

# **The Conflict between Self-Determination and Territorial Integrity: The South Ossetian Paradigm**

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## **I: Introduction**

Following the outbreak of the August 2008 War between Georgia and Russia, Soviet and Russian historian, Ronald Suny made two apt observations to the Associated Press. In his view, Georgia has a legitimate claim to South Ossetia on the grounds of territorial integrity because the region is located within Georgian boundaries, boundaries that cannot be changed unless both sides agree to the changes, according to international law. On the other hand, Suny says the Ossetians' claim for independence is justifiable on the grounds of self-determination, the general idea that any group that sees itself as a nation should have a right to rule itself. The problem, however, for the Ossetians is that these putatively justifiable grounds do not necessarily translate into political independence and sovereignty within a legally separated, defined, and recognized territory in the current international legal framework.<sup>1</sup> This essay explores some of the legal and theoretical issues that make South Ossetia's status as an independent state at best ambiguous, and at worst impossible in the current international framework. In doing so, the essay will survey the clash between secession based on self-determination and the necessity of preserving territorial integrity, using the Georgia-South Ossetian case as a paradigm. It will begin with an overview of the conflict, and then discuss the trajectory of self-determination and secession in international law since WWI. Next, the essay will survey some arguments and theories for and against secession based on self-determination. Finally, it will provide a brief discussion of how Russia's recognition of South Ossetia as an independent state complicates its recognition by others, thus leaving South Ossetia dangling somewhere between *de facto* and *de jure* statehood.

## **II: The Georgian Conflict in Context: Independence versus Territorial Integrity**

South Ossetia is a region in the north of Georgia inhabited largely by ethnic Ossetians and a minority of Georgians. The Ossetians, who speak a language related to Farsi, have a long history of tense relations with Georgia over the former's desire for independence from the latter. Enmity between Ossetians and Georgians first arose in the early 1920s when South Ossetia sided with the Bolshevik occupation of Georgia and became not a republic, but rather an autonomous region in Soviet Georgia with special privileges and status as a reward for its loyalty.<sup>2</sup>

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<sup>1</sup> Suny, Ronald, qtd. in "Why Does South Ossetia Want Independence," *International Herald Tribune*, 19 Aug. 08. Online, Internet. Available: <<http://www.iht.com/articles/ap/2008/08/19/europe/EU-Russia-Georgia-Disputed-Territory.php>> (11 Nov. 2008).

<sup>2</sup> "Regions and Territories: South Ossetia," *BBC News*, Online, Internet, Available: <[http://news.bbc.co.uk/2/hi/europe/country\\_profiles/3797729.stm](http://news.bbc.co.uk/2/hi/europe/country_profiles/3797729.stm)> (12 Nov. 2008).

In 1989, as Georgia began pursuing its own independence from the tottering Soviet Union, South Ossetia made concurrent bids for full independence from Georgia and for unification with North Ossetia in the RSFSR. Open conflict erupted by January 1991 as then Georgian President, Zviad Gamsakhurdia, attempted to reassert Georgian authority in South Ossetia. The resulting hostilities produced an estimated 2,000-4000 deaths while thousands on both sides, were displaced.<sup>3</sup> Eighteen months later, a ceasefire was negotiated in June 1992 and a tripartite peacekeeping network of Russians, Georgians, and Ossetians (JPFK)\* set up a security zone around Tskhinvali.<sup>4</sup> The Organization for Security and Cooperation in Europe (OSCE) facilitated negotiations to end the conflict and continues to monitor JPFK activities in South Ossetia.<sup>5</sup>

While a ceasefire was brokered, mutual hostility smoldered in a ‘frozen conflict,’ where few developments toward resolution were made, but many opportunities were lost. Robert Legvold points to Georgia’s failure to guide itself (and its breakaway regions)<sup>1</sup> through transition from its Soviet past to a modern socio-political order, thus leaving itself “weakened and poorly positioned to address the security challenges confronting it.” Within this context, Legvold believes South Ossetia ‘evokes’ national security “in its most primal form...as a threat to the territorial integrity of the state itself.”<sup>6</sup>

Because of this perceived threat, incoming Georgian president, Mikheil Saakashvili, pledged to rectify these disparities after the Rose Revolution (2003). He set out to reform and strengthen the executive, bring corruption to heel, break criminal networks, create a trustworthy police force and institute other democratic and economic reforms like tax collection for revenue. More pressingly, Saakashvili wanted to “compel progress” by reclaiming central government control over its breakaway regions. In 2004, Saakashvili sent hundreds of police, military, and paramilitary, personnel into South Ossetia. This activity had the immediate effect of ‘reheating the embers of conflict’ with South Ossetia through “inconclusive clashes” that were brought to an end quickly after Russia sent in several hundred paramilitary elements to support the Ossetians and discourage the Georgians.<sup>7</sup>

After all forces pulled back, Saakashvili announced a new “peace plan” for South Ossetia in July 2005. In his *Initiative*, he guaranteed South Ossetia’s status as an “autonomous entity within the territory of Georgia,” and assured that South Ossetia’s territory would be “restored within the same borders fixed before the commencement of

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<sup>3</sup> Nichol, Jim, “Russia-Georgia Conflict in South Ossetia: Context and Implications for U.S. Interests.” Congressional Research Service Report for Congress. 7 October 2008. *Federation of American Scientists*. Online. Internet. Available: <<http://www.fas.org/sgp/crs/row/RL34618.pdf>>, 1 (11 Nov. 2008).

\* JPFK or the Joint Peacekeeping Forces.

<sup>4</sup> Ibid. Tskhinvali is South Ossetia’s capital city.

<sup>5</sup>The JCC is the negotiating mechanism co-chaired by Russia, Georgia, North Ossetia, and South Ossetia. See “OSCE Mission to Georgia: Overview,” *OSCE*, Online, Internet, Available: <<http://www.osce.org/georgia/13199.html>> (12 Nov. 2008).

<sup>1</sup> South Ossetia and Abkhazia.

<sup>6</sup> Legvold, Robert, “Outlining the Challenge,” in Coppieters, Bruno and Robert Legvold, eds., *Statehood and Security: Georgia after the Rose Revolution* (Cambridge (Mass.): MIT Press, 2005), 2.

