comment discusses *infra* Part II are all related to the law of intervention. Territorial integrity and the principle of non-intervention set general standards against intervention. Self-defense, responsibility to protect (R2P), and self-determination are reasons why the international community may intervene in a host state.

for intervention in both states. This Comment will use Russia's attitude towards the recent intrastate conflicts in Libya and Syria as a measure of Russia's legal stance on intervention in the Security Council.

Considering the significance Russia attaches to international law, the question remains: do the legal justifications set forth by Russia regarding intervention in Georgia and Ukraine fit within the UN legal order? This Comment answers in the negative with one caveat for Russian peacekeepers in Georgia,<sup>24</sup> and it will discuss how Russia's legal arguments for intervention are facially consistent with the UN legal order. An in-depth analysis, however, yields opposite results. In addition, this Comment will demonstrate how Russia's legal justifications for intervention in Georgia and Ukraine are very different from the legal stance on intervention that Russia traditionally adopts within the Security Council.

Part II of this Comment identifies the sources of the UN legal order and four of its components as a measure for analyzing Russia's legal justifications. These rules include: self-defense, self-determination, responsibility to protect<sup>25</sup> (R2P), and non-intervention/territorial integrity. Part III analyzes Russia's legal perspective in the Security Council. This Part will emphasize Russia's traditional non-interventionist voting behavior by examining its action, or lack thereof, in Libya and Syria. Part IV briefly examines the Kosovo conflict and Russia's legal position against intervention and the 2008 Kosovar declaration of independence. It will also show how the conflict influenced Russia's attitude on intervention today. Part V discusses the Russian intervention of Georgia and Ukraine. It identifies the legal arguments proffered by Russia to justify intervention and draws commonalities between the two conflicts. Additionally, Part V will scrutinize whether these legal arguments pass muster under the four UN legal order components discussed *supra*. In conclusion, Part VI integrates the findings in Part V, ultimately showing that on a surface level, Russia's legal arguments fit within the UN legal order. Beyond a surface-level analysis, however, Part VI will demonstrate that the majority of these justifications are inconsistent with the UN legal order. Finally, Part VI draws a distinction between Russia's legal stance in the Security Council and how Russia operates

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<sup>24</sup> See *infra* Part V.

<sup>25</sup> The R2P has not hardened into a rule of international law generally. This Comment concerns the UN legal order, which is not synonymous with international law. The rules within the UN legal order certainly overlap with rules under international law, but vary in some instances like R2P. See *infra* Part II for a more in-depth discussion about R2P and its status in the UN legal order.

independently, displaying the nuance in Russia's perspective on international law and the UN legal order.

## II. UN LEGAL ORDER

The UN arose out of the chaos created by two world wars and was established to prevent future war among member states and promote the peaceful settlement of disputes.<sup>26</sup> To promote these goals, the UN formed the UN legal order, which provided states with a new framework to operate within. For purposes of this Comment, the UN legal order is derived from three sources: (1) the UN Charter; (2) Security Council Resolutions; and (3) General Assembly Resolutions.<sup>27</sup> Together, these sources codified pre-existing international law circa 1945 and also fostered the creation of new rules under international law.

As mentioned *supra*, this Comment analyzes Russia's legal justifications for intervention in Georgia and Ukraine using the four components *infra* to measure Russian compliance with the UN legal order. Sub-part A discusses territorial integrity and the norm of non-intervention. Sub-part B identifies the right of states to act in self-defense. Sub-part C examines self-determination and its inherent tension with state sovereignty.<sup>28</sup> Finally, Sub-part D addresses the recently formed R2P framework.

### A. *Territorial Integrity and Non-Intervention*

The territorial integrity of states is the cornerstone of the UN legal order and is codified in Article 2(4) of the UN Charter.<sup>29</sup> Article 2(4) mandates all member states to "refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any state."<sup>30</sup> The scope of the prohibition on the use of force is comprehensive in outlawing all uses of physical force, except in particular cases such as self-defense and humanitarian

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<sup>26</sup> See U.N. Charter art. 1, ¶ 1; U.N. Charter art. 2, ¶ 3. See also GERD OBERLEITNER, HUMAN RIGHTS IN ARMED CONFLICT: LAW, PRACTICE, POLICY 40 (2015).

<sup>27</sup> Although not binding upon member states, General Assembly resolutions reflect consensus amongst member states that is important to consider when identifying customary international law.

<sup>28</sup> Pursuant to state sovereignty, the state itself has the ultimate authority over its domestic affairs. Applied in a conservative manner, it would follow that states are the only legitimate players in international relations. See generally STEPHEN D. KRASNER, SOVEREIGNTY: ORGANIZED HYPOCRISY (1999).

<sup>29</sup> See Borgen, *supra* note 12, at 8.

<sup>30</sup> U.N. Charter art. 2, ¶ 4.

intervention.<sup>31</sup> Therefore, the ban on the use of force preserves states' territorial integrity against armed intervention by other states.

Accordingly, the Security Council monopolizes the legitimate use of force pursuant to Chapter VII of the UN Charter. The Security Council bears the responsibility to address any threats to the peace and security of the international community.<sup>32</sup> The Security Council may use several tools to resolve a threat to the peace including non-forcible measures,<sup>33</sup> provisional measures,<sup>34</sup> and the use of force.<sup>35</sup> Pursuant to Articles 25 and 48 of the UN Charter, all member states are required to carry out Security Council decisions.<sup>36</sup> Moreover, these decisions prevail over any other legal obligations.<sup>37</sup> Thus, the UN legal order strongly favors the Security Council to be used as the primary mechanism for resolving disputes with the use of force.

The norm of non-intervention is also codified in Article 2(7) of the UN Charter.<sup>38</sup> The norm prohibits interference in the domestic affairs of other states.<sup>39</sup> The General Assembly has further defined non-intervention in several declarations including 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>40</sup> Although territorial integrity and non-intervention seem to outlaw any use of force in international relations, there are certain circumstances described *infra* in which those rules are overridden.

#### B. *Self-Defense*

Due to the importance of Article 2(4), the UN Charter explicitly permits the use of force only in situations of Security Council authorization and self-defense.<sup>41</sup> Article 51 preserves the right of

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<sup>31</sup> See U.N. Charter arts. 42, 51; James A. Green, *Questioning the Peremptory Status of the Prohibition of the Use of Force*, 32 MICH. J. INT'L L. 215, 229 (2011).

<sup>32</sup> See U.N. Charter art. 39.

<sup>33</sup> *Id.* at art. 41.

<sup>34</sup> *Id.* at art. 40.

<sup>35</sup> *Id.* at art. 42.

<sup>36</sup> *Id.* at arts. 25, 48.

<sup>37</sup> *Id.* at art. 103.

<sup>38</sup> U.N. Charter art. 2, ¶ 7 ("Nothing contained in the present Charter shall authorize the United Nations to intervene in matters which are essentially within the domestic jurisdiction of any state . . .").

<sup>39</sup> *Id.* See G.A. Res. 2625 (XXV), U.N. Doc. A/RES/2625(XXV), Declaration on Principles of International Law Concerning Friendly Relations and Co-operation among States in Accordance with the Charter of the United Nations (Oct. 24, 1970) [hereinafter, Friendly Relations Declaration].

<sup>40</sup> See Friendly Relations Declaration, *supra* note 39.

<sup>41</sup> Thomas H. Lee, *The Law of War and the Responsibility to Protect Civilians: A*

member states to unilaterally defend against an attack until the Security Council takes adequate measures.<sup>42</sup> Generally, the application of Article 51 only arises when four conditions are met: (1) when a significant armed attack occurs;<sup>43</sup> (2) when the act of self-defense responds to an armed attacker or parties legally responsible for the attack; (3) when the response is necessary; and (4) when the response is proportional.<sup>44</sup>

The International Court of Justice (ICJ or “the Court”) in *Nicaragua v. United States* elaborated upon the meaning of an armed attack in its application of Article 51, concluding that an armed attack occurs when a state sends either regular forces or armed bands to carry out an attack in the victim state.<sup>45</sup> Even when Article 51 requirements are met, the right of self-defense only justifies a temporary and limited unilateral response from the aggrieved state.<sup>46</sup> The strict requirements placed upon Article 51 exemplify the importance that the UN legal order attaches to the prohibition on the use of force.<sup>47</sup>

There is a second, more limited, version of self-defense that allows a state to take unilateral action to protect its nationals: humanitarian rescue.<sup>48</sup> Humanitarian rescue does not derive from the UN legal order; rather, it comes from customary international law. Nevertheless, this Comment includes it as a subset of the right to self-defense because this is one of the legal arguments asserted by Russia to justify intervention.<sup>49</sup>

When looking at state practice, it is clear that both before and after the UN’s creation, international law permitted states to take

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*Reinterpretation*, 55 HARV. INT’L L.J. 251, 256 (2014).

<sup>42</sup> U.N. Charter art. 51.

<sup>43</sup> An imminent armed attack also satisfies this requirement. Toomey, *supra* note 5, at 457 (citing MARY ELLEN O’CONNELL, *THE POWER & PURPOSE OF INTERNATIONAL LAW* 172–73 (2008)).

<sup>44</sup> *See id.* at 456 (citing O’CONNELL, *supra* note 43, at 171).

<sup>45</sup> Military and Paramilitary Activities in and Against Nicaragua (*Nicar. v. U.S.*), Judgment, 1986 I.C.J. Rep. 14, ¶ 195 (June 27).

<sup>46</sup> Ved P. Nanda, *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).

<sup>47</sup> *See* O’CONNELL, *supra* note 43, 178–79 (discussing how member states in fear of an armed attack should appeal to the Security Council to remedy perceived danger); Toomey, *supra* note 5, at 457.

<sup>48</sup> Some authors categorize humanitarian rescue as a form of the responsibility to protect and a form of humanitarian intervention. *See* Lee, *supra* note 41, at 253. This paper classifies humanitarian rescue as a form of self-defense because it relates greatly to Russia’s legal arguments for intervention in Georgia and Ukraine.

<sup>49</sup> *See infra* Part IV.



unilateral action in rescuing its nationals in danger abroad.<sup>50</sup> Instead of an attack on a state's territory triggering Article 51, this form of self-defense is asserted on behalf of a state's nationals in danger in another state. Humanitarian rescue allows the use of force when undertaken to protect nationals abroad who face an imminent risk of death.<sup>51</sup> Moreover, the aggrieved state must exhaust all peaceful measures to resolve the situation prior to engaging in humanitarian rescue and act proportionally.<sup>52</sup>

### C. *Self-Determination*

One of the principles upon which the UN was founded is the "principle of equal rights and self-determination of peoples."<sup>53</sup> Self-determination means people may "freely determine their political status and freely pursue their economic, social, and cultural development."<sup>54</sup> "People" is a term of art used to identify individuals that have "a separate culture, a separate language or ethnic origins different from the majority population in the State."<sup>55</sup>

Self-determination for a people living within a state outside of the decolonization process or foreign occupation entails enjoyment of minority rights, often referred to as "internal self-determination."<sup>56</sup> Thus, the right to self-determination is fulfilled so long as the minority group retains the right to speak its own language, participate in the political community, and practice its culture.<sup>57</sup> The right to self-determination was reaffirmed by the General Assembly in the Friendly Relations Resolution passed in 1970.<sup>58</sup>

When the minority group is not allowed these rights, however, international law is divided on what the legal remedies entail. In extraordinary circumstances, independence of oppressed peoples within a state may be effectuated in accordance with the right to self-

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<sup>50</sup> See generally Eric Engle, *Humanitarian Intervention and Syria: Russia, the United States and International Law*, 18 BARRY L. REV. 129, 154 (2012).

<sup>51</sup> Lee, *supra* note 41, at 274.

<sup>52</sup> *Id.*

<sup>53</sup> U.N. Charter art. 1, ¶ 2.

<sup>54</sup> International Covenant on Civil and Political Rights art. 1, Dec. 16, 1966, 999 U.N.T.S. 171; International Covenant on Economic, Social and Cultural Rights art. 1, Dec. 16, 1966, 999 U.N.T.S. 3.

<sup>55</sup> Juliane Kokott, *Human Rights Situation in Kosovo 1989–1999*, in KOSOVO AND THE INTERNATIONAL COMMUNITY: A LEGAL ASSESSMENT (C. Tomuschat ed., 2002).

<sup>56</sup> Borgen, *supra* note 12, at 9.

<sup>57</sup> *Id.* at 8.

<sup>58</sup> See Friendly Relations Declaration, *supra* note 39.

determination.<sup>59</sup> In the Kosovo Advisory Opinion, the ICJ opined that declarations of independence do not violate international law.<sup>60</sup>

An inherent tension between territorial integrity and self-determination exists within the UN legal order. The UN Charter calls for both the preservation of state territorial integrity and the protection of individual rights under self-determination.<sup>61</sup> This tension was understood by the General Assembly when it passed the Friendly Relations Resolution.<sup>62</sup> After describing the right to self-determination, the General Assembly was careful to note that “[n]othing in the foregoing paragraphs shall be construed as authorizing or encouraging any action which would dismember or impair, totally or in part, the territorial integrity or political unity of sovereign and independent States conducting themselves in compliance with the principle of equal rights and self-determination of peoples.”<sup>63</sup> Therefore, the right to self-determination is balanced with the parent state’s territorial integrity.

The next logical step to a declaration of independence is secession, otherwise known as “external self-determination.” This occurs when “peoples” break away from the former parent state seeking to create a new state or to incorporate with another state. Although not completely analogous to secession, international law does not authorize declarations of independence, nor does it explicitly prohibit it.<sup>64</sup> Nevertheless, state practice shows that secession is typically allowed in the decolonization context and where a “people” is subject to alien subjugation.<sup>65</sup>

Secessionist disputes are often analyzed under domestic law,<sup>66</sup> but they can also implicate international law in certain circumstances. These circumstances include: (1) the new entity seeking recognition as a sovereign state; (2) the Security Council’s determining that the

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<sup>59</sup> William Burke-White, *Crimea and the International Legal Order*, Penn Law Sch. Pub. Law & Legal Theory Research Paper Series No. 14-24, 2 (2014).

<sup>60</sup> See Timothy William Waters, *Plucky Little Russia: Misreading the Georgian War Through the Distorting Lens of Aggression*, 49 STAN. J. INT’L L. 176, 217 (2013).

<sup>61</sup> See U.N. Charter art. 1, ¶ 2; U.N. Charter art. 2, ¶ 4. See also Burke-White, *supra* note 59.

<sup>62</sup> Burke-White, *supra* note 59.

<sup>63</sup> Friendly Relations Declaration, *supra* note 39.

<sup>64</sup> Accordance with International Law of the Unilateral Declaration of Independence in Respect of Kosovo, Advisory Opinion, 2010 I.C.J. Rep. 438, ¶ 81 (July 22) [hereinafter, Kosovo Advisory Opinion].

<sup>65</sup> *In re* Secession of Quebec, [1998] 2 S.C.R. 217, 222 (Can.); H. Tagliavini, *Independent Fact-Finding Mission on the Conflict in Georgia: Report 17* (2009) [hereinafter, Tagliavini Report].

<sup>66</sup> See Borgen, *supra* note 12, at 8.

conflict is a threat to international peace and security; and (3) another sovereign state intervening in the conflict in support of the separatists.<sup>67</sup> This implies that secession may be carried out in several ways. One of the least controversial ways to effectuate secession is with the parent state's consent.<sup>68</sup> Additionally, secession may represent a UN-supported remedy for a situation that the Security Council deems to be a threat to international peace and security invoking Chapter VII authority (binding all member states to this determination).<sup>69</sup>

The most controversial way to secede is by unilateral remedial secession, which occurs when neither the parent state nor the UN consents to secession. One scholar argues that remedial secession "arises in only the most extreme cases and, even then, under certain defined circumstances."<sup>70</sup> For example, a parent state committing genocide or crimes against humanity may trigger the right to secession.<sup>71</sup> Essentially, for secession to rightfully occur, the circumstances on the ground have to be dire for the separatist population, and all other means of reconciling the conflict internally must have been exhausted.<sup>72</sup> As discussed *supra*, territorial integrity of the states is a cornerstone component of the UN legal order. Therefore, the secessionist conflict must be extreme to warrant the dismemberment of a state against its will.

#### D. R2P

The concept of R2P is comprised of three pillars: (1) all states have the responsibility to protect civilians within its territory; (2) the entire international community bears the responsibility to ensure that

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<sup>67</sup> See *id.* at 9.

<sup>68</sup> See generally Alain Pellet, *The Opinions of the Badinter Arbitration Committee: A Second Breath for the Self-Determination of Peoples*, 3 EUR. J. INT'L L. 178, 184 (1992).

<sup>69</sup> For example, the Security Council deemed the conflict in Darfur a threat to international peace and security. See S.C. Res. 1945, preamble, U.N. Doc. S/RES/1945 (Oct. 14, 2010). In connection with a 2005 peace agreement between the Government of Sudan and the Sudan People's Liberation Movement, voters in a January 2011 referendum overwhelmingly voted for independence, thereby creating the new state of South Sudan. See *Independence of South Sudan*, UNITED NATIONS MISSION IN THE SUDAN, <http://www.un.org/en/peacekeeping/missions/past/unmis/referendum.shtml>. See also G.A. Res. 65/308, U.N. Doc. A/RES/65/308 (Aug. 25, 2011) (admitting the Republic of South Sudan as a UN member state).

<sup>70</sup> Borgen, *supra* note 12, at 9 (citing *In re Secession of Quebec*, [1998] 2 S.C.R. 217, 282 (Can.)).

<sup>71</sup> See Burke-White, *supra* note 59, at 3.

<sup>72</sup> *In re Secession of Quebec*, [1998] 2 S.C.R. at 285–86; Angelika Nußberger, *South Ossetia*, in MAX PLANCK ENCYCLOPEDIA OF PUB. INT'L L. (Rüdiger Wolfrum ed., online), <http://opil.ouplaw.com/view/10.1093/law:epil/9780199231690/law-9780199231690-e2068?rsk=r4w7nk&result=1&prd=EPIL> (last updated Jan. 2013).

each state is complying with this obligation; and (3) in cases where a state fails to comply with such obligation, other states may use any necessary means to protect the civilians within that state's territory.<sup>73</sup> R2P arose out of the shortcomings of humanitarian intervention because lawful humanitarian intervention typically requires Security Council authorization.<sup>74</sup> Indeed, the ICJ in *Nicaragua v. United States* largely prohibited humanitarian concerns as a legal justification for unilateral military intervention in another state.<sup>75</sup> R2P, on the other hand, places emphasis on the need for civilian protection.<sup>76</sup>

The doctrine of R2P is a relatively new addition to the UN legal order. Although not codified in the UN Charter, R2P has made its way into the UN legal order through Security Council and General Assembly resolutions.<sup>77</sup> R2P was originally adopted by the UN's High-level Panel on Threats, Challenges, and Change in preparation for the 2005 World Summit.<sup>78</sup> By the end of the 2005 World Summit, more than 170 states adopted the final report.<sup>79</sup> The most notable applications of R2P are Security Council Resolutions 1970 and 1973,

<sup>73</sup> Lee, *supra* note 41, at 252.

