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**Plucky Little Russia: Misreading the Georgian War Through the Distorting Lens of Aggression**

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PLUCKY LITTLE RUSSIA: MISREADING THE GEORGIAN WAR THROUGH THE DISTORTING LENS OF AGGRESSION

TIMOTHY WILLIAM WATERS*

One might expect massed armor crossing an international frontier to constitute the paradigmatic example of aggression—a case perfectly fit to analyze with the rules of jus ad bellum—and in the first flush and shock of the Georgian War in 2008, this is exactly how Western leaders described Russia’s actions. Yet that August, a constellation of circumstances combined to produce an anomalous outcome: an international war without any aggressor or any wrongful violation of territorial integrity. In theory—in doctrine—this is not supposed to happen.

The key to this puzzle is the special regime created by the 1992 Sochi Agreement, which functioned as an internationalized mechanism regulating the internal conflict between Georgia and South Ossetia by creating a new territorial status within Georgia’s sovereignty. Once we view Sochi in this way, the performance of the various actors in August 2008 looks rather different: Rather than aggressors, Russian tanks are a responsive mechanism designed to stop Georgian incursions in violation of the Sochi regime—a mechanism, moreover, that actually worked as it was supposed to.

Understanding the Georgian War in this way leads us to confront our present, dualistic approaches to sovereignty: Under international law, it is by definition impossible for Georgia to aggress against itself or violate its own territorial integrity, and it is only because of the Sochi regime that we can describe Georgia’s actions as wrongful.

In some ways, the 2008 war looks like part of a rising phenomenon: the effort to regulate the resort to violence within states. Indeed, the Sochi

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regime suggests a far better mechanism than some of the current proposals, since it creates a new category of protectable territory, rather than identifying levels of harm that trigger a reaction; this may be particularly useful in self-determination disputes, in which separatists challenge the very fact of the state’s sovereignty. Still, seeing the Georgian War in this way is not necessarily a source of optimism. Sochi was the product of a specific context, and there is no reason to suppose it is generalizable. But the greatest source of pessimism concerns the rhetorical reactions to the war: Western leaders resorted to the vocabularies of the jus ad bellum in ways that distracted them from the actual operation of the mechanism regulating the underlying conflict. It seems we remain enchanted by categories, ill-equipped to recognize the real logic of our own imperfect efforts to regulate internal wars.

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INTRODUCTION: PUZZLING CRITICISM, AND A DOCTRINAL PUZZLE—WAR WITHOUT A LEGAL WRONG?

The August 2008 Georgian War\(^1\) elicited immediate, strong condemnation of Russia by most Western states. While understandable from a geopolitical perspective or as an expression of shared political values, the particular critiques Western states employed were curiously suffused with the language of law. Western states accused Russia of aggression, disproportionate use of force, occupation of Georgian territory, and improperly recognizing the independence of two secessionist regions—all defined modes of conduct in international humanitarian law, international criminal law, or general international law. In fact, the dominant rhetoric of Western officials centered on these categories rather than calculating geopolitical interests or invoking human suffering.

These critiques had common themes: Western policymakers were much more critical of Russia’s decision to invade Georgia than of the way Russia fought once it did. In legal terms, they made critiques arising out of the \textit{jus ad bellum} rather than the \textit{jus in bello}.\(^2\) Second, they were very concerned with where Russia fought. They objected much more to the war’s territorial consequences—its threat to the integrity of the Georgian state—than the human costs of the conflict, though these were well known even as the war was going on.

From a certain perspective, this is not surprising: Shifts in control over territory and challenges to the political order excite more concern than mere death. Nor would one expect policymakers to be particularly fastidious in their legal claims. Few are trained international lawyers, and in any event, the laws of war are open to many interpretations—it is the rare actor who does not find the mote in his enemy’s eye sooner than the beam in his ally’s. Political actors have been accusing each other of violating the laws of war, with or without a basis in fact, since laws of war were first articulated—presumably always with some combination of cynical manipulation and genuine indignation.

So, in calling Russia’s decision to fight illegal, Western policymakers may have both sincerely thought themselves right and consciously been deploying law as a tool of policy. What is of interest is the particular shape that otherwise typical

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\(^1\) Names for the conflict track problematically with political preferences. \textit{Cf. 2008 South Ossetia War, WIKIPEDIA} (Dec. 2011), http://en.wikipedia.org/wiki/2008_South_Ossetia_war (giving names for the war—“the South Ossetia War” or “the Russia-Georgia War”—in regional languages, and discussing objections to the neutrality of the article’s title). “The August War” appropriates a lot of the calendar, assuming optimistically that there won’t be other wars in other Augusts. I use “the Georgian War” as a plausible indicator of the war’s location. Also, throughout I refer to “war,” though the standard usage in international law is “armed conflict.” \textit{See Elihu Lauterpacht, The Legal Irrelevance of the “State of War”,} 62 AM. SOC’Y INT’L L. PROC. 58, 58 n.1 (1968).

\(^2\) \textit{See Yoram Dinstein, War, Aggression and Self-Defence} 5, 16 (4th ed. 2005); \textit{see also Robert Cryer et al., An Introduction to International Criminal Law and Procedure} 223–24 (2007) (describing \textit{jus ad bellum} as the legality of war and \textit{jus in bello} as the basic rules of warfare; describing the separation of \textit{jus ad bellum} and \textit{jus in bello} as a fundamental principle of international humanitarian law).
exercise in opportunism and perspectival bias took: Policymakers—already predisposed to support an ally—chose particular arguments that show us not merely preferences, but blind spots. Whether sincere or strategic, the categories policymakers deployed were seriously mismatched not only to the Georgian War, but also to the nature of modern conflicts of the kind that war represents.

A candid evaluation of known events in the Georgian War, mapped against the existing state of the law, suggests real difficulties with contemporary Western critiques as acts of legal interpretation. As we will see, accusations that Russia violated the jus ad bellum are largely unfounded. Yet it is immediately obvious that Georgia did not violate the rules on aggression or territorial integrity either—given that all its operations were within its own territory, it hardly could have. Indeed, it might seem that no party committed aggression or illegally violated another state’s territorial integrity, yet there still was what we would call, in common parlance, a war. In theory, this should not happen—unless the Security Council has acted, a party’s use of force should always violate some other sovereign’s control of territory—but this is exactly what seemed to happen in August 2008 in the Caucasus.

The key to understanding this puzzle is the special regime that governed South Ossetia, the separatist region of Georgia at the center of the 2008 war. The justification for Russia’s use of force is founded on its legitimate presence in the disputed area, and in turn explains why there is a doctrinal basis for describing Georgia’s actions as violative—but doing so requires us to confront our present, highly dualistic approaches to the jus ad bellum and to sovereignty over territory.

As we shall see, what specially characterized the situation in Georgia before the war was the existence of an internationalized internal conflict and a mechanism, already in place, to regulate the resort to force on part of Georgia’s territory. And what marked the subsequent reaction, once the war began, was a patterned failure to understand and react to this legal and political reality. Instead, Western actors resorted to the existing categories and vocabularies of the jus ad bellum, in ways that distracted from the operation of the system for regulating the underlying internal conflict between South Ossetia and Georgia, in which Russia had become involved. Their responses to the Georgian War suggest that policymakers—who are generally focused on political interests and values, rather than formal categories—may nonetheless be curiously affected by the dysfunctional doctrinal framework of contemporary humanitarian law, and discover themselves, quite unwittingly, adopting positions that are difficult to understand or motivate.

This gap in the law arises from the rigidity of a jus ad bellum focused entirely on interstate conflict. This narrow dogmatism increasingly appears as an anomaly in a discipline that has become more realistically engaged with the nature of combat: Over the past few decades, international criminal and humanitarian law have followed a broad deformalizing trajectory, with doctrinal distinctions between internal and international conflicts reduced or erased. Yet the norms regulating the initial decision to use force have not followed this trend: The extension of international humanitarian and criminal law to internal conflicts have played out
within the *jus in bello*, while the law of aggression has halted at the frontier of the state. This lacuna vitiates the value of the law in regulating the internal wars that are now the most frequent form of armed conflict—a failure to develop an adequate language for describing resort to force.

But all of that is to anticipate this Article’s conclusions; first, we must work through the argument about what was said, what was actually happening, and what the law was during the Georgian War. That argument runs like this: Part I briefly lays out the contours of the peacekeeping, monitoring and conflict resolution arrangements agreed for South Ossetia in the early 1990s, showing that functionally they constituted an internationalized mechanism for regulating the internal conflict between South Ossetia and Georgia. The next two parts then survey the general legal norms governing use of force and their application in the Georgian War: Part II analyzes the public statements of Western—particularly U.S.—policymakers during the war, showing how they represented the conflict in relatively precise legal terms; this part also begins to sketch out the basic outlines of the relevant legal framework. Part III revisits these characterizations to demonstrate the mismatch between plausible legal interpretations of the conflict and Western characterizations of it. Briefly, it shows that Russia was not an aggressor—but neither was Georgia, leaving us with an anomalous situation: a war without any unlawful cause. Part IV shows that the straightest path to an adequate legal description requires us to reconsider how we characterize Georgia’s actions in light of the special legal regime described in Part I—the Sochi Agreement. This special regime may point the way to a reconceived relationship between the *jus ad bellum* and internal conflicts in general international law; equally, though, the problematic features of the Georgian war and its resolution suggest this potential is limited, or at least unlikely to be realized.

**Some Prefatory Notes on Methodology and Purpose**

Suggesting, as I am going to, that Russia’s actions were not illegal in the way the United States claimed does not imply approval. Nor does it mean Russia acted legally in all ways: Observers have credibly claimed that Russia, South Ossetia, and Georgia all violated specific aspects of the *jus in bello*, through indiscriminate killing, deportations, or violations of the duties of an occupying

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3 See HALVARD BUHAUG, SCOTT GATES, HÅVARD HEGRE & HÅVARD STRAND, PEACE RESEARCH INSTITUTE OSLO (PRIO), GLOBAL TRENDS IN ARMED CONFLICT (2007), http://www.regjeringen.no/nb/dep/ud/kampanjer/refleks/innspill/engasjement/prio.html?id=492941 (showing the numerical dominance of intrastate over international conflicts between 1946 and 2006). As a proxy for the likely regulatory burden, consider the current docket of the International Criminal Court: Uganda, the Democratic Republic of Congo, the Central African Republic, Uganda, Sudan (Darfur), Kenya, Libya, and Ivory Coast. See Situations and Cases, INT’L CRIM. CT., http://www.icc-cpi.int/en_menus/icc/situations%20and%20cases/Pages/situations%20and%20cases.aspx (last visited Jan. 22, 2013) (listing the situations and cases in which the International Criminal Court has been involved). Each of these situations concerns an internal conflict.
I am not a partisan interested in vindicating Russia's position or attacking Georgia's; I happen to think that Russia did not commit aggression, and that Georgia did violate important norms—and these in themselves are important conclusions. But my point and purpose is to show why those conclusions—plausible and perhaps the best view, yet so different from what the West was able to argue at the time—demonstrate something defective in the structure of international law as we now have it, and how the curious, contrarian indications we can derive from that structure point the way toward a radically different model, not only for the use of force, but for territory and sovereignty.

Methodologically, this Article draws on statements by policymakers in the United States to build its argument. The choice is not arbitrary: The United States is Georgia's most consequential ally and the leading actor in NATO, which Georgia had been hoping to join. In general, the United States made some of the strongest critiques of Russia, but the views of the main Western powers were not far apart, as mutually reinforcing declarations and joint NATO statements show. Nor do I

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6 France occupied a middle position, and Germany and Italy showed the greatest accommodation. Jonathan Eyal, 'We are Extremely Concerned': The EU and Georgia, ROYAL UNITED SERVICES INST. (Aug. 11, 2008), http://www.rusi.org/analysis/commentary/ref:C48A0B419E4BCA/#.UMWVMeo8UU (noting that Italy sided with Russia and that "Europe remains divided between its East and West, and Western European governments simply do not feel the same urgency about Russia"); Angela Merkel Calls for Immediate Ceasefire, BUNDESREGIERUNG [GERMAN FEDERAL GOVERNMENT AND CHANCELLOR] (Aug. 11, 2008), http://www.deutsche-aussenpolitik.de/daparchive/ anzeige.php?zaehler=12679 (focusing almost exclusively on the mutual need to prevent violence, engage in mediation, and provide humanitarian assistance; there is no attempt to characterize the conflict in legal terms). Some of France's positions are noted below.

7 See Press Release, Office of the Press Sec'y, Statement by the Press Secretary on EU Decision Regarding Georgia (Sept. 1, 2008), http://georgewbush-whitehouse.archives.gov/news/release/s/2008/09/20080901-15.html ("We join the EU in condemning Russia's decision to recognize the independence of Abkhazia and South Ossetia and in calling on other states not to recognize these Georgian separatist regions.").

assume the United States is monolithic\(^9\)—though in August 2008 the range of opinions was quite uniform, with disagreement centered on how the United States should respond.\(^{10}\)

For the events of the war, I rely on what we may call the standard account—drawn from journalistic sources like the BBC, New York Times, and Der Spiegel, and the EU’s Tagliavini Report\(^1\)—and the claims of the war’s major actors themselves. Although there is never consensus on matters of war,\(^2\) outside of partisan circles there is broad agreement on the events of early August 2008. If the facts turn out to be different, my conclusions might be different—remembering that it is the facts known by the parties at the time that matter.\(^3\) However, I am not advancing a subjective theory of responsibility—the idea that each party’s belief in the rightness of its cause and its legal interpretations should be determinative. Doubtless both Georgia and Russia felt entirely justified and believed, too, that they were not violating any laws, but this tells us little about the existing law itself.

\(^9\) On the contrary, I assume that plural and conflicting positions exist within the state—and at the same time, that the state is in fact the predominant legal fiction about and through which legal claims are analyzed. Cf. MYRES S. MCDougal & FLORENTINO P. Feliciano, LAW AND MINIMUM WORLD PUBLIC ORDER: THE LEGAL REGULATION OF INTERNATIONAL COERCION 12–13 (1961) (cautioning against describing actors in international processes as states, rather than the individuals within them: "For purposes of precision in description . . . as well as for the application of certain sanctioning procedures, such as those providing for criminal liability, one must frequently go behind the institutional abstraction 'state' and refer to the effective decision-makers . . . .").

\(^10\) Even candidates Obama and McCain, locked in a fierce election campaign, were largely in agreement in condemning Russia, differing mostly on the manner of response. See CONGRESSIONAL RESEARCH SERV., RUSSIA-GEORGIA CONFLICT IN SOUTH OSSETIA: CONTEXT AND IMPLICATIONS FOR U.S. INTERESTS 105 (2008) (noting that both McCain and Obama condemned the Russian military incursion, with McCain "warn[ing] Russia that there could be severe, long-term negative consequences to its relations with the United States and Europe" and Obama "call[ing] for Georgia to refrain from using force in South Ossetia and Abkhazia, and urg[ing] all sides to pursue a political settlement that addresses the status of the regions").

\(^1\) See generally INDEP. INT’L FACT-FINDING MISSION ON THE CONFLICT IN GEOR., REPORT vols. 1–3 (2009), available at http://www.ceiig.ch/Report.html [hereinafter TAGLIAVINI REPORT] (describing the August 2008 conflict, along with relevant background material on the region’s history, legal issues, and international resolution efforts). This report was assigned by the EU to an independent fact-finding mission. Id. vol. 1 at 2.


\(^3\) I focus on comments made during the actual fighting and its immediate aftermath. I make use of later analysis to clarify points about the known record and to test my core claims. At the same time, there is parsimony in focusing on the conflict period when the outcome was still unclear; the contemporaneous responses of officials are valid data in and of themselves. For a discussion of how officials in the warring states and media presented the conflict, see Hans-Georg Heinrich & Kirill Tanaev, Georgia & Russia: Contradictory Media Coverage of the August War, 3 CAUCASIAN REV. INT’L AFF. 244 (2009) (discussing media coverage of the war, which the authors find was initially favorable to Georgia, and then became more skeptical); James V. Wertsch & Zurab Karumidze, Spinning the Past: Russian and Georgian Accounts of the War of August 2008, 2 MEMORY STUD. 377 (2009) (examining Russian and Georgian media narratives).
In any case, my argument does not depend solely on a particular factual basis; its conclusions in fact derive equally well from a hypothetical scenario.\textsuperscript{14} The legal regime had certain contours on August 6th, 2008, and it was against those contours that events played out and were interpreted. It is far less consequential that the facts are or are not clear than that the law governing those facts was systematically misinterpreted because it is, in discrete ways, defective. Indeed, it should be entirely possible for a Russian, South Ossetian, or Georgian partisan advocate to agree with my conclusions about the law, what it speaks to, and what it doesn’t—though that might require particularly cold blood.

Finally—and here we move between questions of method and the argument itself—we need some theory of the relationship between law, language, and politics. Legal scholarship has largely abandoned antique pretensions that its doctrinal categories operate independently from politics.\textsuperscript{15} Indeed, some theories assign such strong value to language in shaping behavior that they (perhaps indirectly) assert the power of language and legal concepts to control choices.\textsuperscript{16} Still, for theorists of international relations and political science—and for most of the legal academy—realist assumptions counsel against casually supposing that law’s categories directly control interests; at most, law affects perception in the

\textsuperscript{14} See infra text at page 225.

\textsuperscript{15} See Jack M. Balkin, \textit{The Promise of Legal Semiotics}, 69 TEX. L. REV. 1831, 1842 (1991). Balkin observed:

[L]egal discourse was permeable to political discourse and vice versa. The two were so similar, and so deeply intertwined in their common forms of expression, that it was no accident that legal argument and political argument moved in lock step. Thus, lawyers and judges were not making legal arguments in order to cover up political arguments that they dared not openly express. Rather, they were always making political arguments because the basic forms of legal and political discourse were identical, or at the very least shared large elements in common.


Transitional jurisprudence examines the way law mediates such periods and constructs the transition, thereby describing this bounded domain. . . . Legal practices in such periods reveal a struggle between two points, between settled and revolutionary times, as well as a dialectically induced third position. Persistent dichotomous choices arise as to law’s role in periods of political change: backward versus forward, retroactive versus prospective, continuity versus discontinuity, individual versus collective, law versus politics. Transitional legal mechanisms mediate these antinomies.

same way language does more generally, and serves as an efficacious tool for advancing policy preferences.\textsuperscript{17} And I largely agree: Although I argue that the law of aggression as we now have it leaves a great deal off the table, and that its categories and forms serve as distracting "enchanted" tools,\textsuperscript{18} I am emphatically not suggesting that policymakers are caught in some Whorfian trap constructed from their own statements about what the law is—though if one's own preferred theory supposed that legal language actually determined people's politics, a defective law of aggression would be even more problematic. The effect I describe is more marginal than that, if no less consequential: The inadequate, misleading vocabulary with which we discuss modern war does not make our choices defective, but indicates where our values and assumptions are.

I. THE SOCHI REGIME: INTERNATIONALIZING AND FREEZING AN INTERNAL CONFLICT

Writing a history of the relations between the peoples of Georgia, South Ossetia, Russia, and the Soviet Union would be as thankless as it is beyond the scope of this Article. For many outsiders, the region and its vicissitudes are obscure; others with connections to the Caucasus may be quite familiar with the basic outlines,\textsuperscript{19} though it is precisely because those familiar with the conflict have reasons to be that their disagreement on the details and interpretations of that history is so foundational and so irreconcilable.

Suffice it to say—insufficient as it is—that in the waning days of the Soviet Union, the extant political and territorial dispensation was challenged at multiple levels: Georgia challenged the continued authority of Moscow and, at the same time, the internal autonomy of units within its territory. One of those units, the autonomous oblast of South Ossetia, challenged Georgia's authority, demanding heightened, republican status and eventually independence. The relationship between these two processes was dynamic. The situation was quite tense from 1989; significant fighting—a shooting war, really—broke out in January 1991 and

\textsuperscript{17} See Christopher 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 (2009) (discussing the role of language in law and politics with reference to the Georgian-Ossetian conflict).