<sup>7</sup> Ibid., 3; Nichol, 2. Russia also sent several hundred paramilitary personnel into South Ossetia to counter Georgia’s military weight.

the conflict.”<sup>8</sup> Eduard Kokoity, South Ossetia’s ‘President,’ rejected the plan in October 2005 arguing that South Ossetians are “citizens of Russia.” Such an assertion is informed, and complicated by, Russia’s quick defense of South Ossetians and their territory, but also South Ossetia’s use of Russian passports and currency, and significantly, their participation in Russia’s presidential election in 2004.<sup>9</sup>

In November 2006, South Ossetians took part in a plebiscite that asked the question, “Should the Republic of South Ossetia retain its current status as an independent state, and be recognized by the international community?”<sup>10</sup> While 99% of voters opted to ‘remain independent,’ the EU, OSCE, Council of Europe, US State Department, and NATO refused to recognize the results. In general, these groups believe the unilateral referendum served only to increase tensions and divisions at a time when both sides “should [have been] devoting all efforts to stabilizing the situation and moving forward to negotiating process.” Georgia unsurprisingly condemned the plebiscite, backing instead a ‘counter-referendum’ among ethnic Georgians in (and displaced from) South Ossetia that supported the preservation of Georgia’s territorial integrity.<sup>11</sup>

Open conflict did not rekindle until 7 August 2008, though tensions escalated with intermittent artillery attacks and bombings around Tskhinvali beginning as early as 3 July.<sup>12</sup> One month later, Georgia launched a military attack on Tskhinvali in the attempt to retake the territory and assert Georgian central state authority. This attack was met with significant Ossetian resistance and a swift, and large, Russian military response. Defending “Russian citizens” and serving the role of “guarantor of security for peoples of the Caucasus,” Russian soldiers not only pushed Georgian troops back out of South Ossetia, but also occupied Georgian territory for several weeks.<sup>13</sup>

Russia’s short-term occupation of Georgia was met with quick international condemnation, as was its formal recognition of South Ossetia and Abkhazia as independent states on 26 August. After considering referendum results from both regions, the Russian Federation Council and the State Duma voted to support each regions’ formal appeals for recognition of their independence. Russian President, Dmitry Medvedev, declared that the decision to recognize South Ossetia and Abkhazia was based first on “the freely expressed will of the Ossetian and Abkhaz peoples.” Second,

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<sup>8</sup> “Initiative of the Georgian Government with Respect to the Peaceful Resolution of the Conflict in South Ossetia (2005),” Art. III (Territory); Art. IV (Political Status), *President of Georgia Website*. Online, Internet, Available: <<http://www.president.gov.ge/?l=E&m=0&sm=5&st=210>> (12 Nov. 2008).

<sup>9</sup> Kokoity, Eduard, qtd. in Nichol, 3. Nichol also notes South Ossetian participation in the 2007 Duma election and 2008 Russian presidential election as well, 3n.

<sup>10</sup> Landru, Nicolas, “Two Referendums and Two ‘Presidents’ in South Ossetia,” *Caucas Europe News*, Online, Internet, Available: <[http://www.caucas.com/home\\_eng/breve\\_contenu.php?id=279](http://www.caucas.com/home_eng/breve_contenu.php?id=279)> (13 Nov. 2008).

<sup>11</sup> Nichol, 3. For other Internet-based news sources, see “International Community Will Not Recognize South Ossetia Vote,” *Radio Free Europe: Radio Liberty*, 20 Nov. 2006, <<http://www.rferl.org/content/article/1072687.html>>; “NATO Rejects Referendum in Georgia’s South Ossetia Region,” *International Herald Tribune*, 11 Nov. 2006, <[http://www.ihf.com/articles/ap/2006/11/11/europe/EU\\_GEN\\_NATO\\_Georgia.php](http://www.ihf.com/articles/ap/2006/11/11/europe/EU_GEN_NATO_Georgia.php)>; Quoted text from “Referendum in South Ossetia Region Not Recognized and Unproductive, OSCE Chairman Says,” *OSCE*, 13 Nov. 2006, <<http://www.osce.org/item/22052.html>> (12 Nov. 2008).

<sup>12</sup> Nichol, 4.

<sup>13</sup> Medvedev, Dmitry, qtd. in Nichol, 4; Schwirtz, Micheal, Anne Barnard, and C.J. Chivers, “1,500 Reported Killed in Georgia Battle,” *New York Times*, 9 Aug. 2008. Online, Internet, Available: <<http://www.nytimes.com/2008/08/10/world/europe/10georgia-2.html>> (13 Nov. 2008).

Medvedev pointed out that provisions set out in the UN Charter, the 1970 Declaration on the Principles of International Law Governing Friendly Relations between States, and the 1975 CSCE Helsinki Final Act, guided Russian recognition.<sup>14</sup>

Some of these provisions are worth noting, not only for Russian justifications behind their endorsement of South Ossetia's independence, but also the international community's condemnation of this recognition. Overall, grounds from both sides have important implications for the legitimacy and illegitimacy of South Ossetia's secession. From Russia's perspective, Articles 73 and 74 of the UN Charter call for "good neighbourliness" on the part of member states to assist non-self-governing territories in the "progressive development of their political institutions according to the particular circumstances of each territory and its peoples..."<sup>15</sup> Article VIII of the Helsinki Final Act discusses respect for the "equal rights of peoples and their right to self-determination" and asserts that all peoples "always have the right, in full freedom, to determine, when and as they wish, their internal and external political status..."<sup>16</sup> As for the 1970 Declaration governing Friendly Relations, the Preamble makes clear that,

“...the principle of equal rights and self-determination of peoples constitutes a *significant contribution* to contemporary international law, and that its effective application is of paramount importance for the promotion of friendly relations among states, based on respect for the principle of sovereign equality.”