<sup>74</sup> See *Nicar. v. U.S.*, 1986 I.C.J. at ¶ 134 (June 27) (“[W]hile the United States might form its own appraisal of the situation as to respect for human rights in Nicaragua, the use of force could not be the appropriate method to monitor or ensure such respect . . . . The Court concludes that the argument derived from the preservation of human rights in Nicaragua cannot afford a legal justification for the conduct of the United States . . . .”); G.A. Res. 36/103, U.N. Doc. A/RES/36/103, Declaration on the Inadmissibility of Intervention and Interference in the Internal Affairs of States (Dec. 9, 1981). Humanitarian intervention is commonly defined as “the threat or use of force by a state, group of states, or international organization primarily for the purpose of protecting the nationals of the target state from widespread deprivations of internationally recognized human rights.” SEAN D. MURPHY, HUMANITARIAN INTERVENTION 11–12 (1996). The aforementioned shortcomings refer to the fact that the usage of humanitarian intervention focuses more upon the legality of intervention instead of focusing upon the need to protect civilians. See Christian Walter, *The Kosovo Advisory Opinion: What It Says and What It Does Not Say*, in SELF-DETERMINATION AND SECESSION IN INTERNATIONAL LAW 13, 17 (2014).

<sup>75</sup> See *Nicar. v. U.S.*, 1986 I.C.J. at ¶ 134.

<sup>76</sup> See *id.*

<sup>77</sup> See, e.g., G.A. Res. 60/1, ¶¶ 138–40, U.N. Doc. A/RES/60/1 (Sept. 16, 2005); S.C. Res. 2031, ¶ 11, U.N. Doc. S/RES/2031 (Jan. 31, 2013); S.C. Res. 2016, ¶ 3, U.N. Doc. S/RES/2016 (Oct. 27, 2011); S.C. Res. 1973, preamble, U.N. Doc. S/RES/1973 (Mar. 17, 2011); S.C. Res. 1970, preamble, U.N. Doc. S/RES/1970 (Feb. 26, 2011); S.C. Res. 1923, ¶ 2, U.N. Doc. S/RES/1923 (May 25, 2010); S.C. Res. 1861, preamble, U.N. Doc. S/RES/1861 (Jan. 14, 2009); S.C. Res. 1856, preamble, U.N. Doc. S/RES/1856 (Dec. 22, 2008); S.C. Res. 1778, preamble, U.N. Doc. S/RES/1778 (Sept. 25, 2007); S.C. Res. 1769, ¶ 15(a)(ii), U.N. Doc. S/RES/1769 (July 31, 2007); S.C. Res. 1706, ¶ 12(a), U.N. Doc. S/RES/1706 (Aug. 31, 2006).

<sup>78</sup> See High-level Panel on Threats, Challenges and Change, *A More Secure World: Our Shared Responsibility*, U.N. Doc. A/59/565 (Dec. 2, 2004).

<sup>79</sup> See G.A. Res. 60/1, *supra* note 77.

regarding the conflict in Libya, passed under Chapter VII authority.<sup>80</sup>

The general consensus is that R2P has not yet formed into customary international law due to lack of *opinio juris* and state practice.<sup>81</sup> The UN Secretary-General's 2012 report classified R2P as a "political framework based on fundamental principles of international law for preventing and responding to genocide, war crimes, ethnic cleansing, and crimes against humanity."<sup>82</sup> Therefore, R2P is not a binding obligation under international law. At most, R2P can be seen as a norm of international law.<sup>83</sup> Nevertheless, the Security Council invoked R2P in connection with multilateral intervention.

The status of R2P under international law is controversial to say the least. The conflict in Libya soured many states due to the high potential for R2P to be used as a pretext for regime change. For example, Security Council Resolution 1973 limited the scope of military operations by excluding "a foreign occupation force" and, further, implying that intervention was meant to be defensive in nature—to protect civilians.<sup>84</sup> Moreover, the Arab League's endorsement of Resolution 1973 was a key reason why Russia and China did not use their veto powers.<sup>85</sup> Russia and China immediately issued their condemnation when Western powers used Resolution 1973 as a legal justification for offensive military operations and eventual regime change.<sup>86</sup> The perceived pretextual usage of R2P will

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<sup>80</sup> S.C. Res. 1970, *supra* note 77; S.C. Res. 1973, *supra* note 77.

<sup>81</sup> William Burke-White, *Adoption of the Responsibility to Protect*, in THE RESPONSIBILITY TO PROTECT 17, 34 (Jared Genser & Irvin Cotler eds., 2011). *Opinio juris* and state practice are two essential elements for a rule to ripen into customary international law. "State practice" refers to an objective level of consistent state behavior conforming to the rule. See *Assessment of Customary International Law*, INT'L COMMITTEE OF THE RED CROSS, [https://www.icrc.org/customary-ihl/eng/docs/v1\\_rul\\_in\\_asofcuin#Fn\\_80\\_10](https://www.icrc.org/customary-ihl/eng/docs/v1_rul_in_asofcuin#Fn_80_10) (last visited Dec. 23, 2015). *Opinio juris* is a subjective inquiry assessing whether the state behavior arose from a belief that the state was legally obligated to take such action. See *id.*

<sup>82</sup> U.N. Secretary-General, *Responsibility to Protect: Timely and Decisive Response: Rep. of the Secretary-General*, ¶ 59, U.N. Doc. A/66/874-S/2012/578 (July 25, 2012).

<sup>83</sup> Lee, *supra* note 41, at 277 ("What the Responsibility to Protect is not, however, is an international legal rule. It has not been codified in an international treaty; it lacks the state practice and sufficient *opinio juris* to give rise to customary international law; and it does not qualify as a general princip[le] of law. Instead, the Responsibility to Protect is best understood as a norm of international conduct.") (quoting Burke-White, *supra* note 81, at 34).

<sup>84</sup> S.C. Res. 1973, *supra* note 77, ¶ 4; Lee, *supra* note 41, at 295.

<sup>85</sup> Michael Fullilove, *China and the United Nations: The Stakeholder Spectrum*, 34 WASH. Q. 63, 71 (2011); Lee, *supra* note 41, at 296.

<sup>86</sup> See Lee, *supra* note 41, at 301; see also Press Release, Security Council, Security Council Fails to Adopt Draft Resolution on Syria as Russian Federation, China Veto Text Supporting Arab League's Proposed Peace Plan, U.N. Press Release SC/10536

most likely stifle the application of forcible R2P in the near future.<sup>87</sup>

### III. RUSSIA IN THE SECURITY COUNCIL

As a P5 Member, Russia wields significant influence within the Security Council. Many scholars argue that Russia's prominent status within the UN is one reason why Russia holds the UN legal order in high regard.<sup>88</sup> Due to Russia's P5 status, it is important to understand Russia's voting position in order to understand the potential, or lack thereof, for Security Council action in the future. As discussed *supra*, the Security Council is the body within the UN legal order tasked with maintaining international peace and stability.<sup>89</sup> Through the passage of resolutions, the Security Council determines when intervention is warranted in other states' domestic affairs. Thus, its decisions reflect the law of intervention as agreed upon by the voting member states. A member state's vote and subsequent legal explanation becomes highly relevant in determining not only that state's view on the law, but also the UN legal order's content and scope.

As a preliminary matter, when a P5 Member abstains from a vote, it "withholds from the proposed action the legitimacy that an affirmative vote from it provides."<sup>90</sup> Thus, a Russian abstention allowing the Security Council action to proceed should not be misconstrued as Russian support.<sup>91</sup> As with every member state, the voting decision is context dependent and fact specific. This is emphasized in Russia's justification for abstaining on Resolution 1284, regarding weapons monitoring in Iraq.<sup>92</sup> Specifically, the Russian representative noted that "the fact that his country did not block this imperfect resolution did not mean that it was obliged to go along with a forceful implementation of it."<sup>93</sup> Therefore, abstentions and vetoes are similarly considered as negative votes. Voting patterns within the Security Council and the associated legal justifications set forth by member states indicate, in part, state views on intervention in the

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(Feb. 4, 2012), <http://www.un.org/press/en/2012/sc10536.doc.htm>.

<sup>87</sup> See Lee, *supra* note 41, at 302.

<sup>88</sup> See Andrew Monaghan, *Calmly Critical: Evolving Russian Views of US Hegemony*, 29 J. STRATEGIC STUD. 987-1013 (2006).

<sup>89</sup> See U.N. Charter art. 39.

<sup>90</sup> PHIL C. W. CHAN, *A Keen Observer of the International Rule of Law?, in CHINA, STATE SOVEREIGNTY AND INTERNATIONAL LEGAL ORDER* 238, 259 (2015).

<sup>91</sup> See *id.*

<sup>92</sup> S.C. Res. 1284, U.N. Doc. S/RES/1284 (Dec. 17, 1999).

<sup>93</sup> Press Release, Security Council, Security Council Establishes New Monitoring Commission for Iraq Adopting Resolution 1284 (1999) By Vote Of 11-0-4, U.N. Press Release SC/6775 (Dec. 17, 1999).

context of the UN legal order. Identifying a state's legal stance on intervention will juxtapose how it behaves as a member state within the UN legal order and its unilateral conduct outside of the UN.

Analyzing Russia's voting behavior and legal justifications for its votes is necessary to determine the parameters for Russian intervention. An understanding of the circumstances required for Russia to support collective Security Council action will provide a full picture of Russia's decision to unilaterally intervene in Georgia and Ukraine. Part VI will show that Russia's legal position on intervention in the Security Council stands in seeming contradiction with its legal arguments for intervention in Georgia and Ukraine.

This section of the Comment will use the recent intrastate conflicts in Libya and Syria as measures for Russia's voting pattern and legal attitude regarding international intervention. It is important to note, however, that Russia's decision to support or oppose any given Security Council resolution does not take place in a vacuum. Russia's voting behavior reflects some combination of Russia's self-interest, the unique characteristics of the conflict, and Russia's legal perspective on the UN legal order. With regard to Libya and Syria, Part A will discuss Russia's action, or inaction, as a P5 Member in the Security Council. Then, Part B will draw common trends in Russia's voting pattern and associated legal reasoning.

A. *Russia's Evolving Voting Pattern Emerging from the Violent Intrastate Conflicts in Libya and Syria*

As stated *supra*, the large-scale interstate violence of two world wars led to the creation of the UN and the Security Council. In the past few decades, however, the growing rate of intrastate conflicts has forced the UN—and in particular, the Security Council—to adapt to this new reality and make more decisions regarding intervention in internal conflicts with human rights abuses.<sup>94</sup> Libya and Syria represent two prime test cases to analyze the legal position on intervention adopted by Russia in the Security Council. The violent intrastate conflicts in Libya and Syria originated from political instability and oppressive government regimes that systemically committed human rights violations. Russia's decision to support or oppose resolutions regarding these conflicts exemplifies its overall view on intervention and what parameters must be met to justify

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<sup>94</sup> C.f. Katie Lynch, *China and the Security Council: Congruence of the Voting Between Permanent Members*, 5 CHINA PAPERS 2009, at 26–27 (2009) (arguing that China and Russia cooperate more often than any other states in the Security Council).

violating territorial integrity.<sup>95</sup> Sub-part 1 will analyze Russia's conduct regarding Libya, and Sub-part 2 will discuss how Russia reacted to the civil war in Syria.

### 1. Libya

Spurred by the Arab Spring, widespread political protest against Colonel Qaddafi's oppressive regime began in February 2011.<sup>96</sup> In response to the growing unrest, the Qaddafi regime used military force to quell protesters.<sup>97</sup> The Arab League swiftly condemned this violence against Libyan civilians;<sup>98</sup> as a result, the Security Council unanimously adopted Resolution 1970, imposing against the Libyan government a sanctions regime consisting of an arms embargo, a travel ban, and an assets freeze.<sup>99</sup> As the situation worsened, the Arab League endorsed the imposition of a no-fly zone to prevent the Libyan government from using military aircrafts against civilians.<sup>100</sup> Taking up the call, the Security Council adopted Resolution 1973, which invoked Chapter VII authority in imposing the no-fly zone and authorized member states to "take all necessary measures . . . to protect civilians and civilian populated areas under the threat of attack."<sup>101</sup> Despite supporting Resolution 1970, Russia and China abstained from voting for Resolution 1973.<sup>102</sup>

Air strikes led by the United States, the United Kingdom, and France began in March 2011 to dismantle the Qaddafi regime.<sup>103</sup> Shortly thereafter, the NATO took over military operations to enforce Resolution 1973.<sup>104</sup> The NATO-led military intervention ended in October 2011, and the Qaddafi regime was effectively ousted from power.<sup>105</sup>

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<sup>95</sup> See *supra* notes 61–63 and accompanying text.

<sup>96</sup> See *Chronology of Events: Libya*, SECURITY COUNCIL REP., <http://www.securitycouncilreport.org/chronology/libya.php?page=9> (last updated Nov. 30, 2015).

<sup>97</sup> See *id.*

<sup>98</sup> *Id.*

<sup>99</sup> See S.C. Res. 1970, *supra* note 77.

<sup>100</sup> *Arab League Backs Libya No-Fly Zone*, BBC NEWS (Mar. 12, 2011), <http://www.bbc.com/news/world-africa-12723554>.

<sup>101</sup> S.C. Res. 1973, *supra* note 77, at ¶ 4.

<sup>102</sup> See Press Release, Security Council, Security Council Approves 'No-Fly Zone' over Libya, Authorizing 'All Necessary Measures' to Protect Civilians, by Vote of 10 in Favour with 5 Abstentions, U.N. Press Release SC/10200 (Mar. 17, 2011).

<sup>103</sup> See *Chronology of Events: Libya*, *supra* note 96.

<sup>104</sup> *Id.*

<sup>105</sup> See *id.*



Russia's affirmative support for Resolution 1970 turned into non-support when Russia abstained from voting for Resolution 1973. During the time preceding Resolution 1973, the international community became more divided, especially with the African Union explicitly opposing any NATO intervention.<sup>106</sup> Russia's Permanent Representative to the UN, Vitaly Churkin, elaborated upon Russia's legal reasoning for abstention. Mr. Churkin noted that the resolution "could potentially open the door to large-scale military intervention."<sup>107</sup> Instead of involving military force, Russia advocated an immediate ceasefire to secure the civilian population.<sup>108</sup> Shortly after the NATO intervention began, leaders of Russia, China, South Africa, Brazil, and India expressed severe criticism towards the offensive military intervention, arguing that Resolution 1973 was "being interpreted arbitrarily."<sup>109</sup> Russia's pre-passage objections to Resolution 1973 seemed to come true; Russia argued that NATO acted outside of the scope of Resolution 1973 by engaging in offensive military aircraft action that effectively ousted the Qaddafi regime.<sup>110</sup>

## 2. Syria

The first major protests sparking the current civil war in Syria began in Damascus in March 2011.<sup>111</sup> The Assad regime used military force against civilian protesters in May 2011. Only several months later, the Arab League suspended Syria's membership due to the violence committed against the civilian population.<sup>112</sup> In October 2013, the Assad regime engaged in the "Starvation Until Submission Campaign," and later that year, UN inspectors found clear evidence that sarin gas was used against civilians.<sup>113</sup> The chaos in Syria multiplied with the rise of the Islamic State in Iraq and Syria (ISIS).<sup>114</sup> As of

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<sup>106</sup> See Enrico Carisch & Loraine Rickard-Martin, *Global Threats and the Role of United Nations Sanctions*, FRIEDRICH EBERT STIFTUNG INT'L POL'Y ANALYSIS 1, 3 (2011).

<sup>107</sup> U.N. SCOR, 66th Sess., 6498th mtg. at 8, U.N. Doc. S/PV.6498 (Mar. 17, 2011).

<sup>108</sup> See *id.*

<sup>109</sup> *Chronology of Events: Libya*, *supra* note 96.

<sup>110</sup> Lee, *supra* note 41, at 301.

<sup>111</sup> See Anup Kaphle, *Timeline: Unrest in Syria*, WASH. POST (Jan. 20, 2014), <http://apps.washingtonpost.com/g/page/world/timeline-unrest-in-syria/207/>.

<sup>112</sup> See Neil MacFarquhar, *Arab League Votes to Suspend Syria over Crackdown*, N.Y. TIMES (Nov. 12, 2011), [http://www.nytimes.com/2011/11/13/world/middleeast/arab-league-votes-to-suspend-syria-over-its-crackdown-on-protesters.html?pagewanted=all&\\_r=0](http://www.nytimes.com/2011/11/13/world/middleeast/arab-league-votes-to-suspend-syria-over-its-crackdown-on-protesters.html?pagewanted=all&_r=0).

<sup>113</sup> Rep. of U.N. Human Rights Council, Indep. Int'l Comm'n of Inquiry on the Syrian Arab Republic, 25th Sess., July 15, 2013–Jan. 20, 2014, ¶¶ 13, 127–29, U.N. Doc. A/HRC/25/65 (Feb. 12, 2014).

<sup>114</sup> See Ben Hubbard, *ISIS Tightens Its Grip with Seizure of Air Base in Syria*, N.Y. TIMES

February 2015, the Syrian Observatory for Human Rights estimated the death toll to be approximately 210,000 after almost four years of civil war.<sup>115</sup>

In light of the dire circumstances on the ground, the Security Council action thus far has been meek, partly because of Russia. Resolution 2043 created the United Nations Supervision Mission in Syria (UNSMIS), composed of 300 unarmed military observers.<sup>116</sup> Moreover, Resolution 2118 ordered the Assad regime to destroy all chemical weapons within its possession.<sup>117</sup> In response to the “Starvation Until Submission Campaign,” Resolution 2139 demanded all parties to allow civilians to move freely throughout the country and called for the delivery of humanitarian aid.<sup>118</sup> By unanimous vote and without Syria’s consent, the Security Council passed Resolution 2165, which authorized UN access to the Syria-Iraq border for humanitarian aid delivery.<sup>119</sup>

The resolutions passed in response to the Syrian conflict are only part of the story. Russia, along with China, vetoed a total of four resolutions regarding Syria.<sup>120</sup> In October 2011, Russia and China jointly vetoed a draft resolution that attributed the atrocities to the Assad regime and commanded the regime to cease all hostilities.<sup>121</sup> Russia vetoed the resolution because it did not “agree with this unilateral, accusatory bent against Damascus.”<sup>122</sup> Mr. Churkin explained that Russia introduced an alternative draft resolution instead focusing on Syria’s territorial integrity and the principle of non-intervention.<sup>123</sup> In justifying Russia’s veto for another draft resolution in 2012, Mr. Churkin noted that some member states “have undermined any possibility of a political settlement, calling for regime

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(Aug. 24, 2014), <http://www.nytimes.com/2014/08/25/world/middleeast/isis-militants-capture-air-base-from-syrian-government-forces.html>.

<sup>115</sup> Suleiman Al-Khalidi, *Syria Death Toll Now Exceeds 210,000: Rights Group*, REUTERS (Feb. 7, 2015, 9:51 AM), <http://www.reuters.com/article/2015/02/07/us-mideast-crisis-toll-idUSKBN0LB0DY20150207>.

<sup>116</sup> S.C. Res. 2043, ¶ 5, U.N. Doc. S/RES/2043 (Apr. 21, 2012).

<sup>117</sup> See S.C. Res. 2118, ¶¶ 2–4, U.N. Doc. S/RES/2118 (Sept. 27, 2013).

<sup>118</sup> See S.C. Res. 2139, ¶¶ 5–8, U.N. Doc. S/RES/2139 (Feb. 22, 2014).

<sup>119</sup> See S.C. Res. 2165, U.N. Doc. S/RES/2165 (July 14, 2014).

<sup>120</sup> See *Security Council—Veto List*, DAG HAMMARSKJÖLD LIBRARY RESEARCH GUIDES, <http://research.un.org/en/docs/sc/quick> (last updated Apr. 13, 2015).