\textsuperscript{18} Cf. David Kennedy, The Dark Sides of Virtue: Reassessing International Humanitarianism xviii, 279 (2005) (elaborating on how the tools of humanitarian and human rights work are "enchanted," becoming themselves the focus of attention in lieu of substantive engagement).

continued sporadically past Georgia’s full, formal independence in December 1991.  

At least 250 people died during the conflict—not a particularly long or large war, but serious and violent, especially in relation to the quite small population of the contested area; the fighting was marked by atrocities.  

Large numbers of people were displaced in both directions—Georgians from South Ossetia, Ossetians from Georgia (with some fleeing into North Ossetia, in Russia). Soviet and Russian forces were directly involved in the fighting. In June 1992, at war’s end, the Russian-backed separatist South Ossetia controlled most of the territory of the former oblast, with Georgia holding areas in the southeast and enclaves near Tskhinvali, the South Ossetian capital.  

Whatever one’s own preferred interpretation concerning the causes of the initial conflict and Russia’s involvement in it, the resolution was an international, diplomatic solution—the so-called Sochi Agreement, which established the security regime with whose operation and misinterpretation we are principally concerned. At Sochi, the parties—Georgia, Russia, and South Ossetia—agreed to a set of arrangements that created or altered legal rights and obligations: The Agreement established a ceasefire, committed the parties to withdraw forces and take various steps to demilitarize the conflict, provided for the delineation of what became known as the “zone of conflict,” and established a number of institutions, including a Joint Control Commission and the Joint Peacekeeping Forces.  

The Joint Control Commission (JCC) was established to “exercise control over the implementation of cease-fire, withdrawal of armed formations, disband of [sic] forces of self-defense and to maintain the regime of security in the region[].”  


21 See HUMAN RIGHTS WATCH/HELSINKI, BLOODSHED IN THE CAUCASUS: VIOLATIONS OF HUMANITARIAN LAW AND HUMAN RIGHTS IN THE GEORGIA-SOUTH OSSETIA CONFLICT 2 (1992), http://www.hrw.org/legacy/reports/pdfs/georgia/georgia.923/georgia923full.pdf (“The armed conflict in South Ossetia included the shelling (by both sides) of both Georgian and Ossetian villages, blockades, and hostage-taking, claiming at least 250 lives, and wounding at least 485.”).  

22 The autonomous region of Abkhazia also broke free of Georgia’s control around this time. See generally Michael Toomey, August 2008 Battle of South Ossetia: Does Russia Have a Legal Argument for Intervention?, 23 TEMP. INT’L & COMP. L.J. 443 (2009) (discussing challenges to Georgia’s effective control of territory and declarations of independence).  


24 Sochi Agreement, supra note 23, art. 3(1) (incorporating by reference the military observers established in the earlier Kazbegi Agreement); see also ICG, REPORT NO. 183, supra note 23, at 1. ICG, REPORT NO. 183 states:
The JCC had representation from Georgia, Russia, South Ossetia, and North Ossetia (itself a component of Russia). This arrangement was quite favorable to the separatists and to Russia, and Georgia was never really satisfied with it. The JCC met infrequently in later years, and shortly before the war, Georgia suspended its participation and proposed altering the composition of the JCC to replace North Ossetia with the provisional South Ossetian government recognized by Georgia, as well as representation for the EU and the OSCE. Russia continued to support the existing framework, however, and Georgia did not formally leave the institutions until the August 2008 war.

The Joint Peacekeeping Forces (JPKF), established on the basis of the Sochi Agreement, were composed of Russian, Georgian, and Ossetian units—the last notionally from North Ossetia, but in fact mostly composed of South Ossetian forces. The JPKF was responsible for maintaining the peace and limiting the use of force, but had weak rules of engagement; given the poor relationship between its constituents, it was “not a joint force, but rather separate battalions, more loyal to their respective sides than to the peacekeeping chain of command.”

The language of Sochi and its accompanying documents is not very clear or specific, so it is open to a variety of interpretations. Regulations agreed to in 2004, for example, specify a range of activities in which the peacekeepers might use force. The main constraints are the absence of any clear provisions providing for the consequences of a breach of the agreement, or allowing peacekeepers from

Id.  
25 See Vladimir Socor, South Ossetia Joint Control Commission Ingloriously Mothballed, EURASIA DAILY MONITOR (Mar. 7, 2008), http://www.jamestown.org/single/?no_cache=1&tx_ttnews[tt_news]=33440 (“The JCC’s single purpose and relevance was as a tool for freezing the Russia-Georgia conflict in South Ossetia. In this aspect alone the JCC had proven its effectiveness from its inception in 1992 to the present.”).  
27 I TAGLIAVINI REPORT, supra note 11, at 14; ICG, REPORT NO. 183, supra note 23, at 17–18.  
28 ICG, REPORT NO. 183, supra note 23, at 17 (citing an interview with an unnamed international expert).  
29 Press Release, Ministry of Foreign Affairs of the Russ. Fed’n, Polozhenie ob Osnovnykh Printsiakh Deyateli’nosti Voennykh Kontingentov i Grupp Voennykh Nabljudatelei, Prednaznachennykh dlya Normalizatsii Situatsii v Zone Gruzino-osetinskogo Konflikta (ПОЛОЖЕНИЕ Об основных принципах деятельности военных контингентов и групп военных наблюдателей, предназначенных для нормализации ситуации в зоне грузино-осетинского конфликта) [Regulation on the Basic Principles of the Military Contingents and Military Observers Group, Intended to Normalize the Situation in the Georgian-Ossetian Conflict] (June 4, 2004), http://www.mid.ru/BRP_4.NSF/0/2bd92ad33af69703c3256ea90022457/$OpenDocument [hereinafter 2004 Regulations] (giving the text of the Regulations). The 2004 Regulations authorized the peacekeeping forces to keep the peace and ensure control over the zone of conflict (art. 1); respond to breaches of the cease-fire (art. 2); dishand any irregular forces, prevent armed groups from entering the conflict zone, deny entry of weaponry and materiel into the zone, and assist law enforcement in establishing law and order in the zone (art. 3); patrol, detain or destroy armed groups (art. 4). Id.
just one side, such as Russia, to use force independently of the joint control mechanism. Peacekeepers are required to obey an integrated command, and resort to force in response to a breach is determined by the JPKF commander. Peacekeepers are allowed to suppress violations of the agreement and ceasefire, but these too are subject to joint command provisions, which make it unclear what should happen when the violations are caused by one of the parties. Certainly, Sochi does not give Georgian and Russian peacekeepers any specific, clear-cut rights to use force in response to actions by the other party that violate the agreement—in the way that, say, Turkey argued it had specified rights under the 1960 Treaty of Guarantee on which it grounded its later interventions in Cyprus. In November 1992, the Organization for Security and Cooperation in Europe (OSCE) established its own small mission to monitor the peacekeeping operation, though its effective scope of operation was often limited, sometimes by the JPKF itself. Subsequent agreements aimed at developing confidence-building measures or ensuring a peaceful process. For example, a May 1996 “Memorandum on Measures to Ensure Security and Reinforce Mutual Confidence Between the Parties to the Georgian-Ossetian Conflict” outlined further security and confidence-building measures and renounced the use of force.

Sochi’s institutional structure was quite thin—nothing like the dense international transitional administration established for Kosovo after NATO’s intervention there in 1999, for example. The institutions Sochi did create did not work particularly well—at best, they kept the peace, and often barely that—and they were clearly not merely technical mechanisms, but rather the outcome of political, diplomatic and military maneuvering. There is no doubt, for example, that Russia was generally acting from its own interests rather than as a notionally

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30 Sochi Agreement, supra note 23, at art. 3(5) (“In case of violation of provisions of this Agreement, the Control Commission shall carry out investigation of relevant circumstances and undertake urgent measures aimed at restoration of peace and order and non-admission of similar violations in the future.”); 2004 Regulations, supra note 29, art. 2 (“The decision to use troops and military observers in the event of breach of the cease-fire by a party, is taken by a commander of [Joint Peacekeeping Force] in order to restore peace, with the notice of JCC.”).


33 ICG, REPORT NO. 183, supra note 23, at 18.

34 ICG, REPORT NO. 159, supra note 20, at 5.

35 See UNMIK: Mandate and Structure, U.N. INTERIM ADMIN. MISSION IN KOSOVO, http://www.unmikonline.org/Pages/about.aspx (last visited Dec. 12, 2012); see also Ralph Wilde, Note, From Danzig to East Timor and Beyond: The Role of International Territorial Administration, 93 AM. J. INT’L L. 583 (2001) (discussing the structure and role of international administration in Kosovo and other locations).
neutral outside actor. Critically, neither Sochi nor any other agreement provided any clear mechanism for actually resolving the conflicts—whether between South Ossetia and Georgia or between Georgia and Russia. Attempts to achieve a final resolution—such as the OSCE’s proposal for a constitutional framework in 1994, or President Mikheil Saakashvili’s proposal for Ossetian autonomy within Georgia in 2005—were unsuccessful.

But effective or not, the institutions and processes were in place, and the net result was that they constituted an internationally approved regime whose purpose was to freeze the conflict and limit the ways in which force could be deployed by any of the parties: the international intervener Russia; the unrecognized internal claimant South Ossetia; or the notional sovereign Georgia. Georgia never recognized the separatist South Ossetian regime, but did enter into a kind of indirect relationship with it. Russia was clearly a strong supporter of the South Ossetia regime, but did not formally recognize it; it retained forces in South Ossetia, as did Georgia, but these were now identified as peacekeepers, with assigned roles and defined numbers. South Ossetia did not gain recognition, but neither was it compelled to reintegrate into Georgia, and it gained permanent (or at least indefinite) protection from a powerful neighbor.

The mechanism was international—and with it so was the conflict, in a way it had not been when it began as a dispute within Soviet Georgia. Russia was the undeniably dominant military actor in the region, but also tremendously weakened—after all, ‘the region’ had, very recently, been part of Moscow’s sovereign imperium; the very idea that Georgia was part of the Near Abroad—a zone of special influence—was redolent of expansive Russian aspirations, but equally was evidence of Soviet collapse. Thus what might have been just a few years earlier a purely internal Soviet, and then Georgian, matter was both clearly international—Georgia was a recognized sovereign state that entered into agreements with a sovereign Russia—and internationalized more broadly with the


39 See Thornike Gordadze, Georgian-Russian Relations in the 1990s, in THE GUNS OF AUGUST 2008, supra note 12, at 3–34; Margarita Antidze, Russia Closes Last Military Base in Georgia, REUTERS, Nov. 13, 2007, available at http://www.reuters.com/article/2007/11/13/us-georgia-russia-bases-idUSL1387605220071113. The disengagement of Russian forces from Georgian territory was a protracted affair. When Georgia first declared independence, Soviet military structures were still in place, many of which were inherited by Russia: Russian forces operated on the Georgian border with Turkey, and Russia’s Transcaucasian Military District had its headquarters in Tbilisi. Russia only closed its last base in Batumi in 2007, and its forces are still in the disputed areas. See Timeline: Georgia, supra note 38 (listing on the timeline for 2007 that ”Russia says it has withdrawn last troops [sic] based in Georgia since 1991 collapse [sic] of the Soviet Union, but retains a presence in the breakaway provinces”).
involvement of the OSCE, through which the United States and Western European states accepted and even approved this arrangement.

Over the next decade and a half, there were numerous provocations and violations—an outsider would say "committed by all sides," without necessarily implying any moral or legal equivalence.\textsuperscript{40} From 2004, tensions in the region increased considerably, nearly returning to open war, as the new Georgian government under President Saakashvili made renewed efforts to bring South Ossetia back under its sovereign control, including recognition of an alternative government for South Ossetia that Georgia sought to incorporate into the existing peacekeeping mechanisms.\textsuperscript{41} But for all of those, and the violence that in fact accompanied these events, the conflict did not reach anything like the level of force of its early phase. Unhappy as each side may have been with the behavior of the other, all were willing to concede the continuing legitimacy of the ceasefire regime; none were willing to openly declare the entire mechanism illegitimate or in desuetude. This was to change radically with the war in August 2008.

\section*{II. Not 1968: U.S. Characterizations of the War}

There were many indications in mid-2008 that a war between Russia and Georgia was imminent. The tensions of 2004 had never fully subsided, and there had been a considerable increase in shooting incidents and border incursions over the preceding months—as well as discussion of a possible Russian retaliation for Western recognition of Kosovo’s independence.\textsuperscript{42} More generally, the very fact that peacekeeping arrangements had been in place since the early 1990s suggested what everyone understood: that this so-called “frozen conflict” might unfreeze at any time.\textsuperscript{43}

\textsuperscript{40} For some, especially on the Georgian side, this will seem inadequate; the decision to use force in 2008 cannot be separated from the progressive insults and incursions by the South Ossetians and their Russian patrons. See infra note 120 (discussing the theory of accumulated basis self-defense).

\textsuperscript{41} Timeline: Georgia, supra note 38. During this period the new government in Georgia successfully reincorporated the autonomous Adjaria region (May 2004), and shortly thereafter reclaimed control of the Kodori Gorge region in Abkhazia (July 2006). Id. See also Nikolai Topuria, Georgia Takes Control of Renegade Region, Sets Sights on Two Others, AGENCE FRANCE-PRESSE, May 6, 2004, available at http://reliefweb.int/node/146752; Civil Georgia, Tbilisi Turns Kodori into 'Temporary Administrative Center' of Abkhazia, CIVIL.GE (Sept. 27, 2006), http://www.civil.ge/eng/article.php?id=13654.


Nonetheless, the outbreak of major hostilities on August 7th, 2008 seems to have surprised many in the West. So, although they had intelligence briefings and positions—pre-existing views of the conflict and the security arrangements—policymakers were responding to events in real time over the six-day shooting war and three-week crisis. Their public statements invoked legal categories that characterized the war as of a particular kind, in which fault and legal responsibility were overwhelmingly assigned to Russia.

The earliest comments by U.S. policymakers appear more concerned with stabilizing the conflict than condemning Russia. The intensity of criticism and the invocation of juridical categories appear to have increased after combat operations had largely ended and an overwhelming Russian victory was assured. For example, in one of his earliest comments on the situation, made in Beijing on August 9th, President Bush declared:

I'm deeply concerned about the situation in Georgia . . . . The attacks are occurring in regions of Georgia far from the zone of conflict in South Ossetia. They mark a dangerous escalation in the crisis. The violence is endangering regional peace. Civilian lives have been lost, and others are endangered. This situation can be resolved peacefully . . . . Georgia is a sovereign nation and its territorial integrity must be respected. We have urged an immediate halt to the violence and a stand-down by all troops. We call for an end to the Russian bombings, and a return by the parties to the status quo of August the 6th.

Bush expressed concern about Russia's actions both directly (ending bombings) and indirectly (noting Georgia's sovereignty and territorial integrity). But the overall message is pragmatically focused on minimizing violent escalation: It refers to a "situation" and a "crisis."

Two days later, back in Washington D.C., Bush expressed harsher condemnation in language that, both juridically and politically, is much more prejudicial:

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44 Johanna Popjanevski, From Sukhumi to Tskhinvali: The Path to War in Georgia, in The Guns of August 2008, supra note 12, at 143, 145–49, 160 (noting that, before July 2008, the prevailing assumption was that conflict would break out over Abkhazia rather than South Ossetia).


46 ICG, REPORT NO. 183, supra note 23, at 32. Since the cease-fire in 1992, there has been a defined "zone of conflict" running in an East-West zig-zag across the southern part of South Ossetia and the adjacent territory of Georgia proper, with its northern limit just north of Tskhinvali and its southern limit just north of Gori. See Toal, supra note 19, at 671 (reproducing maps showing the zone of conflict). It is possible that President Bush was referring not to this, but instead to only the area in South Ossetia in which combat was actually taking place (thanks to Jonathan Kulick for this point); however, later U.S. government statements clearly invoked the legally defined "zone of conflict."
Russia has invaded a sovereign neighbouring state and threatens a democratic government elected by its people. Such an action is unacceptable in the 21st Century. The Russian government must reverse the course it appears to be on and accept this peace agreement as a first step toward solving this conflict.  

In general, the Bush administration’s rhetoric became more assertive over the course of the crisis, and its criticism of Russia also focused on several aspects of the conflict: the invasion of other parts of Georgia—what came to be known as “Georgia proper”—as an act of aggression in violation of Georgia’s sovereignty and territorial integrity, and a disproportionate response; recognition of breakaway regions; charges of ethnic cleansing; and blocking access to Georgia’s ports. There was, throughout, a minor key of ambivalence: Alongside full-throated defenses of Georgia, there were indications that U.S. policymakers were annoyed with Georgia and even harbored doubts about which side was responsible. Still, the consistent and overwhelming tenor of U.S. comments is critical of Russia.

Although these critiques took the form of legal arguments, it is difficult to say anything about the administration’s subjective intentions. It might be that the administration intensified its rhetoric in response to the changing situation, viewing the spread of fighting into Georgia proper as a serious escalation; it may have been genuinely concerned that Russia might press on to Tbilisi, and thus may have been signaling the Russian leadership about what it considered the acceptable limits of its war aims. Perhaps U.S. leaders only felt free to deploy harsher rhetoric after the crisis stabilized—a conscious strategy to compensate for the lack of viable alternatives to effectively counter Russia. With the passage of days, policy

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47 Georgia Conflict: Key Statements, BBC (Aug. 19, 2008), http://news.bbc.co.uk/2/hi/7556857.stm [hereinafter Key Statements]. The peace agreement to which Bush refers is apparently French Foreign Minister Bernard Kouchner’s initial effort rather than the six-point plan finally agreed to.


49 See, e.g., Popjanevski, supra note 44, at 155 (noting that the “the prevailing Western view after August 2008 is that the Georgian government acted irresponsibly when sending troops into Tskhinvali,...”); Conor Sweeney & Richard Balmforth, Russia’s First Georgia Move Legitimate: U.S. Envoy, REUTERS, Aug. 22, 2008, available at http://www.reuters.com/article/GCA-Georgia/idUSL47889020080822 (discussing U.S. Ambassador to Russia’s comments in support of Russia’s initial, though not subsequent, actions); Roy Allison, Russia Resurgent? Moscow’s Campaign to ‘Coerce Georgia to Peace’, 84 INT’L AFF. 1145, 1145 (2008). Allison stated:

The strong support Georgia received for its sovereignty and territorial integrity during this crisis from western states, for all their initial concerns about Georgia’s assault on Tskhinvali,... reflects a robust commitment to Georgian statehood.... The claim of an initial Russian violation of Georgian territory was received rather skeptically by most western states at first, and has still not been conclusively corroborated.

Id. Even states supportive of Georgia were, in some cases, uncomfortable with what they perceived to be the profoundly unwise Georgian decision to begin hostilities.

50 See Alexis Crow, The U.S., Georgia, and Russia, ROYAL UNITED SERVICES INST., (Aug. 12, 2008), http://www.rusi.org/analysis/commentary/ref:C48A20D977C550/. Crow stated:
positions may have been clarified, and hardened, in internal bureaucratic processes or coordination with allies. Finally, Western leaders may not have been trying to craft a legal argument at all, only expressing condemnation in the strongest terms, which happen to be lexically similar to those law deploys. All of these possibilities would be consistent with a (to my mind persuasive) realist account that U.S. leaders and policymakers were pursuing their own interests, as they understood them, and mustered legal arguments consistent with those interests. In short, we should not assume U.S. leaders necessarily believed anything particular about their own legal claims.

But whatever their psychological state, U.S. policymakers consistently condemned Russia’s intervention in specific, legally salient ways—and knew they were doing so. Some comments were extemporaneous or must be understood as lay characterizations not to be taken literally, but others were issued by spokesmen and drafted pursuant to interagency coordination norms; individual policymakers might not have been fully aware of the significance of the terms they employed, but their advisors surely were. More generally, policymakers often make claims with the express intention of locating themselves in or defining debates about the legality of a given policy. So, even if policymakers were not

In the next five days, the United States continually reassured Georgia that it was a staunch American ally, and demanded Russia to halt its military actions. Yet many of these statements were guarded: Bush condemned the Russians for bombing ‘outside’ of South Ossetia, and reprimanded Russia for its ‘disproportionate response.’ Despite Bush’s insistence that he was ‘very firm’ with Putin, his statements reflect a cautious tone.