As it stands, only Russia and Nicaragua recognize South Ossetia as an independent state. Other existing states and international organizations have refused to offer recognition to South Ossetia and condemn Russia's endorsement. Statements issued to the OSCE from countries like Canada and the US collectively disagree with Russia's recognition because it "violates Georgia's territorial integrity and sovereignty, and is contrary to UN Security Council Resolutions supported by Russia."<sup>17</sup> OSCE Chairman, Alexander Stubb says Russia, as a participating state, must follow OSCE principles and respect Georgia's territorial integrity and sovereignty, and that the "international community cannot accept unilaterally established buffer zones."<sup>18</sup> Georgia predictably, opposes the endorsement on the official grounds that Russia interfered in its internal affairs, while violating rights to self-determination and disrespecting human rights and freedoms enshrined in the UN Charter and the Helsinki Final Act.<sup>19</sup> The Georgian position on self-determination is particularly important:

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<sup>14</sup> "Statement by President of Russia Dmitry Medvedev," 26 Aug. 2008, President of Russia Website, Online, Internet, Available: [http://www.kremlin.ru/eng/speeches/2008/08/26/1543\\_t\\_ype82912\\_205752.shtml](http://www.kremlin.ru/eng/speeches/2008/08/26/1543_t_ype82912_205752.shtml) (14 Nov. 2008).

<sup>15</sup> "Declaration Regarding Non-Self-Governing Territories, Articles 73 & 74." *Charter of the United Nations*. Online, Internet, Available: <http://www.un.org/aboutun/charter/> (14 Nov. 2008).

<sup>16</sup> "Art. VIII." *Conference on Security and Cooperation in Europe: Final Act, Helsinki*, 1 Aug. 1975, Online, Internet, Available: <http://www.osce.org/item/15661.html> (15 Nov. 2008).

\* Emphasis mine, its significance will be explained in the next section.

<sup>17</sup> Canadian Delegation to the OSCE, "Statement on Georgia," 11 Sept. 2008, OSCE, Online, Internet, Available: [http://www.osce.org/documents/pc/2008/09/33027\\_en.pdf](http://www.osce.org/documents/pc/2008/09/33027_en.pdf) (15 Nov. 2008).

<sup>18</sup> Stubb, Alexander, qtd. in "OSCE Chairman Condemns Russia's Recognition of South Ossetia, Abkhazia Independence," 26 Aug. 2008, OSCE, <http://www.osce.org/item/32667.html> (15 Nov. 2008).

<sup>19</sup> Ministry of Foreign Affairs of Georgia, "Statement of the Ministry of Foreign Affairs of Georgia," 27 Aug. 2008, OSCE, Online, Internet, Available: [http://www.osce.org/documents/pc/2008/08/32748\\_en.pdf](http://www.osce.org/documents/pc/2008/08/32748_en.pdf) (15 Nov. 2008).

“In legal terms, the right of peoples to self-determination means that this process should proceed within democratic frames. The will, once expressed freely, may only be superseded by an analogous decision made under no duress or interference by external forces.”<sup>20</sup>

Yet, along with its apparent willingness to work within a democratic framework to recognizing and ensuring South Ossetia’s right to self-determination, Georgia also recognizes the necessity of upholding “the fundamental principles of the contemporary international system: respect for the territorial integrity of sovereign states and inviolability of frontiers.”<sup>21</sup> Each of these principles is clearly laid out in the UN Charter, Helsinki Final Act, and the Declaration Governing Friendly Relations. For example, the latter document provides that first, states must refrain from the use of force against the territorial integrity of another state. Second, states must not intervene in matters within the domestic jurisdiction of another state, and third, states cannot engage in the “partial or total disruption of the national unity and territorial integrity” of another state.<sup>22</sup> Because these norms appear to have been violated in Georgia, other states condemn Russia’s occupation of Georgia and recognition of South Ossetia, and by implication South Ossetia’s secession because these actions violate established international legal norms on territory.

Therefore, South Ossetia’s current status is at best ambiguous as it dangles somewhere between *de facto* and *de jure* recognition. Unfortunately, for South Ossetia, the current framework of international law and state-building make recognition of its independence difficult, to achieve. This is because rights to self-determination and secession do not *in fact* exist in international law, though as the Declaration Governing Friendly Relations between States shows above, self-determination has made a “significant contribution” in the construction of today’s international legal framework.

### **III: Self-Determination and Independence in The Twentieth Century**

Self-determination itself has played an ambiguous role in state-building since the early twentieth century, while secession remains the “most dramatic form assertions of self-determination can take.”<sup>23</sup> According to Malcolm Shaw, the principle of self-determination in international law is the condition where a people within a “colonially defined territorial unit” are free to determine their own political status.<sup>24</sup> ‘Colonial’ is the operative word in this context because at present, an *international legal right* to secede is found in only two specific circumstances: the process of classic “saltwater” decolonization, and the reclaiming of state territory subject to unjust military occupation.<sup>25</sup> In both cases, self-determination does have nationalistic and political

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<sup>20</sup> Ibid.

<sup>21</sup> Ibid.

<sup>22</sup> “Preamble, Preamble (a), (c), “Principle 1 (a),” *Declaration of Principles of International Law Governing Friendly Relations and Cooperation among States in Accordance with the Charter of the United Nations*, Online, Internet, Available: < <http://www.hku.edu/law/conlawhk/conlaw/outline/Outline4/2625.htm>>. (14 Nov. 2008).

<sup>23</sup> Buchanan, Allen, *Justice, Legitimacy, and Self-Determination: Moral Foundations for International Law* (New York: Oxford UP, 2004), 332.

<sup>24</sup> Shaw, Malcolm N., *International Law*, Fifth Ed. (Cambridge: Cambridge UP, 2003), 231.