<sup>121</sup> S.C., France, Germany, Portugal, and United Kingdom of Great Britain and Northern Ireland: Draft Resolution, ¶¶ 1, 4, U.N. Doc. S/2011/612 (Oct. 4, 2011).

<sup>122</sup> U.N. SCOR, 66th Sess., 6627th mtg. at 3, U.N. Doc. S/PV.6627 (Oct. 4, 2011).

<sup>123</sup> *Id.*; see also S.C., Bahrain, Colombia, Egypt, France, Germany, Jordan, Kuwait, Libya, Morocco, Oman, Portugal, Qatar, Saudi Arabia, Togo, Tunisia, Turkey, United Arab Emirates, United Kingdom of Great Britain and Northern Ireland and United States of America: Draft Resolution, U.N. Doc. S/2012/77 (Feb. 4, 2012).

change, encouraging the opposition towards power, indulging in provocation and nurturing the armed struggle.”<sup>124</sup> Later that same year, Russia vetoed yet another draft resolution indicating that Western states would “use the Security Council of the United Nations to further their plans of imposing their own designs on sovereign States.”<sup>125</sup> Specifically, Russia refused to support the draft resolution that would only impose sanctions upon the Assad regime, but did not take foreign military intervention off of the table.<sup>126</sup>

Finally, Russia vetoed a May 2014 draft resolution that sought to refer the conflict to the International Criminal Court (ICC).<sup>127</sup> Mr. Churkin reiterated Russia’s beliefs that only locally-based solutions would end the conflict and that the draft resolution “reveals an attempt to use the ICC to further inflame political passions and lay the ultimate groundwork for eventual outside military intervention.”<sup>128</sup> It is also worth noting that Russia has several self-interested reasons for refusing to permit intervention in Syria. First, Russia maintains a naval base in Syria, which is its “last foreign military base outside the former Soviet Union.”<sup>129</sup> Additionally, Syria buys significant amounts of military exports from Russia, thereby providing the country with much needed revenue.<sup>130</sup>

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<sup>124</sup> U.N. SCOR, 67th Sess., 6711th mtg. at 9, U.N. Doc. S/PV.6711 (Feb. 4, 2012).

<sup>125</sup> U.N. SCOR, 67th Sess., 6810th mtg. at 8, U.N. Doc. S/PV.6810 (July 19, 2012); *see also* S.C., France, Germany, Portugal, United Kingdom of Great Britain and Northern Ireland and United States of America: Draft Resolution, U.N. Doc. S/2012/538 (July 19, 2012).

<sup>126</sup> *See* U.N. SCOR, 67th Sess., 6810th mtg. at 8, U.N. Doc. S/PV.6810 (July 19, 2012).

<sup>127</sup> S.C., Albania, Andorra, Australia, Austria, Belgium, Botswana, Bulgaria, Canada, Central African Republic, Chile, Cote d’Ivoire, Croatia, Cyprus, Czech Republic, Democratic Republic of the Congo, Denmark, Estonia, England, France, Georgia, Germany, Greece, Hungary, Iceland, Ireland, Italy, Japan, Jordan, Latvia, Libya, Liechtenstein, Lithuania, Luxembourg, Malta, Marshall Islands, Mexico, Monaco, Montenegro, Netherlands, New Zealand, Norway, Panama, Poland, Portugal, Qatar, Republic of Korea, Republic of Moldova, Romania, Samoa, San Marino, Saudi Arabia, Senegal, Serbia, Seychelles, Slovakia, Slovenia, Spain, Sweden, Switzerland, The Former Yugoslav Republic of Macedonia, Ukraine, United Arab Emirates, United Kingdom of Great Britain and Northern Ireland and United States of America: Draft Resolution, ¶ 2, U.N. Doc. S/2014/348 (May 22, 2014).

<sup>128</sup> U.N. SCOR, 69th Sess., 7180th mtg. at 12–13, U.N. Doc. S/PV.7180 (May 22, 2014).

<sup>129</sup> Max Fisher, *The Four Reasons Why Russia Won’t Give up Syria, No Matter What Obama Does*, WASH. POST (Sept. 5, 2013), <https://www.washingtonpost.com/news/worldviews/wp/2013/09/05/the-four-reasons-russia-wont-give-up-syria-no-matter-what-obama-does/>.

<sup>130</sup> *Id.*; *see also* Ben Piven, *Russia Expands Military Footprint Abroad with New Syria Base*, ALJAZEERA AM. (Sept. 18, 2015, 5:00 AM), <http://america.aljazeera.com/articles/2015/9/18/russia-foreign-military-bases.html>.

B. *Russia's Legal Stance on Intervention as a P5 Member*

The term “intervention” in the Russian language refers only to the use of armed force.<sup>131</sup> Other forms of intervention, such as economic aid or political support, are referred to as “non-interference.”<sup>132</sup> Therefore, the mere use of the term “intervention” implies a more aggressive behavior when interpreted by Russians than it otherwise would when interpreted by people of other ethnicities and cultures.<sup>133</sup>

Historically, Russia maintained a negative perspective on humanitarian intervention. Between 1918 and 1922, the Russian homeland suffered attacks from fourteen different states.<sup>134</sup> Russians characterized World War I as the war against Nazi interventionists.<sup>135</sup> In the Soviet context, the term “intervention” was associated with acts that violated international law by undermining state sovereignty.<sup>136</sup> Due to being a victim of intervention, Russia developed a stricter notion of state sovereignty rendering any claim for intervention suspect.<sup>137</sup>

The fact that Russia itself is experiencing separatist movements within its borders also speaks towards Russia's apprehension of humanitarian intervention. Russia may fear foreign states intervening in its own domestic affairs and limiting its ability to quash separatist movements.<sup>138</sup> For example, Chechnya is one of the bloodiest secessionist movements within Russia. In *Isayeva v. Russia* and *Isayeva v. Russia*, the European Court of Human Rights held that Russia breached the European Convention on Human Rights due to its indiscriminate use of heavy military weaponry against civilians in Chechnya.<sup>139</sup> Therefore, Russia has an interest in objecting to humanitarian intervention on behalf of separatist movements.

Russia's P5 status within the Security Council provides it with great authority to decide whether the UN should authorize foreign

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<sup>131</sup> See Baranovsky, *supra* note 4, at 14.

<sup>132</sup> See *id.*

<sup>133</sup> Indeed, the common understanding of “intervention” has changed over time by becoming highly associated with military intervention. See KOFI ATTA ANNAN, THE QUESTION OF INTERVENTION: STATEMENTS BY THE SECRETARY-GENERAL 3, 9 (United Nations Dep't of Pub. Info. 1999).

<sup>134</sup> See Baranovsky, *supra* note 4, at 12.

<sup>135</sup> *Id.*

<sup>136</sup> *Id.* at 13.

<sup>137</sup> See *id.* at 13–14.

<sup>138</sup> See Lynch, *supra* note 94.

<sup>139</sup> *Isayeva v. Russia*, App. No. 57950/00, Eur. Ct. H.R., at ¶ 191 (2005), <http://hudoc.echr.coe.int/eng?i=001-68381>; *Isayeva v. Russia*, App. Nos. 57947/00, 57948/00, 57949/00, Eur. Ct. H.R., at ¶ 195 (2005), <http://hudoc.echr.coe.int/eng?i=001-68379>.

intervention. As discussed *supra*, Russia often makes an effort to justify its actions under international law.<sup>140</sup> Thus, analyzing the ways in which Russia legally justifies its voting behavior is crucial in gaining the full picture of Russia's legal perspective on both foreign intervention and the UN legal order. Russia's voting pattern and associated legal reasoning in the recent intrastate conflicts in Libya and Syria serve as measurement for Russia's overall legal stance.<sup>141</sup>

Russia's overarching legal position on humanitarian intervention is founded upon its great deference for state sovereignty,<sup>142</sup> the principle of nonintervention, and territorial integrity.<sup>143</sup> Russia fosters close ties with the Non-Aligned Movement (NAM), a group of states that represents developing countries within the UN and objects to foreign intervention without host state consent.<sup>144</sup> Moreover, Russia seems to value diplomacy over military force in ending violent conflict.<sup>145</sup> Indeed, for many conflicts, Russia believes that intervention will only create further unrest.<sup>146</sup> As an over-arching principle and pursuant to the UN Charter, Russia believes that the Security Council is the only body with the authority to sanction foreign intervention.<sup>147</sup>

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<sup>140</sup> See *supra* note 12 and accompanying text.

<sup>141</sup> It is important to note, however, that Russia does not adhere to one legal policy *per se* because every conflict is different. This Section merely aims to identify Russia's general legal stance for foreign intervention.

<sup>142</sup> In light of Russia experiencing its own separatist movements, like in Chechnya, it makes sense why Russia highly values state sovereignty and the principle of non-intervention. In a strict sense, state sovereignty and the principle of non-intervention both preclude intervention in the domestic affairs of states without their consent. Therefore, Russia would not need to worry about outside intervention in its own quest to quell internal unrest. See Saira Mohamed, *Shame in the Security Council*, 90 WASH. U. L. REV. 1191, 1246 (2013); see also Baranovsky, *supra* note 4, at 25–26.

<sup>143</sup> See Mohamed, *supra* note 142; DIRECTORATE-GENERAL FOR EXTERNAL POLICIES OF THE UNION, *supra* note 16, at 15. For example, Russia argued that the only way the Security Council could establish an observer force in the Palestinian territories was with the consent of Israel and Palestine. See Press Release, Security Council, Security Council Fails to Adopt Draft Resolution on Observer Mission for Occupied Palestinian Territories, U.N. Press Release SC/6976 (Dec. 18, 2000).

<sup>144</sup> See Mohamed, *supra* note 141, at 1247; *The Non-Aligned Movement: Description and History*, NON-ALIGNED MOVEMENT, <http://www.nam.gov.za/background/history.htm> (last updated Sept. 21, 2001).

<sup>145</sup> See DIRECTORATE-GENERAL FOR EXTERNAL POLICIES OF THE UNION, *supra* note 16, at 15. This is part of the reason why Russia does not generally view intrastate conflicts as posing a threat to international peace and security, thereby not warranting Security Council action.

<sup>146</sup> See Baranovsky, *supra* note 4, at 19.

<sup>147</sup> See *id.* at 20; Gilbert Rozman, *Russian Repositioning in Northeast Asia: Putin's Impact and Current Prospects*, in RUSSIA'S PROSPECTS IN ASIA 63, 69 (Stephen J. Blank ed., 2010) ("The two also share a firm commitment to leave with the UN Security Council the sole authority to address questions or the use of force beyond one's national

Often, Russia will forego the state consent requirement when a regional organization endorses intervention.<sup>148</sup>

In applying these generalized legal positions to Libya, Russia's change of heart in the Security Council is telling. In its positive vote for Resolution 1970, Russia (along with China) "did not see any reason not to go with what the Arab League wanted,"<sup>149</sup> showing that Russia does value regional organization support when making its decision to support a resolution. The tides began to turn when Russia grew suspicious that Western states would militarily intervene in Libya and voiced its objections that Resolution 1973 was worded too broadly.<sup>150</sup> Staying true to its preference for diplomatic solutions over military intervention against host state consent, Russia instead proposed that the Security Council should call for a ceasefire in Libya.<sup>151</sup>

The aftermath of NATO intervention in Libya greatly influenced Russia's legal position in the Security Council on intervention. As discussed *supra*, Russia voiced its criticism about the regime change effectuated by Resolution 1973 and the subsequent NATO intervention.<sup>152</sup> Inherently, the air-based NATO military campaign against the Qaddafi regime represented a severe intrusion on Libya's state sovereignty and territorial integrity, which are two legal principles that Russia highly values. In fact, Mr. Churkin stated that Russia was:

[C]oncerned at the trend towards an arbitrary interpretation of the norms of international humanitarian law for the protection of civilians in armed conflict and their application to the responsibility to protect. It is unacceptable to use issues related to the protection of civilians and overall human rights to achieve political goals, especially as a pretext for interference in the internal affairs of sovereign States.<sup>153</sup>

Therefore, Russia seems much more cautious about invoking R2P in any Security Council action due to the Libyan regime change.<sup>154</sup> It is notable, however, that despite Russia's criticism of R2P, Russia does recognize that a state has a legal duty to protect civilians.<sup>155</sup> Russia

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borders.”).

<sup>148</sup> See Mohamed, *supra* note 142, at 1247.

<sup>149</sup> Lee, *supra* note 41, at 298.

<sup>150</sup> See U.N. SCOR, 66th Sess., 6498th mtg. at 8, U.N. Doc. S/PV.6498 (Mar. 17, 2011).

<sup>151</sup> See *id.*

<sup>152</sup> See *supra* notes 109–10 and accompanying text.

<sup>153</sup> U.N. SCOR, 68th Sess., 6903rd mtg. at 17, U.N. Doc. S/PV.6903 (Jan. 21, 2013).

<sup>154</sup> See, e.g., David Rieff, Opinion, *R2P, R.I.P.*, N.Y. TIMES (Nov. 7, 2011), <http://www.nytimes.com/2011/11/08/opinion/r2p-rip.html?pagewanted=all>.

<sup>155</sup> See Press Release, Security Council, Security Council, Expressing Deep Regret over Toll on Civilians in Armed Conflict, Reaffirms Readiness to Respond to Their

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differs from other states because it believes that the international community should primarily assist states in maintaining this duty.<sup>156</sup>

The aftermath of Libya has, in part, influenced Russia's legal justifications in vetoing four draft resolutions on the Syrian civil war. The violence in Syria is much greater than the rebellion in Libya, yet Russia (and China as well) refuses to support similar Security Council action.<sup>157</sup> As indicated in Russia's legal justifications for its negative votes, Russia was very concerned with adhering to Syria's territorial integrity and the principle of non-intervention.<sup>158</sup> Moreover, Russia made it clear that it would not allow other member states to use Security Council authorization to effect regime change and, therefore, adopted a conservative approach in choosing the language to be included in any successful resolution.<sup>159</sup>

Overall, Russia adheres to more conservative legal rules in the Security Council by requiring certain parameters before offering its support for foreign intervention. These requirements for intervention of course are not only products of Russia's legal view on intervention, but also are influenced by other political factors. Although Russia's perspective may raise controversy and seem like an outlier compared to other member states, Russia does not ignore the principles underlying the UN legal order. Indeed, Russia grounds its legal position using foundational elements of the UN legal order such as territorial integrity and the principle of non-intervention.

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Deliberate Targeting, U.N. Press Release SC/9786 (Nov. 11, 2009) (discussing how Mr. Churkin stated that the "protection of civilians was primarily the responsibilities of States involved in conflict, and the actions of the international community should be aimed at assisting national efforts").

<sup>156</sup> *See id.*

<sup>157</sup> DIRECTORATE-GENERAL FOR EXTERNAL POLICIES OF THE UNION, *supra* note 16, at 6.

<sup>158</sup> *See supra* note 123 and accompanying text.

<sup>159</sup> *See supra* notes 124–26 and accompanying text.

#### IV. THE LEGAL JUSTIFICATIONS FOR SECESSION IN KOSOVO AND HOW IT INFLUENCED RUSSIA'S LEGAL RHETORIC

Kosovo's independence<sup>160</sup> from Serbia heavily influenced Russia's legal justifications for intervention in Georgia and Ukraine. Sub-part A will briefly introduce the conflict's factual background. Sub-part B discusses Russia's opposition to NATO intervention. Sub-part C discusses the ICJ's Advisory Opinion on Kosovo and the legal arguments set forth by Russia. Finally, Sub-part D analyzes how the situation in Kosovo affected Russia's legal stance towards the UN legal order.

##### A. *The Kosovo Conflict*

Most of Kosovar's population is ethnic Albanian with a Serb minority.<sup>161</sup> Kosovo enjoyed autonomy under the Federal Socialist Republic of Yugoslavia (FSRY) as a province of the Serbian republic.<sup>162</sup> Under the FRSY's legal framework, only republics were entitled to statehood after its dissolution.<sup>163</sup> Along with the crumbling Union of Soviet Socialist Republics ("Soviet Union"), the FRSY began to disintegrate in 1991 with Slovenia, Croatia, Bosnia, and Macedonia declaring independence from Yugoslavia.<sup>164</sup> Serbia and Montenegro, however, continued the Federal Republic of Yugoslavia (FRY).<sup>165</sup> Subsequently, Kosovo first declared independence from Yugoslavia on September 21, 1991, which had little success as only Albania recognized Kosovo's independence.<sup>166</sup>

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<sup>160</sup> Kosovo's status as an independent state remains hotly contested to this day. See, e.g., Jure Vidmar, *Kosovo: Unilateral Secession and Multilateral State-Making*, in *KOSOVO: A PRECEDENT? THE DECLARATION OF INDEPENDENCE, THE ADVISORY OPINION AND IMPLICATIONS FOR STATEHOOD, SELF-DETERMINATION AND MINORITY RIGHTS* 143, 177 (James Summers ed., 2011) (arguing that Kosovo fails to satisfy statehood requirements). In fact, only ninety-six states recognize Kosovo as an independent state. *Countries that Have Recognized the Republic of Kosovo*, MINISTRY FOREIGN AFF., <http://www.mfa-ks.net/?page=2,33> (last visited Dec. 23, 2015).

<sup>161</sup> *Demographic Changes of the Kosovo Population 1948–2006*, STATISTICAL OFFICE OF KOSOVO (Feb. 2008), [https://ask.rks-gov.net/ENG/pop/publications/doc\\_details/521-demographic-changes-of-the-kosovo-population-1948-2006?tmpl=component&format=raw](https://ask.rks-gov.net/ENG/pop/publications/doc_details/521-demographic-changes-of-the-kosovo-population-1948-2006?tmpl=component&format=raw).

<sup>162</sup> James Summers, *Kosovo*, in *SELF-DETERMINATION AND SECESSION IN INTERNATIONAL LAW* 235, 236 (Christian Walter et al. eds., 2014).

<sup>163</sup> *Id.* at 237–38.

<sup>164</sup> *Id.*

<sup>165</sup> *Id.*

<sup>166</sup> *Id.* See also European Community: Declaration on Yugoslavia and on the Guidelines of the Recognition of New States, Dec. 16, 1991, *reprinted in* 31 I.L.M. 1485, 1485–86 (1992) (explaining how the European Community recognized the independence of only former Yugoslav republics).



Serbia began a “Serbianization” campaign in Kosovo to solidify authority over the region,<sup>167</sup> and the Kosovo Liberation Army (KLA) commenced guerilla insurgency against Serbia.<sup>168</sup> In response, Serbia commenced military operations in Kosovo, resulting in widespread atrocities against ethnic Albanians.<sup>169</sup> The Serbs committed ethnic cleansing against ethnic Albanians and displaced about 200,000 Kosovars in the process.<sup>170</sup>

After negotiations to end the violence failed, and amidst continued ethnic cleansing, NATO began an airstrike campaign against the FRY.<sup>171</sup> While NATO did not have Security Council authorization to intervene,<sup>172</sup> it justified the use of force as “necessary to avert a humanitarian catastrophe.”<sup>173</sup> Shortly thereafter, the armed conflict concluded with a peace agreement.<sup>174</sup>

The Security Council passed Resolution 1244, which created a framework for the international administration of Kosovo.<sup>175</sup> The Security Council established a peacekeeping mission, the United Nations Mission in Kosovo (UNMIK), to create a stable political framework.<sup>176</sup> This interim regime<sup>177</sup> permitted Kosovo to exercise self-government within the territorial integrity of the FRY, while simultaneously prohibiting the FRY from exercising sovereignty over the region.<sup>178</sup> Moreover, Resolution 1244 established a process to determine the final status of Kosovo, but did not include many details on how this would occur.<sup>179</sup> The UN administration lasted for several years, but officials announced in December 2007 that the negotiation process for determining Kosovo’s final legal status had resulted in an impasse.<sup>180</sup>

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<sup>167</sup> See Kokott, *supra* note 55, at 15–26.

