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

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Abstract

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, formalistic approaches to sovereignty. Under international law, it is definitionally impossible for Georgia to aggress against itself or violate its own territorial integrity, and it is only because of the Sochi regime that we describe Georgia’s actions as wrongful.

In some ways, the 2008 war looks like an example of a rising phenomenon – the effort to regulate the resort to violence within states. Indeed, in certain ways, the Sochi regime suggests a far better mechanism, 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 existing categories and vocabularies of the *jus ad bellum* in ways that distracted them from the actual operation of the very mechanism regulating the underlying conflict. It seems we remain ill-equipped to recognize the real logic of efforts to regulate internal wars.
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

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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 and general international law. In fact, the dominant rhetoric of Western officials centered on these categories, rather than calculation of geopolitical interests or invocation of 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, policymakers made critiques arising out of what is called the *jus ad bellum* rather than the *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

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² Yoram Dinstein, *War, Aggression and Self-Defence* 5, 16 (2005); Robert Cryer et al., *An Introduction to International Criminal Law and Procedure* 223-24 (2007) [hereinafter Cryer, *International Criminal Law*] (describing *jus ad bellum* as the legality of war and *jus in bello* as the basic rules of warfare; describing the separation of *jus ad bellum* and *jus in bello* as a fundamental principle of international humanitarian law).
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 – and 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 of that otherwise typical exercise in opportunism and perspectival bias: policymakers – already predisposed to support an ally – chose particular arguments that indicate not merely preferences, but blind spots. Whether sincere or strategic, the categories policymakers deployed were seriously mismatched not only to the Georgian War, but 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 the fact that all its operations were within its own territory, it hardly could have. Indeed, it may be 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 – there should always be a party whose use of force is violative in relation to sovereign 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 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 formalistic approaches to the *jus ad bellum* and of 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 contain and regulate the resort to force; and what characterized 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 them 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 normally thought to be focused on political interests and values, rather than legal 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 rigid formalism 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 deiformalizing
trajectory, with doctrinal distinctions between internal and international conflicts reduced or
erased. Yet the norms regulating the 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*, and the formal law of aggression has halted at the frontier of the state.
This lacuna vitiates the value of the laws of war in regulating the internal conflicts that are now
the most frequent form of armed conflict\(^3\) – a failure to develop an adequate language for
describing resort to force.

But all of that is to anticipate this Article’s tentative 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 constitute an internationalized mechanism for
regulating the internal conflict between South Ossetia and Georgia. Parts II and III 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 American – 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. Then, Part III revisits
these characterizations to demonstrate the mismatch between plausible interpretations of the

\(^3\) Peace Research Institute Oslo (PRIO), *Conflict Type* (graph), PRIO.NO (Dec. 6, 2011), http://www.prio.no/sptrans/-
193189583/Graph - Conflicts by Type.pdf (representing the numerical dominance of intrastate over international
conflicts between 1946 and 2008). 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. All these situations concern internal conflicts.
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. This is a problem, and the Part IV shows that the straightest path to an adequate legal description requires us to reconsider how we ought to characterize Georgia’s actions in light of the special legal regime described in Part I. This special regime points the way, perhaps, to a broader practice reconceiving the relationship of the _jus ad bellum_ to 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.

A. Some prefatory notes on methodology and purpose

Suggesting, as I am going to, that Russia’s actions were not illegal in the way the US claimed does not imply approval of those actions. Nor does it mean Russia acted legally in _all_ ways: Observers have made credible claims that Russia, South Ossetia and Georgia all violated specific aspects of the _jus in bello_, through indiscriminate killing, deportations, and violations of the duties of an occupying force.⁴ 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.

Methodologically, this Article draws on statements by policymakers in the United States to build its argument. The choice is not arbitrary: the US is Georgia’s most consequential ally and the leading actor in NATO, which Georgia had been hoping to join. In general, the US adopted some of the strongest critiques of Russia, but the views of the main Western powers were not that far apart, as evidenced by mutually reinforcing declarations and joint NATO statements. Nothing in my analysis supposes that the US government is monolithic – though in August 2008

5 Bucharest Summit Declaration: Issued by the Heads of State and Government participating in the meeting of the North Atlantic Council, NATO (North Atlantic Treaty Organization), 3 April 2008, available at http://www.nato.int/cps/en/natolive/official_texts_8443.htm; NATO, NATO’s relations with Georgia, NATO.INT (Nov. 30, 2010), http://www.nato.int/cps/en/natolive/topics_38988.htm. Georgia joined NATO’s Partnership for Peace in 1994 and during NATO’s 2008 Bucharest Summit was promised eventual membership. This was itself a source of tension with Russia in the run-up to the war.