<sup>25</sup> Buchanan, *Justice*, 333.

function. What can emerge from its exercise within a given territory *is* independence as a sovereign, independent state, (re)unification with an existing, neighboring state, or any other political status “freely decided upon by the people concerned.”<sup>26</sup> Yet, while self-determination has had a significant role to play in the creation of statehood, it is also “instrumental in both the creation and dissolution of states” in that self-determination movements can preserve or challenge the sovereignty and independence of states while providing focal points for disputes, if not the “criteria” for their resolution.<sup>27</sup>

Prior to the First World War, when nationalist movements achieved independence from mother states, other states recognized the “established facts of statehood,” though international law did not recognize the legitimacy of claims to self-determination before independence of the new state was gained. After the war, the Paris Peace Conference marked what Diane Orentlicher calls a significant, though limited departure from the classical view. By creating boundaries for new and reconfigured states along “national lines,” self-determination was not a legal right, but rather a “guiding principle for statesmen” charged with the duty of remapping East and Central Europe.<sup>28</sup> However, the right to self-determination with corresponding territorially based statehood based on self-determination was neither codified into law nor the League of Nations Covenant. Indeed, Woodrow Wilson’s proposal for the future execution of “territorial adjustments” to accommodate changes in “present racial conditions and aspirations or present social and political relationships, pursuant to the principle of self determination,” was rejected.<sup>29</sup>

A consequence of this omission was realized soon afterward when two League of Nations Commissions connected to the Aaland Islands dispute concluded in 1921 that “international law does not recognize a right of national self-determination” and that to detach the Aaland Islands from Finland and give them to Sweden “would be an impairment of the status and rights of Finland,” a sovereign state whose “sovereignty extended over the Aaland Islands.”<sup>30</sup> While this decision indicates early international prioritizing of Finland’s sovereignty over the Aalanders’ desire for unity with Sweden, Orentlicher points out there were “hints at possible exceptions” in conditions where the rights of minorities were implicated.<sup>31</sup> Her reading of the Commission reports show how secession could be “a last resort when the State lacks either the will or the power to enact and apply just and effective guarantees’ of minority rights.”<sup>32</sup>

Nevertheless, this would not be the case for the Aaland Islands that ultimately became an autonomous region of Finland. Despite two plebiscites and several petitions to League members asking first to be united with Sweden and then to be accorded the right of self-determination, the League Commission judged in Finland’s favor because Finland

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<sup>26</sup> Shaw, 231.

<sup>27</sup> Ibid.; Högger, Daniel, “...Till Law Do Us Part!-On the Right to Secede in International Law,” *International Relations and Security Network*, Special Issue Nov. 2008, Online, Internet, Available: <<http://www.isn.ethz.ch/isn/>> (16 Nov. 2008).

<sup>28</sup> Orentlicher, Diane F., “International Responses to Separatist Claims,” in Macedo, Stephen and Allen Buchanan, eds., *Secession and Self-Determination* (New York: New York UP, 2003), 21.

<sup>29</sup> Wilson, Woodrow, “Covenant (Wilson’s First Draft),” in Miller, David H., *The Drafting of the Covenant*, Vol. 2 (New York: G. P. Putnam’s Sons, 1928), 12.

<sup>30</sup> “First Act of League: Findings of Its Commission on Aaland Islands Reach New York and Are Summarized.” *New York Times*. 15 May 1921.

<sup>31</sup> Orentlicher, 21.

<sup>32</sup> “The Aaland Islands Question: Report Submitted to The Council of The League of Nations by The Commission of Rapporteurs (1921),” qtd. in Orentlicher, 21-22.

had granted the Aaland Islands autonomy and permitted the substitution of civil over military duties to the state.<sup>33</sup> In this case, it appears that Finland made efforts to accommodate a minority group within its sovereign territory (ie: incentives to stay), but these attempts were met with strong Aalander opposition, a situation not unlike the Ossetians absolute refusal to accept Georgian offers of autonomy and political rights within Georgian territory after the unrecognized 2006 Ossetian plebiscite.<sup>34</sup>

While the Aaland Islands case serves as an early marker of the League of Nations' preference for upholding a sovereign state's territorial integrity, self-determination did resurface in the post-Second World War period of decolonization. This period is crucial to understanding the shift in meanings for self-determination and independence because as Joshua Castellino notes, liberation evolved into a process based less on ethnicity and nationality, and more on the principle that a newly liberated group had a right to govern themselves in whichever form they chose. The importance of this principle is reflected further "as it sought universal rather than European application" throughout Africa and Asia.<sup>35</sup>

New nations, however, did not always come into being peacefully as colonies sought liberation from metropolitan control while colonial empires were compelled (sometimes grudgingly) to retreat from their former colonial territories.<sup>36</sup> The 1960 *Declaration on the Granting of Independence to Colonial Countries and Peoples* served as a guideline for this process. Though it undoubtedly focuses specifically on decolonization, the 1960 Declaration remains one of the clearest statements on self-determination found in international law.<sup>37</sup> The Declaration plainly states that "all peoples have the right to self-determination; by virtue of that right they freely determine their political status and freely pursue their economic, social and, and cultural development."<sup>38</sup> However, Castellino rightly identifies a crucial point in the document that "unwittingly" became the basis for modern conflict around self-determination and secession.<sup>39</sup> The Declaration's second paragraph states that its makers are "conscious of the need for the creation of conditions of stability and well-being and peaceful and friendly relations based on respect for the principles of equal rights and self-determination of all peoples."<sup>40</sup> Castellino observes that self-determination and the liberation of colonial peoples "could not be allowed to come at the price of stability," thus indicating the threat independence "naturally poses to order."<sup>41</sup>

As mentioned above, not all colonizers left their former territories behind willingly, a disinclination that had important implications for the territorial aspect of decolonization. During this period, Portugal "insisted that the 'overseas territories' it

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<sup>33</sup> "First Act of League," *New York Times*.

<sup>34</sup> Nichol, 3.

<sup>35</sup> Castellino, Joshua, *International Law and Self-Determination: The Interplay of the Politics of Territorial Possession with Formulations of Post-Colonial 'National' Identity* (The Hague: Martinus Nijhoff, 2000), 22.

<sup>36</sup> Buchanan, *Justice*, 333.

<sup>37</sup> *Ibid.*

<sup>38</sup> "Art. II," *Declaration on the Granting of Independence to Colonial Countries and Peoples* (1960), Online, Internet, Available: <[http://www.unhchr.ch/html/menu3/b/c\\_coloni.htm](http://www.unhchr.ch/html/menu3/b/c_coloni.htm)> (16 Nov. 2008).

<sup>39</sup> Castellino, 23.

<sup>40</sup> "Paragraph II," *1960 Declaration*.