<sup>168</sup> Summers, *supra* note 162, at 238.

<sup>169</sup> Borgen, *supra* note 12, at 3.

<sup>170</sup> See ALEX J. BELLAMY, *KOSOVO AND INTERNATIONAL SOCIETY* 120–55 (2002); TIM JUDAH, *KOSOVO: WAR AND REVENGE* 140–71 (1st ed. 2000).

<sup>171</sup> Waters, *supra* note 60, at 216.

<sup>172</sup> This was due to Russia’s and China’s veto power and political opposition to such intervention.

<sup>173</sup> See Press Release, N. Atl. Treaty Org. (NATO), Press Statement by Dr. Javier Solana, Secretary General of NATO (Mar. 23, 1999).

<sup>174</sup> Summers, *supra* note 162, at 240.

<sup>175</sup> See S.C. Res. 1244, U.N. Doc. S/RES/1244 (June 10, 1999).

<sup>176</sup> See *id.* ¶ 9.

<sup>177</sup> *Id.* ¶ 10.

<sup>178</sup> *Id.* ¶¶ 10, 11, pmb.

<sup>179</sup> See *id.* ¶ 11.

<sup>180</sup> Borgen, *supra* note 12, at 4.

Kosovo unilaterally declared its independence on February 17, 2008 and claimed that it had reached statehood.<sup>181</sup> A minority of states recognized Kosovo as a state shortly thereafter.<sup>182</sup> Upon Serbia's request in 2008, the UN General Assembly asked the ICJ to provide an Advisory Opinion on the legality of Kosovo's independence ("Kosovo Advisory Opinion").<sup>183</sup> The ICJ delivered its ten-to-four majority opinion on July 22, 2010 and announced that Kosovo's declaration of independence did not violate international law.<sup>184</sup> The ICJ's decision, however, is silent as to any potential right to secede under international law.<sup>185</sup>

B. *Russia's Reaction to NATO Intervention in Kosovo*

As discussed *supra*, Russia exhibits caution towards intervention and, more often than not, shows great deference to the principle of non-intervention.<sup>186</sup> The legal parameters<sup>187</sup> for Russia to support intervention in the Security Council were all at play in the NATO intervention in Kosovo. Russia saw Yugoslavia (Serbia's predecessor) "as the victim of aggression from powerful nations, the object of unfair treatment on the part of those who are stronger and more numerous and can impose their will on one who is weaker."<sup>188</sup> The effectiveness of humanitarian intervention was also brought into question because approximately 350,000 Serbs fled Kosovo immediately following the arrival of NATO-led forces amidst increasing reports of violence against Serbs.<sup>189</sup> This example illustrates why Russia often argues that foreign intervention may worsen an intrastate conflict instead of

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<sup>181</sup> See Kosovo Declaration of Independence, Feb. 17, 2008, *reprinted in* 47 I.L.M. 467, 471 (2008).

<sup>182</sup> Summers, *supra* note 162, at 244.

<sup>183</sup> G.A. Res. 63/3, U.N. Doc. A/RES/63/3 (Oct. 8, 2008).

<sup>184</sup> Kosovo Advisory Opinion, 2010 I.C.J.403, ¶ 84 (July 22).

<sup>185</sup> See *id.* ¶ 56. Many scholars criticized the Court for not reaching the substantive issue of whether a right to secede exists under international law. See, e.g., Anne Peters, *Has the Advisory Opinion's Finding that Kosovo's Declaration of Independence was not Contrary to International Law Set An Unfortunate Precedent?*, in *THE LAW AND POLITICS OF THE KOSOVO ADVISORY OPINION* 291, 299 (Marko Milanović & Michael Wood eds., 2015); Timothy William Waters, *Misplaced Boldness: The Avoidance of Substance in the International Court of Justice's Kosovo Opinion*, 23 *DUKE J. COMP. & INT'L L.* 267, 267 (2013).

<sup>186</sup> See *supra* Part III.

<sup>187</sup> See *supra* notes 142–48 and accompanying text.

<sup>188</sup> Baranovsky, *supra* note 4, at 22 (citing S. Startsev, "Balkanskiy pristup geopoliticheskogo darvinizma," *Osobaya papka* (special appendix to *Nezavisimaya gazeta*), no. 1, Apr. 1999, 12).

<sup>189</sup> *Id.* at 24 (citing Kosovo-eto, *napomnim, chast Yugoslavii, Trud*, 1 Apr. 2000 p. 4).

curtailing the violence.<sup>190</sup>

In addition, Russia is sensitive to NATO expansion. States are often more concerned with perceived threats close to home rather than events happening farther abroad.<sup>191</sup> Accordingly, NATO enlargement to states near Russian borders becomes a direct security threat to Russian territory. Russia has clearly opposed NATO enlargement and refuses to allow neighboring states to turn into Western hubs.<sup>192</sup> Following the 1995 NATO air-campaign against Bosnian Serbs, “Russian President Boris Yeltsin said, ‘[t]his is the first sign of what could happen when NATO comes right up to the Russian Federation’s border . . . . The flame of war could burst out across the whole of Europe.’”<sup>193</sup> In light of Russia’s sensitivity to NATO expansion, many Russians believe that purported human rights considerations used to justify intervention are a mere pretext for larger political goals.<sup>194</sup>

### C. *The Kosovo Advisory Opinion*

Russia vehemently opposed Kosovar independence. Russia’s legal arguments are comprehensively reflected in its written submission to the ICJ filed in connection with the Kosovo Advisory Opinion.<sup>195</sup> These arguments are largely based upon state sovereignty, the norm of non-intervention, and high respect for territorial integrity.<sup>196</sup> Ultimately, Russia rejected any Kosovar claim for remedial secession from Serbia.<sup>197</sup>

Before delving into its legal arguments, it is key to note that Russia made several factual observations about the Kosovo conflict. Overall, Russia did not see the Kosovo conflict as an ongoing one. Since Yugoslavia dissolved in 1992,<sup>198</sup> the dissolution was irrelevant to the Kosovar claim for independence.<sup>199</sup> Russia also separated the 1998–1999 crises, which resulted in the ethnic cleansing of thousands of Kosovar Albanians, from the period after Resolution 1244 where

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<sup>190</sup> See *supra* note 146 and accompanying text.

<sup>191</sup> See Mearsheimer, *supra* note 7, at 81–82.

<sup>192</sup> *Id.* at 77.

<sup>193</sup> *Id.* at 78 (citation omitted).

<sup>194</sup> See *supra* note 153 and accompanying text; see also Antonov, *supra* note 2, at 22.

<sup>195</sup> See Written Statement by the Russian Federation, Accordance with International Law of the Unilateral Declaration of Independence in Respect of Kosovo, Advisory Opinion, 2010 I.C.J. 403 (Apr. 16, 2009).

<sup>196</sup> *Id.* ¶ 21.

<sup>197</sup> *Id.* ¶ 103.

<sup>198</sup> See generally Danilo Türk, *Recognition of States: A Comment*, 4 EUR. J. INT’L L. 66 (1993).

<sup>199</sup> See Written Statement by the Russian Federation, *supra* note 195, ¶¶ 44–45.

Kosovars were “not being exposed to risks of discrimination.”<sup>200</sup> Therefore, Russia argued that the ICJ should only consider the February 2008 conditions in Kosovo for any possible claim of secession from Serbia, and that any atrocities committed between 1998 and 1999 were no longer relevant to the inquiry.<sup>201</sup> The reasoning behind this legal argument was that Kosovo had been under international administration for several years and Serbia no longer posed any threat to Kosovars.<sup>202</sup>

As a preliminary matter, Russia asserted that the ICJ should use Security Council Resolution 1244 as the “special legal regime upon which the Court can base its consideration of the request.”<sup>203</sup> Russia found the language affirming Serbia’s territorial integrity within Resolution 1244 particularly valuable in determining whether Kosovo had the right to secede.<sup>204</sup> Additionally, Resolution 1244 never recognized secession as a possible outcome.<sup>205</sup> Thus, Resolution 1244 created a strong presumption in favor of maintaining Serbia’s territorial integrity.<sup>206</sup>

Russia also attacked Kosovo’s February 2008 Declaration of Independence. Russia classified territorial integrity as “an unalienable attribute of a State’s sovereignty.”<sup>207</sup> Russia recognized, however, that a state’s territorial integrity may be overridden if it refuses to respect the self-determination of its “peoples.”<sup>208</sup> Russia qualified this concession as only applying to extreme conditions where the existence of a “people” is at risk.<sup>209</sup>

Russia also curiously noted that self-determination had not been invoked as a legal justification for intervention in Kosovo until years after the 1999 air-strike campaign. Therefore, self-determination should not have been a legal basis for secession in 2008.<sup>210</sup> Russia further argued that the 1999 NATO intervention was not based upon the Kosovar’s right to self-determination, but instead was taken for

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<sup>200</sup> *Id.* ¶ 46.

<sup>201</sup> *Id.* ¶ 47.

<sup>202</sup> *Id.* ¶¶ 51–52.

<sup>203</sup> *Id.* ¶ 28.

<sup>204</sup> *Id.* ¶ 54.

<sup>205</sup> Written Statement by the Russian Federation, *supra* note 195, ¶ 56.

<sup>206</sup> *Id.* ¶ 58.

<sup>207</sup> *Id.* ¶ 77.

<sup>208</sup> *Id.* ¶ 88. This is based upon the Savings Clause in the Friendly Relations Declaration that has been construed to permit secession under certain conditions. *See* Friendly Relations Declaration, *supra* note 39.

<sup>209</sup> *Id.* ¶ 87.

<sup>210</sup> *Id.* ¶¶ 92, 94.

humanitarian purposes.<sup>211</sup> Since Resolution 1244 addressed human rights abuses, this foreclosed any right to remedial secession.<sup>212</sup> Finally, Russia noted how different the new Serbian state was from its predecessor, the FRY.<sup>213</sup> Serbia adopted democracy and human rights law.<sup>214</sup> Therefore, the Kosovars no longer faced any threat of force or severe oppression, foreclosing any right to secession.<sup>215</sup>

#### D. *The Kosovo Advisory Opinion's Impact on Legal Rhetoric*

Similar to domestic law, ICJ cases often serve as precedent for future disputes, despite Article 59 of the Statute of the Court, which states that “[t]he decision of the Court has no binding force except between the parties and in respect of that particular case.”<sup>216</sup> As opposed to traditional judgments between parties, the ICJ may also give advisory opinions on specific legal questions.<sup>217</sup> An advisory opinion is technically not binding upon any party, but in reality carries heavy legal weight.<sup>218</sup> International organizations are the only parties that enjoy the right to seek advisory opinions from the ICJ.<sup>219</sup>

Despite considering Kosovo’s declaration of independence in an advisory capacity, some states have regarded the ICJ’s judgment as precedent. Notwithstanding having NATO membership, however, Western powers, such as the United States, assert that Kosovo is *sui generis* and that no precedential value may be derived from the outcome.<sup>220</sup> Western powers will likely continue to adopt such an approach for fear of emboldening separatist movements elsewhere.<sup>221</sup> Although it is one of Kosovo’s harshest critics, Russia has surprisingly embraced the ICJ’s advisory decision as precedent, invoking it to justify its interventions in Georgia and Ukraine.<sup>222</sup> In response to Western

<sup>211</sup> Written Statement by the Russian Federation, *supra* note 195, at ¶ 94.

<sup>212</sup> *Id.* ¶ 97.

<sup>213</sup> *See id.* ¶ 99.

<sup>214</sup> *Id.*

<sup>215</sup> *Id.* ¶¶ 101, 103.

<sup>216</sup> Statute of the International Court of Justice, art. 59, 3 Bevans 1179, 59 Stat. 1031, U.N.T.S. 993, 39 AM. J. INT’L L. Supp. 215 (1945).

<sup>217</sup> *Id.* art. 65.

<sup>218</sup> *Advisory Jurisdiction*, I.C.J., <http://www.icj-cij.org/jurisdiction/index.php?p1=5&p2=2> (last visited Dec. 23, 2015).

<sup>219</sup> *Id.*

<sup>220</sup> *See* Borgen, *supra* note 12.

<sup>221</sup> *See id.*

<sup>222</sup> *See, e.g.,* Angelika Nußberger, *Abkhazia*, in MAX PLANCK ENCYCLOPEDIA OF PUB. INT’L L. ¶ 30 (Rüdiger Wolfrum ed., online) (last updated Jan. 2013) [hereinafter, *Abkhazia Max Planck*]; Burke-White, *supra* note 59, at 5; Waters, *supra* note 60; *Russia Max Planck*, *supra* note 7, at ¶ 150. *See infra* Part V for a full discussion on Russia’s

recognition of Kosovo, former President Dmitry Medvedev stated:

Western countries rushed to recognise Kosovo's illegal declaration of independence from Serbia. We argued consistently that it would be impossible, after that, to tell the Abkhazians and Ossetians (and dozens of other groups around the world) that what was good for the Kosovo Albanians was not good for them. In international relations, you cannot have one rule for some and another rule for others.<sup>223</sup>

In his March 18, 2014 speech to the Russian Duma,<sup>224</sup> President Putin referenced the Kosovo Advisory Opinion in legally justifying Crimea's declaration of independence.<sup>225</sup> In effect, Russia flipped the tables against Western powers and used Kosovo as precedent to its own advantage.

#### V. RUSSIA'S LEGAL JUSTIFICATIONS FOR INTERVENTION IN GEORGIA AND UKRAINE

Russia engaged in legal rhetoric to justify its actions to the international community for intervening in Georgia and Ukraine. Several potential reasons explain why Russia made such carefully crafted legal arguments. Russia might have felt bound by international law and, therefore, set forth arguments believed to accurately reflect it. Additionally, Russia may have been worried about reputational costs<sup>226</sup> for disregarding international law completely and felt obligated to proffer legal justifications. A "state with a poor reputation is either excluded from deals or it is charged a high price of admission."<sup>227</sup> Regardless of the reasoning, it is necessary to identify Russia's legal arguments for intervention to draw the dichotomy between Russia's legal stance in the Security Council and how it behaves unilaterally.

Russia's legal justifications are more than just legalese. The examination of statements made by states is imperative in assessing

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legal justifications for intervention in Georgia and Ukraine.

<sup>223</sup> Christopher Waters, *South Ossetia*, in SELF-DETERMINATION AND SECESSION IN INTERNATIONAL LAW 175, 179 (Christian Walters ed., 2014) [hereinafter, *Christopher Waters South Ossetia*] (quoting Dmitry Medvedev, *Why I Had to Recognize Georgia's Breakaway Regions*, FIN. TIMES (Aug. 26, 2008), <http://www.ft.com/intl/cms/s/0/9c7ad792-7395-11dd-8a66-0000779fd18c.html#axzz1fDVC6nP8>).

<sup>224</sup> The Russian Duma is the lower house of the Russia's national parliament, known as the Federal Assembly.

<sup>225</sup> See Burke-White, *supra* note 59, at 5–6.

<sup>226</sup> Reputational costs are consequences of state behavior that negatively influence state reputation.

<sup>227</sup> Rachel Brewster, *Unpacking the State's Reputation*, 50 HARV. INT'L L.J. 231, 245 (2009).

customary international law.<sup>228</sup> Both *opinio juris* and state practice may be derived from state legal rhetoric.<sup>229</sup> The ICJ frequently considers official statements as examples of state practice.<sup>230</sup> Russia's legal rhetoric can be construed as evidence *opinio juris* and state practice, thereby having potential to alter customary international law or, at the very least, create new international norms if accompanied with international acceptance. Sub-part A discusses the Russian intervention in Georgia and Russia's subsequent legal justifications for participating in the conflict. Sub-part B similarly analyzes the more recent events in Ukraine. Both of these sub-parts will also consider whether these legal arguments pass muster under the four UN legal order components discussed *supra*. Finally, Sub-part C will describe commonalities, if any, between the legal arguments that Russia has proffered for each conflict.

A. *Russia's Unilateral Intervention in Georgia*

1. Revisiting the Five Day Russo-Georgian War

The origin of the war between Russia and Georgia lies in the Soviet Union's *perestroika* period. Georgia was a republic within the Soviet Union that enjoyed significant administrative powers and state apparatus.<sup>231</sup> South Ossetia and Abkhazia<sup>232</sup> were both semi-autonomous regions within the republic.<sup>233</sup> On September 20, 1990, South Ossetia asserted its sovereignty as a republic within the Soviet Union—Georgia subsequently withdrew South Ossetia's limited autonomy, sparking full-scale armed conflict.<sup>234</sup> In a similar fashion, Georgia annulled the Abkhaz declaration of state sovereignty in 1990,

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<sup>228</sup> In determining sources of international law, Article 38(1)(b) of the Statute of the ICJ defines customary international law as "a general practice accepted as law." Statute of the International Court of Justice, art. 38(1)(b), 3 Bevans 1179, 59 Stat. 1031, U.N.T.S. 993, 39 Am. J. Int'l L. Supp. 215 (1945).

<sup>229</sup> *Assessment of Customary International Law*, *supra* note 81; *see supra* note 81 (defining *opinio juris* and state practice).

<sup>230</sup> *See, e.g.*, Case concerning the Gab ikovo-Nagymaros Project (Hungary/Slovakia), 1997 I.C.J. 7, 39–46 (Sept. 25); Military and Paramilitary Activities in and Against Nicaragua (Nicar. v. U.S.), 1986 I.C.J. 100 (June 27).

<sup>231</sup> *See South Ossetia Max Planck*, *supra* note 72, at ¶ 6.

<sup>232</sup> In 1931, Abkhazia was downgraded from its own republic within the Soviet Union to an autonomous region within the Georgian republic creating tension between Georgia and Abkhazia. *See Abkhazia Max Planck*, *supra* note 222, at ¶ 8.

<sup>233</sup> *Abkhazia Max Planck*, *supra* note 222, at ¶ 8; *South Ossetia Max Planck*, *supra* note 72, at ¶ 5.

<sup>234</sup> *Christopher Waters South Ossetia*, *supra* note 223, at 176; *South Ossetia Max Planck*, *supra* note 72, at ¶ 10.

further flaring tensions.<sup>235</sup> Georgia gained international recognition by the end of 1991 due to the collapse of the Soviet Union. Abkhazia and South Ossetia both declared independence from Georgia in 1992, but much of the world believed that the territories legally remained within the new Georgian state.<sup>236</sup>

In the midst of these events, the armed conflict within Georgia intensified. In regards to South Ossetia, the skirmishes lasted through 1992, resulting in approximately 60,000 displaced Ossetians and Georgians.<sup>237</sup> The armed conflict concluded with Georgia, Russia, and South Ossetia signing the Sochi Agreement in 1992.<sup>238</sup> The ceasefire agreement deployed peacekeepers from each of the three signatories into South Ossetia, and negotiations commenced, sponsored by the Organization for Security and Co-operation in Europe (OSCE), regarding the future status of South Ossetia.<sup>239</sup>

The events unfolded differently in Abkhazia. Georgians and Abkhazians reportedly committed mass human rights violations during this time period.<sup>240</sup> The conflict resulted in the mass eviction of Georgians from Abkhazia as a result of an effective ethnic cleansing campaign.<sup>241</sup> Unlike the situation in South Ossetia, the UN was involved in Abkhazia. A ceasefire brokered by Russia and the UN was signed in July 1993.<sup>242</sup> Negotiations began to attempt to reconcile the differences between Georgia and Abkhazia under the auspices of the UN and the OSCE.<sup>243</sup>

Throughout the 1990s, Russia began offering South Ossetians and Abkhazians Russian passports and citizenship.<sup>244</sup> Additionally, South Ossetians and Abkhazians enjoyed free travel into Russia with the ability to earn Russian pensions and obtain other social benefits.<sup>245</sup> The

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<sup>235</sup> *Abkhazia Max Planck*, *supra* note 222, at ¶ 11.