6 The Federal Chancellor, Angela Merkel Calls for Immediate Ceasefire (11 Aug. 2008) available at http://www.bundeskanzlerin.de/nn_704284/Content/EN/Archiv16/Artikel/2008/08/2008-08-08-suedossetien-gewalt-stoppenn__en.html (last visited Dec. 2011); Jonathan Eyal, ‘We are Extremely Concerned’: The EU and Georgia, ROYAL UNITED SERVICES INST., 11 Aug. 2008, available at http://rusi.org/research/studies/european/commentary/ref:C48A0B419E4BCA (last visited Dec. 2011). France occupied a middle position, and Germany and Italy showed the greatest accommodation. For example, a statement from the Federal Chancellery on 11 August focuses 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; discussing various states’ responses and noting that Italy sided with Russia. Some of France’s positions are noted below.

7 Statement by Press Secretary on EU Decision Regarding Georgia, 1 Sept. 2008, available at http://sarajevo.usembassy.gov/georgia_20080901.html (last visited Dec. 2011) ("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.").

the range of opinions was quite uniform, with disagreement centered on how the US should respond.⁹

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 Report¹⁰ – as well as the claims of the major actors in the war themselves. Although there is never consensus on matters of war,¹¹ 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 too – remembering that it is the facts known by the parties at the time that matter.¹²

In any case, my argument does not depend solely on a particular factual basis. The legal regime had certain contours on 6 August 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 which ought to govern those facts was systematically misinterpreted because it is, in discrete

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⁹ Even candidates Obama and McCain, locked in a fierce election campaign, were largely in agreement in condemning Russia, differing mostly on the manner of American response.


¹² I focus on comments made during the actual fighting and its immediate aftermath. I make use of subsequent analysis to clarify points about the known record or 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.
ways, defective. Indeed, it should be entirely possible for a Russian, South Ossetian or Georgian partisan advocate to agree with my conclusions about what current law speaks to, and what it doesn’t – though it might require particularly cold blood.¹³

Finally – and here we move between questions of method and the argument itself – we need some theory of the relationship between law and politics. Legal scholarship has largely abandoned antique pretensions that its doctrinal categories operate independently from politics,¹⁴ although some theories assign such strong value to language in shaping behavior that they (perhaps indirectly) re-assert the power of legal concepts to shape choices.¹⁵ For theorists of

¹³ Thus I am not advancing a subjective theory of responsibility – the idea that each party’s belief in the rightness of its cause should be determinative. Doubtless both Georgia and Russia felt entirely justified and believed, too, that they were not violating any laws, but my argument depends principally on an interpretation of existing law.

¹⁴ Richard A. Posner, The Decline of Law as an Autonomous Discipline: 1962-1987, 100 HARV. L. REV. 761 (1987); Brian Bix, Law as an Autonomous Discipline, in THE OXFORD HANDBOOK OF LEGAL STUDIES 975 (Peter Cane & Mark V. Tushnet eds., 2003), available at http://ssrn.com/abstract=1010995; Jack M. Balkin, The Promise of Legal Semiotics, 69 U. TEXAS L. REV. 1831, 1842 (1991) (“[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.”).

¹⁵ JOHN M. CONLEY & WILLIAM M. O’BARR, JUST WORDS: LAW, LANGUAGE AND POWER (1998); HELLE MALMVIKG, STATE SOVEREIGNITY AND INTERVENTION: A DISCOURSE ANALYSIS OF INTERVENTION AND NON-INTERVENTIONARY PRACTICES IN KOSOVO AND ALGERIA (2006); LUDWIG WITTGENSTEIN, PHILOSOPHICAL INVESTIGATIONS (1968); Felix Cohen, Transcendental Nonsense and the Functional Approach, 35 COLUM. L. REV. 809 (1935); Ruti Teitel, Transitional Jurisprudence: The Role of Law in Political Transformation, 106 YALE L.J. 2009, 2077 (1997) (“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
international relations and political science – and for most of the legal academy – realist assumptions counsel against casually supposing that law controls interests; at most, law affects perception in the same way language does more generally, and serves as an efficacious tool for advancing policy preferences. Although I argue that the law of aggression as we now have it leaves a great deal off the table, I am emphatically not suggesting that policymakers are caught in some Whorfian trap constructed out of their own statements about what the law is – though if one’s own preferred theory supposed that legal language actually determine 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.