<sup>41</sup> Castellino, 23.

ruled were sovereign Portuguese territory and not colonies” and refused to report on their ‘colonies’ progress toward self-rule as required under the *UN Charter* declaration on non-self-governing peoples.<sup>42</sup> Portugal’s claim that its territories were integral parts of Portugal prompted *UN General Assembly Resolution 1541 (XV)* which reiterates the obligation of states to transmit information about progress toward self-rule under Article 73 (e) while stating that the obligation only ceases when the non-self-governing territory in question attains a “full measure of self-government” for its people and territory.<sup>43</sup>

Yet, Portugal largely based its claim on Article 6 of the *1960 Declaration on the Granting of Independence* where, like the *Declaration on Friendly Relations*, “Any attempt aimed at the partial or total disruption of the national unity and the territorial integrity of a country is incompatible with the purposes and principles of the *Charter of the United Nations*.”<sup>44</sup> However, as Castellino points out, the UN’s position on the matter can be found in Principle IV of *Resolution 1541* where the obligation to transmit information on progress concerns territories that are “geographically separate” and “distinct ethnically and/or culturally from the country administering it.”<sup>45</sup> In this vein, if India were decolonized, British territorial integrity could not be affected, nor would the Congo’s independence compromise the territorial integrity of Belgium. In other words, because the territories are “separate,” independence cannot negatively “affect the territorial integrity of the colonial power,”<sup>46</sup> thus Portugal’s claim was effectively neutralized.

While this definition is clear in the context of decolonization, its limited application is problematic for secessionist movements within the territory of a mother country and outside of the process of decolonization. Thus, one lesson taken from decolonization is that despite the fact that legal norms established in this period justify colonial emancipation based on the colonized territory’s rights to self-determination, issues of stability and interpretations about sovereign territory are still subjects of substantial concern and contention. This is true for not only the relevant competing parties, but also supporters and detractors of secession based on self-determination. It is largely due to these ‘conflicts of interest’ that few secessionist movements have succeeded since the last wave of decolonization, save notably countries like Bangladesh, Eritrea, and among others, Kosovo and former Soviet republics like Georgia.

Overall, the considerable difficulty in achieving political independence is due to the fact that like rights to self-determination, no laws on the right to secession outside the context of decolonization have been established. However, it is widely understood that the exercise of secession may be recognized as legitimate in cases where “gross and systematic violations of human rights” are present and “when the resulting entity is economically [and politically] viable.”<sup>47</sup> It should be noted that the economic and

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<sup>42</sup> *Ibid.*, 25; “Art. 73 (e),” *UN Charter*.

<sup>43</sup> “Principles II & III,” *UN General Assembly Resolution 1541 (XV)*, Online, Internet, Available: <<http://daccessdds.un.org/doc/RESOLUTION/GEN/NR0/153/15/IMG/NR015315.pdf?OpenElement>> (17 Nov. 2008).

<sup>44</sup> “Art. VI,” *Declaration on the Granting of Independence*.

<sup>45</sup> “Principle IV,” *Resolution 1541*.

<sup>46</sup> Castellino, 26.

<sup>47</sup> Carley, Patricia, “Self-Determination: Sovereignty, Territorial Integrity, and the Right to Secession,” *Report from a Roundtable Held in Conjunction with the US Department of State’s Policy Planning Staff* (Washington: United States Institute for Peace, 1996), 17.



political viability of potential states is a significant departure from the legitimation of independence in the decolonization period where the 1960 Declaration on the Granting of Independence affirmed that the “inadequacy of political, economic, social, or educational preparedness should never serve as a pretext for delaying independence.”<sup>48</sup> Outside the context of decolonization, a potential state must then demonstrate economic and political capability in order for its independence to be both legitimated and recognized, the precluding many would-be nations with measurably inadequate institutions from seceding from mother countries.

As well, under the norm of *uti possidetis juris*, created in the context of decolonization to preserve the stability of new states whose frontiers might otherwise be challenged by neighbors, boundaries established and existing at the moment of independence cannot be altered unless the relevant parties consent to change. This norm was created in the interest of post-colonial stability and required new states to consent to “the respecting of colonial borders” but still take into account “the interpretation of the principle of self-determination of peoples.” Therefore, in this context, it is taken for granted that self-determination cannot invoke changes to frontiers that existed at the time of independence and “cannot be utilized as a legal tool for the dismantling of sovereign states.”<sup>49</sup>

The importance of the norm of *uti possidetis juris* cannot be overstressed, nor can its relevance to the South Ossetia-Georgia conflict be ignored. The collapse of the Soviet Union raised the same “spectre” of difficulties associated with the transfer of power during decolonization, thus much stress was placed on order and the “maintenance of newly independent states in the same shape as when they were a part of the old Soviet Union.”<sup>50</sup> Article III of the 1991 Charter of the Commonwealth of Independent States declares that members shall respect the sovereignty of member states, the inviolability of state borders, the recognition of existing border and the territorial integrity of states. The Article also calls for the respect of “the inalienable rights of peoples to self-determination and the right to determine their fate without outside interference.”<sup>51</sup> The reality, however, is that while CIS nations “endorse the frontiers they received” territorial claims remain unresolved because, as was the case during decolonization, *uti possidetis juris* “created new identities by forcing peoples together under alien allegiances, in a territorial straight-jacket.” Thus, the doctrine is an ordering principle meant to protect new states from fragmentation while it gained, and maintains precedence over self-determination “for reasons of stability”<sup>52</sup>

#### **IV: Theories of Secession Based on Self-Determination**

While no law is in place for the right to secession internationally, there exists extensive scholarship on theories of secession because, quite simply, separatist movements have continued long after decolonization ran its course. Theories of

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<sup>48</sup> “Art. III,” *Declaration on the Granting of Independence*.

<sup>49</sup> Shaw, 270-71. See also UN General Assembly Resolutions 1514 (XV) and 1541 (XV)

<sup>50</sup> Castellino, 119.

<sup>51</sup> “Art III,” *Charter of the Commonwealth of Independent States*, 8 Dec. 1991, Online, Internet, Available: < <http://therussiasite.org/legal/laws/CIScharter.html> > (18 Nov. 2008).