<sup>236</sup> *Id.* ¶ 12.

<sup>237</sup> *Christopher Waters South Ossetia*, *supra* note 223, at 176.

<sup>238</sup> *Id.*

<sup>239</sup> *Id.* at 177; Toomey, *supra* note 5, at 447.

<sup>240</sup> *Abkhazia Max Planck*, *supra* note 222, at ¶ 13.

<sup>241</sup> *Id.*

<sup>242</sup> *Abkhazia Max Planck*, *supra* note 222, at ¶ 14; Farhad Mirzayev, *Abkhazia*, in *SELF-DETERMINATION AND SECESSION IN INTERNATIONAL LAW* 191, 193 (Christian Walters ed., 2014).

<sup>243</sup> *See supra* note 242.

<sup>244</sup> *See* HUM. RTS. WATCH, UP IN FLAMES: HUMANITARIAN LAW VIOLATIONS AND CIVILIAN VICTIMS IN THE CONFLICT OVER SOUTH OSSETIA 18 (Jan. 23, 2009), <http://www.hrw.org/reports/2009/01/22/flames-0> (“[B]y the end of 2007, according to the South Ossetian authorities, some 97 percent of residents of South Ossetia had obtained Russian passports.”).

<sup>245</sup> *See id.*



popularly deemed “Rose Revolution” occurred in 2003, ousting the Soviet-era leader Eduard Shevardnadze from the Georgian presidency.<sup>246</sup> Mikheil Saakashvili’s ascent to power flared tensions in 2004 when, under his direction, Georgia began an effort to reestablish control over South Ossetia and Abkhazia.<sup>247</sup> Former President Mikheil Saakashvili did not hesitate to warn that if peaceful efforts failed to re-integrate both regions, Georgia would resort to physical force.<sup>248</sup> Despite such efforts, ninety-five percent of South Ossetians voted for separation from Georgia in a 2006 referendum.<sup>249</sup>

During NATO’s April 2008 summit in Bucharest, officials considered extending membership to Georgia and Ukraine.<sup>250</sup> The inclusion of these two states that directly border Russian territory raised serious concern within Russia.<sup>251</sup> Russia’s deputy foreign minister at the time warned: “Georgia’s and Ukraine’s membership in the alliance is a huge strategic mistake which would have most serious consequences for pan-European security.”<sup>252</sup>

Tensions came to a head in early August 2008. The facts of how the war began are hotly contested; however, the standard account is that Georgia attacked the capital of South Ossetia, Tskhinvali, on August 7, 2008.<sup>253</sup> In response, the Russian military mobilized on August 8, 2008, commencing a full-scale two-week military campaign against Georgia.<sup>254</sup> Not only did Russian troops seek to repel the Georgian forces in Tskhinvali,<sup>255</sup> but they also sought to attack

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<sup>246</sup> Christopher Waters *South Ossetia*, *supra* note 223, at 177; see Giorgi Kandelaki, *Georgia’s Rose Revolution: A Participant’s Perspective*, U.S. INST. PEACE, July 2006, at 10, <http://www.usip.org/sites/default/files/sr167.pdf> (noting that to the dismay of Russia, Western powers and other Western non-governmental organizations supported the Rose Revolution).

<sup>247</sup> *Supra* note 246; Waters, *supra* note 60, at 191.

<sup>248</sup> Christopher Waters *South Ossetia*, *supra* note 223, at 178.

<sup>249</sup> Toomey, *supra* note 5, at 449.

<sup>250</sup> See Press Release, NATO, Bucharest Summit Declaration (Apr. 3, 2008), at ¶ 23, [http://www.nato.int/cps/en/natolive/official\\_texts\\_8443.htm](http://www.nato.int/cps/en/natolive/official_texts_8443.htm).

<sup>251</sup> See *supra* note 192 and accompanying text.

<sup>252</sup> Mearsheimer, *supra* note 7, at 79.

<sup>253</sup> See Tagliavini Report, *supra* note 65, at 1, 10; see also Christopher Waters *South Ossetia*, *supra* note 223, at 178. On the contrary, Georgia contests this account for two reasons. First, Georgia claims that it attacked Tskhinvali in response to numerous South Ossetian attacks upon Georgian villages. See Borgen, *supra* note 12, at 5; Waters, *supra* note 60, at 207. Second, Georgia maintains that Russian troops traveled from North Ossetia on August 7<sup>th</sup> and went through the Roki tunnel. Therefore, the attack aimed to prevent Russian troops from entering South Ossetia from the Roki tunnel. See Toomey, *supra* note 5, at 450–51; Waters, *supra* note 60, at 207.

<sup>254</sup> Borgen, *supra* note 12, at 5.

<sup>255</sup> HUM. RTS. WATCH, *supra* note 244, at 22–23; Toomey, *supra* note 5, at 451.

undisputed Georgian territory.<sup>256</sup> In fact, Russian forces came within miles of the Georgian capital, Tbilisi.<sup>257</sup>

Although the 2008 war was triggered by events in South Ossetia, conflict erupted in Abkhazia as well. Russian and Abkhazian troops attacked Georgian forces stationed in the upper Kodori Valley, a region with no association to the Abkhazian plight.<sup>258</sup> Abkhazian forces seized the territory after expelling the local Georgian population.<sup>259</sup>

On August 12, 2008, French President Nicolas Sarkozy brokered the Six Point Ceasefire Agreement between the parties.<sup>260</sup> Shortly thereafter, Russian troops withdrew from Georgia proper and returned to their South Ossetian bases.<sup>261</sup> Russia formally recognized Abkhazia and South Ossetia as sovereign states on August 26, 2008.<sup>262</sup> As of this Comment, a total of four UN member states officially recognize South Ossetia and Abkhazia as independent states: Russia, Nicaragua, Venezuela, and Nauru.<sup>263</sup>

## 2. Russia's Legal Arguments Justifying Intervention

Russia's military operations in Georgia effectively ousted the Georgian government from power in South Ossetia and Abkhazia, a clear violation of the prohibition against the use of force and the norm of non-intervention. Russia asserted three main legal arguments to justify its unilateral intervention in Georgia. It is evident that Russia took care in crafting its legal position to facially comport with the UN legal order's principles. For example, Russia is well aware that there are only a few exceptions<sup>264</sup> to the prohibition on the use of force and invoked those exceptions as legal justifications for its military

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<sup>256</sup> Borgen, *supra* note 12, at 15–16.

<sup>257</sup> *Id.* at 5.

<sup>258</sup> *Abkhazia Max Planck*, *supra* note 222, at ¶ 18.

<sup>259</sup> *Id.*

<sup>260</sup> OFFICE OF THE STATE MINISTER OF GEORGIA FOR RECONCILIATION AND CIVIC EQUALITY, SIX POINT PEACE PLAN (Aug. 12, 2008), <http://www.smr.gov.ge/docs/doc111.pdf>.

<sup>261</sup> Borgen, *supra* note 12, at 5.

<sup>262</sup> *Id.* at 5–6.

<sup>263</sup> *Abkhazia Max Planck*, *supra* note 222, at ¶ 20; *South Ossetia Max Planck*, *supra* note 72, at ¶ 1. The island nation of Tuvalu withdrew its recognition of Abkhazia and South Ossetia in 2014. *Tuvalu Profile-Timeline*, BBC NEWS (Nov. 18, 2014), <http://www.bbc.com/news/world-asia-pacific-16340166>. Vanuatu withdrew recognition from Abkhazia in 2011. See SB, *Vanuatu Withdraws Recognition of Abkhazia*, EURASIAN L. BREAKING NEWS (June 20, 2011), [http://eurasian-law-breaking-news.blogspot.com/2011\\_06\\_01\\_archive.html](http://eurasian-law-breaking-news.blogspot.com/2011_06_01_archive.html).

<sup>264</sup> These exceptions include self-defense and humanitarian intervention. See U.N. Charter arts. 42, 51; Green, *supra* note 31, at 229.

intervention in Georgia and Ukraine. The real question, however, is whether Russia's legal justifications actually comport with the UN legal order or whether they only conform on a surface level.

The first sub-part of this Section will address the Russian "privileged interests" doctrine, from which two of Russia's legal arguments derive. Next, the second sub-part will explain Russia's argument that it acted in self-defense for ethnic Russians in South Ossetia and Abkhazia. The third sub-part discusses the humanitarian-based concerns, which Russia asserted warranted intervention. Finally, the fourth sub-part will address Russia's final legal justification for intervention, predicated upon defending Russian peacekeepers within Georgia pursuant to the Sochi Agreement.<sup>265</sup>

*i. The Privileged Interests Doctrine*

Before analyzing the first two justifications indicated *supra*, it is necessary to discuss the privileged interests doctrine. Russia first coined the term "privileged interests" in 1968 when it advanced the Brezhnev doctrine to justify military aid to "fraternal count[ries]" dealing with civil strife.<sup>266</sup> More recently, in 2008 the Russian Minister of Foreign Affairs, Sergey Lavrov, explained that the doctrine means remembering "relationships with our old friends."<sup>267</sup> In essence, the privileged interests doctrine resembles the old "sphere of influence" rhetoric used during the Cold War. Mr. Lavrov defined the doctrine to mean Russia "will develop friendly, mutually beneficial relations with all those who are prepared to do the same on the equal and mutually beneficial basis, paying particular attention to the traditional partners of the Russian Federation."<sup>268</sup> Mr. Lavrov further indicated that these "traditional partners" include the states of the former Soviet Union.<sup>269</sup> During a speech on September 12, 2008 (only days after Russia withdrew from much of Georgia), then-President Medvedev asserted that Russia would foster close relations with states with which it has traditionally been close.<sup>270</sup> Significantly, both Georgia and

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<sup>265</sup> See *supra* notes 238–39 and accompanying text.

<sup>266</sup> See Toomey, *supra* note 5.

<sup>267</sup> *Id.* at 444 (quoting 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.cfr.org/world/sergey-lavrov/p34440> [hereinafter, Lavrov Transcript]).

<sup>268</sup> Lavrov Transcript, *supra* note 267.

<sup>269</sup> *Id.*

<sup>270</sup> Dmitry Medvedev, President of the Russian Federation, Meeting with the Participants in the International Club Valdai (Sept. 12, 2008),

Ukraine were previously republics within the Soviet Union and, therefore, fit within the privileged interests doctrine.

Article 61 of the Russian Constitution states: “[t]he Russian Federation shall guarantee to its citizens protection and patronage abroad.”<sup>271</sup> Pursuant to this article and the privileged interests doctrine, Russia argues that it legally has the right to exercise some control over states that host Russian citizens.<sup>272</sup> Significantly, Russia also believes that it may legally intervene on behalf of ethnic Russians in danger abroad under the auspices of humanitarian rescue.<sup>273</sup> Therefore, if an ethnic Russian finds himself or herself in imminent danger, Russia may unilaterally intervene to rescue the individual so long as the force used is proportionate.<sup>274</sup>

As will be discussed in more detail *infra*, Russia specifically views the right of self-defense to include the protection of its nationals abroad.<sup>275</sup> For example, the Chief Justice of the Constitutional Court of the Russian Federation, Valery Zorkin, interpreted Article 61 of the Russian Constitution to permit Russia “to apply the full force of its military and destroy the armed forces of a foreign state if the goal of such an operation is to secure the lives of its compatriots who are permanently living abroad.”<sup>276</sup> Therefore, the privileged interests doctrine applies to several components of the UN legal order discussed *supra*.<sup>277</sup> For example, the doctrine broadens the scope of humanitarian rescue and humanitarian intervention to ethnic Russians in foreign states, especially if those states are “traditional partners” with Russia. Moreover, the privileged interests doctrine provides Russia with legal justification for a military invasion of another state that threatens the security of Russian nationals. The scope of the

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[http://archive.kremlin.ru/eng/speeches/2008/09/12/1644\\_type82912type82917type84779\\_206409.shtml](http://archive.kremlin.ru/eng/speeches/2008/09/12/1644_type82912type82917type84779_206409.shtml).

<sup>271</sup> KONSTITUTSIYA ROSSIYSKOI FEDERATSII [KONST. RF] [CONSTITUTION] art. 61, ¶ 2 (Russ.).

<sup>272</sup> See Lavrov Transcript, *supra* note 267.

<sup>273</sup> Toomey, *supra* note 5, at 474 (citing Andrew E. Kramer & James Kanter, *Gas Dispute Runs Deeper Than Pipes, Experts Say*, N.Y. TIMES (Jan. 14, 2009), [http://www.nytimes.com/2009/01/14/world/europe/14gazprom.html?\\_r=0](http://www.nytimes.com/2009/01/14/world/europe/14gazprom.html?_r=0)); Christian Walter, *Postscript: Self-Determination, Secession, and the Crimean Crisis 2014*, in SELF-DETERMINATION AND SECESSION IN INTERNATIONAL LAW 293, 307 (2014) [hereinafter, *Walter Crimea*]; see also *supra* notes 50–52 and accompanying text.

<sup>274</sup> See *supra* notes 50–52 and accompanying text.

<sup>275</sup> Burke-White, *supra* note 59, at 5.

<sup>276</sup> Peter Roudik, *Russian Federation: Legal Aspects of War in Georgia*, LIBRARY OF CONGRESS, <http://www.loc.gov/law/help/russian-georgia-war.php> (last updated Dec. 15, 2014). See Valery Zorkin, [Peace Enforcement and Human Rights], ROSSIYSKAYA GAZETA (Aug. 13, 2008), <http://www.rg.ru/2008/08/13/zorkin.html>.

<sup>277</sup> See *supra* Part II.

doctrine becomes very important in explaining Russia's legal justifications for unilateral intervention in both Georgia and Ukraine.

*ii. Self-Defense of Ethnic Russians in South Ossetia and Abkhazia*

As indicated *supra*, many ethnic Russians and Russian nationals resided in South Ossetia and Abkhazia. This is largely due to Russia conferring citizenship and providing passports to many South Ossetians and Abkhazians during the 1990s.<sup>278</sup> In accordance with the privileged interests doctrine, Russia asserted its legal right to intervene on behalf of the ethnic Russians residing in South Ossetia and Abkhazia.<sup>279</sup> On August 8, 2008, Russia called an emergency meeting of the Security Council to discuss the situation and called for the Security Council to condemn the Georgian attacks.<sup>280</sup> Mr. Churkin explained that “[m]assive artillery fire [was] being directed against a peaceful civilian population, including old people and children, using Grad multiple launch systems and large-calibre rocket launchers.”<sup>281</sup> Russia characterized Georgia's August 7, 2008 attacks upon the “peaceful population of South Ossetia” as “treacherous” and “criminal.”<sup>282</sup> Moreover, Russia claimed that Georgia had similar plans to attack Abkhazia.<sup>283</sup> Therefore, Russia asserted the right to self-defense pursuant to Article 51 of the UN Charter to protect ethnic Russians.<sup>284</sup> Russia claims that it continued to use force in self-defense until the conditions warranted otherwise.<sup>285</sup> Additionally, Russia asserted a humanitarian rescue claim to justify the unilateral intervention on behalf of South Ossetian and Abkhazian civilians.<sup>286</sup>

It is undeniable that Russia breached Georgia's territorial integrity and the norm of non-intervention through its military invasion into parts of Georgia.<sup>287</sup> Russia attempted to justify its conduct

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<sup>278</sup> See *supra* note 244 and accompanying text.

<sup>279</sup> See *supra* notes 275–76 and accompanying text.

<sup>280</sup> See U.N. SCOR, 63th Sess., 5951th mtg., U.N. Doc. S/PV.5951 (Aug. 8, 2008).

<sup>281</sup> See *id.* at 2.

<sup>282</sup> See Tagliavini Report, *supra* note 65, at 188–89 (discussing Russia's written submission to the fact-finding mission detailing Russia's factual and legal views upon the war with Georgia).

<sup>283</sup> *Id.* at 190.

<sup>284</sup> *Id.* at 188; Borgen, *supra* note 12, at 16; Lee, *supra* note 41, at 291; Toomey, *supra* note 5, at 444, 465.

<sup>285</sup> See Tagliavini Report, *supra* note 65, at 189.

<sup>286</sup> Lee, *supra* note 41, at 254, 257. As detailed *supra*, humanitarian rescue is a subset of the general right of self-defense. See *supra* notes 48–49 and accompanying text.

<sup>287</sup> See Mirzayev, *supra* note 242, at 205.

by invoking the right to self-defense and humanitarian rescue, a subset doctrine under the right to self-defense, as lawful exceptions to territorial integrity and the norm of non-intervention.<sup>288</sup> The problem, however, is that both of these arguments do not pass muster.

Russia's actions do not meet the requirements to assert self-defense under Article 51 of the UN Charter<sup>289</sup> for three main reasons: (1) no armed attack<sup>290</sup> occurred on Russian territory; (2) the right to self-defense did not extend to ethnic Russians in Georgia; and (3) Russia acted disproportionately. First, to warrant overriding the general prohibition on the use of force, the victim state may only use force "to protect the security of a State and its essential rights, in particular the rights of territorial integrity and political independence."<sup>291</sup> Therefore, the armed attack must rise to a certain level of severity for a state to resort to unilateral military action. An attack that was not launched upon or against the victim state's territory will most likely not suffice because no nexus exists between the attack and the state's territory.<sup>292</sup> Since Georgia's attacks upon ethnic Russians were conducted within Georgian territory, and therefore did not directly threaten the security of the Russian state, Russia may not have asserted the right to self-defense.

Moreover, the danger ethnic Russians faced at the hands of the Georgian government could not trigger Russia's right to self-defense.<sup>293</sup> As described *supra*, many South Ossetians and Abkhazians received Russian citizenship and passports.<sup>294</sup> The conferral of Russian citizenship, however, cannot justify Russia's military intervention based upon self-defense.<sup>295</sup> The European Union's (EU) Independent International Fact-Finding Mission on the Conflict in Georgia affirmed this by stating:

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<sup>288</sup> See *supra* Part II for a discussion about the right of self-defense and humanitarian rescue.

<sup>289</sup> See also *supra* notes 43–44 and accompanying text.

<sup>290</sup> See *supra* note 45 and accompanying text for the ICJ's interpretation of what constitutes as an armed attack.

<sup>291</sup> STANIMIR A. ALEXANDROV, SELF-DEFENSE AGAINST THE USE OF FORCE IN INTERNATIONAL LAW 17 (1996). See also G. Nolte & A. Randelzhofer, *Article 51*, in THE CHARTER OF THE UNITED NATIONS: A COMMENTARY vol. II, ¶ 28 (B. Simma et al. eds., 2012).

<sup>292</sup> See Mirzayev, *supra* note 242, at 206; see also A. Randelzhofer & O. Dörr, *Article 2(4)*, in THE CHARTER OF THE UNITED NATIONS: A COMMENTARY vol. I, ¶ 58 (B. Simma et al. eds., 2012).

<sup>293</sup> See Mirzayev, *supra* note 242, at 206 ("[I]nternational law does not allow the use of force against other states for the protection of one's own citizens.").

<sup>294</sup> See *supra* note 244 and accompanying text.