*Id.*

Perhaps policymakers emphasized sovereignty and territory instead of ethnic cleansing because evidence of the latter often is ambiguous or contested, whereas the fact of invasion—at least of the kind Russia undertook—is notorious. Even so, this would imply a fastidious caution and a respect for the integrity of legal argument, rather than the naked instrumentalization of law for political purposes.

See Balkin, *supra* note 15 (“[T]he fact that legal discourse is rhetorizable says nothing about its lack of authenticity. To the contrary, . . . the only type of discourse that truly authentic is that which is permissible within our existing language games, and is thus always rhetorizable.”).


interested in the legal value of their arguments—even if they viewed legal claims as purely instrumental—their use of terms such as “aggression” or “territorial integrity” should be understood as conveying a legal sense, or at least not contradicting the United States’ existing positions on the law. 57 Certainly, scholars analyzing customary law would consider such statements probative. 58

We will now review the actual comments U.S. policymakers made, by category, to see how the United States characterized Russia’s actions as violations of international law. We will not spend as much time on characterization of Georgia’s actions, both because U.S. officials did not condemn Georgia and because Georgia’s non-violation was thought to be obvious—though as we will see, in Part IV, it was not. 59

A. Aggression and Violation of Territorial Integrity

Aggression refers to the illegal resort to force by one state against another—the use of armed force by a State against the sovereignty, territorial integrity or political independence of another State, or in any other manner inconsistent with the Charter of the United Nations . . . . 60 The only force the Charter authorizes is either ordered by the Security Council or used in self-defense, 61 which means that aggression is not simply the first use of force, but its wrongful use. 62 Indeed, aggression is effectively the opposite of lawful force; these

57 By contrast, reports by Amnesty International and Human Rights Watch avoid “aggression” in their legal analysis. See, e.g., AMNESTY INT’L, supra note 4; HUMAN RIGHTS WATCH, supra note 4.

58 See generally JEFFERY L. DUNOFF ET AL., INTERNATIONAL LAW, NORMS, ACTORS, PROCESS: A PROBLEM-ORIENTED APPROACH (2d ed. 2006) (reviewing the formation of customary international law).


two categories define the universe of interstate violence. Doctrinally, aggression belongs to a separate category from other war crimes—it is addressed in the *jus ad bellum*, the resort to war, rather than the *jus in bello*, the way wars are fought.

"Aggression" was invoked only as the initial military phase of the crisis came to an end. From about the third day of the conflict, U.S. leaders began characterizing Russian actions as aggression. On August 11th, for example, U.S. Vice President Dick Cheney issued a statement declaring that "Russian aggression must not go unanswered." On August 12th, U.S. Secretary of State Condoleezza Rice’s spokesman announced that "[w]hat we’re calling on is for Russia to stop its aggression." Explicit references to aggression disappeared from the Bush administration’s statements after the ceasefire was agreed, although territorial integrity continued to be invoked by the United States as well as by Georgia.

Throughout, administration officials were careful to distinguish between a legitimate Russian presence in South Ossetia—peacekeepers there under the earlier Sochi Agreement—and new forces introduced into South Ossetia and Georgia proper after August 7th.

For their part, Russia and South Ossetia deployed similar language, though with the opposite valence: As early as the afternoon of August 7th, South Ossetian authorities reported "large-scale military aggression against the Republic of South Ossetia,"—consistent with their self-perception as a sovereign state. Though it had not recognized South Ossetia’s independence, the next day “Russia warn[ed] Georgia that its ‘aggression’ will not go ‘unpunished.’” Russian use of the term

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63 Recently asserted principles of humanitarian intervention contemplate legitimate interstate uses of force not approved by the Security Council or undertaken in self-defense. See infra Part IV.


65 See Key Statements, supra note 47.

66 See id. On August 17, Bush referred to Russia’s “invading forces.”


As you all know, we initiated military operations after separatist rebels in South Ossetia bombed Tamarasheni and other villages under our control . . . . A large-scale military aggression is taking place against Georgia. Over the past few minutes and hours, Russia has been bombing our territory and our urban areas. This can only be described as a [sic] classic international aggression.


68 Caucasian Tragedy, supra note 42 (quoting unnamed South Ossetian authorities).

69 Alexis Crow, *Georgia-Russia Conflict Timeline (Includes South Ossetia and Abkhazia)*, ROYAL UNITED SERVICES INST. (Aug. 11, 2008), http://rusi.org/research/studies/european/commentary/
aggression was oriented, from the start, to the harm to its peacekeepers and its rights under Sochi. On August 8th, President Medvedev declared:

Last night, Georgian troops committed what amounts to an act of aggression against Russian peacekeepers and the civilian population in South Ossetia. What took place is a gross violation of international law and of the mandates that the international community gave Russia as a partner in the peace process.70

On August 19th, Russian Foreign Minister Sergei Lavrov used the term "aggression" when criticizing a summit statement issued by the North Atlantic Council:

The declaration above all appears unobjective and biased, because there's not a word about how all this started, why it happened, who started the aggressive action and who armed Georgia . . . . It appears to me that Nato is trying to portray the aggressor as the victim, to whitewash a criminal regime and to save a failing regime.71

Unsurprisingly, "all sides have declared their own actions to be ‘defensive’"72—that is, as falling within the one exception to the prohibition on force that the U.N. Charter clearly identifies.73 Needless to say, no U.S. official

ref:C48A08074B93E4. Russia used the term "‘aggression’" liberally, even before the war. See, e.g., Kazbek Basayev, Russia Accuses Georgia of Open Aggression, REUTERS, July 4, 2008, available at http://www.reuters.com/article/idUSL04712416 (reporting Russian accusations that Georgia killed two people in a mortar raid against South Ossetia). Basayev commented:

"Moscow considers it unacceptable when Tbilisi . . . . is committing undisguised acts of aggressions [sic] against South Ossetia[,]" the Russian foreign ministry said in a statement.

"The recent military incidents will lead to a sharp escalation in the armed confrontation in the conflict zone," it said. "Any further delays in resuming the negotiations process could lead to the most tragic consequences."

Id. (ellipsis in original).


71 Key Statements, supra note 47.

72 AMNESTY INT’L, supra note 4, at 6. Russia’s claims to be defending its own passport-holding citizens and peacekeepers are discussed in Part III.

73 U.N. Charter art. 51 (providing for a right of self-defense). I have not found any side claiming that their actions were directly authorized by the Security Council, though it is common for states to claim implicit authorization from ambiguously worded prior resolutions, or from the Council's silence. Russia does claim that the basis for its subsequent recognition of the separatist regions is the U.N. General Assembly Declaration 2625 on Principles of International Law Concerning Friendly Relations and Co-operation Among States, and there was Security Council action on Abkhazia earlier that year. See S.C. Res. 1808, ¶ 1318, U.N. Doc. S/RES/1808 (Apr. 15, 2008) (covering settlement of the Georgian-Abkhaz conflict and extension of the mandate of the U.N. Observer Mission in Georgia). The United States invoked this same resolution to oppose Russia’s military actions in Georgia proper. See infra note 77.
characterized Georgia’s actions as aggression—and this is logical enough, since at no point did Georgian forces leave the territory of their own state.

U.S. condemnation of Russian aggression was often linked to the closely related concept of territorial integrity, which is the “cornerstone” of the U.N. Charter’s prohibition on the use of force. As the definition of aggression implies, a state’s territorial integrity and sovereignty are protected against interstate violence. Sovereignty is a notoriously vague concept, but territorial integrity is straightforward in principle: A state’s physical territory is protected against unwanted incursions by other states.

As early as August 8th—the first full day after the conflict broke out—the United States described Russia’s actions as a violation of territorial integrity, and continued to invoke this description throughout the crisis, as on August 15th, when Secretary of State Rice declared that:

Georgia has been attacked. Russian forces need to leave Georgia at once. The world needs to help Georgia maintain its sovereignty, its territorial integrity and its independence. This is no longer 1968 and the invasion of Czechoslovakia . . . when a great power invaded a small neighbour and overthrew its government. The free world will now have to wrestle with the profound implications of this Russian attack on its neighbour . . . .

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76 See DINSTEIN, supra note 2, at 83; see, e.g., U.N. Charter art. 2, para. 4 (prohibiting the threat or use of force against the territorial integrity or political independence of a state “or in any other manner inconsistent with the Purposes of the United Nations”); id. at para. 7 (prohibiting interference with a state’s domestic jurisdiction); Declaration of Principles of International Law Concerning Friendly Relations and Co-operation Among States in Accordance with the Charter of the United Nations, G.A. Res. 26/25, Annex art. 1, U.N. GAOR, 25th Sess., U.N. Doc. A/RES/2625(XXV) (Oct. 24, 1970) (“Every state has the duty to refrain in its international relations from the threat or use of force against the territorial integrity or political independence of any State, or in any other manner inconsistent with the purposes of the United Nations.”). The Helsinki Final Act defines sovereignty to include “in particular the right of every State to juridical equality, to territorial integrity and to freedom and political independence.” Conference on Security and Co-operation in Europe Final Act, Aug. 1, 1975, 14 I.L.M. 1292, available at http://www.osce.org/mc/39501. Analyzing violations of territorial integrity proves much more difficult in practice—defining the scope of “interference with a state’s domestic jurisdiction” or “political independence” is a complex definitional and line-drawing exercise.
77 Rice, Russia Move into Georgia, supra note 55. Rice stated: We call on Russia to cease attacks on Georgia by aircraft and missiles, respect Georgia’s territorial integrity, and withdraw its ground combat forces from Georgian soil . . . . We underscore the international community’s support for Georgia’s sovereignty and territorial integrity within its internationally recognized frontiers, as articulated in numerous U.N. Security Council resolutions, including . . . 1808. . . .
78 Key Statements, supra note 47 (citing Rice using very similar language about 1968 two days earlier).
As with aggression, U.S. officials did not describe all Russian actions within Georgia as violations of territorial integrity: Vociferous U.S. opposition to the invasion coexisted with acknowledgement that some Russian forces were legally based in South Ossetia, a position the United States never repudiated. U.S. claims that Russia was violating Georgia’s territorial integrity referred to actions by forces operating outside Sochi’s operational and territorial mandate; this meant both additional forces within South Ossetia and all forces operating in other parts of Georgia.

One implication of framing the conflict according to the norms of territorial integrity and aggression was the concomitant view that Georgia was acting within its own sovereign sphere—an internal matter. For the United States this was largely a given; for Georgia, it was the express justification for its actions. Thus on the evening of August 7th, “the Georgian side informed the general in charge of the Russian peacekeepers that they planned to use military force to re-establish “constitutional order” in the Tskhinvali Region, the Georgian term for South Ossetia . . . .”79 This made perfect sense, as all Georgian operations took place within its international borders, which even Russia recognized. As with aggression, so with territorial integrity: The idea of even describing Georgia’s actions on its own territory in terms drawn from the jus ad bellum would have been not only contrary to the political sensibilities of the United States and Georgia’s allies, but almost nonsensical.

Russian leaders also framed the debate in terms of territorial integrity—but to a very different purpose and from a very different perspective. Initially they claimed they were not encroaching on Georgia’s territorial integrity in any way because their forces were operating in a pre-agreed framework; they became openly dismissive of Georgia’s territorial claims after it became clear Russia had prevailed decisively in the conflict.80 Later, Russia directly challenged Georgia’s territorial

79 Caucasian Tragedy, supra note 42; 3 TAGLIAVINI REPORT, supra note 11, at 595-626 (referring to the supposed “Order No. 2”); see also Michael Cecire, Doubting Der Spiegel—What is Order No. 2?, GEORGIAN DAILY (Apr. 27, 2009), http://georgiandaily.com/index.php?option=com_content&task=view&id=11271&Itemid=130 (calling into question a Der Spiegel article that blamed Georgian leadership for the Georgian War). General Kurashvili made a similar comment on television, but other Georgian officials distanced themselves from this characterization. See Email from Jonathan Kulick, Advisor, Office of the State Minister of Geor. for Reintegration, to author (Nov. 13, 2010) (on file with author). These comments about reasserting constitutional order are controversial because they are thought to show Georgian premeditation, but they also indicate a view of the conflict’s nature: Georgia was restoring its sovereignty over its own territory, which is what any state might be expected to do. As Professor Gotz notes, the phrase is “the basis of virtually any country’s decision to re-establish control over breakaway pieces of real estate and mafia dens, ranging from the U.S. South in 1861 to Italian efforts to trim the mob in Sicily.” Cecire, Doubting Der Spiegel, supra.

80 See ICG, REPORT No. 195, supra note 42, at 9. The report states:
Russia insisted it supported Georgia’s territorial integrity, but this language is no longer to be heard. Prime Minister Putin was the first to state, on 9 August, that ‘a fatal blow has been inflicted on the territorial integrity of Georgia itself, and . . . its own sovereignty.’ Foreign Minister Sergei Lavrov similarly said on 14 August, ‘one can forget any talk about Georgia’s territorial integrity’ Id. (citations omitted).
integrity with its recognition of the breakaway regions’ independence. Throughout, however, Russia claimed to respect territorial integrity as a principle—the question, though, was, integrity of what?

I have not found claims by Russia that Georgia’s actions during the brief war violated South Ossetia’s territorial integrity—and since Russia had not yet recognized the independence of South Ossetia, logically it would not have made such a claim. Still, as we have seen, that hardly stopped Russia from talking about “Georgian aggression” for actions Georgia took inside its own territory—a logical and doctrinal inconsistency, though one fully consistent with Russia’s evident preferences about the eventual outcome.

B. Illegal Occupation and Violation of the Ceasefire

Whether or not a given use of force violates international law, states whose armies cross a frontier and hold another state’s territory against its will are said to be in occupation and have obligations towards the civilian population and the displaced sovereign. Occupation is not per se illegal, though occupation

81 See infra Part III.C (discussion of Russia’s recognition of the separatist regions).
following aggression presumably is, and a legal occupation may become illegal; occupation is an open-ended prospect, terminated by substantive conditions rather than a predetermined clock. Even if Russia’s act of taking and holding territory were initially legal, it could have become an illegal occupation through subsequent events; whether or not its occupation was legal, Russia could have violated its obligations as an occupier.

In the Georgian War, the United States invoked “occupation” much less often than “violation of territorial integrity,” perhaps because occupation is conventionally a relatively long-term condition—occupation must be “effective,” not just a fleeting presence on another state’s territory—and therefore less apposite to the running, shooting part of a conflict. Instead, Western criticism of the illegality of Russia’s continuing presence was primarily aimed at Russia’s failure to uphold undertakings made in the ceasefire agreement. The agreement, brokered by French President Nicolas Sarkozy on August 12th and signed by Georgia and Russia on August 15th and 16th respectively, provided for the cessation of hostilities and mutual—if asymmetrical—withdrawal of forces, and indicated a further diplomatic process. Whatever obligations Russia may have had before, it arguably entered into new ones by signing a ceasefire agreement with Georgia.


Parsons, supra note 83, at 32. Occupations may be legal or illegal. If a state moved forces into another state with authorization by the Security Council, its actions would be legal but would still be an occupation. “United Nations (U.N.) governance occupations, such as those in East Timor and Kosovo and the U.S. and British occupation of Iraq in 2003, are instances of transformative occupations requiring resort to legal authority outside the traditional law of occupation framework. . . . [T]hese occupations occurred under legal frameworks authorized by the U.N. Charter and the approval of the U.N. Security Council.” Id. (citations omitted).

BENVENISTI, supra note 83, at 144 (distinguishing between “the course through which the territory came under the foreign state’s control” and “the phenomenon of occupation,” which he defines as “the effective control of a power . . . over a territory to which that power has no sovereign title, without the volition of the sovereign of that country”). Occupation is supposed to be temporary—the inadequacy of the law in dealing with situations such as the Palestinian territories suggests the problems that arise when occupation become effectively permanent—but as a legal category it refers primarily to some period longer than the shooting war; this is why its provisions are concerned to avoid such things as resettlement of populations. As Benvenisti explained:

The Hague Regulations did not envision that a peace treaty between the rival powers would take long to reach. In the nineteenth century, military defeats were soon followed by peace treaties and border modifications, and thus occupations were short lived. The Fourth Geneva Convention did envision the possibility of protracted occupation. . . . Most of the articles dealing with occupation, including . . . the occupant’s prescriptive powers, are enumerated as the exceptions that are retained as long as the occupation lasts.

Id.

See Text of the Peace Accord, N.Y. TIMES (Aug. 13, 2008), http://graphics8.nytimes.com/packages/pdf/world/2008/08/20080813_GEORGIA_ACCORD.pdf. During negotiations, a set of modifications proposed by Georgia was rejected. The final Agreement provides, in full (with the rejected provisions indicated thusly):

1. No recourse to the use of force
2. Definitive cessation of hostilities
3. Free access to humanitarian aid (and to allow the return of refugees)
4. Georgian military forces must withdraw to their normal bases of encampment.
The signing of the ceasefire appears, paradoxically, to have increased the level of Western criticism, which—whatever the ambiguities of the early phase of fighting—now focused on the presence of Russian troops in Georgia proper, and of new Russian forces in South Ossetia, as ceasefire violations, rather than violations of general international law. Secretary of State Rice began raising the claim of ceasefire violations even before the final deal was struck,²⁸ NATO Secretary General Jaap de Hoop Scheffer warned on August 19th that “Russia has to honour all points in the agreement” or face a freeze in relations.²⁹ Following Russia’s recognition of South Ossetia’s independence on August 26th, the G-7 states condemned Russia’s “continued occupation of parts of Georgia” (referring to several checkpoints Russia maintained in Georgia proper) and called on Russia to implement the peace agreement.³⁰ In September 2008, the State Department said any further deployments in South Ossetia would violate the agreement.³¹

5. Russian military forces must withdraw to the lines prior to the start of hostilities. While awaiting an international mechanism, Russian peacekeeping troops will implement additional security measures (six months).

6. Opening of international discussions on the modalities of lasting security in Abkhazia and South Ossetia (based on the decision of the U.N. and the O.S.C.E.)

Id. In a communiqué, Sarkozy stated, in relation to point 5:

[T]hese . . . may only be implemented in the immediate proximity of South Ossetia to the exclusion of any other part of Georgian territory . . . . [T]hese “measures” may only be implemented inside a zone of a depth of a few kilometers from the administrative limit between South Ossetia and the rest of Georgia in a manner such that no significant urban zone would be included . . . . Special arrangements must be defined to guarantee the liberty of movement and traffic along the length of the major highways and railways of Georgia . . . . These “additional security measures” will take the form of patrols undertaken solely by Russian peacekeeping forces at a level authorized by existing agreements.


³⁷ Key Statements, supra note 47 (“That means—and we do not see signals of that happening—that Russian troops will have to withdraw now to their pre-crisis positions. There can be no business as usual in our relations to and with the Russian Federation.”).

South Ossetia—which believed itself an independent state—naturally characterized Georgian forces on its claimed territory as illegal occupiers, though it more commonly used the language of aggression. With one exception, Russia seems not to have used the language of occupation; this would be logical, since it still acknowledged Georgia’s formal sovereignty and a state cannot occupy its own territory. The likelier reason, however, is that Russia, like South Ossetia, was much more inclined to refer to Georgian aggression. In any event, given the course of the war, Georgian forces were not in a position to be accused of occupation for very long.

C. Recognition of Breakaway States

On August 26th, Russia recognized the independence of South Ossetia and Abkhazia. These entities had long claimed independence, but no state had recognized them. International law places separatists in an ambiguous and

We deplore Russia’s...continued occupation of parts of Georgia. We call unanimously on the Russian government to implement in full the six point peace plan...in particular to withdraw its forces behind the pre-conflict lines. We reassert our strong and continued support for Georgia’s sovereignty within its internationally recognized borders...

Id.


We are extremely concerned about recent statements from the Russian government indicating that Russian forces will remain permanently in South Ossetia and Abkhazia. The ceasefire agreement...obliges Russian troops to withdraw to the positions they held on August 6. Any additional deployments...would constitute a violation....