<sup>52</sup> Castellino, 120, 133; Shaw, Malcolm, “The Heritage of States: The Principle of *Uti Possidetis Juris* Today,” *British Yearbook of International Law*, Vol. 67 (London: Oxford UP, 1996), 97.

secession can be grouped into two sections. The first cluster includes Remedial Right Only theories, and the second, Primary Right theories. The former cluster incorporates theories that assert a group's general right to secede "if and only if it has suffered certain injustices, for which secession is the appropriate remedy of last resort." However, Remedial Right Only theories also allow for "special rights" to secede in cases where a) a state grants a right to secede, b) if a state's constitution includes a right to secede, or c) secession comes through an agreement by which "was initially created out of previously independent political units" and it there was an "implicit or explicit assumption" at the time of unification that secession at some later point was permissible.<sup>53</sup>

Overall, as Allen Buchanan explains, Remedial Right Only theories demonstrate there can be special rights to secede in the absence of injustice, but they do restrict the general right to secede only to these three cases. As for injustices, two examples that fall into this rubric include the human rights violations cited by East Pakistanis who seceded to create Bangladesh in 1970 and previously sovereign territories that were unjustly taken by the state (ie: the Baltic Republics in the USSR). However, before secession, Buchanan argues other conditions should be satisfied in order for the secessionist group to be recognized as having the right to secede. These provisos include guarantees for the respect of human rights for all citizens (including minorities from the rump state) and that just terms of secession will be negotiated including the fair division of national debt, the negotiation of treaty, defense, and security obligations, and a "negotiated determination of new boundaries."<sup>54</sup>

The second cluster of theories are Primary Right theories that differ from Remedial Right arguments in that they assert certain groups "can have a (general) right to secede in the absence of injustice," though different theories select varying conditions that must be satisfied before a group can have a right to secede when no injustice is evident.<sup>55</sup> The Primary Right cluster is itself subdivided between Ascriptive Group and Associative Group theories. The former assigns rights to secede to groups with commonalities like culture or ethnicity that exist independently of "any actual political association." Associative Group theories, on the other hand, show no common ascriptive characteristics are needed for secession if heterogeneous members choose voluntarily to "associate together in an independent political unit of their own. One important example from the Associative Group Primary Right theory cluster is that of the pure plebiscite theory of the right to secede. This theory demonstrates how any secessionist group that represents the majority within a defined area can have the right to secede if this option is chosen by the majority in a plebiscite (ie: inside South Ossetia's as opposed to Georgian 'borders'). Therefore, any group that has a desire to determine their own independent political course has the right to secede from a rump state, so long as the majority of people in the affected territory agree, ethnicity, history, or culture notwithstanding.<sup>56</sup>

Political and legal philosophers, Harry Beran and Christopher Heath Wellman offer strong examples in this line of thinking. Beran says any group can secede if they constitute a "substantial majority" in their portion of the state and are able to assemble

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<sup>53</sup> Buchanan, Allen, "Theories of Secession," *Philosophy and Public Affairs*, Vol. 26. No. 1 (Winter 1997): 34-35.

<sup>54</sup> *Ibid.*, 36-37.

<sup>55</sup> *Ibid.*, 35.

<sup>56</sup> Buchanan, 38-40.

the necessary resources to create a viable independent state.<sup>57</sup> Beran believes “actual” consent of the governed to be governed by a particular group is necessary for political control, but this consent cannot be assured “unless those who wish to secede are allowed to do so.”<sup>58</sup> Therefore, a separatist movement should call a referendum within the specific territory in question, and “determine whether there should be a change in this territory’s political status (ie: whether it should secede from its state).” If the majority in this territory votes for secession, “then the territory’s people may exercise its right of self-determination and secede.”<sup>59</sup> For the South Ossetians then, their plebiscites indicate first, they do not consent to being governed by Georgia, and second, from the Ossetian point of view, the political functions Georgia has attempted to impose on the region cannot be performed because they conflict with the ‘legitimate’ functions of government set up and approved by South Ossetians.<sup>60</sup>

Like Beran, Wellman argues for a primary right of political association, or rather, what he calls, political self-determination.<sup>61</sup> Careful to note that the realization of “unfettered political self-determination” through secession would be “disastrous for existing states,” Wellman delineates a few provisos of his own to ensure that anarchy does not become “the price of unqualified freedom of association.”<sup>62</sup> First, as above, the majority of people within the given territory must agree to secession. More importantly, however, for the right to secede to be legitimate, both the separatist group and the rump state must be capable of maintaining a secure and just political environment so that the act of secession will not be “excessively harmful.” In other words, not only must the new state be viable, the rump state must also be capable of maintaining its functions (ie: justice and security) in the portion of territory it retains. Without this viability, the right to secession based on self-determination is precluded until such a time that this viability issue is rectified.<sup>63</sup> In the South Ossetia-Georgia case,

Donald Horowitz, a critic of secession and its corresponding theories, believes that secession is never the answer to conflicts associated with self-determination because it can exacerbate violence, minority oppression and expulsion, while precluding interethnic accommodation and at the same time creating broader international conflicts between supporters and detractors.<sup>64</sup> In particular, Horowitz finds fault in secession theories based on groups who want to choose with whom to associate politically because theorists like Wellman begin with the premise that “self-determination is to ethnic groups what moral autonomy is to individuals.”<sup>65</sup> This type of argument, in Horowitz’s view, is “specious,” in that collective identities fluctuate while individual ones do not, while “no

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<sup>57</sup> Ibid., 39; Beran, Harry, *The Consent Theory of Political Obligation* (London: Croom Helm, 1987), 42.

<sup>58</sup> Buchanan, 39.

<sup>59</sup> Beran, Harry, “A Democratic Theory of Political Self-Determination for a New World Order,” in Lehning, Percy, ed., *Theories of Secession* (London: Routledge: 1998), 38-39.

<sup>60</sup> Yates, Steven, “When is Political Divorce Justified?” in Gordon, David ed., *Secession, State & Liberty* (New Brunswick (NJ): Transaction, 1998), 37.

<sup>61</sup> Buchanan, 39; Wellman, Christopher Heath, *A Theory of Secession* (Cambridge: Cambridge UP, 2005), 7.

<sup>62</sup> Wellman, 7-8.

<sup>63</sup> Ibid., 36-39.