<sup>295</sup> See Mirzayev, *supra* note 242, at 208.

The mass conferral of Russian citizenship to Georgian nationals and the provision of passports on a massive scale on Georgian territory, including its breakaway provinces, without the consent of the Georgian Government runs against the principles of good neighborliness and constitutes an open challenge to Georgian sovereignty and an interference in the internal affairs of Georgia.<sup>296</sup>

Thus, even if the right to self-defense applied to attacks conducted outside of the victim state, attacks upon ethnic Russians in Georgia did not give Russia the right to defend itself.

Finally, Russia's claim for self-defense fails because Russia acted with a disproportionate amount of force.<sup>297</sup> Factors to consider in the proportionality analysis include the types of weapons used, the duration of the defensive military action, the scope of the operation, and the amount of territory covered.<sup>298</sup> The defensive military action must be "limited and temporary unilateral intervention, [used] only as a last resort."<sup>299</sup> Russia not only engaged in a full-scale military invasion of not only South Ossetia and Abkhazia, but also extended its military operations to undisputed Georgian territory.<sup>300</sup> Overall, the argument that Russia could legally defend ethnic Russians within Georgia does not comport with the UN legal order, especially because the failure to meet any of the three aforementioned deficiencies quashes Russia's self-defense claim.

Unlike the discussion regarding self-defense *supra*, humanitarian rescue may be lawfully asserted to protect nationals abroad who face imminent death.<sup>301</sup> Therefore, an armed attack upon Russian territory is not required for Russia to assert that it legally intervened on behalf of ethnic Russians abroad in Georgia. Although Russia's argument for intervention fares better under the humanitarian rescue doctrine, the argument still fails for two main reasons: (1) Russia acted disproportionately; and (2) the ethnic Russians in Georgia were not legally Russian nationals.

For the same aforementioned reasons that Russia acted disproportionately for purposes of asserting a lawful self-defense claim,

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<sup>296</sup> *Id.* (citing Tagliavini Report, *supra* note 65, at 18).

<sup>297</sup> See HUM. RTS. WATCH, *supra* note 244, at 93–119; Tagliavini Report, *supra* note 65, at 21.

<sup>298</sup> Tagliavini Report, *supra* note 65, at 27.

<sup>299</sup> Nanda, *supra* note 46.

<sup>300</sup> See Borgen, *supra* note 12, at 5; Toomey, *supra* note 5, at 476. *But see* Waters, *supra* note 60, at 219–20 (arguing that Russia acted proportionately because it did not invade enough of Georgia proper to delegitimize the defensive action).

<sup>301</sup> See *supra* note 51 and accompanying text.

Russia also acted disproportionately for purposes of asserting a humanitarian rescue claim.<sup>302</sup> Additionally, the provision of citizenship and passports to ethnic Russians in South Ossetia and Abkhazia is dubious at best under international law. Specifically, the “passportized” Abkhazians and South Ossetians did not qualify as Russian citizens for the purposes of the humanitarian rescue doctrine.<sup>303</sup> Indeed, the ICJ in the *Nottebohm Case* noted that the act of naturalizing a person with little connection to the naturalizing state should not be recognized by another state since it disregards the concept of nationality in international relations.<sup>304</sup> Because humanitarian rescue only applies to the defending state’s citizens, the circumstances in Georgia did not warrant humanitarian rescue.

*iii. Humanitarian Intervention in Georgia*

In addition, Russia also asserted that it had a legal right to intervene in Georgia based upon humanitarian concerns and R2P.<sup>305</sup> Mr. Lavrov explained that pursuant to the privileged interests doctrine, Russia could intervene based upon humanitarian concerns and that Russia would protect its people “wherever they are” and “with all means available.”<sup>306</sup> Russia realizes that after the Soviet Union’s collapse, many ethnic Russians found themselves in the minority in the newly created states, like Georgia.<sup>307</sup> In accordance with this realization, Mr. Lavrov wrote:

We can’t understand why those who are talking about the responsibility to protect and about the security of the person at every turn, forgot it when it came to the part of the former Soviet space where authorities began to kill innocent people, appealing to sovereignty and territorial integrity. For us, the issue in South Ossetia was to protect our citizens directly on

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<sup>302</sup> Indeed, the proportionality requirement seems to be stricter for humanitarian rescue operations. For example, the 1976 Israeli raid in Entebbe, Uganda entailed approximately 200 Israeli troops raiding an airport in Entebbe to rescue 100 hostages held by pro-Palestinian hijackers. The mission lasted thirty-five minutes, killing twenty Ugandan soldiers and three hostages in the cross-fire. *See 1976: Israelis Rescue Entebbe Hostages*, BBC NEWS, [http://news.bbc.co.uk/onthisday/hi/dates/stories/july/4/newsid\\_2786000/2786967.stm](http://news.bbc.co.uk/onthisday/hi/dates/stories/july/4/newsid_2786000/2786967.stm) (last visited Dec. 23, 2015). Therefore, humanitarian rescue typically entails small-scale military operations intended only to remove the state’s nationals from danger.

<sup>303</sup> Toomey, *supra* note 5, at 476.

<sup>304</sup> *See Nottebohm Case (Liech. v. Guat.)*, 1955 I.C.J. 4, ¶¶ 59, 67 (Apr. 6).

<sup>305</sup> *See Borgen, supra* note 12, at 16; Lee, *supra* note 41, at 291; Toomey, *supra* note 5, at 444, 465.

<sup>306</sup> *See Lavrov Transcript, supra* note 267.

<sup>307</sup> Borgen, *supra* note 12, at 19.



the borders of Russia, not in the Falkland Islands.<sup>308</sup>

Thus, Russia did not assert that it had a broad legal right to intervene anywhere in the world based upon humanitarian concerns and R2P, but only within the post-Soviet states. Specifically relating to Georgia, Russia argued that the previously aforementioned Georgian attacks on civilians, which began on August 7, 2008, amounted to ethnic cleansing of South Ossetians.<sup>309</sup> Additionally, on August 10, 2008, then-President Medvedev accused Georgia of committing genocide in South Ossetia, and Russia's Prosecutor's Office began documenting the alleged war crimes for future prosecution.<sup>310</sup>

Russia's claim that it legally intervened in Georgia based upon humanitarian concerns and/or R2P hinges upon the same factual finding that South Ossetians and Abkhazians faced an extreme amount of peril at the hands of the Georgian state right before Russia intervened.<sup>311</sup> Georgia clearly endangered the lives of its citizens during the August 7, 2008 attack in South Ossetia. As discussed *supra*, Russia argued that Georgia committed ethnic cleansing in South Ossetia.<sup>312</sup> The EU's Independent International Fact-Finding Mission on the Conflict in Georgia, however, found that genocide did not take place despite Russia's insistence.<sup>313</sup> Russia compared the Georgian conflict to Kosovo; however, the Kosovo conflict resulted in large-scale ethnic cleansing of the Kosovars<sup>314</sup> while the situation in Georgia was politically rooted, without systemic discrimination against the South Ossetians or Abkhazians for their ethnic Russian heritage.<sup>315</sup> Therefore, whether the danger to South Ossetians after Georgia's August 7, 2008 attack warranted R2P or humanitarian intervention is ambiguous at best.

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<sup>308</sup> *Id.* at 20 (citing *Russian Minister of Foreign Affairs Sergey Lavrov's Article 'Russian Foreign Policy and a New Quality of the Geopolitical Situation' for Diplomatic Yearbook 2008*, MINISTRY FOREIGN AFF., [http://www.mid.ru/brp\\_4.nsf/e78a48070f128a7b43256999005bcbb3/bc2150e49dad6a04c325752e0036e93f?OpenDocument](http://www.mid.ru/brp_4.nsf/e78a48070f128a7b43256999005bcbb3/bc2150e49dad6a04c325752e0036e93f?OpenDocument) (last visited Dec. 23, 2015)).

<sup>309</sup> See Lee, *supra* note 41, at 291. Russia reformulated its perspective on territorial sovereignty as based upon the will of the people shown by factual circumstances on the ground. See Borgen, *supra* note 12, at 20. In accordance with this perspective, Russia argued it was not overlooking Georgia's territorial integrity, but the circumstances in South Ossetia made it very unlikely for South Ossetians to remain within Georgia's sovereign territory. *Id.* at 20–21.

<sup>310</sup> HUM. RTS. WATCH, *supra* note 244, at 70. This same report, however, ultimately determined that Georgia was not guilty of genocide. *Id.* at 71.

<sup>311</sup> See *supra* notes 73–76 and accompanying text.

<sup>312</sup> See *supra* note 309 and accompanying text.

<sup>313</sup> Christopher Waters *South Ossetia*, *supra* note 223, at 187.

<sup>314</sup> See Mirzayev, *supra* note 242, at 196.

<sup>315</sup> See *id.*

Russia does not have a legal claim for humanitarian intervention for one main reason: Russia did not receive Security Council authorization to intervene in Georgia.<sup>316</sup> Moreover, R2P has not yet formed into customary international law.<sup>317</sup> Due to R2P's ambiguous status within the UN legal order, it would be very unlikely for a singular state to successfully rely upon R2P to justify intervention. Indeed, R2P originally became a part of the UN legal order after having been invoked to justify multilateral interventions.<sup>318</sup> Even if R2P could be seen as a legitimate justification for unilateral intervention, only mass atrocities committed against the civilian population may trigger a right for foreign intervention.<sup>319</sup> The aforementioned circumstances in Georgia did not rise to this high threshold.<sup>320</sup> Overall, Russia's humanitarian-based arguments do not carry much legal weight.

*iv. Self-Defense of Russian Peacekeepers*

Finally, Russia argued that it had a legal right to defend the Russian peacekeepers stationed in Georgia pursuant to the Sochi Agreement.<sup>321</sup> During the August 7, 2008 Georgian attack, eighteen Russian peacekeeping troops were killed.<sup>322</sup> The attack was classified as "an act of aggression against Russian peacekeepers."<sup>323</sup> Thus, in addition to asserting a claim of self-defense for ethnic Russians, Russia also asserted self-defense of its peacekeepers as a legal reason for its unilateral intervention in Georgia.

This is Russia's strongest legal argument to justify its unilateral intervention in Georgia. Although Russia characterizes its legal argument in terms of the general right of self-defense, for reasons discussed *supra* regarding the requirement for an armed attack on the defending state's territory, it is more accurate to categorize Russia's legal argument under the doctrine of humanitarian rescue, a subset of

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<sup>316</sup> See *supra* notes 74–75 and accompanying text.

<sup>317</sup> See *supra* note 81 and accompanying text.

<sup>318</sup> See *supra* Part III stating, however, that Security Council R2P invocation is also unlikely to occur because of the veto power held by Russia and China.

<sup>319</sup> See INT'L COMM'N ON INTERVENTION & STATE SOVEREIGNTY, THE RESPONSIBILITY TO PROTECT 31 (2001), <http://responsibilitytoprotect.org/ICISS%20Report.pdf>.

<sup>320</sup> Mirzayev, *supra* note 242, at 195–96 ("These minority groups were not subject to acts of genocide or gross violation of human rights.")

<sup>321</sup> See *South Ossetia Max Planck*, *supra* note 72, at ¶ 29; see also *Russia Max Planck*, *supra* note 7, at ¶ 30; Waters, *supra* note 60, at 211.

<sup>322</sup> Waters, *supra* note 60, at 206.

<sup>323</sup> *Id.* at 195 (quoting Dmitry Medvedev, President of Russ., Statement on the Situation in South Ossetia (Aug. 8, 2008), [http://archive.kremlin.ru/eng/speeches/2008/08/08/1553\\_type82912type82913\\_205032.shtml](http://archive.kremlin.ru/eng/speeches/2008/08/08/1553_type82912type82913_205032.shtml)).

the right to self-defense.<sup>324</sup> Indeed, a state may take unilateral action to defend its citizens in danger abroad.<sup>325</sup> The Russian peacekeepers, who were lawfully present in Georgia pursuant to the Sochi Agreement, were Russian citizens. Moreover, it became apparent that Russian peacekeepers faced imminent danger after the August 7, 2008 attack orchestrated by the Georgian government that killed eighteen peacekeepers.<sup>326</sup> The EU's Independent International Fact-Finding Mission on the Conflict in Georgia found that Russia intervened lawfully on behalf of its peacekeepers stationed in South Ossetia.<sup>327</sup>

Humanitarian rescue justified Russia's immediate reaction to defend Russian peacekeepers after the August 7, 2008 attack, but it did not justify the invasion of Georgia that spilled into Georgia proper.<sup>328</sup> Indeed, the EU's Independent International Fact-Finding Mission on the Conflict in Georgia stated:

The Russian reaction to the Georgian attack can be divided into two phases: first, the immediate reaction in order to defend Russian peacekeepers, and second, the invasion of Georgia by Russian armed forces reaching far beyond the administrative boundary of South Ossetia. In the first instance, there seems to be little doubt that if the Russian peacekeepers were attacked, Russia had the right to defend them using military means proportionate to the attack. Hence the Russian use of force for defensive purposes during the first phase of the conflict would be legal. On the second item, it must be ascertained whether the subsequent Russian military campaign deeper into Georgia was necessary and proportionate in terms of defensive action against the initial Georgian attack. Although it should be admitted that it is not easy to decide where the line must be drawn, it seems, however, that much of the Russian military action went far beyond the reasonable limits of defense.<sup>329</sup>

Therefore, humanitarian rescue of Russian peacekeepers was a legitimate justification for the August 8, 2008 intervention, but not for Russia's subsequent full-scale military invasion.

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<sup>324</sup> See *supra* notes 289–90 and accompanying text.

<sup>325</sup> See *supra* notes 50–52 and accompanying text.

<sup>326</sup> See *supra* note 322 and accompanying text.

<sup>327</sup> Tagliavini Report, *supra* note 65, at 23; see also *Russia Max Planck*, *supra* note 7, at ¶ 30.

<sup>328</sup> Tagliavini Report, *supra* note 65, at 23.

<sup>329</sup> *Id.* at 23–24.

B. *Russia's Unilateral Intervention in Ukraine*

## 1. The Crimean Crisis

The fundamental source of the Crimean crisis lies in its unique history and relationships with the West and Russia. Crimea is the only Russian-majority province in Ukraine.<sup>330</sup> According to census data from 2001, 58.5% of Crimea's population is ethnic Russian, 24.4% is Ukrainian, and 12.1% is Crimean Tartars.<sup>331</sup> There is a general divide within Ukraine: western and central Ukraine largely align with Western powers while support for Russia is preeminent in southern and eastern Ukraine.<sup>332</sup> This east-west divide is based upon cultural differences, emotional sentiment, and politics.<sup>333</sup>

In 1954, Crimea was "gifted" from the Russian Soviet Federative Socialist Republic to the Ukraine Soviet Socialist Republic because then-General Secretary of the Communist Party, Nikita Khrushchev, had strong ties to Ukraine.<sup>334</sup> When the Soviet Union collapsed in 1991, Ukraine gained independence due to its republic status. It was not until 1992 that post-Soviet nationalists began contesting the legality of Crimea's transfer to Ukraine.<sup>335</sup> In fact, on May 21, 1992, the Russian Duma declared the transfer illegal.<sup>336</sup> Only several days prior to this declaration, Crimea's legislature passed an independence resolution and scheduled a subsequent referendum for Crimeans to decide the peninsula's future status.<sup>337</sup> As a result of these events, Ukraine allowed for Crimea to become an autonomous republic with significant authority to self-rule within Ukraine.<sup>338</sup> Subsequently, in 1997, under the direction of then-President Leonid Kuchma, Russia and Ukraine

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<sup>330</sup> RAJAN MENON & EUGENE RUMER, CONFLICT IN UKRAINE: THE UNWINDING OF THE POST-COLD WAR ORDER 2 (2015).

<sup>331</sup> *Walter Crimea*, *supra* note 273, at 295.

<sup>332</sup> MENON & RUMER, *supra* note 330.

<sup>333</sup> *See id.*; Christian Marxsen, *The Crimea Crisis—An International Law Perspective*, 74 HEIDELBERG J. INT'L L. 367 (2014), [http://www.mpil.de/files/pdf4/Marxsen\\_2014\\_-\\_The\\_crimea\\_crisis\\_-\\_an\\_international\\_law\\_perspective.pdf](http://www.mpil.de/files/pdf4/Marxsen_2014_-_The_crimea_crisis_-_an_international_law_perspective.pdf).

<sup>334</sup> *See Walter Crimea*, *supra* note 273, at 296; *see also* Krishnadev Calamur, *Crimea: A Gift to Ukraine Becomes a Political Flash Point*, N.P.R. (Feb. 27, 2014), <http://www.npr.org/blogs/parallels/2014/02/27/283481587/crimea-a-gift-to-ukraine-becomes-a-political-flash-point> (theorizing that Crimea was "gifted" to Ukraine because the transfer marked the 300th-year anniversary of Ukraine's integration into the Russian empire).

<sup>335</sup> MENON & RUMER, *supra* note 330, at 3.

<sup>336</sup> *Id.*

<sup>337</sup> *Id.* at 3–4 (citing Serge Schmemmann, *Crimean Parliament Votes to Back Independence from Ukraine*, N.Y. TIMES (May 6, 1992), <http://www.nytimes.com/1992/05/06/world/crimea-parliament-votes-to-back-independence-from-ukraine.html>).

<sup>338</sup> *Id.* at 4; *Walter Crimea*, *supra* note 273, at 296.

executed the 1997 Treaty on Friendship, Cooperation, and Partnership with Russia acknowledging Ukraine's international borders, including Crimea.<sup>339</sup> In that same year, the two states executed an agreement that allowed Russia to lease a naval base in Sevastopol (a port city within Crimea) for Russia's Black Sea Fleet.<sup>340</sup>

Although President Kuchma emphasized strengthening ties with Russia in his presidential campaign, he also developed relationships with the EU and NATO. For example, in 1997, Ukraine and NATO signed a Charter on a Distinctive Partnership.<sup>341</sup> In 2002, President Kuchma signed an Action Plan declaring Ukraine's "long-term goal of NATO membership."<sup>342</sup> Moreover, this sentiment was reaffirmed in Ukraine's military policy that further added Ukraine's commitment to becoming a full-fledged member of the EU.<sup>343</sup> It was only after the EU and NATO made it clear that the organizations did not plan to confer membership upon Ukraine anytime soon that President Kuchma turned his focus back to fostering ties with Russia. Specifically, he announced that Ukraine was not ready to become a NATO member and deleted any reference to NATO membership within the military doctrine.<sup>344</sup>

The 2004 presidential election within Ukraine illuminated the east-west divide within the state. The two front-runners were Viktor Yushchenko, an ethnic Ukrainian who was seen by Russia as an advocate for Western integration, and Viktor Yanukovich, an ethnic Russian from the Donbass region in eastern Ukraine bordering with Russia.<sup>345</sup> Yanukovich initially won the election; however, alleged election fraud spurred widespread political protests that involved the protester occupation of Kiev's Independence Square.<sup>346</sup> These protests, which became known as the Orange Revolution, resulted in a new election that Yushchenko won with 51.2% of the votes.<sup>347</sup> This was a strong blow to the pro-Russian region of Ukraine that created internal unrest.<sup>348</sup>

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<sup>339</sup> *Walter Crimea*, *supra* note 273, at 296.

<sup>340</sup> See Eric Posner, *The 1997 Black Sea Fleet Agreement Between Russia and Ukraine*, ERIC POSNER BLOG (Mar. 5, 2014), <http://ericposner.com/>.