The one exception is a statement made on August 9th by Foreign Minister Sergei Lavrov, in an interview with the BBC. “They [Russian troops] have a mandate to liberate the zone of conflict from violators. Whatever it takes we would do. To stop this is for the Commander-in-Chief of the Georgian army, to give orders to his troops to withdraw from the area they illegally occupied.” Press Release, Ministry of Foreign Affairs of the Russ. Fed’n., Interview by Minister of Foreign Affairs of the Russian Federation Sergey Lavrov to BBC (Aug. 9, 2008), http://www.mid.ru/brp_4.nsf/sps/F87A3FB7A7F669EBC32574A100262597. Lavrov’s initial reference to Russian troops is ambiguous, but appears to encompass the additional forces, not just the peacekeepers.

South Ossetia and Abkhazia recognized each other in November 2006, and established diplomatic relationships in September 2007. Abkhazia i Iuzhnaia Osetiia ustanovili diplomaticheskie otnosheniia (Абхазия и Южная Осетия установили дипломатические отношения) [Abkhazia and
difficult position: It is not illegal for a region to secede and constitute a new state, but neither is there any right to do so. The matter is generally considered political, but there are strong if ill-defined prohibitions against states supporting or encouraging secession from other states, as that could violate the territorial integrity and sovereignty norms of the U.N. Charter. An occupier is under a special obligation to maintain the existing legal system and respect the sovereignty of the occupied state, which suggests that there is a higher threshold for a state’s recognizing secessionist entities on territory it occupies.

Western reaction was uniform: “We... condemn the action of our fellow G8 member. Russia’s recognition of the independence of South Ossetia and Abkhazia violates the territorial integrity and sovereignty of Georgia and is contrary to U.N. Security Council Resolutions supported by Russia”. Almost every Western statement throughout the crisis reaffirmed Georgia’s sovereignty and territorial integrity, insisting that any final deal must be consistent with that baseline. For Western states, non-recognition of the separatists was a necessary

South Ossetia Established Diplomatic Relations], NOVYI REGION (НОВЫЙ РЕГИОН), (Sept. 27, 2007), http://www.nr2.ru/pm/141972.html; Abkhazia tuzhatina Osetii i Pridiestrove priznali nezavisimost’ drug druga i prizvali vsekh k etomu zhe (Abkhazia, Южная Осетия и Приднестровье признали независимость друг друга и призвали всех к этому же) [Abkhazia, South Ossetia and Transdniestria Recognized Each Other’s Independence and Called All Others to Do Likewise], NEWSRU (Nov. 17 2006), http://www.newsru.com/russia/17nov2006/aup.html.

99 Committee on the Elimination of All Forms of Racial Discrimination, General Recommendation No. 21: Right to Self-Determination, ¶ 6, U.N. Doc. CERD/48/Misc.7/Rev.3 (Aug. 23, 1996), available at http://www.unhchr.ch/tbs/doc.nsf/0/dc598941c9e68a1a8025651e004d31d0?OpenDocument (“[International law has not recognized a general right of peoples unilaterally to declare secession from a State.”). CERD provided the basis for Georgia’s (now dismissed) case against Russia before the International Court of Justice. See Georgia v. Russian Federation, supra note 82, at 115-84.

98 See, e.g., John Dugard & David Raic, The Role of Recognition in the Law and Practice of Secession, in SECESSION: INTERNATIONAL LAW PERSPECTIVES 95 (Marcelo G. Kohan ed., 2005) ("Recognition of a new State that emerges from the territory of an existing State, without the consent of the latter, is in most circumstances viewed as a violation of international law."); ALEKSANDAR PAVKOVIC & PETER RADAN, CREATING NEW STATES: THEORY AND PRACTICE OF SECESSION (2007) (describing the practice of secession through a series of case studies, including low odds of success for secession); Bridget L. Coggins, Secession, Recognition & the International Politics of Statehood 2 (2006) (unpublished Ph.D. dissertation, Ohio State University) (assessing threshold conditions under which Great Powers find it attractive to recognize secession). If a separatist group establishes de facto control over a defined territory with a stable population and is capable of entering into diplomatic relations, other states could recognize it (some scholars add a requirement the claimant must demonstrate democratic legitimacy), but in practice, recognition is rare without the acquiescence of the former metropole. Dugard & Raic, supra.

97 See Parsons, supra note 83 (outlining the obligations of occupation but also arguing that a changed framework allows occupiers to usurp the occupied state’s sovereignty under certain conditions); see also Grant Harris, The Era of Multilateral Occupation, 24 BERKELEY J. INT’L L. 1 (2006) (making a similar argument).

96 Joint Statement on Georgia, supra note 90.

95 See Parsons, supra note 83 (outlining the obligations of occupation but also arguing that a changed framework allows occupiers to usurp the occupied state’s sovereignty under certain conditions); see also Grant Harris, The Era of Multilateral Occupation, 24 BERKELEY J. INT’L L. 1 (2006) (making a similar argument).
concomitant of the obligation to respect Georgia’s territorial integrity. For Russia, recognition—justified by Georgia’s actions—changed the dynamic, and the parameters, of negotiations; in particular, it mooted the ceasefire’s limitations on its troop presence, since an independent South Ossetia could simply request that Russian troops remain, as it quickly did.100

D. Disproportionate Force and Jus in Bello Objections

In addition to condemning Russia’s resort to force and the territorial consequences for Georgia, Western leaders also condemned Russia’s conduct during the war—acts generally falling under the *jus in bello* governing the conduct and modalities of war, such as disproportionate use of force and acts of ethnic cleansing.101 *Jus in bello* applies to conflicts whether or not lawfully undertaken;102 thus even when Western leaders acknowledged the ambiguity of the initial conflict, or allowed that Russia might have had some basis for fighting, they still could, and did, raise criticisms about the way Russia fought.

Indeed, after concerns about territorial integrity violations, claims that Russia used disproportionate force were the most common criticism from Western officials, and were voiced by non-state observers as well.103 On August 17, for example, U.S. Secretary of State Rice declared that “Russia overreached, used

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100 C.J. Chivers, *Russia Keeps Troops in Georgia, Defying Deal*, N.Y. TIMES (Apr. 2, 2009), http://nytimes.com/2009/04/03/world/europe/03georgia.html (describing Russian forces stationed in portions of South Ossetia formerly in Georgian hands, even though international monitors were in place, and noting both that this violates the ceasefire agreement and that Russia has concluded a bilateral deal with South Ossetia to station troops).

101 See Geneva Convention Relative to the Protection of Civilian Persons in Time of War art. 2, Aug. 12, 1949, 75 U.N.T.S. 287 (“[T]he present Convention shall apply to all cases of declared war or of any other armed conflict which may arise between two or more of the High Contracting Parties, even if the state of war is not recognized by one of them.”); Prosecutor v. Tadić, Case No. IT-94-1-A, Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, ¶70 (Int’l Crim. Trib. for the Former Yugoslavia Oct. 2, 1995) (“[A]n armed conflict exists whenever there is a resort to armed force between states.”); CRYER, supra note 2, at 233 (“The paradigmatic situation of international armed conflict is the resort to force between the military forces of States.”). See generally Yoram Dinstein, THE CONDUCT OF HOSTILITIES UNDER THE LAW OF INTERNATIONAL ARMED CONFLICT (2004) (describing how different obligations apply in international and non-international armed conflicts).

102 See ADAM ROBERTS & RICHARD GUELFF, DOCUMENTS ON THE LAW OF WAR 1 (3d ed. 2004).

103 Leading non-governmental rights organizations criticized both Russia and Georgia for disproportionate use of force. See AMNESTY INT’L, supra note 4, at 60 (criticizing Georgia for not adopting measures to protect civilians in Tskhinvali and criticizing Russia for failing to distinguish military objectives and targets from civilian settlements); HUMAN RIGHTS WATCH, supra note 4, at 3 (blaming Georgia’s “indiscriminate and disproportionate force” in artillery assaults, and Russia’s indiscriminate “aerial, artillery, and tank fire strikes”, and criticizing both sides for the use of cluster munitions).
disproportionate force against a small neighbor and is now paying the price for that because Russia’s reputation... is frankly, in tatters.” Some criticisms focused on aerial bombardment and the targeting or indiscriminate killing of civilians, yet the main thrust of U.S. critiques was not about the methods of war, but the location: Repeated statements by Rice emphasized that, whatever the legitimacy of Russian actions in South Ossetia, carrying the war into Georgia proper was *per se* disproportionate. That is, in the U.S. critique, disproportionality served primarily as evidence of a *jus ad bellum* violation.

Western governments were far more cautious about characterizing Russia’s actions as ethnic cleansing or genocide. Ethnic cleansing is an omnibus descriptor for a number of illegal acts, such as deportation and extermination. Genocide is a defined crime: The commission of certain acts (such as killing) with intent to destroy, in whole or in part, a national, ethnic, racial or religious group. Both Georgia and Russia accused each other of committing genocide or ethnic cleansing, but Western governments appear not to have given reports of genocide credit, and did not emphasize complaints about ethnic cleansing nearly as much as they did the territorial aspects of Russia’s incursion.

In sum, the legal categories that U.S. leaders deployed centered on the sovereignty and territorial integrity of Georgia. They also demonstrated a patterned

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104 *Key Statements, supra note 47.*

105 Recent Events, *supra note 88.* Rice stated:

[B]ut... Russia seriously overreached.... Russia engaged in activities that could not possibly be associated simply with the crisis in South Ossetia. Bombing civilian targets—bombing targets outside the zone of conflict, some of which have civilian uses, the activities in Gori, the activities in Poti, destruction of civilian infrastructure—these are hardly moves that are related to South Ossetia.


106 *We will consider this in detail in Part III.*

107 *See CRYER ET AL., supra note 2,* at 204 (defining deportation as “forced displacement of persons by expulsion or other coercive acts from the area in which they are lawfully present, without grounds permitted under international law”).


109 *See Key Statements, supra note 47* (quoting Russian President Dmitri Medvedev on August 11th: “The ferocity in which the actions of the Georgian side were carried out cannot be called anything else but genocide . . . .”); Maria Golovnina, *Georgia Accuses Russia of Ethnic Cleansing,* REUTERS Aug. 9, 2008, available at http://www.reuters.com/article/idUSL9329769 (quoting Georgia’s National Security Council Secretary on August 9th: “No doubt about that. Villages that fell under Russian invasion, those villages are being cleaned out . . . . Pulling out our troops would lead to more ethnic cleansing by Russian troops.”). Both states accused the other of ethnic cleansing at the Security Council on August 10, 2008. *Szewczyk, supra note 82.*
distinction between South Ossetia—identified as a zone in which Russian peacekeepers were legitimately present and in which Russia had some limited right to act—and “Georgia proper.” Thus claims of “aggression,” “violation of territorial integrity,” “illegal occupation” and “ceasefire violations” were voiced most strongly in connection with Russian incursions beyond the defined zone in South Ossetia. Likewise, claims about “disproportionate use of force” were most frequently identified with incursions into Georgia proper, the very performance of which was seen as an illicit escalation. All of these interpretative moves emphasized (or at least, suggested) legal features more commonly associated with the jus ad bellum—the decision to fight—and the consequences for Georgia as a sovereign territorial state, rather than the particular harms of war.

Georgia’s actions, by contrast, were seen very differently in relation to these categories: However unwise they had been—however difficult a position they had put the United States and other allies in—because Georgia’s uses of force took place entirely on its own territory, the norms of jus ad bellum did not even arise.

III. A CURIOUS OUTCOME: HOW SHOULD THE LAW CHARACTERIZE WHAT HAPPENED IN THE WAR?

The 2008 Georgian War was not a conflict over legal definitions. Still, Western policymakers did claim Russia had violated important international legal norms, and the most searching condemnations they made concerned jus ad bellum violations of sovereignty: Russia’s actions—invading Georgia, continuing to occupy territory, recognizing breakaway regions—and critiques of Russia’s disproportionate conduct both implicate a territorial interpretation.

These are curious grounds for legal criticism, because as we shall see, many of Russia’s acts were probably perfectly legal, or at least so indeterminate as to provide dubious grounds for condemnation. Things that were most clearly legally improper made up the smallest part of Western critiques. By following the standard account of events, we can review the conduct of the war against existing legal norms, remembering those norms are not always clear—a fact that does not work in favor of the preferred analysis of the United States.

A. Aggression and Violation of Territorial Integrity

Russian troops unquestionably invaded Georgia, but Russia probably did not commit aggression. There had been a chain of incidents and provocations stretching back several years, but on August 7, 2008, Georgia significantly escalated the level of conflict, initiating major military operations by shelling and

110 U.S. policymakers sometimes conflated the “zone of conflict” with South Ossetia as a whole, even though parts of the former Soviet South Ossetia Autonomous Oblast had remained under Georgian control.
attacking Tskhinvali, killing eighteen Russian peacekeeping troops. Russia was evidently ready—probably seeking just such an opportunity—and struck back with overwhelming force the next day. This sequence is decisive.

The first serious wrongful use of force normally constitutes aggression. While the term “first” appears straightforward enough, it will turn out to do very little independent work. “Serious” means non-trivial; for example, not just a stray bullet, an accidental crossing of a frontier, or even minor military operations. Finally, the term “wrongful” is not a moral assessment but means lacking justification, as in force that was neither authorized by the Security Council nor a defensive response to some prior use of force or threat. Thus a state does not necessarily commit aggression merely because it used force first, or because it uses a serious level of force: it must be serious, unauthorized, and (usually) first—and these three elements interact.

Let us begin with temporal priority, and see how it quickly implicates seriousness and wrongfulness. On the standard account, Georgia initiated its attack on Tskhinvali on August 7th, before Russia’s deployment on August 8th. Georgia contests this, claiming that Russian forces moved through the Roki tunnel from North Ossetia early on August 7th. Georgia has also claimed it was responding to prior incidents, of which there had been a well-documented series in the preceding months, indeed over the previous eighteen years. Those incidents were principally between Georgian and South Ossetian or Abkhazian units, though some involved Russian forces. If Russia in fact deployed earlier on the 7th, or if these prior incidents themselves were of sufficient seriousness, then later that day Georgia could plausibly have been responding to them in self-defense. This in turn could mean that on August 8th, Russia was not responding, but continuing a conflict it had begun by an earlier violent action. Let us see how these possibilities work out.

To use force in self-defense, a state must be responding to some prior and sufficiently serious act. Just as not every cross-border incursion constitutes aggression, not every incursion gives grounds for the full range of self-defense measures; although all are violations of sovereignty and territorial integrity, there must be a measure of gravity or seriousness. A state is not allowed to retaliate

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111 See Caucasian Tragedy, supra note 42.
113 See Definition of Aggression, supra note 60.
114 For example, Russian forces were involved in the destruction of a Georgian drone over Abkhazia in April 2008. Martin Malek, Georgia & Russia: The "Unknown" Prelude to the "Five Day War", 3 CAUCASIAN REV. INT'L AFF. 227, 229 (2009).
115 See Definition of Aggression, supra note 60, at Annex art. 2. The U.N. definition of aggression states:

The first use of armed force by a State in contravention of the Charter shall constitute prima facie evidence of an act of aggression although the Security Council may, in conformity with the Charter, conclude that a determination that an act of aggression has been committed
with massive military force to trivial infringements of its sovereignty; a sustained bombing campaign in response to an incursion by a drunken soldier would, in legal terms, be a use of force sufficient to constitute aggression, while the drunken soldier himself would not. But if prior uses of force are serious enough, then actions taken in response constitute legitimate self-defense.

The terms “first” and “serious” are thus related. The Russian incursion on August 8th, which involved large armored and infantry formations, sustained aerial bombardment, and occupation of territory, would clearly qualify on grounds of seriousness. But so would the Georgian action the day before. If the Russians were in fact responding to that, they would not be committing aggression. The standard account says this is what happened, and the Georgian claim that it was merely responding very quickly to an ongoing Russian incursion (or to South Ossetian artillery attacks), which began the day before or earlier that day, is complicated by Georgia’s own extensive preparations. Before August 7th, Georgia reassigned artillery to Gori after the completion of joint Georgian-U.S. operation Immediate Response 2008 rather than returning them to barracks, made “frantic requests” for offensive weaponry from Israel, and assembled 12,000 troops on the Ossetian boundary. This tends to strengthen the view that Georgia was acting, and Russia reacting.

And, of course, on August 7th, it was Georgia that sent forces into South Ossetia and initiated a large, sustained artillery bombardment, before any would not be justified in the light of other relevant circumstances, including the fact that the acts concerned or their consequences are of sufficient gravity.

\[\text{Id. (emphasis added). See also Keith A. Petty, Criminalizing Force: Resolving the Threshold Question for the Crime of Aggression in the Context of Modern Conflict, 33 Seattle U. L. Rev. 105 (2009) (discussing threshold considerations for the crime of aggression).}\]


Although the law, as refined by judges’ decisions, recognizes a right to respond with military force to an armed attack, it warns as well that this right is not absolute, depending, rather, on whether the provocation was of such magnitude as to warrant a full-scale military response. A small border incursion, for example, might not justify a war.

\[\text{Id. See also May, supra note 62, at 323 (“If one is interested in a definition of aggression that was normatively persuasive, more is needed than merely a reference to violating territorial integrity or political sovereignty.”).}\]

\[\text{See Definition of Aggression, supra note 60, at Annex art. 3 (providing a non-exhaustive list of acts constituting aggression).}\]

\[\text{Except, of course, that Georgia’s action was conducted entirely on its territory—but more on this shortly.}\]

\[\text{See Caucasian Tragedy, supra note 42. On the other side of the balance sheet are Georgia’s continuing efforts to negotiate a new ceasefire. Here the claims are as polemical as they are poignant. See, e.g., Damien McElroy, Georgia Conflict: How a Flat Tyre Took the Caucasus to War, Daily Telegraph (London) (Aug. 16, 2008), http://www.telegraph.co.uk/news/worldnews/europe/georgia/2570754/Georgia-conflict-How-a-flat-tyre-took-the-Caucasus-to-war.html (describing a last-minute effort at negotiations foiled by car trouble). However, it is not clear that they tell us much. It is entirely possible that Georgia negotiated even as it prepared for war. Indeed, since both Russia and Georgia engaged in negotiations on August 7th, whichever side started the war was presumably planning to fight while negotiating. This is normal practice—diplomats occasionally, awkwardly, find themselves in the enemy capital as the bombs begin to fall.)}\]
comparably serious military action by Russia. Georgia's application to the International Court of Justice is enlightening in this regard; it accuses Russia of violating the International Convention on the Elimination of All Forms of Racial Discrimination through attacks and expulsions, but does not mention aggression. The text implicitly concedes the most plausible sequence: The complaint submitted by the government of Georgia refers to a Georgian "limited operation" followed by a "well-planned" Russian invasion.\textsuperscript{120}

So we are required to consider what, if any justification there can be for the Georgian attack. Plenty of incidents preceded the Georgian attack on August 7th. There is a view that a sequence of prior incidents, none in itself rising to a sufficient level of seriousness, can by accumulation constitute a sufficient trigger for a right of self-defense.\textsuperscript{121} On this view, Georgia was responding to a string of insults, and in attacking exactly when it did on August 7th was simply choosing the time and manner for its legitimate response.\textsuperscript{122} Because acts of self-defense, by definition, do not give rise to a right of response in the other party (who is, after all, an aggressor by accumulation), Russia's subsequent acts would have been unlawful.

There is certainly a record of violent incidents and provocations going back to the early 1990s, and accelerating after 2004; less clear is how to characterize the causal sequencing of these incidents, since it is equally plausible to describe many of them as the consequence of Georgia's efforts to reassert its constitutional order in the separatist regions, which would not have been a valid exercise of military force under Sochi.

It is not clear that any of those prior incidents, alone or cumulated, would have qualified on grounds of seriousness. No external observer suggested they did

\textsuperscript{120} See Racial Discrimination, supra note 82, ¶¶ 77-78. The ICJ Press Release states:

In response to the persistent shelling of ethnic Georgian villages in South Ossetia by separatist forces, Georgian military forces launched a limited operation into territory held by ethnic separatists on 7 August 2008 for purposes of putting a stop to the attacks. Seizing the opportunity to realize its goal of an ethnically homogenous and compliant South Ossetia, Russia responded with a full-scale invasion of Georgian territory on 8 August 2008. Beginning in the morning hours of 8 August, several thousand Russian troops invaded Georgia in a well-planned air and land attack throughout Georgian territory.