I. The Sochi Regime: Internationalizing and Freezing an Internal Conflict

Writing histories 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, the region and its vicissitudes are obscure; others with connections to the region may be quite familiar with the basic outlines – though it is precisely those who are familiar with the conflict have reasons


to be that their disagreement on the details and interpretations of those histories is so foundational and so irreconcilable.

Suffice 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 – really, a shooting war – broke out in January 1991 and continued, sporadically, past Georgia’s full, formal independence in December 1991.18

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.19 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


19 HUMAN RIGHTS WATCH & HELSINKI WATCH, BLOODSHED IN THE CAUCASUS: VIOLATIONS OF HUMANITARIAN LAW AND HUMAN RIGHTS IN THE GEORGIA-SOUTH OSSETIA CONFLICT 2 (1992), available at http://www.hrw.org/legacy/reports/pdfs/g/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.”).
Russian-back 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 Ossetia capital.²⁰

Whatever one’s own preferred interpretation concerning the causes of the initial conflict and the involvement of Russia, the resolution was an international, diplomatic solution – the so-called Sochi Agreement,²¹ 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.

The Agreement created a Joint Control Commission, to “exercise control over the implementation of cease-fire, withdrawal of armed formations, disband of [sic] forces of self-defense and to [sic] maintain the regime of security in the region[.]”²² The JCC had

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²⁰ The autonomous region of Abkhazia also broke free of Georgia’s control at around this time.


²² ICG, REPORT No. 183, supra note 21, at 1 (“The JCC was tasked to supervise observance of the agreement, draft and implement conflict settlement measures, promote dialogue, devise and carry out measures to facilitate refugee and IDP return, solve problems related to economic reconstruction and monitor human rights. Additionally it was to
representation for 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.\textsuperscript{23} The JCC met infrequently in the 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 OSCE.\textsuperscript{24} 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.\textsuperscript{25} 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”.\textsuperscript{26} In November 1992, the Organization for Security and Cooperation in Europe (OSCE) established its own small

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23 Vladimir Socor, \textit{South Ossetia Joint Control Commission Ingloriously Mothballed}, 5 EURASIA DAILY MONITOR, March 7, 2008, available at 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.”).


26 ICG, \textit{REPORT NO. 183, supra} note 21, at 17 (citing an interview with an unnamed international expert).
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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 for providing security and joint confidence” 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 that 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 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

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28 ICG, REPORT NO. 183, supra note 21, at 18.

29 ICG, REPORT NO. 159, supra note 18.


constitutional framework in 1994,\textsuperscript{32} or President Mikheil Saakashvili’s proposal for Ossetian autonomy within Georgia in 2005\textsuperscript{33} – 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 interveners 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 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 might be part of the Near Abroad – a zone of special influence – was redolent of expansive Russian aspirations, but


\textsuperscript{33} \textit{Timeline: Georgia}, BBC.CO.UK (Nov. 9, 2011, 15:33), http://news.bbc.co.uk/2/hi/europe/country_profiles/1102575.stm (“2005 January. . . President Saakashvili unveils proposals on autonomy within Georgia for South Ossetia, whose leadership rejects them, repeating demand for full independence.”).
equally was evidence of Soviet collapse.\textsuperscript{34} 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 sovereign Russia – and internationalized more broadly, with the involvement of the OSCE, through which the US 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{35} 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 alternative government for South Ossetia that it sought to incorporate into the existing peacekeeping mechanisms.\textsuperscript{36} But

\textsuperscript{34} Thornike Gordadze, \textit{Georgian-Russian Relations in the 1990s, in The Guns of August 2008: Russia’s War in Georgia} 33-34 (Svante E. Cornell & S. Fredrick Starr eds., 2009); Margarita Antidze, \textit{Russia closes last military base in Georgia, Reuters.com} (Nov. 13, 2007, 2:12pm), 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 in the disputed areas, its forces remained through the 2008 war and beyond.