<sup>341</sup> MENON & RUMER, *supra* note 330, at 28.

<sup>342</sup> See *NATO-Ukraine Action Plan*, NATO (Nov. 22, 2002), [http://www.nato.int/cps/en/natohq/official\\_texts\\_19547.htm?](http://www.nato.int/cps/en/natohq/official_texts_19547.htm?).

<sup>343</sup> MENON & RUMER, *supra* note 330, at 28.

<sup>344</sup> *Id.* at 29.

<sup>345</sup> See *id.* at 34.

<sup>346</sup> See *id.*

<sup>347</sup> *Id.*

<sup>348</sup> *Id.* (discussing how some protesters called for merging eastern Ukraine with

Much like the 2003 Rose Revolution in Georgia,<sup>349</sup> Western states and Western non-governmental organizations supported the Orange Revolution in Ukraine.<sup>350</sup> This did not sit well with Yanukovich and his supporters, who rallied against the foreign interference.<sup>351</sup> Western support displeased Russia as well, especially because it followed a similar pattern to the Rose Revolution in Georgia only one year earlier.<sup>352</sup>

It became clear that President Yushchenko was no Russian ally for several reasons. First, President Yushchenko made integration with the EU and NATO a priority.<sup>353</sup> Second, he condemned Russia's unilateral intervention in Georgia.<sup>354</sup> Yushchenko even offered to send Ukrainian troops to a proposed UN peacekeeping force within Georgia.<sup>355</sup> By the beginning of 2010, however, Yushchenko lost his appeal to the Ukrainian people, causing the pendulum to swing back in eastern Ukraine's favor.

In his second presidential election in 2010, Yanukovich won by relying upon Russophone Ukraine for support.<sup>356</sup> Yanukovich's presidency soon became associated with corruption.<sup>357</sup> The pervasive corruption in Ukrainian politics largely caused Yanukovich to turn away from signing the Associated Agreement with the EU, despite the fact that integration would have greatly boosted Ukraine's suffering economy.<sup>358</sup> President Yanukovich's abrupt order to suspend talks with the EU and NATO on November 21, 2013 came as a surprise to everyone.<sup>359</sup> In the same abrupt fashion, Yanukovich declared he would resume negotiations with Russia to join the Eurasian Customs Union (CU).<sup>360</sup> Following through with EU membership would have cut off Yanukovich from Russian support, effectively crippling his

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Russia).

<sup>349</sup> See *supra* note 246 and accompanying text.

<sup>350</sup> MENON & RUMER, *supra* note 330, at 35.

<sup>351</sup> *Id.*

<sup>352</sup> See *id.*

<sup>353</sup> *Id.* at 39.

<sup>354</sup> *Id.*

<sup>355</sup> See Viktor Yushchenko, *Georgia and the Stakes for Ukraine*, WASH. POST (Aug. 25, 2008), <http://www.washingtonpost.com/wp-dyn/content/article/2008/08/24/AR2008082401856.html>.

<sup>356</sup> MENON & RUMER, *supra* note 330, at 44.

<sup>357</sup> See *id.* at 47.

<sup>358</sup> See *id.* at 51.

<sup>359</sup> *Id.* at 77.

<sup>360</sup> *Id.* At that time, the Eurasian Customs Union was comprised of Russia, Belarus, and Kazakhstan.

power and finances.<sup>361</sup> Unfortunately for him, this decision provoked large-scale unrest in Western Ukraine, which ultimately led to his fall from power.

Many EU officials and Ukrainians were angered with President Yanukovich's sudden withdrawal from negotiations, which led to widespread civilian protests throughout Ukraine.<sup>362</sup> By December 2013, protests included more than 800,000 civilians and were escalating in violence, spurring protestors to seize Kyiv's city hall.<sup>363</sup> On December 10, 2013, Ukrainian police violently attempted to dismantle the protesters' stronghold of Kyiv's Independence Square, which resulted in many civilian casualties that spurred condemnation from the international community.<sup>364</sup> The violence continued into February 2014, which influenced the Ukrainian government to sign a compromise agreement that provided constitutional reform beginning in September 2014 followed by a new presidential election.<sup>365</sup> Shortly thereafter, President Yanukovich fled from Ukraine and sought refuge in Russia, causing the Ukrainian Parliament to remove him from office on February 25, 2014.<sup>366</sup> The pro-Western protesters seemed to have won the battle by ousting the pro-Russian regime.

In response to these events, pro-Russian demonstrations began on February 23, 2014 in Crimea.<sup>367</sup> Several days later, armed pro-Russian protesters seized government buildings in Simferopol, the Crimean capital.<sup>368</sup> Subsequently, unidentified uniformed troops appeared throughout Crimea.<sup>369</sup> In the midst of widespread civil unrest between the Ukrainian government and pro-Russian protesters, on March 1, 2014, the Russian Duma authorized President Vladimir Putin to deploy Russian troops until conditions in Ukraine normalized.<sup>370</sup> As a result

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<sup>361</sup> See *id.* at 51.

<sup>362</sup> MENON & RUMER, *supra* note 330, at 78; see also *Walter Crimea*, *supra* note 273, at 297.

<sup>363</sup> MENON & RUMER, *supra* note 330, at 79.

<sup>364</sup> *Id.*

<sup>365</sup> *Id.* at 80; *Agreement on the Settlement of Crisis in Ukraine - Full Text*, GUARDIAN (Feb. 21, 2014), <http://www.theguardian.com/world/2014/feb/21/agreement-on-the-settlement-of-crisis-in-ukraine-full-text>.

<sup>366</sup> MENON & RUMER, *supra* note 330, at 81.

<sup>367</sup> *Id.* at 83.

<sup>368</sup> See *Ukraine Crisis: Timeline*, BBC NEWS (Nov. 13, 2014), <http://www.bbc.com/news/world-middle-east-26248275>.

<sup>369</sup> See *id.* Although wholly denied by Russia, reports rumor that Russian military intervention began before the referendum occurred. See *Walter Crimea*, *supra* note 273, at 302.

<sup>370</sup> *Russian Parliament Approves Troop Deployment in Ukraine*, BBC NEWS (Mar. 1,

of Russian-supported propaganda classifying the revolution in Ukraine as a “Western plot executed by radical Ukrainian nationalists and fascist elements,” the majority of Crimeans supported integration with Russia.<sup>371</sup> On March 16, 2014, an overwhelming amount of voters decided to secede from Crimea and reunify with Russia.<sup>372</sup> President Putin executed a treaty with Crimean officials only two days after annexing Crimea and effectively dismembering Ukrainian territory.<sup>373</sup>

Following Crimea’s swift annexation, Russia amassed troops on the Ukrainian border, threatening military intervention.<sup>374</sup> Moreover, Russia supplied pro-Russian Ukrainians with weapons and other types of logistical support.<sup>375</sup> Self-proclaimed republics have been set up in other parts of eastern Ukraine, such as Donetsk and Luhansk, continuing the violence between the Ukrainian government and pro-Russian forces.<sup>376</sup> In the summer of 2014, Russia sent military supplies and personnel to the separatists in Donetsk and Luhansk in an effort to maintain the Russian strongholds.<sup>377</sup> It was not until September 2014 that the Ukrainian government signed a ceasefire agreement that has resulted in a stalemate.<sup>378</sup> By February 2015, more than 5400 people died since the crisis began.<sup>379</sup>

## 2. Russia’s Legal Justifications for Unilateral Intervention

Russia’s intervention in Ukraine ultimately led to its annexation of Crimea, effectively dismembering Ukraine’s territory.<sup>380</sup> The privileged interests doctrine discussed *supra* is similarly relevant in

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2014), <http://www.bbc.com/news/world-europe-26400035>.

<sup>371</sup> MENNON & RUMER, *supra* note 330, at 84.

<sup>372</sup> Anna Stepanowa, *International Law and the Legality of Secession in Crimea*, CAMBRIDGE J. INT’L COMP. L. ONLINE (Apr. 20, 2014), <http://cjlcl.org.uk/2014/04/20/international-law-legality-secession-crimea/>. While the referendum was held, Russian troops and paramilitary forces were visibly patrolling the streets. MENNON & RUMER, *supra* note 330, at x.

<sup>373</sup> See Will Englund, *Kremlin Says Crimea is Now Officially Part of Russia After Treaty Signing, Putin Speech*, WASH. POST (Mar. 18, 2014), [http://www.washingtonpost.com/world/russias-putin-prepares-to-annex-crimea/2014/03/18/933183b2-654e-45ce-920e-4d18c0ffec73\\_story.html](http://www.washingtonpost.com/world/russias-putin-prepares-to-annex-crimea/2014/03/18/933183b2-654e-45ce-920e-4d18c0ffec73_story.html).

<sup>374</sup> MENNON & RUMER, *supra* note 330, at 85.

<sup>375</sup> *Id.*

<sup>376</sup> *Id.*

<sup>377</sup> *Id.* at 86.

<sup>378</sup> *Id.*

<sup>379</sup> *Ukraine Conflict: Death Toll Rises Ahead of Peace Talks*, BBC NEWS (Feb. 11, 2015), <http://www.bbc.com/news/world-europe-31392473>.

<sup>380</sup> Although the current status of Crimea is controversial, Russia retains *de facto* control of the territory.



analyzing Russia's justifications for intervention in Ukraine.<sup>381</sup> Russia proffered three primary legal arguments to legitimize the events in Ukraine. This Section will consider whether these justifications pass muster under the UN legal order.

Before analyzing Russia's legal arguments set forth to legitimize its intervention in Ukraine, it is necessary to differentiate the conflict from the Russo-Georgian War. Unlike in Georgia, Russia did not execute a full-scale military invasion into Ukraine, but Russia did acquire new territory. In order for the annexation of Crimea to be lawful under international law, a specific series of events needed to occur. First, Crimea needed to secede<sup>382</sup> from Ukraine so that Russia would not violate Ukraine's territorial integrity by acquiring territory through the use of force.<sup>383</sup> Second, the newly independent Crimea would have had to freely consent to incorporation with Russia without any duress.<sup>384</sup> If Crimea never became independent from Ukraine, Russia's subsequent action of annexing the territory, and the means it took to acquire the territory, were illegal. This same two-stage process was set forth by President Putin in his March 18, 2014 address to incorporate Crimea into the Russian Federation.<sup>385</sup> Therefore, Russia not only set forth justifications for intervention, it also asserted legal arguments to legitimize Crimea's secession from Ukraine.

Whether Russia actually used physical force in Crimea is highly disputed. Russia wholly denies that Russian military forces entered Crimea (besides the forces already lawfully stationed in Sevastopol<sup>386</sup>) before Crimea's purportedly lawful secession.<sup>387</sup> Nonetheless, some reports indicated the opposite, stating that Russian military personnel were already in Crimea before the secession referendum occurred.<sup>388</sup>

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<sup>381</sup> See *supra* notes 266–77 and accompanying text.

<sup>382</sup> See *supra* Part II.

<sup>383</sup> Friendly Relations Declaration, *supra* note 39 (“The territory of a State shall not be the object of acquisition by another State resulting from the threat or use of force. No territorial acquisition resulting from the threat or use of force shall be recognized as legal.”).

<sup>384</sup> See *id.*

<sup>385</sup> Putin's Speech, *supra* note 8.

<sup>386</sup> During the Crimean conflict, Russia admitted to increasing the number of armed forces in Sevastopol, but allegedly did not violate the 25,000-troop maximum set by the Black Sea Fleet Agreement. *Id.*

<sup>387</sup> See *supra* note 340 and accompanying text.

<sup>388</sup> See Walter Crimea, *supra* note 273, at 302; see also Fredrik Dahl, *OSCE Team Say Crimea Roadblock Gunmen Threatened to Shoot at Them*, REUTERS (Mar. 12, 2014), <http://www.reuters.com/article/2014/03/12/us-ukraine-crisis-osce-idUSBREA2B1C120140312>; Steven Erlanger, *Ukrainian Government Rushes to Dampen Secessionist Sentiment*, N.Y. TIMES (Mar. 2, 2014), [http://www.nytimes.com/2014/03/03/world/europe/ukraine.html?\\_r=0](http://www.nytimes.com/2014/03/03/world/europe/ukraine.html?_r=0).

If these reports are true, Russia violated the prohibition on the use of force codified by Article 2(4) of the UN Charter and must successfully assert an exception to this rule (like self-defense) to legally justify the intervention.<sup>389</sup>

Regardless, the threat of the use of force is prohibited under Article 2(4), and member states may not intervene in the domestic affairs of other states.<sup>390</sup> On March 1, 2014, the Russian Duma authorized President Putin to deploy Russian military units to Crimea to stabilize the unrest within the peninsula.<sup>391</sup> The authorization represented a clear threat of force despite the fact that Russia never mounted a full-scale military invasion.<sup>392</sup> Moreover, Russia violated the principle of non-intervention because the “prohibition of intervention also applies to premature forms of recognition of secessionist movements in terms of separate statehood.”<sup>393</sup> Specifically, Russia’s conduct provided material support for Crimea’s secession through the March 1<sup>st</sup> authorization to use force and the political support given to the Crimean separatists. After Crimea’s purported annexation, Russia continued to violate the norm of non-intervention. In *Nicaragua v. United States*, the ICJ held that the United States breached the norm of non-intervention by supplying the Nicaraguan rebel forces with arms and logistical support.<sup>394</sup> Thus, Russia’s provision of weapons and logistical support to pro-Russian forces within Ukraine similarly violated the norm of non-intervention.<sup>395</sup> The legal position adopted by Russia to justify its actions in Crimea also seeks to assert exceptions to the norm of non-intervention.

The first sub-part of this Section will discuss Russia’s claim that it intervened on behalf of ethnic Russians in Crimea. In addition, the second sub-part explains Russia’s assertion that it received consent

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<sup>389</sup> See U.N. Charter art. 2, ¶ 4; U.N. Charter art. 51.

<sup>390</sup> U.N. Charter art. 2, ¶ 7; U.N. Charter art. 51.

<sup>391</sup> See *supra* note 370 and accompanying text.

<sup>392</sup> See Putin’s Speech, *supra* note 8 (“True, the President of the Russian Federation received permission from the Upper House of Parliament to use the Armed Forces in Ukraine. However, strictly speaking, nobody has acted on this permission yet.”). Unlike the situation in Kosovo, where almost an entire decade elapsed between the violence in 1999 and the 2008 declaration of independence from Serbia, in Crimea, only several days expired between the March 1, 2014 threat of the use of force and the annexation agreement on March 18, 2014. Therefore, Crimea’s change in status was much more directly connected to Russia’s conduct.

<sup>393</sup> Stefan Oeter, *The Role of Recognition and Non-Recognition with Regard to Secession*, in *SELF-DETERMINATION AND SECESSION* 44, 51 (Christian Walter ed., 2014).

<sup>394</sup> *Military and Paramilitary Activities in and Against Nicaragua (Nicar. v. U.S.)*, 1986 I.C.J. 116–17, ¶ 247 (June 27).

<sup>395</sup> MENNON & RUMER, *supra* note 330, at 85.

from the Ukrainian government. Finally, the third sub-part will address Russia's invocation of self-determination to support its intervention in Crimea.

*i. Self-Defense of Ethnic Russians in Crimea*

Similar to Russia's legal position in Georgia, Russia argues that it acted in lawful self-defense of ethnic Russians located within Crimea.<sup>396</sup> In the context of the Russian Duma's authorization of the use of force in Crimea, the Duma Chairperson, Valentina Matviyenko, asserted that there was "a real threat to the life and security of Russian citizens living in Ukraine."<sup>397</sup> Additionally, the Chairperson stressed the significance of taking "all possible measures, to ensure the security of our citizens living in Ukraine."<sup>398</sup> In President Putin's March 18, 2014 speech to the Duma, he asserted:

Millions of Russians and Russian-speaking people live in Ukraine and will continue to do so. Russia will always defend their interests using political, diplomatic and legal means. But it should be above all in Ukraine's own interest to ensure that these people's rights and interests are fully protected. This is the guarantee of Ukraine's state stability and territorial integrity.<sup>399</sup>

Russia's self-defense argument fails to comport with the UN legal order for two main reasons: (1) no armed attack occurred on Russian territory; and (2) self-defense may not be invoked for ethnic Russians living abroad. The reasoning for why the claim of self-defense fails is similar to the reasoning discussed *supra* for Georgia. First, the conflict in Ukraine did not threaten the existence or security of the Russian state, nor did it concern Russian territory.<sup>400</sup> Moreover, the protection of ethnic Russians may not trigger the right to self-defense.<sup>401</sup>

Russia also asserted a humanitarian rescue claim to justify its intervention in Ukraine.<sup>402</sup> Similar to the outcome in Georgia, Russia's argument for humanitarian rescue also fails since ethnic Russians in Ukraine are not considered legal Russian nationals. As with Russia's "passportization" in Georgia, it is believed that Russia conferred

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<sup>396</sup> See Burke-White, *supra* note 59, at 3–4; Marxsen, *supra* note 333, at 372.

<sup>397</sup> Putin's Letter on Use of Russian Army in Ukraine Goes to Upper House, TASS (Mar. 1, 2014), <http://tass.ru/en/russia/721586>.

<sup>398</sup> *Id.*

<sup>399</sup> Putin's Speech, *supra* note 8.

<sup>400</sup> See *supra* notes 289–90 and accompanying text.

<sup>401</sup> See *supra* note 291 and accompanying text.

<sup>402</sup> See Lee, *supra* note 41, at 253, 257; Marxsen, *supra* note 333, at 374.

passports and citizenship to Ukrainians in the past several years.<sup>403</sup> In addition to constituting interference in Ukraine's domestic affairs,<sup>404</sup> the ICJ has warned that naturalizing a person with little connection to the naturalizing state should not receive recognition in other states.<sup>405</sup>

A successful claim for humanitarian rescue requires the state's citizens to be facing imminent death.<sup>406</sup> During his address, President Putin expressed concern over the coup d'état in Kyiv that led Yanukovich to flee into Russia.<sup>407</sup> Specifically, President Putin stated:

However, those who stood behind the latest events in Ukraine had a different agenda: they were preparing yet another government takeover; they wanted to seize power and would stop short of nothing. They resorted to terror, murder and riots. Nationalists, neo-Nazis, Russophobes and anti-Semites executed this coup. They continue to set the tone in Ukraine to this day.<sup>408</sup>

Despite President Putin's assertions, no evidence exists that ethnic Russians in Crimea were in imminent peril.<sup>409</sup> Therefore, Russia's legal position rooted in self-defense does not meet the UN legal order's parameters to justify the threat on the use of force or violation of the norm of non-intervention.

#### *ii. Intervention by Invitation*

Russia also argues that it had the legal right to intervene in Ukraine because it received Ukraine's consent through President Yanukovich.<sup>410</sup> Russian authorities assert that after Yanukovich fled Ukraine as a result of the political unrest, he wrote a letter asking Russia to intervene in Ukraine against the alleged anti-Semite and nationalist protesters.<sup>411</sup> According to the ICJ, the official government

<sup>403</sup> See Vincent M. Artman, Opinion, *Annexation by Passport*, ALJAZEERA AM. (Mar. 14, 2014), <http://america.aljazeera.com/opinions/2014/3/ukraine-russia-crimea-passportizationcitizenship.html>; Charles King, Opinion, *Crimea, the Tinderbox*, N.Y. TIMES (Mar. 1, 2014), <http://www.nytimes.com/2014/03/03/opinion/crimea-the-tinderbox.html?module=ArrowsNav&contentCollection=Opinion&action=keypress&region=FixedLeft&pgtype=article>.