\textit{Id.} Concern about the facts is not the only reason for this strategy, of course: Georgia had limited jurisdictional options for bringing a contentious case against Russia to the ICJ. See \textsc{Cryer et al.}, supra note 2, at 223-24, 276-78.


\textsuperscript{122} Roundtable: \textit{Causes And Effects Of The Russia-Georgia War} (Radio Free Europe/Radio Liberty radio interview, August 9, 2009), transcript available at http://www.rferl.org/content/Roundtable_Causes_And_Effects_Of_The_Russia_Georgia_War/1795469.html. Edward Lucas commented that "the basic perception now of the war in the West focuses very much on the hours before it started and Saakashvili's decision to send his forces north and rather ignores the two years' worth of provocations that went before that." \textit{Id.}
before the outbreak of the 2008 war; and no major actor suggested at the time that Georgia would be authorized, under a theory of self-defense, to repudiate the Sochi framework and undertake the kind of attack it did on August 7th in response to the actual level of incidents that summer or the incidents over the previous eighteen years. So these incidents, even considered cumulatively, probably cannot excuse Georgia’s serious actions on August 7th, which in turn can excuse Russia’s serious actions on the 8th (if it meets other criteria, to which we will shortly turn). In any case, the accumulation theory is controversial,\(^\text{122}\) and accepting it necessarily treats the attack on August 7th as the first act that, on its own, was undeniably serious enough to constitute aggression and generate a right of response.

The third component of aggression is wrongfulness: the lack of legal authority, which derives from either Security Council authorization or self-defense. A party can use serious force, and even use it first, without committing aggression if the force is rightly authorized. In Georgia’s case, of course there is no question of aggression: Even if it was the first to use serious and unauthorized force, Georgia never attacked another state’s territory, and states do not require Security Council authorization or a claim of self-defense to protect their domestic order against internal threats.\(^\text{123}\) Even the attack on the Russian peacekeepers legally based in South Ossetia cannot be qualified as aggression.\(^\text{124}\) As for Russia, which did attack another state, it did not have Security Council authorization, so only self-defense could justify Russia’s actions. Can Russia’s actions plausibly be called defensive?

Like Georgia, Russia had clearly prepared for war: It scheduled its Kavkaz 2008 maneuvers for July and, following their completion, maintained forces in the area in a high state of readiness;\(^\text{125}\) it apparently evacuated women and children from Tskhinvali by August 4th;\(^\text{126}\) and on August 3rd, the Russian Foreign Ministry

\(^{123}\) Tams, supra note 121, at 370 (discussing Israel’s assertion of a right to defend against “continuous pin-prick assaults” but that this was not accepted at the Security Council; and criticizing side-effects of accumulation doctrine, including confusion regarding temporal aspects of use of force and requirements for immediacy); Derek Bowett, *Reprisals Involving Recourse to Armed Force*, 66 AM. J. INT’L L. 7 (1972) (discussing the Security Council’s repeated rejection of this basis for self-defense in relation to the Israeli conflict). For a current discussion, see Paul Duchene & Eric Pouw, *Operation Change of Direction: A Short Survey of the Legal Basis and the Applicable Legal Regimes*, NETH. ANN. REV. MIL. STUD. 51–96 (2009). For two cases implicitly invoking the concept, see Military and Paramilitary Activities in and Against Nicaragua (Nicar. v. U.S.), 1986 I.C.J. 14, 120 (June 27); Oil Platforms (Iran v. U.S.), 2003 I.C.J. 161, ¶ 64 (Nov. 6) (preliminary objections).

\(^{124}\) Popjanevski, supra note 44, at 157 (“It is not necessary for Georgia to invoke the doctrine of self-defense in this instance because it did not breach a sovereign border in South Ossetia.”).

\(^{125}\) Unauthorized movement of troops stationed within a foreign state constitutes aggression, but an attack on those troops’ base by the host state does not constitute aggression, though of course it may be wrongful in other ways. Thanks to Steve Ratner for this point.

\(^{126}\) Some of these forces are normally based in Pskov, on the Estonian frontier, but did not return there after the end of the Kavkaz exercises. See Malek, supra note 114 (discussing how the 58th Army, the key force in the Russian operation in Georgia, remained in the region after the exercises ended).

warned that an “extensive military conflict” was imminent, a statement consistent either with a defensive response or an intent to invade, though not with a claim of perfidious surprise. The fact that both sides prepared for war—for attack, counterattack, or both—could simply show that both sides accurately understood the rising risks; after all, that is what militarys are supposed to do.

Preparations can provide the basis for a claim of anticipatory self-defense if they are of a sufficiently threatening nature, along the lines of the 1967 Six Day War. In Georgia’s case, applying the traditional Caroline test this would have required a credible belief that Russia was preparing an imminent invasion. It is plausible to characterize Georgia’s actions in early August as anticipating an impending Russian invasion, but equally plausible to characterize Russia’s actions as anticipating an impending Georgian attack. Again we descend into the thicket of facts—facts whose best available interpretation favors the Russian claim or, if things are truly ambiguous, counsels against accusations of illegality. Similarly, the speed of Russia’s response does not change its plausible factual and legal character as a legal response rather than a first wrongful use. After all, Georgia’s own version of events requires one to believe that it counter-attacked with at least equal speed.

If we turn to Russia’s affirmative justification for its intervention, we see that it is grounded in a right to respond to Georgia’s own unjustified actions. Although hardly a neutral player, Russia kept peacekeeping troops in South Ossetia under arrangements agreed to by Georgia since 1992, and it had a right to defend both them and the ceasefire lines that, on August 7th, Georgia crossed with main force. Even though Georgia never attacked Russian territory, it did use serious evacuation of women and children, but not specifying by whom).

128 Caucasian Tragedy, supra note 42; Pavel Felgenhauer, After August 7: The Escalation of the Russia-Georgia War, in THE GUNS OF AUGUST 2008, supra note 12, at 165 (“[T]his official Russian position [claiming that their intervention was a spontaneous response] ignores the simple fact that an invasion of such a magnitude would require long-term preparations involving the entire Russian military, including the Army, Air Force, and Navy.”).

129 See U.N. Charter art. 51. The text of the U.N. Charter’s Article 51 arguably limits self-defense to situations of actual attack, but it is often accepted that some measure of anticipation is allowed. See Steven R. Ratner, Aggression, in CRIMES OF WAR 2.0, supra note 83, at 37 (distinguishing between the more broadly accepted anticipatory defense doctrine and the Bush administration’s more expansive pre-emptive self-defense doctrine); Leo Van den Hole, Anticipatory Self-Defense Under International Law, 19 AM. U. INT’L L. REV. 69 (2003) (arguing that it is legitimate to expect a state to use force in anticipation of an armed attack).

130 See R.Y. Jennings, The Caroline and McLeod Cases, 32 AM. J. INT’L L. 82, 89 (1938) (discussing how the “necessity of self-defence [is] instant, overwhelming, leaving no choice of means, and no moment for deliberation”). See generally Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion, 1996 I.C.J. 226 (July 8), available at http://www.icj-cij.org/docfmt/files/95/7495.pdf (articulating arguably narrower self-defense tests than Caroline, allowing less room for anticipation); Military and Paramilitary Activities in and Against Nicaragua (Nicar. v. U.S.), 1986 I.C.J. 14 (June 27). This, of course, would leave even less scope to describe Georgia’s actions as anticipatory, whereas Russia’s core claim—that it was responding to an actual, ongoing invasion by Georgian forces—would if true meet the temporal or sequential elements of any definition of aggression. See CHRISTINE D. GRAY, INTERNATIONAL LAW AND THE USE OF FORCE 105–08 (2008).
force against Russian peacekeepers, killing eighteen in its initial assault; this plausibly implicated Russia’s general right to self-defense or its specific rights under Sochi, or both.

The scope of self-defense for acts occurring beyond a state’s own territory is complex, but probably no state believes its inherent right of self-defense is co-terminal with its territory: almost all states believe they have a right to defend their interests, their populations, and their military forces abroad under defined conditions. Inasmuch as it was responding to attacks on its citizens among the South Ossetian population, Russia might plausibly claim self-defense directly, relying on the so-called Entebbe defense\(^\text{131}\) or passive personality logic for enforcement jurisdiction.\(^\text{132}\) These claims are more controversial,\(^\text{133}\) as is the status of Russia’s dual nationals.\(^\text{134}\) Still, few states accept on principle that they are barred from acting to protect their nationals merely because they are in another state’s territory—especially if, as in this case, that other state is the source of the threat.\(^\text{135}\) I am not aware that any state has ever conceded that fighting back against an attacker who has just killed some of its own military personnel stationed abroad constitutes aggression. So, it is plausible that, in attacking on August 8th, Russia was responding to the Georgian assault on at least two grounds: defending its

\(^{131}\) See Ratner, supra note 129, at 37. Ratner stated:
A number of States have accepted that a State’s first use of force to extricate its citizens from another State when they are in imminent danger, and the other State is not able to protect them, is not aggression (e.g. Israel’s 1976 Entebbe raid) and may be a form of self-defense.\(^{\text{Id.}}\)

\(^{132}\) See, e.g., Popjanevski, supra note 44, at 158 (citing Int’l Comm’n on Intervention and State Sovereignty, The Responsibility to Protect (2001) [hereinafter ICISs Report]) ("[E]ndangerment of a state’s citizens does not automatically create a basis for intervention militarily on another state’s territory"). GRAY, supra note 130, at 108–11 (noting other examples when this right has been invoked—incidents in Suez, Lebanon, Congo, Dominican Republic, Iran, Grenada, Panama—but also that the right to use force to rescue nationals in a foreign state is controversial. Some states—for example, Belgium, Israel, the United States, and the United Kingdom—have argued for this right, but this view has not attracted many adherents). On passive personality, see CRYER ET AL., supra note 2, at 223–24, 42–43 ("In most instances the assertions of such jurisdiction is controversial.").

\(^{133}\) See 2 Tagliavini Report, supra note 11, at 169–78 (strongly criticizing Russia’s wholesale granting of passports to South Ossetians); Kristopher Natoli, Weaponizing Nationality: An Analysis of Russia’s Passport Policy in Georgia, 28 B.U. Int’l L.J. 389 (2010) (criticizing Russia’s grant of passports to South Ossetians and its justification of the war as a defense of them, and arguing for the illegality of Russia’s actions under the abuse of rights doctrine).

\(^{134}\) GRAY, supra note 130, at 157 (stating that most states which have used force to rescue their nationals, including the UK, have “expressly referred to Article 51 as covering their operations . . . although an alternative less satisfactory view is to seek to derive from customary international law a right of intervention to protect nationals”); ICISs Report, supra note 133, at para. 4.13 (“The Commission found in its consultations that even in states where there was the strongest opposition to infringements on sovereignty, there was general acceptance that there must be limited exceptions to the non-intervention rule for certain kinds of emergencies.”). Whatever constraints states assert concerning intervention to protect citizens abroad, the kinds of endangerment that occurred when Georgia attacked on August 7th—including sustained shelling of populated areas and the killing of peacekeepers—would likely allow a response in the eyes of most states.
peacekeepers, and defending territory in South Ossetia for which Russia had a
defined peacekeeping responsibility. As we have already seen, Russia's claims of
Georgian aggression were in fact organized both around the harm to its
peacekeepers and civilians and the violation of its treaty-based protective rights to
be on the territory.136

Finally, it may be that Russia provoked Georgia, but it is not clear why that
matters. Russia may have wanted war, but Georgia did not have to oblige. An
enemy's actions cannot be merely metaphysically provocative. Rather, they must
meet (at least) the criteria of the Caroline test: They have to be real or threatening
in a concrete and immediate sense,137 which includes a measure of seriousness.
This simply returns us to the factual dispute about what happened when, and I have
yet to hear a persuasive explanation of how Russia "provoked" Georgia into
voluntarily invading South Ossetia and killing Russian troops before Russian troops
had made any overt offensive moves.138 Unless one accepts that events prior to
August 7th constituted serious actual uses of force or Carolinian threats, singly or
cumulated, it was Georgia that initiated major combat operations by attacking
territory and persons under recognized Russian protection; once it did, it gave
Russia plausible grounds for a claim of self-defense or a right of responsive
intervention under Sochi.139

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136 See South Ossetia Statement, supra note 70. The statement said:

Russia has maintained and continues to maintain a presence on Georgian territory on an
absolutely lawful basis, carrying out its peacekeeping mission in accordance with the
agreements concluded... Georgia's acts have caused loss of life, including among Russian
peacekeepers. The situation reached the point where Georgian peacekeepers opened fire on
the Russian peacekeepers with whom they are supposed to work together to carry out their
mission of maintaining peace in this region. Civilians, women, children and old people, are
dying today in South Ossetia, and the majority of them are citizens of the Russian
Federation.

Id.

137 The Bush administration proposed a revised doctrine of preemptive self-defense, which
would relax the immediacy requirements of traditional anticipation. See THE WHITE HOUSE,
gov/documents/organization/63562.pdf. But this has proved highly controversial, as it was "widely
rejected as impermissible under international law." CRYER ET AL., supra note 2, at 223–24, 269.

138 Cf. May, supra note 62, at 325. May stated:

'First strike' should be seen as short-hand for 'first wronging' rather than about which State
literally engaged in physical assault first. It may seem odd to say that the State that provokes
is an aggressor, rather than the State that launches an attack. But history has shown many
examples of States that try to start wars stealthily by provoking another State to use violence
that can then be countered by supposedly self-defensive violence. Think of a state that
menacingly moves its troops to the border of another State thereby provoking that other State
to attack first.

Id. However, any such provocation must still meet the criteria for anticipatory self-defense. May
describes a doctrinal possibility; it does not mean Russia's actions actually reached to that level. Again
we return to the facts.

139 Popjanevski, supra note 44, at 160. Popjanevski said:
In sum, Georgia’s actions on August 7th were a considerable escalation in the level of activity; Georgia’s resort to main force was not preceded by any sufficiently serious event and was, therefore, the first serious use of force without authorization. There is no question of Georgia’s committing aggression because it restricted its operations to its own territory. Still, it is not necessary to show that Georgia committed aggression or violated Russia’s territorial integrity in order to find that Russia had the necessary authorization; Georgia used force in a way that implicated Russia’s rights as peacekeeper or its right of self-defense. Russia’s first use of serious force occurred on August 8th, plausibly in response to Georgia’s actions of the previous day; Russia’s attack was serious, but it was not first, and it was authorized as an act of self-defense of Russian forces legally stationed in South Ossetia. However much Russia may have welcomed this development, it is not liable for its wishes. Georgia’s attack—which had all the qualities of aggression, save that it took place on Georgia’s own territory—was a gift that gave Russia the opportunity to do what it desired.

The analysis is essentially the same for violations of territorial integrity: Any use of force against another state technically violates its territorial integrity, but authorized uses of force are justified. So, Russia’s incursion into Georgia violated Georgia’s territorial integrity, but if Russia was responding to attacks on its peacekeepers or defending civilian populations for which it had responsibility under the Sochi Agreement or under a self-defense theory, its actions, even entering undisputed Georgian territory, were not illegal, so long as they were pursuant to those purposes. For its part, Georgia’s actions may have contravened Sochi, but they could not be characterized as territorial violations because they took place on Georgia’s own territory.

As we have seen, there is a countervailing Georgian narrative that contests the temporal sequence or contextualizes it, and based on that alternative account one could find a claim of aggression against Russia. This view, which was mostly accepted by U.S. officials at the time, has been contradicted by the standard account; the point is that the Georgian narrative acknowledges the same general contours of the law of aggression. It fills those contours with different factual claims, but the law is the same.

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Georgia’s decision to advance towards Tskhinvali on August 7 likely constituted a grave miscalculation of the possible Russian response. Whether or not Tbilisi perceived itself as having no other choice but to order its troops towards Tskhinvali on August 7, its moved provided Moscow with the pretext it needed to launch its invasion of Georgian territory.

Id. 140 Popivanevski, supra note 44, at 161 (“The events in early August, those on August 7 in particular, should not be treated as decisive with regard to the issue of accountability in the Russia-Georgia war.”).
B. Illegal Occupation and Violation of the Ceasefire

Any state that seizes the territory of another through force and exercises effective control over it is in occupation; so, Russia occupied Georgian territory. But as we have seen, this is not necessarily illegal. However, the ceasefire added contractually specified actions that Russia, even as an occupier, might not otherwise have been obliged to take. As a result, it proved a more effective vehicle for Western condemnation than the occupation did.

Indeed, as we have seen, much Western criticism centered on alleged Russian violations of the ceasefire agreement, such as Russia’s continued operation of some twenty-five checkpoints within Georgia. Although French and U.S. leaders produced a highly precise formula for what the ceasefire required, the actual six-point text was hardly clear. For example, it called for the withdrawal of Russian forces to their prewar positions but also allowed Russia to take unspecified “additional security measures.”141 Even subsequent French clarifications appear to indicate that Russian forces could remain in a defined zone within Georgia proper for an indeterminate period.142 Quite simply, the text is ambiguous, and ambiguity weighs against easy accusations of violation.

Whatever the ambiguities and complexities of the ceasefire’s text, the question of its relevance arose at the end of the August crisis. For after August 26th, on the Russian account, a sovereign South Ossetia became competent to enter new relations (which it promptly did), rendering the ceasefire moot, at least those parts of it pertaining to areas under South Ossetia’s now-sovereign control.143 Western states and Georgia rejected this, but that is a clash over principles of recognition, which cannot be resolved by debating the meaning of the ceasefire or the rules governing occupation.144

141 Text of the Peace Accord, supra note 86, at point 5.
142 See id. and accompanying text, discussing the French position on the “additional security measures.”
143 One might argue that South Ossetia’s independence would not have this effect: Russia’s obligations under the ceasefire—whatever they are—constitute a binding international agreement with Georgia and France concerning the location of Russian forces, which might remain valid even if South Ossetia seceded. Russia did not interpret things this way, and to my knowledge no Western state raised this claim, though presumably this is because they rejected the South Ossetia’s independence outright and considered Russia’s recognition itself to be a violation of the ceasefire; they simply were not developing arguments “in the alternative” that might acknowledge South Ossetia’s independence. Russia never contested that those parts of the ceasefire affecting Georgia proper remained valid, although it differed with Georgia and Western states over interpretation. Over time, following initial foot-dragging and vociferous objections from Western states, Russia withdrew from its forward positions in Georgia proper.
144 An occupier cannot annex land or take other actions that undermine the sovereignty of the occupied state, and recognition of a secessionist entity might contravene this rule. However, that improperly collapses the question. If South Ossetia’s secession were otherwise valid, Georgia would no longer be sovereign, and nothing would preclude Russian recognition.
C. Recognition of Breakaway States

Russia's recognition of the two breakaway regions not only altered its relationship to the ceasefire (as Russia saw it), but also created new grounds for Western critique. International law strongly protects states' territorial integrity, and probably forbids states from taking steps that even indirectly threaten the territorial integrity or sovereignty of other states; in practice, it is very difficult for territories or populations to secede against the wishes of the recognized government. In South Ossetia's case, the Sochi Agreement created a process for negotiations and confidence-building but made no promises of independence. Thus, although South Ossetia and Abkhazia have had de facto independence since the early 1990s, no other state had recognized them; all parties confirmed support for Georgia's territorial integrity, even as some (like Russia) discouraged Georgia from reintegrating the territories. Under traditional doctrines of self-determination, the separatist regions would have no claim to external self-determination—that is, independence.

So, at first glance, these two regions' declarations of independence and Russia's recognition might look like violations of international law. However, because secession is a political act, it is not in fact clear what constraints actually

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Russia's official position since the end of the hostilities [in the 1990s] was based on its recognition of Georgia's territorial integrity. Russia committed itself to seek an 'agreement toward mutually acceptable model of reincarnation in [sic] common state, or towards any other status acceptable for the parties to conflict and the custodians.' All the UN Security Council resolutions and positions of its member states have unambiguously adhered to the territorial integrity of Georgia.

Id. at 110.