<sup>64</sup> Horowitz, Donald L., “The Cracked Foundations of the Right to Secede,” *Journal of Democracy*, Vol. 14, No. 2 (April 2003): 5-6; Buchanan, Allen, *Secession: The Morality of Political Divorce from Fort Sumter to Lithuania and Quebec* (Boulder: Westview, 1991), 2.

<sup>65</sup> Horowitz, 7.

new political entity can solve the problem of collective self-expression,” and the continued issue of minorities in the new state means “a clean break is a chimera.”<sup>66</sup>

As for boundaries and territorial integrity, Buchanan puts forth the idea that secession would mean the institutions left behind in the rump state would be quite simply diminished in population and fragmented in territory. This means that the “territorially porous remainder” would not be able to perform satisfactorily the functions of a modern state such as securing peace and protecting rights.<sup>67</sup> In Buchanan’s view, a state’s authority rests on its ability to serve the basic interests of individuals; therefore it has “an obligatory interest in maintaining territorial integrity. All nations have the same “morally legitimate interest” in preserving this integrity that encompasses both territorial sovereignty and territorial preservation in order to maintain “an enforceable legal order and all the benefits that depend on it.”<sup>68</sup> In other words, if secession was codified into international law, this would legitimize the rise of secessionist movements globally, thus threatening the collapse of the global order and giving rise to the anarchy of which Wellman also cautions.

## **V: Recognition and the Russian Card**

So far, this paper has provided an overview of the Georgia-South Ossetian conflict, discussed the direction of self-determination in 20<sup>th</sup> century international law, and surveyed some theories of secession and arguments to the contrary. Yet, while the overall conflict between self-determination and territorial integrity help illustrate the significant difficulty in determining South Ossetia’s right to secession, the problem is complicated still further by Russia’s recognition of its independence. By Russia’s will and consent, under the constitutive theory of recognition, South Ossetia was effectively created as a new state, endowing it with legal personality.<sup>69</sup> At the same time, South Ossetia can claim statehood based on Article III of the 1933 Montevideo Convention on the Rights and Duties of States:

“The political existence of the state is independent of recognition by the other states. Even before recognition, the state has the right to defend its integrity and independence, to provide for its conservation and prosperity, and consequently to organize itself as it sees fit, to legislate upon its interests, administer its services, and to define the jurisdiction and competence of its courts.”<sup>70</sup>

Though South Ossetia may claim statehood due to its initial declaration independent of recognition coupled with its subsequent recognition by Russia and Nicaragua, the vast majority of existing nations do not recognize South Ossetia, which

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<sup>66</sup> Ibid., 7-8.

<sup>67</sup> Buchanan, *Theories*, 47; Wellman, 8.

<sup>68</sup> Buchanan, 47; Elden, Stuart, “Contingent Sovereignty, Territorial Integrity and the Sanctity of Borders, *SAIS Review*, Vol. 26, No. 1 (Winter-Spring 2006), 21.

<sup>69</sup> Shaw, 368.

<sup>70</sup> “Art. III,” *Montevideo Convention on The Rights and Duties of States* (26 Dec. 1933), Online, Internet, Available: <[http://www.cfr.org/publication/15897/montevideo\\_convention\\_on\\_the\\_rights\\_and\\_duties\\_of\\_states.html](http://www.cfr.org/publication/15897/montevideo_convention_on_the_rights_and_duties_of_states.html)> (24 Nov. 2008). Political existence and its independence from recognition by others was reiterated in Art. IX of the *Charter of the Organization of American States* (1948). See <<http://www.oas.org/juridico/English/charter.html#ch3>>.

“undoubtedly hamper[s] the exercise of its rights and duties, especially in view of the absence of diplomatic relations.” At the same time, this non-recognition constitutes “tangible evidence” that South Ossetia has not established its “conformity with the required criteria of statehood,” notably the capacity to enter into relations with other states.<sup>71</sup> Yet, South Ossetian historian, Ruslan Bzarov, counters this idea stating South Ossetia meets all of the requirements that include possession of a permanent population, a defined territory, a government, and the capacity have relations with other states like Russia, Nicaragua, if not Abkhazia.<sup>72</sup> Moreover, Bzarov claims their right to independence was gained as a result of the 1991 referendum. Since then it has conducted 2 plebiscites, 3 presidential and 5 parliamentary elections, and has established an independent judiciary, social services, viable infrastructure, and a military. Yet, while South Ossetia is confident in the legitimacy of its claims to sovereignty and independence based on first self-determination, and second, the fact that it can exist as a state independent of international recognition, it still “seeks participation” in the international integration processes.<sup>73</sup>

While it seems clear that the international community will continue to give primacy to Georgia’s territorial integrity while acknowledging South Ossetia’s autonomy within that territory, another strike against South Ossetia is international concern about Russia’s invasion and recognition. US Ambassador to the OSCE, Julie Finley states explicitly, “Russia’s decision to recognize the independence of South Ossetia...again raises serious questions about its intentions vis-à-vis Georgia and in the region.”<sup>74</sup> While Russia’s motives are beyond the scope of this paper, it is necessary to point out that South Ossetia can be seen as first, Russia’s retaliation against the Western states that recognized Kosovo’s independence in February 2008.<sup>75</sup> Critics fear that Kosovo’s independence created a “precedent that could lead to redrawn borders” around the world,” including a dangerous precedent for Chechnya, whose own separatist bids threaten Russia’s national interest. However, because Serbia is one of Russia’s client states, Kosovar independence presents a significant challenge to both Russia’s strategic position and credibility as a great power in the former Soviet Union (FSU).<sup>76</sup>

Georgia also challenges Russia’s position and credibility by serving as a transit area for the 1770 km Baku-Tbilisi-Ceyhan (BTC) oil pipeline from the Caspian and Central Asia to Europe and the US via Turkey. Parts of this pipeline run only 55 km from South Ossetia, but the entire line threatens Russian predominance in oil deliveries to

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<sup>71</sup> Shaw, 371-72.

<sup>72</sup> “Art. I,” *Montevideo Convention*; Bzarov, Ruslan, “Independence of the Republic of South Ossetia: A Guarantee of Safety and a Reliable Future for the South Ossetian People,” *State Committee on Information and Press of the Republic of South Ossetia*, Online, Internet, Available: < <http://cominf.org/2008/09/10/1166478243.html> > (24 Nov. 2008).