<sup>404</sup> See *supra* note 296 and accompanying text (concluding that Russia's "passportization" policy interfered in Georgia's internal affairs).

<sup>405</sup> See *Nottebohm Case (Liech. v. Guat.)*, 1955 I.C.J. 4, ¶¶ 59, 67 (Apr. 6).

<sup>406</sup> See *supra* note 51 and accompanying text.

<sup>407</sup> See *supra* notes 363–66 and accompanying text.

<sup>408</sup> Putin's Speech, *supra* note 8.

<sup>409</sup> See *Walter Crimea*, *supra* note 273, at 309; see also Marxsen, *supra* note 333, at 374.

<sup>410</sup> Marxsen, *supra* note 333, at 374.

<sup>411</sup> *Id.*; Scott Neuman, *Yanukovich: 'I Was Wrong' to Ask Russian Troops into Crimea*, N.P.R. (Apr. 2, 2014), <http://www.npr.org/blogs/thetwo-way/2014/04/02/>

of a state may invite foreign states to deploy military troops to its territory, but an opposition group may not.<sup>412</sup> In order to assert such a claim, Russia must show that Ukraine lawfully consented to intervention.

Russia must also demonstrate that Yanukovich had legitimate authority to request Russian intervention to make his invitation attributable to the state of Ukraine.<sup>413</sup> As a preliminary matter, Yanukovich's removal from office failed to comply with the Ukrainian Constitution, which codifies removal procedures.<sup>414</sup> Nevertheless, Yanukovich lacked the authority to consent to Russian intervention because at the time of his invitation, he had already lost effective control over Ukraine and lacked legitimacy in the eyes of many Ukrainians.<sup>415</sup> Alternatively, even if Yanukovich possessed the required authority to consent to Russian intervention, Russia's argument still fails because the intervention far exceeded the scope of Yanukovich's invitation.<sup>416</sup> Russia made no attempt to re-establish Yanukovich's regime and instead supported Crimea's secession.

### *iii. Russia's Invocation of Self-Determination*

Finally, Russia justified its intervention in Ukraine by broadly interpreting the principle of self-determination to legitimize Crimea's secession from Ukraine.<sup>417</sup> As indicated above, self-determination is one of the main principles of the UN legal order<sup>418</sup> and gives a "people" the right to freely "determine . . . their political status and to pursue their economic, social and cultural development."<sup>419</sup> When the right to self-determination is frustrated, a people may secede under certain circumstances. Two generally agreed upon circumstances include the colonial context and a people under foreign subjugation.<sup>420</sup> Some argue that when a parent state systemically violates a people's right to self-determination, a people are entitled to remedial secession.<sup>421</sup> For example, remedial secession may be appropriate when the parent state

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298385578/yanukovich-i-was-wrong-to-ask-russian-troops-into-crimea.

<sup>412</sup> Military and Paramilitary Activities in and Against Nicaragua (Nicar. v. U.S.), 1986 I.C.J. 116, ¶ 246 (June 27).

<sup>413</sup> See Marxsen, *supra* note 333, at 374–75.

<sup>414</sup> CONSTITUTION OF UKRAINE art. 108 (Uk.).

<sup>415</sup> See Marxsen, *supra* note 333, at 377.

<sup>416</sup> *Id.*

<sup>417</sup> See Putin's Speech, *supra* note 8.

<sup>418</sup> See U.N. Charter art. 1, ¶ 2.

<sup>419</sup> Friendly Relations Declaration, *supra* note 39.

<sup>420</sup> See *supra* note 65 and accompanying text.

<sup>421</sup> See Burke-White, *supra* note 59, at 3.

commits systemic crimes against humanity or genocide against a people.<sup>422</sup> A large amount of controversy surrounds remedial secession, however, so its status under international law remains unclear.<sup>423</sup> Nevertheless, Russia asserted that the new Ukrainian government systemically oppressed Crimeans, therefore leading Crimea to effectuate lawful remedial secession.<sup>424</sup>

In legitimizing Crimea's secession under international law, President Putin argued that it was "practically impossible to fight against the will of the people."<sup>425</sup> Russia argued that the Crimeans were subjected to large-scale oppression by the new Ukrainian government, characterizing its new members as "neo-Nazis, Russophobes and anti-Semites."<sup>426</sup> To illustrate this point, President Putin spoke about a draft law to revise language policies in Ukraine that aimed to infringe upon the Russian minority within the state.<sup>427</sup> Moreover, President Putin explained that anyone who opposed the new Ukrainian government was "threatened with repression" and that Russia could not "abandon Crimea and its residents in distress."<sup>428</sup> Finally, Russia asserted that Crimeans made a free, fair, and transparent choice to secede from Ukraine and join Russia.<sup>429</sup> For the purposes of this Comment, it will be assumed that Crimeans qualify as a "people."<sup>430</sup>

As aforementioned, remedial secession may not be a valid avenue for secession under international law. Assuming, however, that remedial secession comports with the UN legal order, the circumstances in Crimea were nowhere near the high threshold needed to assert such an extraordinary remedy.<sup>431</sup> The Ukrainian Constitution provided a relatively significant degree of political autonomy.<sup>432</sup> Indeed, the right to self-determination is commonly satisfied through federalism and by breaking a state into provinces with

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<sup>422</sup> *Id.*

<sup>423</sup> Indeed, only three instances of remedial secession appear in recent state practice including: the independence of Timor-Leste in 2002; the independence of Kosovo in 2008; and the creation of South Sudan in 2011. *Id.* All of these cases shared some level of UN involvement.

<sup>424</sup> *See id.* at 6; Putin's Speech, *supra* note 8.

<sup>425</sup> Putin's Speech, *supra* note 8.

<sup>426</sup> *Id.*

<sup>427</sup> *Id.*

<sup>428</sup> *Id.*

<sup>429</sup> Burke-White, *supra* note 59, at 6.

<sup>430</sup> *See supra* note 55 and accompanying text for the most commonly cited definition of a "people."

<sup>431</sup> *See* Burke-White, *supra* note 59, at 7; Marxsen, *supra* note 333, at 383.

<sup>432</sup> *See supra* note 338 and accompanying text.

varying degrees of autonomy.<sup>433</sup> More significantly, the Ukrainian government did not systemically oppress Crimeans.<sup>434</sup> Ukraine did not commit large-scale genocide or ethnic cleansing against Crimeans to warrant the dismemberment of its territory.<sup>435</sup> Therefore, the conflict did not meet the standard required for remedial secession. Since Crimea failed to legally secede from Ukraine, Russia's subsequent annexation is illegal.

C. *Commonalities Between Russia's Legal Rhetoric in Georgia and Ukraine*

Although the series of events in Georgia and Ukraine are distinct, Russia's legal arguments for intervention share several common features. Drawing commonalities between the two conflicts will shed light on Russia's overall legal position towards foreign intervention without state consent. As indicated *supra*, Russia's legal justifications for intervention in Georgia and Ukraine largely fail legal analysis measuring compliance with the UN legal order. Nevertheless, Russia's legal arguments to justify intervention are facially grounded in international law and the UN legal order specifically.<sup>436</sup> The fact that Russia's legal justifications comport with the UN legal order on the surface is still significant to the analysis.

Generally, states conform to international law, but maintain differing perspectives on the same legal rules.<sup>437</sup> Russia interprets the UN legal order in such a way as to serve its material interests. Often, "states cloak their actions in legalese to foster reputations of being lawful actors . . . . A reputation for compliance with international law is valuable because it allows states to make more credible promises to other states."<sup>438</sup> Therefore, it is often too risky to unilaterally intervene in a non-consenting foreign state without any legal support.<sup>439</sup> It is likely that this logic weighs upon Russian decision-makers, and this desire to ground its actions in international law influences Russia's legal perspective on intervention. Consistency of behavior is important in the international community,<sup>440</sup> so Russia's overall legal stance on foreign intervention may adapt to justify actions taken to

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<sup>433</sup> Oeter, *supra* note 393, at 55.

<sup>434</sup> See Marxsen, *supra* note 333, at 383.

<sup>435</sup> See generally Burke-White, *supra* note 59, at 8.

<sup>436</sup> See *id.* at 2.

<sup>437</sup> See VAUGHAN LOWE, INTERNATIONAL LAW 18 (2007).

<sup>438</sup> Borgen, *supra* note 12, at 28 (internal quotation mark omitted).

<sup>439</sup> See LOWE, *supra* note 437, at 21.

<sup>440</sup> *Id.* at 23.

further Russia's self-interest.<sup>441</sup>

A good example of Russia morphing its legal perspective to reflect its material interest is the use of the privileged interests doctrine. Pursuant to the doctrine, Russia "pay[s] particular attention to the traditional partners of the Russian Federation."<sup>442</sup> In line with this belief, Russia argues that its general right of self-defense applies to protect Russian nationals abroad as if the Russian homeland itself were under attack.<sup>443</sup> Moreover, the argument that Russia may intervene to rescue ethnic Russians in a foreign state also derives from the privileged interests doctrine.<sup>444</sup> Russia asserted these arguments to justify its intervention in Georgia and Ukraine despite the differing factual circumstances of each conflict. Since the privileged interests doctrine has been incorporated into the Russian legal perspective on intervention, it is highly likely that Russia will continue to assert the same legal claims for future interventions in "fraternal" states.

As previously discussed in Part IV, another common theme between Russia's legal justifications for Georgia and Ukraine is the use of Kosovo conflict as precedent.<sup>445</sup> Russia recited the ICJ's holding in the Kosovo Advisory Opinion which stated that no prohibition on declarations of independence exist under international law.<sup>446</sup> In President Putin's March 18, 2014 address he asked:

We keep hearing from the United States and Western Europe that Kosovo is some special case. What makes it so special in the eyes of our colleagues? It turns out that it is the fact that the conflict in Kosovo resulted in so many human casualties. Is this a legal argument? The ruling of the International Court says nothing about this. This is not even double standards; this is amazing, primitive, blunt cynicism. One should not try so crudely to make everything suit their interests, calling the same thing white today and black tomorrow. According to this logic, we have to make sure every conflict leads to human losses.<sup>447</sup>

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<sup>441</sup> See *supra* note 13 and accompanying text.

<sup>442</sup> See *supra* notes 268–69 and accompanying text.

<sup>443</sup> See *supra* note 275 and accompanying text.

<sup>444</sup> See *supra* note 274 and accompanying text.

<sup>445</sup> Kosovo Advisory Opinion, 2010 I.C.J. Rep. 437–38, ¶ 81 (July 22). See also *supra* notes 222–23 and accompanying text.

<sup>446</sup> See Putin's Speech, *supra* note 8; see also Christopher Waters *South Ossetia*, *supra* note 223.

<sup>447</sup> See Putin's Speech, *supra* note 8.



In fact, the Crimean Declaration of Independence cites the Kosovo Advisory Opinion as legal authority for independence from Ukraine.<sup>448</sup> Despite the fact that Russia vehemently opposed Kosovar independence, Russia incorporated the outcome into its legal rhetoric justifying unilateral intervention in Georgia and Ukraine because it suited Russia's material interest.

Finally, another area of overlap between Russia's legal rhetoric in Georgia and Ukraine relates to potential NATO expansion in both states. In addition to asserting that Russia has the right to intervene on behalf of ethnic Russians in the former Soviet Union states, the privileged interests doctrine also implicates Russia as the regional guarantor of security.<sup>449</sup> As discussed *supra*, Russia feels threatened by eastward NATO expansion. After NATO announced its plans to incorporate Georgia and Ukraine, Russia did not shy away from voicing its strong objections.<sup>450</sup> In addition to NATO enlargement being perceived as a security threat to Russia, it also represents the weakening of Russian authority in its own backyard.<sup>451</sup> Thus, for the most part, Russia wants to keep NATO (and its member states) out of its region of interest. This is illustrated by Russia's veto of a 2009 draft Security Council resolution extending the mandate for the United Nations Observer Mission in Georgia.<sup>452</sup> Russia found the draft resolution "clearly unacceptable" because it would include foreign peacekeepers in Georgia as opposed to Russia's formerly unilateral peacekeeping control.<sup>453</sup> Therefore, Russia has a general distaste for Western encroachment into its area of privileged interests and will take the necessary steps to ensure that it maintains its high status within the region.

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<sup>448</sup> *Walter Crimea, supra* note 273, at 299.

<sup>449</sup> *See Borgen, supra* note 12, at 19.

<sup>450</sup> *See Mearsheimer, supra* note 7, at 79.

<sup>451</sup> *See id.* at 77 ("Since the mid-1990s, Russian leaders have adamantly opposed NATO enlargement, and in recent years, they have made it clear that they would not stand by while their strategically important neighbor turned into a Western bastion.").

<sup>452</sup> Press Release, Security Council, Security Council Fails to Adopt Resolution Extending Mandate of Georgia Mission for 2 Weeks, as Russian Federation Votes against Text, U.N. Press Release SC/9681 (June 15, 2009).

<sup>453</sup> *See id.*

VI. RUSSIA'S OVERALL COMPLIANCE WITH THE UN LEGAL ORDER AND ITS CONTRADICTIONARY LEGAL POSITION REGARDING FOREIGN INTERVENTION

State adherence to the UN legal order is important to maintain international peace and security. Compliance with the UN legal order allows states to generally predict how other states will behave.<sup>454</sup> States that do not conform to the UN legal order often face the consequences: "There is likely to be a price to be paid for violations; and it is not easy to foresee when and where that price will be exacted. In most cases it is preferable to obey the law and sleep soundly."<sup>455</sup> Therefore, it is no surprise that Russia's justifications for intervention in Georgia and Ukraine are based upon international law and the UN legal order.<sup>456</sup>

Facially, Russia's legal arguments to legitimize its breach of the prohibition on the use of force and the norm of non-intervention in Georgia and Ukraine conform to the UN legal order. For example, in both conflicts, Russia asserted the right to self-defense, codified by Article 51 of the UN Charter. Also, the promotion of human rights is listed as a purpose of the UN legal order in Article 1; thus, Russia classified its actions as humanitarian in nature, thereby complying with its obligations under Article 56 of the UN Charter to further the purposes of the UN. Further, Russia relied upon one of the UN legal order's founding principles of self-determination to support Crimean independence. These arguments are driven by Russia's self-interest and its unique perspective on the UN legal order created in furtherance of such interests. The fact that Russia proffered these legal arguments to support its intervention indicates that Russia attaches some value to conformance with the UN legal order<sup>457</sup> and desires to foster an image of being a lawful actor within the international system.<sup>458</sup>

As indicated in Part V, although Russia's legal arguments set forth to justify intervention in Georgia and Ukraine seem to comply with the UN legal order on a surface level, deeper legal analysis yields opposite results. The majority of these arguments fails under closer scrutiny and does not meet the required legal parameters pursuant to the UN legal order. The potential exception to this conclusion is Russia's assertion that it acted in self-defense of its peacekeepers stationed in

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<sup>454</sup> See LOWE, *supra* note 437, at 20.

<sup>455</sup> *Id.* at 23.

<sup>456</sup> See BURKE-WHITE, *supra* note 59.

<sup>457</sup> See *supra* notes 8–12 and accompanying text.

<sup>458</sup> See Borgen, *supra* note 12, at 28.

South Ossetia.<sup>459</sup> Therefore, Russia's stance on intervention in Georgia and Ukraine falls outside of the UN legal order in that regard. This does not mean, however, that Russia is a rogue state within the international system that pays no regard to the UN legal order. The fact of the matter is, much like other great powers, Russia interprets international law and the UN legal order in its own way. In this particular instance, though, Russia's perspective on the state of the law for foreign intervention does not pass muster.

Russia's legal perspective upon foreign intervention in the Security Council, however, is a different story. Seemingly, there is a night and day difference between the Russia that unilaterally intervened in Georgia and Ukraine, and the Russia that adopts a more conservative approach within the Security Council. Using the recent conflicts in Libya and Syria, Part III discussed how Russia generally disfavors foreign intervention. As a P5 Member, Russia shows great deference for state sovereignty, the principle of non-intervention, and territorial integrity.<sup>460</sup> Generally, Russia objects to foreign intervention without host state consent and, further, adopts the belief that foreign intervention often exacerbates domestic unrest.<sup>461</sup> Moreover, Russia seems to strictly adhere to the UN Charter in believing that the Security Council is the only body with the authority to order intervention in the domestic affairs of member states.<sup>462</sup>

Russia's voting behavior in the context of Libya and Syria illustrated its conservative approach. For example, Russia became very displeased with the regime change effectuated by NATO intervention in Libya. Russia expressed its belief that Western states used the norms underlying international humanitarian law and R2P as a pretext for political goals.<sup>463</sup> Russia's dissatisfaction with the outcome in Libya translated into an even more conservative legal perspective upon intervention in Syria. In justifying its vetoes for several draft resolutions addressing the growing violence in the Syrian civil war, Russia emphasized Syria's territorial integrity and the principle of non-intervention.<sup>464</sup>

Russia's legal stance in the Security Council and its legal arguments set forth to justify intervention in Georgia and Ukraine are in clear contradiction. As a P5 Member, Russia champions the

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<sup>459</sup> See *supra* notes 321–29 and accompanying text.

<sup>460</sup> See *supra* notes 142–43 and accompanying text.

<sup>461</sup> See *supra* notes 144 & 146 and accompanying text.

<sup>462</sup> See *supra* note 147 and accompanying text.

<sup>463</sup> See *supra* notes 153–54 and accompanying text.

<sup>464</sup> See *supra* note 158 and accompanying text.

protection of state sovereignty and territorial integrity, but did not afford Georgia and Ukraine the same level of deference. Russia's contradictory legal positions display the nuance in Russia's overall perspective on foreign intervention and the UN legal order itself.

## VII. CONCLUSION

This Comment concludes that Russia's legal position within the Security Council most accurately reflects its general legal stance towards foreign intervention. This general legal stance, however, changes when conflicts arise in Russia's backyard. As evinced by the privileged interests doctrine, Russia feels closely connected to post-Soviet states. Russia's legal positions for intervening in Georgia and Ukraine stem from its belief that it has a sovereign right to maintain stability within the region. Indeed, Russia possesses a need to maintain regional power, thereby influencing its perspective upon the UN legal order and foreign intervention.

Understanding Russia's legal perspective on intervention is significant because of Russia's P5 status within the Security Council. The Security Council is comprised of diverse states with varying political agendas. The Security Council's efficacy is largely dependent upon the goodwill of other states and the ability of its diverse members to come to collective decisions. Since Russia is an influential decision-maker within the Security Council, knowing the circumstances in which Russia is more (or less) likely to support intervention becomes valuable in predicting future Security Council action. Without understanding the reasons behind Russia's voting behavior and foreign policy goals, other Security Council members will face great difficulty in working with Russia to effectuate collective action.

As discussed above, Russia exhibits relatively high sensitivity to unrest in its near abroad. Thus, it is more likely that Russia will continue to unilaterally intervene in the domestic affairs of its neighboring states and will block any potential Security Council intervention in those states. Unfortunately for Ukraine, this means that the Security Council will not be coming to its aid to repel the illegal Russian intervention. At the same time, however, Russia is likely to maintain its conservative approach towards Security Council intervention when it involves other regional conflicts, such as the conflict in Syria. Russia's conservative approach may partly be explained by Russia's desire to keep other foreign powers out of its area of privileged interests. The more rigorously Russia defends territorial integrity and the norm of non-intervention, the less likely it becomes that other states will intervene through collective Security

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Council action. Therefore, Russia's legal perspective on the components of the UN Legal Order identified in Part II is both reflective of Russia's legal interpretation of international law and its material interests.