146 Self-determination is a right of "all peoples[]." International Covenant on Civil and Political Rights, G.A. Res. 2200A (XXI), art. 1, 999 U.N.T.S. 171 (Dec. 16, 1966). However, there is no clear definition of a "people" apart from the whole population of a state or territory—a definition that tautologically excludes sub-state regions like South Ossetia. Moreover, self-determination's application has traditionally been restricted to situations of colonial or alien rule. See Declaration on the Granting of Independence to Colonial Countries and Peoples, G.A. Res. 1514 (XV), U.N. Doc. A/RES/1514(XV) (Dec. 14, 1960); Accordance with International Law of the Unilateral Declaration of Independence in Respect of Kosovo, Advisory Opinion, 2010 I.C.J. 141, ¶¶ 78–83 (July 22) ("[I]nternational law of self-determination developed in such a way as to create a right to independence for the peoples of non-self-governing territories and peoples subject to alien subjugation, domination and exploitation . . . ."); 1 ÖPPENHEIM’S INTERNATIONAL LAW 15, 712 (Robert Jennings & Arthur Watts eds., 19th ed. 1996) (noting that "the principle has often appeared in practice to be an adjunct of the decolonialisation [sic] process rather than an autonomous principle . . . ."). On the doctrine of self-determination and its limited applicability outside the colonial context, see generally HURST HANNUM, AUTONOMY, SOVEREIGNTY, AND SELF-DETERMINATION: THE ACCOMMODATION OF CONFLICTING RIGHTS (1996).
operate on states in their recognition policies. One of the classical criteria governing recognition is the factual independence and capacity of the de facto entity, and South Ossetia and Abkhazia had met those criteria since the early 1990s. States have on occasion recognized new states out of the territory of other states, and there are few cases of a state being formally (or effectively) sanctioned for recognizing a new state. Moreover, there are plausible arguments that the right of external self-determination, though quite limited, can be invoked in cases in which a population is denied meaningful participation in governance or is subjected to violent repression.

Recent events in Kosovo have further complicated any analysis of secession and self-determination claims. In 1999, NATO intervened in Kosovo to protect its ethnic Albanian population from ethnic cleansing by Serbia—the leading modern example of humanitarian intervention in an internal conflict. The province was put under U.N. administration while remaining formally a part of Serbia. Attempts to find a mutually acceptable negotiated solution stalled; finally, in

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148 See Convention on the Rights and Duties of States art. 1, Dec. 26, 1933, 165 L.N.T.S. 19 (hereinafter Montevideo Convention) ("The state as a person of international law should possess the following qualifications: a) a permanent population; b) a defined territory; c) government; and d) capacity to enter into relations with the other states."). See also Montevideo Convention, supra, art. 3 ("The political existence of the state is independent of recognition by the other states."). Even so, de facto states are often not recognized; examples include Northern Cyprus, Transdniestria, Somaliland, and of course South Ossetia and Abkhazia until 2008.

149 States have accused each other of illegal conduct in recognizing breakaway regions. For example, Serbia condemned the recognition of Kosovo's independence by other states as a violation of international law. As we have seen, several states objected to Russia's recognition of Ossetia and Abkhazia. See, e.g., U.N. SCOR, 63d Sess., 5969th mtg., U.N. Doc. S/PV.5969 (Aug. 28, 2008). At that meeting, Costa Rica's representative said it was unacceptable that a United Nations Member State was being "dismembered" by force. "We cannot, and the international community should not, reward this approach, which is counter in all aspects to international law." A settlement of the situation must include respect for the territorial integrity of Georgia, the rights of the peoples of Abkhazia and South Ossetia and the integrity of international law and the principles of peaceful coexistence, as enshrined in the United Nations Charter.


150 See Reference Re Secession of Quebec [1998] 2 S.C.R. 217 (Can.). The opinion states: A right to secession only arises under the principle of self-determination of people at international law where 'a people' is governed as part of a colonial empire; where 'a people' is subject to alien subjugation, domination or exploitation; and possibly where 'a people' is denied any meaningful exercise of its right to self-determination within the state of which it forms a part. In other circumstances, peoples are expected to achieve self-determination within the framework of their existing state.

Id.
February 2008, the United States and several major European states recognized Kosovo’s unilateral declaration of independence from Serbia.151

The United States denied that Kosovo’s independence was a precedent, citing the existence of a U.N. administration, the history of ethnic cleansing, and other supposedly unique factors.152 Yet as an objective matter it is difficult to see how the recognition of Kosovo didn’t strengthen the case of other claimants for statehood, 153 especially those, like South Ossetia, that could claim a measure of internationalization of their conflict.154 The International Court of Justice’s (ICJ) recent advisory opinion on Kosovo’s unilateral declaration of independence appears to stand for the proposition that declarations of independence do not violate international law and is entirely silent on the recognition of secessionist entities.155 Before the ICJ’s opinion, it was hard to show that recognition could be illegal; afterwards, it is no easier.

Politically, the catalytic effect of Western recognition of Kosovo was undeniable, increasing Russia’s determination and capacity to act in parallel in the


\[152\] See U.N. SCOR, 63d Sess., 5830th mtg. at 19, U.N. Doc. S/PV.5839 (Feb. 18, 2008) (“My country’s recognition of Kosovo’s independence is based upon the specific circumstances in which Kosovo now finds itself. We have not, do not and will not accept the Kosovo example as a precedent for any other conflict or dispute.”)

\[153\] See RONALD D. ASMUS, A LITTLE WAR THAT SHOOK THE WORLD: GEORGIA, RUSSIA, AND THE FUTURE OF THE WEST 87 (2010); Oksana Antonenko, A War with No Winners, 50 SURVIVAL 23, 30ff (2008), available at http://dx.doi.org/10.1080/00396330802456445 (describing the effects of Kosovo’s independence on the conflict in Georgia); Solveig Righter & Uwe Halbach, A Dangerous Precedent? The Political Implication of Kosovo’s Independence on Ethnic Conflicts in South-Eastern Europe and the CIS, 20 SECURITY & HUM. RTS. 223 (2009) (discussing Kosovo’s influence on the conflicts in Abkhazia and South Ossetia); Waters, supra note 151 (critiquing the argument that Kosovo’s recognition did not create precedential effects); Kosovo Precedent for 200 Territories, B92 (Jan. 23, 2008), http://www.b92.net/eng/news/politics-article.php?yyyy=2008&mm=01&dd=23&nav_id=47173 (quoting comments of Sergei Lavrov, Russian Foreign Minister: “A precedent is objectively created not just for South Ossetia and Abkhazia but also for an estimated 200 territories around the world. If someone is allowed to do something, many others will expect similar treatment.”); Shaun Walker, The Kosovo Precedent, PROSPECT (Apr. 27, 2008), http://www.prospectmagazine.co.uk/magazine/thekosovoprecedent (“[I]n recognising Kosovo, the west has admitted that there are sometimes circumstances when a country’s territorial integrity can be violated without its consent.”).

\[154\] Certainly the Sochi regime was nothing like the 1244 regime in Kosovo, which was a true international governance project rather than just a security arrangement. But this merely shows that Kosovo is a precedent, and the real question is how similar South Ossetia would need to be for that to matter. Cf. David Wippmann, Univ. of Minn. Law Sch., Comments at the American Society for International Law Annual Conference, Panel: Creating and Building a “State”: International Law and Kosovo (Mar. 26, 2010) (arguing that Kosovo was a precedent, but one with a very high threshold).

\[155\] See Waters, supra note 151 (discussing the opinion and criticizing its failure to engage with questions of secession and self-determination).
Kosovo is now widely recognized, and that suggests the international rules—including, possibly, those pertaining to the subjects of and threshold for self-determination claims—have loosened. Russia took advantage of that to recognize claims South Ossetia and Abkhazia. Only Nicaragua, Nauru, Tuvalu, Vanuatu and Venezuela have joined Russia in recognizing the two states, but the small number of recognitions itself does not suggest Russia has done anything illegal.

And, of course, hidden beneath the naked opportunism of Russia’s actions is the nature of the opportunity Georgia created on August 7th, for Russia’s decision to recognize the separatists—a step it had failed to take for over fifteen years—came only after Georgia attempted to reassert its control over the separatists through the most significant escalation in fighting since the initial conflict in the early 1990s. Whatever changes may have occurred in the broader legal and geopolitical framework, Russian recognition, coming after Georgia’s attack on the region, could plausibly be characterized as a response to a radical alteration of the status quo by Georgia, and certainly Russia described it in those terms.

D. Disproportionate Force and the Geographic Scope of the Conflict

Before it jumped at the chance to recognize the separatists, Russia seized a military opportunity, carrying the war Georgia had begun in South Ossetia to the rest of Georgia’s territory. Western policymakers criticized Russia’s war effort as disproportionate in its use of weaponry and tactics, but especially in its geographical scope.

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"Can the Ossetians and the Abkhaz — and do they want to — be a part of Georgia?" Medvedev asked. “This question should be put to them and they will give their own, unambiguous answer. It is not Russia or any other country that should answer this question. This should be done in strict compliance with international law, although in recent years international law too has abounded with examples of self-determination of peoples and the emergence of new states on the map. Let’s recall the example of Kosovo. So, it is a question that needs to be answered by the Ossetians and the Abkhaz, taking into consideration history and what has happened in recent days.”

Id. See also Hafkin, supra note 59, at 221 (“Russia was among the fiercest objectors to the Kosovo intervention, though nine years after that conflict it proceeded to fight in Ossetia on a somewhat similar rationale.”); David J. Smith, The Saakashvili Administration’s Reaction to Russian Policies Before the 2008 War, in THE GUNS OF AUGUST 2008, supra note 12, at 127–32 (discussing the implications of Kosovo’s independence for Georgian and Russian policy towards Abkhazia and South Ossetia).

157 The liquefying potential of Kosovo was recognized long before the province’s independence. See, e.g., Lorie Graham, Self-Determination for Indigenous Peoples After Kosovo: Translating Self-Determination “Into Practice” and “Into Peace”, 6 ILSA J. INT’L & COMP. L. 455, 460 (2000) (“At the very least, the Kosovo experience calls into question any lingering claims by participating States that the right of self-determination is limited in scope by the theoretical construct of territorial sovereignty. More importantly, it appears to signal a change in the conceptual understanding of self-determination . . . .”)

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The first part of the critique is readily dismissed: Although proportionality places limits on the force that can be applied against an enemy, especially in the presence of non-combatants—one may not firebomb a city to kill a sniper—no doctrine requires an army to match its weapons to the foe’s or to make the fight fair. Russia unquestionably deployed overwhelming force, which is precisely why it overwhelmed Georgia’s smaller forces. This approach to fighting wars has a name: It is known as the Powell Doctrine.\(^\text{158}\)

Far more central to U.S. critiques was a claim that Russia’s actions were disproportionate because of their geographic scope. Russia carried the fight to Georgia proper, systematically destroying key military installations, port facilities, and communications infrastructure throughout the country. Was this disproportionate?

The U.S. claim seems problematic. Proportionality does figure as part of the \textit{jus ad bellum}, where it is used to determine the validity of a military response as a whole in relation to the incursion that preceded it. However, it is most commonly deployed as part of the \textit{jus in bello} to analyze discrete attacks,\(^\text{159}\) precisely because it is difficult to evaluate proportionality \textit{ad bellum}. Given the uncertainty inherent in defining any war’s aims, measuring the proportionality \textit{ad bellum}—really \textit{in media belli} in the Georgian War, given how quickly Western leaders reacted—of a given use of force is difficult, and the margin of discretion considerable.\(^\text{160}\)

Specifically, while the right of self-defense is limited to proportional means, this is really just a corollary of seriousness analysis, which defines an

\(^{158}\) Robert Haddick, \textit{This Week at War: The Long Death of the Powell Doctrine}, FOREIGN POL’Y (Mar. 5, 2010), http://www.foreignpolicy.com/articles/2010/03/05/this_week_at_war_the_powell_doctrine_is_dead (noting that one element of the strategy is that any “military plan should employ decisive and overwhelming force in order to achieve a rapid result”). There is little evidence that Russia used exotic, prohibited weaponry; it simply used a great deal of the conventional sort.

\(^{159}\) \textit{See} LARRY MAY, AGGRESSION AND CRIMES AGAINST PEACE 117–19 (2008) (discussing \textit{jus ad bellum} and \textit{jus in bello} proportionality principles, and noting that the former is principally oriented toward measuring whether the losses caused by a war outweigh the gains). On the differences, and overlap, between theater and incident proportionality, see Final Report to the Prosecutor by the Committee Established to Review the NATO Bombing Campaign Against the Federal Republic of Yugoslavia, ICTY Doc. PR/P.I.S./510-E, 39 I.L.M. 1257 (June 13, 2000), available at http://www.icty.org/sid/10052. That report states:

[A] determination that inadequate efforts have been made to distinguish between military objectives and civilians or civilian objects should not necessarily focus exclusively on a specific incident. If precautionary measures have worked adequately in a very high percentage of cases then the fact they have not worked well in a small number of cases does not necessarily mean they are generally inadequate.

\textit{Id.} at ¶ 29.

\(^{160}\) Timothy William Waters, \textit{Unexploded Bomb: Voice, Silence, and Consequence at the Hague Tribunals: A Legal and Rhetorical Critique}, 35 N.Y.U. J. INT’L L. & POL. 1015 (2003) (discussing findings by the Prosecution of the International Criminal Tribunal for the Former Yugoslavia finding that NATO’s Kosovo campaign had not been disproportionate at the tactical or theater level and showing that the Prosecution itself argued that applying proportionality, especially at the theater level, is very difficult).
acceptable range of responses. An otherwise authorized defender is not required to stop at the initial incursion line or leave an attacker’s military capacity intact. Proportionality and necessity can limit the proper geographic scope of a military response, and states do sometimes limit their operations, but this has never been read to imply a constraint on otherwise militarily valid campaigns reaching the whole national territory of the combatant states themselves. More broadly, a right of necessary and proportional self-defense implies a right to defend oneself effectively, which can reach Napoleonic levels. Canonical examples include the United States’ prosecution of the war against Japan well beyond the Hawaiian Islands and the Philippines, including its systemic bombing and planned invasion of the Home Islands, or the debellation of the Third Reich. More recent examples include the Gulf War, in which operations against Iraq were not limited to Kuwaiti territory or even the immediately adjacent parts of Iraq, or the removal of the Taliban following Al-Qaeda’s 9–11 attacks, undertaken under NATO’s Article 5 self-defense provision. These examples suggest that, once a defensive right is triggered, combatants have considerable discretion to pursue the logic of military advantage, with all that implies about taking the fight to enemy forces, and that

161 Oil Platforms (Iran v. U.S.), 2003 I.C.J. 161, ¶ 77 (Nov. 6) (preliminary objections) (finding U.S. action disproportionate to original attack); Legality of the Threat, supra note 130, ¶¶ 40–44 (discussing proportionality in the context of nuclear weapons); MAY, supra note 159, at 126–29 (discussing a “specific rule whereby self-defence would warrant only measures which are proportional to the armed attack and necessary to respond to it, a rule well established in customary international law”); Mary Ellen O’Connell, Preserving the Peace: The Continuing Ban on War Between States, 38 CAL. W. INT’L L.J. 41, 52–54 (2007) (arguing that a U.S. attack on Iran aimed at stopping its nuclear program or its aid to Hezbollah would violate principles of necessity and proportionality because it would likely not succeed in accomplishing its military objective).

162 In Armed Activities on the Territory of the Congo, the ICJ rejected Uganda’s claim of self-defense and found that Uganda had violated Congo’s territorial integrity and sovereignty, with sufficient gravity to constitute a violation of Charter Article 2’s prohibition on use of force. While not reaching the question directly, it suggested that Uganda’s operations inside Congo might have been disproportionate, but these were hundreds of kilometers from the frontier where, Uganda alleged, transborder incursions by irregular forces had occurred, which the court was not satisfied could be attributed to Congo in any case. These facts are difficult in all particulars from the events of August 2008. See Armed Activities on the Territory of the Congo (Dem. Rep. Congo v. Uganda), Judgment, 2005 I.C.J. 168, ¶ 146–65 (Dec. 19).

163 Compare Christopher Greenwood, The Relationship Between Jus ad Bellum and Jus in Bello, 9 REV. INT’L STUD. 221, 223 (1983) (“The traditional assumption that the outbreak of war between two states necessarily involved hostilities ... wherever they might meet ... can no longer be regarded as valid.”), with Christopher J. Greenwood, Scope of Application of Humanitarian Law, in THE HANDBOOK OF HUMANITARIAN LAW IN ARMED CONFLICT 51 (Dieter Fleck ed., 1995) (“The area of war comprises[] the territories of the parties to the conflict as defined by the national boundaries ... ”). See generally DINSTEIN, supra note 2, at 20–24 (noting only exceptions based on formal neutralization arrangements because “[i]n principle, all the territories of the belligerent States, anywhere under their sovereign sway, are inside the region of war”).


165 Cf. DINSTEIN, supra note 2, at 237–38 (“Once war is raging, the exercise of self-defense may bring about the destruction of the enemy’s army regardless of the condition of proportionality ... . The scale of counterforce used by the victim State in a war of self-defense will be far in excess of the magnitude of the original force employed in an armed attack ‘short of war’, and the devastation caused by the war will surpass the destructive effects of the initial use of unlawful force.”).
objective evaluation of actions taken in self-defense includes a vast margin of appreciation. 166

On the facts in the Georgian war, the claim of disproportion is even more tenuous. States do often limit the geographic scope of their operations, but Russia’s incursions, including ones specifically criticized as disproportionate, actually did not go far beyond the disputed territory. Gori, the Georgian operation’s principal base, is only a few miles from South Ossetia. 167 Poti is further, but is also the principal port, a classic military objective. Abkhazia was less plausibly related to strategic protection of Ossetia, but as we have seen, nothing in the laws of war limits a defender to the original territory, and operations there would fit comfortably in the broad discretion typically afforded to a defender to neutralize a military threat. And Georgia is simply not that large of a country: The much-discussed drive towards Tbilisi stopped halfway to the capital, about twenty-five miles from the Ossetian boundary.

Finally, we might contrast the smallness of Georgia with the size of Georgia’s attack, and what that implies about Russia’s authorization. Self-defense must be proportional to the real or anticipated harm, so if the harm or the operational scope required to neutralize it is great enough, the right of self-defense is commensurately expansive. The Georgian operations on August 7th were hardly the bombing of Pearl Harbor or the breaching of the Polish frontier, but they were significant military operations involving the mobilization of military resources and infrastructure across much of Georgia, leading to significant loss of life and Georgia’s brief recapture of Tskhinvali and sizable parts of South Ossetia. 168 If those operations gave Russia a responsive right to use force, it stretches credulity to suppose that right did not reach to the broader territory beyond the zone of peacekeeping operations—that is, to Georgia proper, and as much of it as necessary.

But apart from the weakness of its specific critique, what is of interest is how U.S. claims that Russia’s actions were geographically disproportionate conflated the two halves of the laws of war. Criticisms of Russia’s insertion of

166 We might recall as well another recent war, whose aftermath was tangentially relevant to the recognition crisis following the Georgian War: NATO’s Kosovo bombing campaign, which was not limited to the area in which ethnic cleansing was occurring but in fact targeted sites all across Serbia. In that war, NATO did not invoke self-defense, but the rationale of fighting wherever military necessity requires was the same.

167 The Georgian forces that attacked on August 7th began their operations from bases in Gori, received their supplies from Georgia proper, and were commanded from Tbilisi.

168 It is interesting to consider if Russia’s authorization would have been more limited had Georgia not killed Russian peacekeepers. Logically, the contingency of the harm—a shell landing wide or hitting the mark—shouldn’t govern the outcome, but practically, levels of harm serve as at least a rough proxy for seriousness. This means that if Georgia hadn’t killed peacekeepers, or hadn’t launched a major assault to retake territory but only a small incursion, Russia’s claim would have been commensurately weaker. On the actual facts, though, it is doubtful if the loss of life was decisive, because the territorial aspects of Georgia’s attack were, by themselves, clearly serious enough. Self-defense may require some tangible acts by the enemy, but a defending state is not required to wait for human losses to repel an invader.
forces into 'Georgia proper' as disproportionate conflated territorial integrity with the *jus in bello* norms of proportionate response\textsuperscript{169}—saying, in effect, that given the origins of the conflict in South Ossetia, any Russian response should have been contained to that area, and any extension of the war into Georgia proper was *ipso facto* disproportionate. Nothing in the laws of war supports this.