<sup>73</sup> Bzarov, “Independence.”

<sup>74</sup> Finley, Julie, “Statement on the Situation in Georgia” (28 Aug. 2008), *OSCE*, Online, Internet, Available: <[http://osce.usmission.gov/media/pdfs/2008-statements/st\\_082808\\_georgia.pdf](http://osce.usmission.gov/media/pdfs/2008-statements/st_082808_georgia.pdf)> (24 Nov. 2008).

<sup>75</sup> Trenin, Dmitri, “The Independence of Kosovo and Its Implications,” in *What is ‘Just’ Secession: Is Kosovo Unique? International Relations and Security Network*, Online, Internet, Available: <<http://se1.isn.ch/serviceengine/FileContent?serviceID=ISN&fileid=BA887183-8880-C010-2AC78E8CCF CF9F74&lng=en>> (24 Nov. 2008).

<sup>76</sup> Friedman, George, “Kosovar Independence and the Russian Reaction,” 20 Feb. 2008, *Stratfor*, Online, Internet, Available: < [http://www.stratfor.com/weekly/kosovar\\_independence\\_and\\_russian\\_reaction](http://www.stratfor.com/weekly/kosovar_independence_and_russian_reaction) > (24 Nov. 2008).

Europe because the BTC effectively reduces Western reliance on oil from Russia.<sup>77</sup> According to the London Times, Russia sees the Caucasus as its “own sphere of influence and wants Central Asian oil to be exported via its own territory.”<sup>78</sup> Russia has not highlighted energy as an issue in its conflict with Georgia, though Western analysts believe a Russian foothold in South Ossetia (and Abkhazia) would help the Russians maintain a strategic position in the area by upsetting the role Georgia plays in European energy security.<sup>79</sup>

Lastly, there is the issue of Georgia’s bid to join NATO, a hope expressed by Ukraine as well. Since 1991, numerous Soviet satellite states have joined NATO, a process that has meant, in the Russian view, continued NATO encirclement of its territory. Furthermore, the US plan to set up an anti-Iranian radar and missile shield system in Poland and the Czech Republic have rattled Russians further while the thought of “Ukraine and Georgia doing the same gives Kremlin securocrats nightmares.”<sup>80</sup> Therefore, granting citizenship to South Ossetians, recognizing their independence, and engaging Georgia in warfare on their behalf is Russia’s way of discouraging NATO presence in South Ossetia should Georgia complete its Membership Action Plan and join the organization.<sup>81</sup> In this way, South Ossetia, as independent state, can serve as a buffer zone between not only Russia and Georgia, but also Russia and NATO.

## **VI: Conclusion**

This essay has explored some of the legal, theoretical, and contingent issues that complicate South Ossetia’s realization of independent statehood. Largely at issue is the clash between secession based on self-determination and the international community’s predilection toward maintaining territorial integrity for the sake of order. While self-determination has played a significant role in nation-state building since the First World War, existing states have been far less willing to approve of its invocation in state breaking outside of decolonization. Likewise, South Ossetia’s bid for secession based on political self-determination conflicts with Georgia’s claims that South Ossetia’s secession violates its territorial sovereignty by threatening its lawfully formed boundaries. Because

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<sup>77</sup> “Analysis: Energy Pipeline That Supplies West Threatened by Georgia Conflict,” 8 Aug. 2008, *London Times Online*, Internet, Available: <[http://www.timesonline.co.uk/tol/news/world/europe/article\\_4484849.ece](http://www.timesonline.co.uk/tol/news/world/europe/article_4484849.ece)> (25 Nov. 2008).

<sup>78</sup> Ibid.

<sup>79</sup> “Q & A: Conflict in Georgia,” 11 Nov. 2008, *BBC*, Online, Internet, Available: <<http://news.bbc.co.uk/2/hi/europe/7549736.stm>> (25 Nov. 2008); Klare, Michael T. “South Ossetia: It’s the Oil, Stupid,” *The Huffington Post*, Online, Internet, Available: <[http://www.huffingtonpost.com/michael-t-klare/south-ossetia-its-the-oil\\_b\\_118717.html](http://www.huffingtonpost.com/michael-t-klare/south-ossetia-its-the-oil_b_118717.html)> (25 Nov. 2008); Alic, Jen, “Kosovo vs. South Ossetia,” 15 Nov. 2006 *International Relations and Security Network*, Online, Internet, Available: <<http://www.isn.ethz.ch/isn/Current-Affairs/Security-Watch/Detail/?ots591=4888CAA0-B3DB-1461-98B9E20E7B9C13D4&lng=en&id=52669>> (25 Nov. 2008).

<sup>80</sup> Franchetti, Mark, “Russia Strikes a Blow at Its Fears of NATO Encirclement,” 10 Aug. 2008, *London Times*, Online, Internet, Available: <[http://www.timesonline.co.uk/tol/news/world/europe/article\\_4493624.ece](http://www.timesonline.co.uk/tol/news/world/europe/article_4493624.ece)> (25 Nov. 2008). See also Medvedev’s 5 November 2008 State of the Union Address, Online, Internet, Available: <<http://www.rusembcanada.mid.ru/>> (26 Nov. 2008).

<sup>81</sup> Klussman, Uwe, “Russia Wary of NATO Expansion: Ukraine and Georgia Want In,” 29 Mar. 2008, *Spiegel*, Online, Internet, Available: <<http://www.spiegel.de/international/world/0,1518,544176,00.html>> (25 Nov. 2008).

only Russia and Nicaragua recognize South Ossetia's independence, it is clear that the vast majority of existing nations are inclined to side with Georgia on the issue. This is due to the fact that neither the right to self-determination nor the right to secession are codified in international law, while legal norms of territorial integrity have been long-standing. Therefore, it appears that South Ossetia's *de facto* independence and autonomy within Georgia's borders will continue to be respected by existing states, but *de jure* recognition will be a long time in coming. At the same time, because South Ossetia can exist politically without recognition by others according to the Montevideo Convention, they will continue to maintain and fight for their perceived independence from Georgia.

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