\textsuperscript{35} 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 discussion of the cumulated basis for self-defense, below.

\textsuperscript{36} \textit{Timeline: Georgia, supra} note 33. 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). \textit{Id. See also} Nikolai Topuria, Georgia Takes Control of Renegade Region, Sets Sights on Two Others, \textit{Agence France-Press}, May 6, 2004, available at http://reliefweb.int/node/146752; Civil Georgia, \textit{Tbilisi Turns Kodori into ‘Temporary Administrative Center’ of Abkhazia, CIVIL.GE} (Sept. 27, 2006), http://www.civil.ge/eng/article.php?id=13654.
for all of those, and the violence that in fact accompanied these vents, 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 that the entire mechanism was illegitimate or in desuetude. This was to radically change with the war in August 2008.

II. Not 1968: American 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. 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.

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Nonetheless, the outbreak of major hostilities on 7 August seems to have surprised many in the West.\(^{39}\) 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 American policymakers appear more concerned with stabilizing the conflict than condemning Russia. The intensity of criticism and the deployment 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, in Beijing on 9 August, 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.\(^{40}\)

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\(^{39}\) Johanna Popjanevski, *From Sukhumi to Tskhinvali: The Path to War in Georgia, in The Guns of August 2008: Russia’s War in Georgia* 143, 145-9, 160 (Svante E. Cornell & S. Fredrick Starr eds., 2009) (noting that, before July 2008, the prevailing assumption was that conflict would break out over Abkhazia rather than South Ossetia).

\(^{40}\) George W. Bush, President, *President Bush Concerned by Escalation of Violence in Georgia* (Aug. 9, 2008, 7:20 p.m. (local)) (transcript available at Office of the Press Secretary, http://georgewbush-whitehouse.archives.gov/news/releases/2008/08/20080809-2.html); see also *Georgia conflict: Key statements,*
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 DC, Bush expressed harsher condemnation in language that, both juridically and politically, is much more prejudicial:

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, but criticism of Russia 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 a violation of Georgia’s sovereignty and territorial integrity, and a disproportionate response;


41 ICG, REPORT NO. 183, supra note 21, 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 southern limit just north of Gori. It is possible that Bush was not referring to this, but only to the area in South Ossetia in which combat was actually taking place (thanks to Jonathan Kulick for this point); however, later US government statements clearly invoke the legally defined ‘zone of conflict.’

42 Georgia conflict: Key statements, supra note 40. The peace agreement Bush refers to is apparently French Foreign Minister Bernard Kouchner’s initial effort, rather than the six-point plan finally agreed.

recognition of breakaway regions; charges of ethnic cleansing; and blocking access to the ports. There was, throughout, a minor key of ambivalence: Alongside full-throated defenses of Georgia, there were indications that US policymakers were annoyed with Georgia and even harbored doubts about which side was responsible.\(^{44}\) Still, the consistent and overwhelming tenor of US 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 intentionality. 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 may signaling the Russian leadership about what it considered the acceptable limits of its war aims. Perhaps US leaders only felt free to invoke harsher rhetoric after the crisis stabilized – a conscious strategy to compensate for the lack of viable alternatives to effectively counter Russia.\(^{45}\) With the passage of days, policy positions may have been clarified, and

\(^{44}\) See, e.g., Popjanevski, From Sukhumi to Tskhinvali, supra note 39, at 155 (noting “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.COM (Aug. 22 2008, 6:54am), available at http://www.reuters.com/article/GCA-Georgia/idUSLM47889020080822 (discussing US 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 (2008) (“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.”...“Th[e] 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.”). Even states supportive of Georgia were, in some cases, uncomfortable with what they perceived to be the profoundly unwise Georgian decision to begin hostilities. .