Indeed, what the West condemned as disproportionate force is difficult to distinguish from the very act of attacking Georgia proper as such, even though logically these are different things.\textsuperscript{170} The effect of the United States' interpretation is to conflate disproportionality with aggression. In a sense, of course, all acts pursuant to aggression are disproportionate by definition, but the symmetric property does not apply to the reverse equation.

Much as we have seen with the other categories, the proportionality of Georgia's actions was not discussed in the same terms as was Russia's, and indeed was not at issue in the same way. Although Georgia was criticized for disproportionate acts of the *in bello* variety, it was not criticized for any *ad bellum* violations—how could it, after all, since it was attacking its own territory?

...\textellipsis

So, did Russia act illegally? U.S. policymakers uniformly proclaimed it had, but the legal standards do not easily support such a confident assertion. Some discrete acts were unquestionably illegal, and even if carried out by Ossetian irregulars, Russia could be responsible.\textsuperscript{171} But these were not the things U.S. policymakers focused on: Their public anger was reserved for Russia's decision to fight at all and to carry the war into Georgia proper; on those points, the balance of international law favors Russia. Georgia struck first without cause or authorization; Russia thus struck first without cause or authorization, greatly increasing the levels of violence rather than continuing negotiations, and in the legal analysis, that matters decisively. Most of Russia's actions were consistent with an assertive—and very effective—response within the framework established at Sochi. At least, that is a plausible account of events measured against the legal

\textsuperscript{169} Wood, *supra* note 55 (quoting Deputy Secretary of State John D. Negroponte as saying "that we deplore today's Russian attacks by strategic bombers and missiles.... These attacks mark a dangerous and disproportionate escalation of tensions, as they occur across Georgia in regions far from the zone of conflict in South Ossetia.").

\textsuperscript{170} Popjanevski, *supra* note 44, at 158. Another argument holds that Russia acted wrongly by causing more loss of life than the original alleged harm by Georgia. "Russia's excessive use of force across the entire territory of Georgia, which resulted in casualties well exceeding the number of deaths during the initial fighting and caused severe material destruction, thus discredits Russia's justification for its intervention." *Cf.* May, *supra* note 62, at 321, 327 (arguing that states should decline to intervene if it would result in larger loss of life.) Though morally appealing, this argument makes it hard to explain most accepted exercises of self-defense, including Allied conduct in World War II. Most wars lead to more deaths than their triggering events.

\textsuperscript{171} See HUMAN RIGHTS WATCH, *supra* note 4, at 26–27. Russia likely violated international law by allowing Ossetian irregulars to loot, rape, and expel Georgians; to the degree such acts constitute ethnic cleansing, this is a serious charge. Under the law of occupation, Russia is responsible for maintaining law and order in the areas its forces control. However, even clear violations would not necessarily invalidate the initial resort to force or the decision to strike Georgia proper.
categories: If there is anything problematic here, it lies less in the factual details than in the law.

Still, it is a curious outcome: a war without anyone to blame, at least in law, for starting it. Though Russia was not an aggressor, neither was Georgia, since its operations, although widely described as reckless, took place on its own soil. Georgia could not violate its own sovereignty or territorial integrity, or illegally occupy itself. The de facto South Ossetian regime, in turn, could not commit many of these acts either, because it was still a recognized part of Georgia: South Ossetians could no more commit aggression against their own state than their own state could against them. Even so, there was what any sensible person would call a war, and that suggests a problem.

Even if it does not regulate internal conflicts in precisely the same way it does international ones, a properly conceived law of aggression should be able to say something intelligent and consequential about internal conflicts as well. And this implies, in the present case, asking some very critical questions about Georgia. For who actually upset the legal and normative order in the Caucasus that August? The West condemned Russia for using the archaic tools of twentieth-century power, but really, isn’t that also what Georgia did when it rolled out its tanks? It would be a mistake to blame giant Russia for the war just because it carried the fight to its enemy and won. It would be a mistake to confuse the location of the battlefield with the question of what was being fought over and by whom. Asking what Russian tanks were doing on the other side of the international frontier obscures the equally critical question of what Georgian tanks were doing on their own side—and why it is their side.

IV. WAITING FOR A MECHANISM (WHICH WE ALREADY HAVE):
INTERNATIONALIZING TERRITORIALITY IN INTERNAL CONFLICTS

One might expect massed armor crossing an international frontier to constitute the paradigmatic example of aggression—a case perfectly fit to analyze with the *jus ad bellum*—and in the first flush and shock of war, this is exactly how Western leaders described Russia’s actions. Yet that August, a constellation of circumstances combined to produce an anomalous outcome: an undeniably international war, but without any aggressor or any wrongful violation of territorial integrity. In theory, this is not supposed to happen.

As we have seen, the modern U.N. Charter regime prescribes a limited universe of violence: A use of force is either authorized by the Security Council or undertaken in self-defense, otherwise it violates the Charter. The sequential, causal relationship between aggression and self-defense suggests that it should not be possible for all actors in a war to have a legitimate right to use force.172 The just

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172 See Self-Defense: Discussion, 81 AM. SOC’Y INT’L L. PROC. 350, 351 (1987) (quoting Oscar Schachter, who said: “Self-defense is a justifiable use of force in response to a prior illegitimate use of force. Hence it would not be possible for each of the two states in conflict to legitimate use [sic] of
war tradition—with which this Article is not directly concerned, but which underpins discussions of aggression\(^\text{173}\)—likewise does not readily contemplate the idea of universally just war, in which all parties have a justification to fight.\(^\text{174}\) It is possible that no party to a conflict is justified or legally authorized in using force, but hardly that all are.

It is completely obvious that Georgia did not violate the classical *jus ad bellum* for the simple reason that its forces fought entirely on its own territory where, traditionally, the resort to force was almost completely unregulated. It is equally obvious that Russia's forces—those that were not peacekeepers—crossed an international frontier. That obvious fact combined with the obvious preferences of Georgia's allies to yield the claims and charges we saw in Part II: aggression, violations of territorial integrity, occupation and *ad bellum* disproportionality. But, as we saw in Part III, those claims do not actually work; although the United States and its allies issued vociferous criticisms, the better reading is that Russia had legal justification for its decision to use force and for the broad outlines of its campaign, and that any violations were of the *jus in bello* kind.

This puts the puzzle before us: How can all parties in a conflict be justified? On this, the doctrine is unimpeachable: Logically—tautologically—they cannot. To resolve this, we must see that the reasons why Russia was *not* in violation of the *jus ad bellum* also point to the reasons why Georgia was. And the thing we will find specifically problematic in Georgia's actions shows us there are

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\(^{173}\) Luisa Vierucci, 'Special Agreements' Between Conflicting Parties in the Case-law of the ICTY, in *The Legacy of the International Criminal Tribunal for the Former Yugoslavia* 401, 426 (Bert Swart et al. eds., 2011).


Drawing on arguments put forward by Augustine, Aquinas, and Vitoria, some just war theories argue that war should be waged only to correct and/or punish an injustice that has already occurred. Others, though, go even further and claim that the prevention of an injustice that is about to happen also constitutes a just cause for war.

*Id.* Correction and prevention leave little scope for *mutual* justification.
compelling grounds to rethink the general legal categories we have: to reconceive what we mean by sovereign territory, and—perhaps—discern the outlines of a different model for humanitarian intervention.

A. Layered Territoriality: Sochi as a Special Constraint on Georgia’s Sovereignty

As we have seen, Russia’s justifications for using force principally arise from its legitimate role and presence in South Ossetia. Asking why Russia was allowed to exercise rights in South Ossetia is roughly equivalent to asking why an otherwise sovereign Georgia was not allowed to exercise its rights. At one level, there is a purely positivist answer: In 1992, Russia and Georgia signed an agreement providing for Russia to operate on Georgian soil, and limiting Georgia’s rights in the same area. But the Sochi Agreement was not simply a typical specification of rights and obligations, such as one might find in a trade treaty or even in a status of forces agreement for basing troops abroad; it was a deeply intrusive, open-ended reorganization of Georgia’s internal governance, made in response to an internationalized war at whose root was an internal conflict over sovereignty. Sochi incorporated certain general international rules, like self-defense norms and prohibitions on the use of force, into an internal conflict. Georgia was barred from unilaterally deploying force on part of its own territory—from resolving its own internal conflict—without risking a legally legitimated Russian reaction. The French peace plan from August 2008 speaks of additional security measures “while awaiting an international mechanism.” But of course, there already was one: Functionally, the Sochi Agreement is an internationalized mechanism for regulating an internal conflict.

Once we adopt this view, the performance of the various actors in August 2008 looks rather different. Rather than aggressors, Russian tanks are a responsive mechanism designed to stop Georgian incursions in violation of the Sochi regime—a mechanism, moreover, that actually worked as it was supposed to. This is apparent if one accepts the standard account of the events that August, but even if one has doubts about the particular factual sequence, a hypothetical question makes the point: Under the Sochi regime, what would one have expected Russia to do if Georgia had suddenly tried to reconquer South Ossetia?

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175 Cf. Vicken Cheterian, The August 2008 War in Georgia: From Ethnic Conflict to Border Wars, 28 CENT. ASIAN SURV. 155, 156 (2009), available at http://dx.doi.org/10.1080/02634930903056768 (“The August 2008 war moved the conflicts in the Caucasus from ethnic conflicts powered by mass nationalist mobilization, to conflicts between centralized state structures around borders and territorial control.”). Cheterian writes to another purpose, but the observation about the shift in the conflict’s relationship to territory captures the same point.

Calling the events of August 2008 an act of international regulation is an interesting way to think about the war, and also the answer to our original puzzle: Georgia violated no rules of general international law, but it did violate a *lex specialis* regime incorporating some of those rules into what would otherwise have been a purely internal affair, which gave Russia responsive rights to enforce the regime’s terms with military force. The singular feature of Sochi was its reconceptualization of Georgia’s territory: Under its internationalized regime, Georgia did not have the right to move its military forces into or otherwise exercise almost any effects of its sovereignty over contested parts of its own territory. Sochi effectively created a layered territoriality within Georgia, with rights pertaining to other states like Russia and other actors, including South Ossetia and the OSCE.

A BBC interview with Russia’s Foreign Minister early in the war gives a sense of these two moves—the creation of responsive rights and the reorganization of sovereign Georgian territory. His particular interpretation is obviously highly partisan and preferential, but makes the general point about the mechanism Sochi plausibly put in place:

S. Lavrov: ... this peacekeeping force has a mandate. The mandate is to make sure that there is no violation of quiet in the zone of conflict and the peacekeepers are required by this document to prevent any violations and to put out any violations. Since Georgian forces for the second time are engaged in aggressive actions in full violation of the obligations under those international agreements and international humanitarian law [listing various alleged violations]. So this is absolutely unacceptable and the responsibility of Russia as a peacekeeper could be only sustained by responding to this aggression.

**Question**: Does not Georgia then have the right to control its entire territory?

S. Lavrov: Absolutely. Absolutely, but Georgia after it attacked, as I said, its own regions in the early nineties, accepted that there would be international mechanisms to keep peace in Ossetia and in Abkhazia but not to perpetuate the situation. In both cases international negotiating mechanism [sic] has been established with the participation of Georgia. . .

If we analyze Sochi as a specifically territorial constraint, we arrive at an interpretation that plausibly places Georgia in violation of a specialized norm of territorial integrity—a violation of something that is, or looks very much like, the

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177 Press Release, Ministry of Foreign Affairs, *supra* note 93. Lavrov’s partisan interpretation is heavily focused on events in the 1990s: He bases Russia’s legal claim for acting in 2008 on Georgian violations in light of Sochi. Also, within a few weeks, as we have seen, Russia would no longer reflexively acknowledge Georgia’s territorial sovereignty.
Jus ad bellum. This initiates the doctrinal sequence of action and response, returning us to the position in which the anomaly of universally legal war is erased: Neither side violated the general norms of the jus ad bellum, but Georgia violated specific obligations that we can and should assimilate to general norms on territorial integrity, and from this all the actors’ uses of force can be understood.

B. From Lex Specialis to a General Rule: Internationalizing Internal Conflicts

Accepting this view of territoriality solves our original puzzle: it identifies a violation of territorial integrity norms sufficient to show that one party was not authorized to use force and that another was. The purpose of this exercise has not been to achieve doctrinal purity, however; on the contrary, it is to drag doctrine towards relevance. For it is precisely the rigidity of the jus ad bellum that makes it difficult to see Georgia as the violating party: Under general international law, it was and is by definition impossible for Georgia to aggress against itself or violate its own territorial integrity, and it is only because of the Sochi regime that we can reach such a conclusion.

The present contours of the jus ad bellum remain dogmatically hostile to the regulation of states’ internal resort to force as such. There is simply no prohibition in international law on a state using force within its own territory to suppress insurrections. So, moving beyond a special, contingent interpretation applicable only in defined circumstances (as the Sochi Agreement was) to a more generally applicable interpretation would imply a considerable expansion of the conceptual commitments underlying the rules on territorial integrity. And such an expansion would also move international law towards more substantive engagement with the nature of internal conflicts, which are often fought precisely over questions of sovereignty and self-determination.

Internal conflicts are not unregulated; on the contrary, they are subject to extensive protections and prohibitions in international criminal and humanitarian law. Under the influence of human rights and a re-emergent international criminal law, the law of armed conflict has undergone a dramatic formalization that has relaxed its doctrinal dualism: many of the same rules now apply to both international and non-international armed conflicts; the requirement of a nexus to armed conflict for crimes against humanity has been eliminated; and an expanding

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178 The Tagliavini Report tries to do this, applying the existing jus ad bellum to the actions of both Georgia and South Ossetia on the grounds that South Ossetia is a de facto state, but this has been greeted as an unpersuasive misreading of the lex lata. See supra note 11; see also Christian Henderson & James A. Green, The Jus Ad Bellum and Entities Short of Statehood in the Report on the Conflict in Georgia, 59 INT’L & COMP. L.Q. 129 (2010), available at http://journals.cambridge.org/action/displayFulltext?type=6&fid=7100896&jid=ILQ&volumeld=59&issueld=01&aid=7100892&bodyld=&membershipNumber=&societyETOCSession=&fulltextType=RA&fileld=S0020589309990108 (criticizing the report’s arguments about use of force variously as “flimsy,” “illogical,” and “casual and cursory,” and criticizing the report’s conclusions as desirable lex ferenda, not lex lata).
menu of crimes against humanity track more closely with human rights law. The mere occurrence of human rights violations or significant crimes is, doctrinally and even politically, sufficient to bring an internal conflict onto the international plane, a move that increasingly correlates with the arrival of internationalized military forces.

Most notably, there has been a considerable expansion of support for doctrines of humanitarian intervention, especially the responsibility to protect (known by its regrettable acronym R2P), applied in the recent authorizations of force against Libya and Ivory Coast. Although existing forms of humanitarian intervention like R2P do not formally address *jus ad bellum* norms, they increasingly describe limitations on states’ scope of action in the *jus in bello* that, if sufficiently expanded, could effectively deny a sovereign the ability to go to war against its own people.

However, the practical and conceptual reach of these initiatives into the *jus ad bellum* are still quite limited. They have not extended the definitional scope of aggression—which remains fully, formalistically limited to the international

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179 See especially Prosecutor v. Tadić, Case No. IT-94-1-AR72, Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, ¶ 70 (Int’l Crim. Trib. for the Former Yugoslavia Oct. 2, 1995) (confirming the application of significant portions of the law governing international armed conflict to purely internal conflicts and decline of nexus to armed conflict for crimes against humanity). See also CRYER ET AL., supra note 2, at 229–32 (discussing the gradual expansion of the principles applicable in international armed conflicts to internal armed conflicts); HUMAN RIGHTS WATCH, supra note 4, at 28 (“Customary humanitarian law as it relates to the fundamental principles concerning conduct of hostilities is now recognized as largely the same whether it is applied to an international or a non-international armed conflict.”); STEVEN R. RATNER & JASON S. ABRAMS, ACCOUNTABILITY FOR HUMAN RIGHTS ATROCITIES IN INTERNATIONAL LAW: BEYOND THE NUREMBERG LEGACY 105-07 (2009) (discussing tensions between doctrinal coverage of crimes in internal and international conflicts).

180 MAY, supra note 159, at 273–96; OSCAR SOLERA, DEFINING THE CRIME OF AGGRESSION 444–63 (2007); John Langan, The Element of St. Augustine’s Just War Theory, 12 J. RELIGIOUS ETHICS 19 (1984). Although it has clear roots in Catholic just war theory (especially the third category of acceptable wars, or liberation of an oppressed people), the *locus classicus* of modern humanitarian intervention is NATO’s 1999 Kosovo war.


183 The form of responsibility to protect adopted by the U.N. reiterates the primacy of the Security Council, rather than affirming a pathway for independent action by willing states, as happened in the Kosovo intervention.
plane\textsuperscript{184}—and only imperfectly reach the most critical part of internal conflicts, namely challenges to the very existence of the state’s sovereignty authority. This suggests that the Georgian War—whose internationalized mechanism for regulating a persistent challenge to a state’s sovereign order clearly touches these issues—has something to tell us about an alternative path towards more robust restrictions on internal sovereign violence.\textsuperscript{185}

What would a functional \textit{jus ad bellum} for internal conflicts look like more generally—abstracted, that is, from the circumstances of Sochi? An explication is far beyond the scope of this Article, but it is worth noting a few issues—the enormous questions that would have to be resolved—in defining the parameters such a model of ‘protectable territory’ might take.\textsuperscript{186} A Sochi-style model would import the norms of the \textit{jus ad bellum} to internal conflicts, by identifying territorial lines with a functional status equal to an international frontier in relation to the use of force—territory whose violation would allow the kinds of responses that are automatically available in true international conflicts. This would create, within a single state, differentiated sovereignties derived directly from the territorial aspects of conflict.

A Sochi model would rely on some kind of tripwire forces to secure this ‘protectable territory.’ The force would be authorized to respond to any incursions

\textsuperscript{184}Ironically, R2P and all current forms of humanitarian intervention generally are vulnerable to challenge precisely on the grounds that they constitute a form of illegal aggression—a view Russia has advanced. \textit{Cf.} U.N. SCOR, 54th Sess., 3988th mtg. at 2–3, U.N. Doc. S/PV.3988 (Mar. 24, 1999), \textit{available at} http://www.securitycouncilreport.org/atf/cf/%7B65BFCF9B-6D27-4E9C-8CD3-CF6E4FF96FF9%7D/kos%20SPV3988.pdf. At that meeting, Sergei Lavrov spoke on behalf of Russia:

Attempts to justify the NATO strikes with arguments about preventing a humanitarian catastrophe in Kosovo are completely untenable. Not only are these attempts in no way based on the Charter or other generally recognized rules of international law, but the unilateral use of force will lead precisely to a situation with truly devastating humanitarian consequences. Moreover, by the terms of the definition of aggression adopted by the General Assembly in 1974, “No consideration of whatever nature, whether political, economic, military or otherwise, may serve as a justification for aggression”.

\textit{Id.}

\textsuperscript{185}R2P and humanitarian intervention were not invoked in any significant way during the Georgian War: Georgia and its allies would have had no use for the doctrine (since Georgia never crossed a frontier and its allies could have intervened, had they chosen to, by Georgian invitation), while Russia—which in theory could have used it to justify its cross-border intervention—is not particularly partial to the doctrine, given its provenance in the Kosovo conflict. \textit{See Security Council Report, Update Report No. 4: Protection of Civilians in Armed Conflict 1} (2006), http://www.securitycouncilreport.org/atf/cf/%7B65BFCF9B-6D27-4E9C-8CD3-CF6E4FF96FF9%7D/Update%20Report%2013%20January%202006_POC.pdf (“China and Russia, specifically, believe that reference to responsibility to protect by the Security Council is premature . . . . Also, the principles of sovereignty and territorial integrity have led them to fear that rapid interventions in exercise of the responsibility to protect could occur.”).

\textsuperscript{186}\textit{Cf.} Henderson & Green, \textit{supra} note 178 (criticizing the Tagliavini Report’s attempt to assert \textit{jus ad bellum} rules for internal conflict and arguing that “applying [such] rules to these entities would mean a large conceptual and practical shift in the legal regime of the \textit{jus ad bellum}. Any such process would need careful consideration; the ramifications could be great. The system as it stands is not able coherently to cope with the applicability of the core provisions of the \textit{jus ad bellum} to non-State entities”).
across those quasi-frontiers by military personnel and perhaps other agents of the state.\textsuperscript{187} Once triggered, any response would be subject to the norms of the \textit{jus in bello}, and therefore have to be proportional to the harm and appropriate in nature. So, for example, the establishment of a post office in contravention of a special agreement would not justify a military assault, but might allow the forces to physically shut down the operation. Ideally, conflicts would be governed by the full range of international protections, rather than the less comprehensive rules governing non-international conflicts (though as we have seen, these are converging).

Some of the forces’ operational authority would be specified in a special agreement (indeed it would be necessary to do this, to avoid the uncertainty that leads to escalating disputes of the kind that always arise on what would be, in effect, a militarized frontier), but the most important aspects—such as self-defense norms—might simply be imported from general international law; it is these aspects that would create the tripwire.

Indeed, it might be better not to specify all the conditions under which force could be used. The lack of provisions in Sochi specifying the parties’ powers to act in event of a breach by another party actually suggests the potential of this model: International law’s voluntarism has always allowed states to contract their way into complex relationships. But here the law’s background provisions were imported even without specification, and were probably more robust because of that: In 1992, had the parties engaged in arms-length negotiations to agree on specific language governing breaches of the agreement and rights of intervention, it is likely those norms would have been relatively restrictive, making the mechanism, when it came to be used twenty years later, much less effective. On the other hand, unspecific norms would give the ‘protecting’ state more leeway to intervene opportunistically, in just the way Russia has been plausibly accused of doing.\textsuperscript{188}

How would these forces be created and authorized? Sochi was the product of an international agreement, and initially, at least, it is difficult to see any other way to it. Over time, the model might become generalized—at least, it would clearly be desirable that it be increasingly available as an obvious option or default model that would be hard to avoid, much in the way international criminal tribunals have become a default response to major episodes of internationalized internal conflict. Such a default would put (marginally more) pressure on states involved in internal conflicts to accept intervention. But how this would happen—how exactly mechanisms derived through \textit{lex specialis} would affect general or customary law on

\textsuperscript{187} The tripwire force principally acts to constrain the sovereign, but there is no reason it could not also constrain the separate forces. Indeed, the Sochi model clearly did this, discouraging Georgia from intervening and the separatists from perfecting their claim. As we have seen, Russia, despite its obvious biases, also operated as a constraint on the separatist Ossetians, and Georgia regularly dealt with it in this capacity, whatever its private opinion about the Russian side’s sincerity or neutrality.\textsuperscript{188} Henderson & Green, \textit{supra} note 178, at 137 (“Any such precedent would be extremely damaging to international peace and security. States could forcibly aid any entity that requested help; the scope for the (increased) abuse of the right of self-defence would be huge.”).
the *jus ad bellum* and move from special agreement to general norm—is anything but clear.

As for the likely application of such a model: A typology of internal conflicts and the tools to address them is well beyond the scope of this Article—it might well be one direction this argument suggests for further research—but it is worth noting the ways in which the Sochi Agreement represents a model that moves farther than others towards a functional ban on internal aggression. Unlike existing R2P models, all of which contemplate high levels of human suffering before intervention can be undertaken,\(^{189}\) the Sochi regime gave Russia the right to use necessary and proportionate means to counter whatever level of incursion Georgia undertook within a defined, protected territory.\(^{190}\) Its capacity to respond was not limited to serious interventions: A single Georgian soldier crossing into the special zone, or indeed any improper deployment of Georgian sovereignty, would have authorized Russia to respond—subject to limits of proportionality—without delay or deliberation.

And Russia would have been authorized to act without delay or deliberation, because the Sochi regime created a standing, pre-existing trigger mechanism. R2P models are post hoc and reactive threshold-response models and require either a vote by the Security Council or a long process of deliberation.\(^{191}\) Sochi required neither a threshold of harm nor reactive authorization; when the regime’s territory was breached or its peacekeepers attacked, Russia was already licensed to act. It was this tripwire that allowed the mechanism to react so quickly and effectively.\(^{192}\) These features look much more like the automatic, inherent right of self-defense in the *jus ad bellum*.

The Sochi Agreement did not expressly create these rights for Russia: It did not authorize any autonomous right of military response, nor did it specify any conditions under which Russian forces may cross into Georgia proper. But Sochi *implicitly, necessarily* incorporated a range of general legal norms such as self-


\(^{190}\) One can object that, in fact, over the past two decades the Sochi regime has tolerated an unacceptably high level of violence, including the numerous incidents that on a cumulative theory of self-defense could justify Georgia’s actions in August 2008.

\(^{191}\) The main R2P models also emphasize preventative work and post-conflict rebuilding. See ICISS REPORT, *supra* note 133 at 29, 39; World Summit Final Outcome, *supra* note 181, ¶¶ 138–40; Sean Murphy, *Criminalizing Humanitarian Intervention*, 41 CASE W. RES. J. INT’L L. 341, 353–54 (2009) (discussing the complications arising from the post hoc nature of humanitarian intervention). However, it seems clear that the core of all these models is the justification for military intervention, and on that score, they all adopt a threshold-of-harm approach.

\(^{192}\) A perfectly functioning mechanism would have provided greater signaling and specific deterrence such that Georgia would not even have undertaken its adventure. The Sochi mechanism also provided no means of moving beyond enforcement of the frozen conflict to a permanent resolution. See Sochi Agreement, *supra* note 23.
defense. Once that self-defense logic was engaged, it operated not according to the minimal, poorly drafted norms of Sochi, but by the more categorical logic of the *jus ad bellum*.

Most important, a mechanism like Sochi may be especially apposite for internal conflicts that involve self-determination claims, precisely because the mechanism territorializes the sovereign’s relationship to the internal dispute. It is common to call South Ossetia a “frozen conflict,” but this name implies certain features besides merely being protracted and unresolved: Frozen conflicts typically concern claims to a separate territorial and sovereign status. Under the Sochi regime, Georgia retained a background claim of sovereignty but had very limited rights to exercise that claim and was specifically prohibited from exercising many of the usual incidents of sovereignty on the defined territory. These features were no accident: The real driver of the Sochi regime was the underlying internal conflict between South Ossetia and Georgia. For nearly two decades, the South Ossetian and Abkhazian regimes have contested the very idea that the Georgian state is sovereign over them. This does not necessarily mean South Ossetia and Abkhazia have valid claims; there are arguments on both sides, and I can think of many places on the planet where secessionists have stronger cases. But it does suggest that South Ossetia’s separatism and self-determination claims, whatever one thinks of them, are different from the generic, human rights and harm-driven logic of R2P. South Ossetia’s claims are not complaints about abuses of Georgia’s sovereignty, but a challenge to the very idea that Georgia should be sovereign at all.

This difference can be seen most clearly in Russia’s recognition of South Ossetia and Abkhazia right after the war. The claim that Georgia in effect sacrificed any right to sovereignty over South Ossetia by resorting to violence—Russia’s rationale for recognition—is similar to the logic of R2P, which describes state sovereignty as an obligation (a responsibility to protect) that, if unfulfilled, opens the door for international intervention to fulfill the obligation. But the Russian rationale, considered in the abstract, is actually far more expansive, as it implies not merely a remedial right of intervention to correct an abusive sovereignty—as happened, say in Libya, and may still happen in Syria—but a right for an oppressed group to escape the state’s sovereignty. Even the most intrusive

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194 In Abkhazia, the flight and expulsion of ethnic Georgians in the early 1990s greatly complicates claims about what the Abkhazian population desires. The current, majority ethnic Abkhaz population largely favors separation from Georgia, but if the (mostly ethnic Georgian) expellees were included, the result would be very different. In South Ossetia it is possible to define significant territories whose pre-1991 majority ethnic Ossetian populations favor separation, but even here estimates of the existing populations vary considerably. See INT’L CRISIS GRP., SOUTH OSSETIA: THE BURDEN OF RECOGNITION 2–4, 13–14 (2010), http://www.crisisgroup.org/-/media/Files/europe/205%20South%200ssetia%20-%20The%20Burden%20of%20Recognition.aspx (noting different population estimates and popular sentiment for either integration with Russia or independence).
model of R2P does not contemplate changing a state’s territory, and the pained debates over Kosovo’s declaration of independence—with even its most ardent supporters adamantly denying it could have any precedential effect on secession—suggest how little scope current models have to expand. The Sochi model, if it does anything, runs right at the problem of conflict over sovereignty and territory.

We shall come, in a moment, to the objections such a model raises; they are considerable. First, however, we look at one seeming objection that, on reflection, may actually be a strength: This model is not new. The idea of an intervening military force with extensive protective authority—which inevitably would morph into actual governance—starts to sound a lot like an international transitional administration, or a protectorate, or peacekeeping operations. The objection, then: Isn’t the supposed Sochi model really just the old wine of peacekeeping and protectorate in a new bottle?

And the response, I think, is: Yes. This is in fact of a piece with such things—which is to say that Sochi was not an isolated phenomenon, but part of a trend, a crystallization of various efforts, all in some way responding to the evident structural inadequacies of the *jus ad bellum*. The entire effort to develop R2P arose out of a sense of dissatisfaction with the prevailing standards on intervention—which is to say, standards on territorial sovereignty. Likewise, peacekeeping and conflict resolution efforts in Cyprus, Transdniestria, Kosovo and Bosnia share some of these features. Sochi is simply one more such effort, but a particularly interesting one precisely because it is different in its underlying assumptions—and because it was not recognized as part of that trend, but was seen as something entirely different.

C. Reasons for Pessimism: A Mechanism We Do Not Recognize When It Works

So, the Georgian War—though conventionally seen by the United States as a dangerous throwback to an older model of geopolitics—represents the operation of a surprisingly sophisticated model that bears deep similarities to, and perhaps important lessons for improving on, recent, more conventional exercises in internationalizing internal conflict.

Yet seeing the war in this way is not necessarily a source of optimism. The Sochi regulatory mechanism has been expressed through two wars and twenty years of endemic, seemingly irresolvable tension and protracted low-level violence. Those who are excited about the new interventionism occasionally overlook that what they are prescribing to regulate internal conflict is international war; recent experiences, the history of our species, and the reflections of philosophers who have

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195 See Brian D. Tittemore, *Belligerents in Blue Helmets: Applying International Humanitarian Law to United Nations Peace Operations*, 33 STAN. J. INT’L L. 61, 110 (1997) (“Hybrid and controversial rules appear to be emerging in relation to what have been characterized as internationalized armed conflicts, such as where one state becomes involved in an internal conflict in the territory of another state.”).
considered the danger of apologetic justifications for state violence might recommend against facilely imagining that war solves more problems than it creates.\textsuperscript{196}

Still, the use of war as a regulatory device has great pragmatic appeal—at least, advocates of humanitarian intervention logically must believe it does.\textsuperscript{197} For me, pessimism about the value of the Georgian War as a model for effective intervention norms arises from two different sources in particular: the case-specific derivation of its norms, and policymakers’ evident inability to recognize those norms when they are actually deployed.

We have seen how the Sochi Agreement’s \textit{lex specialis} governed the territory of South Ossetia, altering the sovereign rights and obligations of Georgia and Russia. This regime was effective in internationalizing that internal conflict, but it was also the product of a specific context; there is no reason to suppose that what is produced in specific circumstances is readily generalizable. Sochi was an international agreement, subject to the positivist, voluntaristic norms of treaty formation. Georgia did not have to enter into the agreement; in this case it did, producing specific territorial constraints that acted as a regulatory mechanism. But this is hardly a replicable model: The idea of grounding norms of humanitarian intervention or conflict regulation on the voluntaristic acquiescence of the very states whose violent behavior we wish to regulate seems problematically self-limiting.

Moreover, the Sochi regime was not just tailored to a particular conflict, it was the product of a specific negotiations by the parties to that conflict, and itself an outcome of the war in the early 1990s. Georgia entered into the Agreement in part to forestall the risk of further Russian encroachment;\textsuperscript{198} Sochi was therefore partly a product of duress\textsuperscript{199} and partly of a Russian imperial strategy, rather than a real...
compromise channeling South Ossetian or Georgian interests. Russia was not interested in a mechanism as an abstract exercise in internationalization; it was exercising power in the service of its own strategic concerns. It was surely essential to Sochi’s success that the protecting party was a great power with a veto on the Security Council, operating in its own self-defined Near Abroad; it is hard to imagine a minor power asserting such a right of intervention and acting on it without other states objecting. The actual contours of the South Ossetian peacekeeping system, likewise, were not a function of technical calculation but of a balance-of-forces stand-off. All this makes the Georgian case doctrinally interesting, but also messy, infected with special interest and particular claims—a problematic and context-specific system rather than a promising basis for a global rule on intervention in internal crises.

But the greatest source of pessimism about the possibilities a mechanism like Sochi has for effectively regulating internal conflicts arises from the rhetorical reactions with which we began—the critiques leveled against Russia by the United States and others. For while we accept in principle that war can be a regulatory mechanism to internationalize internal conflict and we even rationalize the ways those ‘mechanisms’ arise out of the grossest assertions of national interest, we still seem ill-equipped to recognize their operation in practice.

Sochi was about as close as one gets to an internationalized regime for governing internal conflicts. Russian and OSCE involvement were means to prevent excessive Georgian zeal from terminating an internal dispute. Sochi was a regime that the United States had accepted, even taken part in, for the better part of two decades. Yet when the mechanism actually began to operate, U.S. officials appeared not only unwilling (as they surely were), but genuinely unable to think of what was happening in those terms. Indeed, almost no one seemed to see the war for what it plausibly was—an internationalized internal conflict—and instead all

think that the Sochi Agreement would not meet the Convention’s standards for validity. Few if any international agreements have been successfully challenged on those grounds.

As we have seen, although Georgia accepted the Sochi regime, it was increasingly dissatisfied with it, and there is no evidence it ever actually liked it.

See Smith, supra note 156, at 125; Allison, supra note 49 (discussing Russia’s interests and strategy in the conflict). Russia was also not principally motivated by sympathy for the separatist regions but was more concerned with Georgia’s independent policy and moves towards NATO. Smith notes that the South Ossetia issue was not central to Russian policy. Still, despite the problems it suggests, the self-interest aspect of Sochi might also explain why it is a functional model: All intervention models rely on states acting with reference to their own interests—there are no pure interveners—so the fact that here Russia was self-interested merely indicates the circumstances in which we could expect this model to work.

At least, it is one of the better examples. The 1244 regime for Kosovo was considerably more intensive. And indeed, the much thicker nature of the Kosovo intervention was, for some, a reason to distinguish between support for recognizing Kosovo’s and South Ossetia’s independence. See Hanna Jamar & Mary K. Vigness, Applying Kosovo: Looking to Russia, China, Spain and Beyond After the International Court of Justice Opinion on Unilateral Declarations of Independence, 11 GERMAN L.J. 913 (2010) (differentiating Kosovo as based on unique circumstances); see also David Wippman, Kosovo and the Limits of International Law, 25 FORDHAM INT’L L. J. 129, 129 (2001) (discussing how “[t]he Kosovo campaign pushed at the boundaries of international law”).
began to debate and criticize the operation of the mechanism as if it were a pure violation, which the United States labeled aggression. Even though it and other actors were fully aware of the underlying internal dispute, the United States relied exclusively on the rules of general international law and the *jus ad bellum*, which all but preordained the outcome of its rhetorical exercise, since those rules are utterly inapplicable to a conflict like South Ossetia.

The inadequacy of that general system for describing and regulating use of force in certain contexts has occurred to almost everyone: the gaps in application to terrorists and other non-state actors, for example, and even to imperfectly internationalized internal conflicts of the kind with which this article is concerned. Yet in the Georgian War, the inadequacy of those general rules was actually exacerbated, precisely because the situation appeared to be one in which the rules *would* apply—a cross-border tank war between recognized states that looked like a brief, bloody reversion to classical type, and was called precisely that. The effect was to distract attention away from the actually existing mechanism—the *lex specialis* of Sochi and the rules it incorporated, which looked very much like self-defense norms—and focus it, instead, onto the doctrinally irrelevant general system.

This does not mean that the United States and its allies were somehow fooled into adopting the policies they did because of the particular language of the law on aggression; whatever the limited influence of language and of legal categories, it does not constrain policymakers in any direct sense. Western powers had plenty of reasons to support Georgia, just as they found reasons to combine strong rhetoric with studied inaction once the war broke out. Certainly U.S. policymakers' statements were consistent with their previously declared political preferences. There is no evidence, and no reason to suppose, that the United States took any position it would not otherwise have merely because of linguistic or doctrinal constraints.

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The character and complexity of the armed conflicts concerned, combined with the web of agreements on humanitarian law that the parties have concluded among themselves, justifies the Commission's approach in applying the law applicable in international armed conflicts to the entirety of the armed conflicts in the territory of the former Yugoslavia.

*Id.*
Yet equally, it would go too far to suppose that, in defining the interests of the United States, U.S. policymakers were unaffected by the legal environment in which they operated. Those policymakers acted primarily out of a sense of self-interest, but their definition of that interest, and of the range of possible or acceptable means they perceived for vindicating it, is not so simply derived and cannot simply be assumed.

Certainly it is possible to criticize the resort to violence in internal conflict—the United States’ response to Russia proves that much—but such criticisms trip over the conceptual problems we have seen here, and are revealed in the impoverished vocabulary we have to voice them. That alone is problematic enough, even from a realist perspective, and if one believed (as I do not) that language actually controls the apparatus of interest-based policymaking, it would be an almost absolute obstacle to reform of the normative regime. At the very least, the vocabulary of international law expresses underlying values and assumptions about how our world is and should be organized, in which case our critique is properly oriented towards those values and assumptions, which make too much of the fact of frontiers. The language we use for sovereignty, territory and aggression has not created the gap in our policy, but it does describe it.\footnote{Thanks to Mark Osiel for prompting this line of thought.}

We lack useful doctrine to regulate or even discuss the resort of force by a state within its own territory. We need a \textit{jus ad bellum} for internal wars, but the current models, grounded in the classical distinction between an international zone and a zone of internal sovereignty, are not capable of direct revision. It seems unlikely that the current approach to intervention, R2P, is moving towards an effective \textit{ad bellum} framework either. For all its flaws, Sochi—which places territory at the center of its process—at least indicates the proper direction.

A respect for the logic underlying the prohibition on aggression (and, for that matter, democracy and self-determination) might encourage one to ask what exactly Georgia was doing try to assert its rule and its constitutional order\footnote{The very fact that Georgia’s partisans have denied purported comments about military operations being intended to restore the constitutional order (the controversy over Order No. 2, noted above) suggests their discomfort with claiming such a purpose as a plausible basis for committing violence against one’s own citizens.}\footnote{Thanks to Gabriella Blum for this general idea and phrasing, in a personal communication.} over areas whose present populations do not want to be ruled by it. There may be excellent answers, but they are hard to find in an international legal order that renders the questions nearly invisible—that make a mechanism designed to restrain Georgian overreach look like Russian aggression. It seems that we are constrained by anachronistic and inflexible categories that do not translate well to actual conflicts, and this forces our efforts to evaluate acts of violence onto pathways that distract us from what our critiques should really be engaged with.

That August—but really, in any August—the language and logic of sovereignty, aggression and territorial integrity shed little light on the dynamics of internal conflicts; if anything, those legal categories obscure both the nature of

\footnote{204 Thanks to Mark Osiel for prompting this line of thought.}
internal conflicts and our own imperfect efforts to regulate them. Our defective *jus ad bellum* produces legal outcomes that merely replicate existing policy preferences or—more troublingly—channel the choices policymakers make away from engagement with substantive disputes between political communities and towards formulaic, enchanted logics.