\(^{45}\) Alexis Crow, The U.S., Georgia, and Russia, ROYAL UNITED SERVICE INST., Aug. 12, 2008, available at http://www.rusi.org/analysis/commentary/ref:C48A20D977C550/ (“In the next five days, the United States
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.\textsuperscript{46} In short, we should not assume US leaders necessarily believed anything particular about their own legal claims.\textsuperscript{47}

But whatever their psychological state, American policymakers consistently condemned Russia’s intervention in specific, legally salient ways. Some comments were extemporaneous and must be understood as layman’s characterizations,\textsuperscript{48} but others were issued by spokesmen and drafted pursuant to interagency coordination norms.\textsuperscript{49} The policymakers themselves might not have been

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.”\textsuperscript{46} 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.\textsuperscript{47}

\textsuperscript{46} Balkin, The Promise of Legal Semiotics, supra note 14 (“[T]he fact that legal discourse is rhetorizable says nothing about its lack of authenticity. To the contrary, . . . the only type of discourse that is truly authentic is that which is permissible within our existing language games, and is thus always rhetorizable.”).

\textsuperscript{47} Balkin, The Promise of Legal Semiotics, supra note 14 (“[T]he fact that legal discourse is rhetorizable says nothing about its lack of authenticity. To the contrary, . . . the only type of discourse that is truly authentic is that which is permissible within our existing language games, and is thus always rhetorizable.”).


\textsuperscript{49} ALAN G. WHITTAKER ET AL., THE NATIONAL SECURITY POLICY PROCESS: THE NATIONAL SECURITY COUNCIL AND INTERAGENCY SYSTEM (2011) (“The Secretariat Staff. . . works with the various offices of the Department in drafting and clearing written materials for the Secretary, Deputy Secretary, and Under Secretary for Political Affairs,” and “[t]he Office of the Legal Adviser (L) furnishes advice on all legal issues, domestic and international, arising in the course of the Department's work. This includes assisting department principals and policy officers in formulating and implementing the foreign policy of the United States[.]”)
fully aware of the significance of the terms they employed, but their advisors surely would have been.\textsuperscript{50} So, even if policymakers were not 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’ may be fairly understood as conveying a legal sense, or at least not contradicting the US’ existing positions on the law.\textsuperscript{51} Certainly, scholars analyzing customary law would consider such statements probative.\textsuperscript{52}

We will now review the actual comments American policymakers made, by category, with an eye towards seeing how the US characterized Russia’s actions as violations of international law. We will not spend as much time on characterization of Georgia’s actions, both because American officials did not condemn Georgia and because, as we will see, Georgia’s non-violation was thought to obvious – though as we will also see in Part IV, it was not.\textsuperscript{53}

\textsuperscript{50} Compare Press Release, Statement by Secretary Condoleezza Rice, Russia Move into Georgia (Aug. 8, 2008) [hereinafter Rice, Russia Move into Georgia], with Press Release, Acting Deputy Spokesman Robert Wood, Russian Actions in Georgia (Aug. 8, 2008) [hereinafter Wood, Russian Actions in Georgia] (using identical language to indicate support for Georgia’s sovereignty and territorial integrity in reference to UN Security Council resolutions).

\textsuperscript{51} AMNESTY, CIVILIANS, supra note 4; HUM. RTS. WATCH, UP IN FLAMES, supra note 4. By contrast, reports by Amnesty International and Human Rights Watch avoid ‘aggression’ in their legal analysis.

\textsuperscript{52} On formation of customary international law, see generally JEFFERY L. DUNOFF ET AL., INTERNATIONAL LAW, NORMS, ACTORS, PROCESS: A PROBLEM-ORIENTED APPROACH (2\textsuperscript{nd} ed. 2006).

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[.]” The only force the Charter authorizes is either ordered by the Security Council or used in self-defense, which means that aggression is not simply the first use of force, but its wrongful use. Indeed, aggression is effectively the opposite of lawful force; these two categories define the universe of interstate violence. Doctrinally, aggression belongs to a separate category from other war crimes – it addresses the *jus ad bellum*, the resort to war, rather than the *jus in bello*, the way wars are fought.

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57 Recently asserted principles of humanitarian intervention contemplate legitimate interstate uses of force not approved by the Security Council or undertaken in self-defense. See discussion in Part IV.
‘Aggression’ was invoked only as the initial military phase of the crisis came to an end. From about the third day of the conflict, American leaders began characterizing Russian actions as aggression. On 11 August, for example, US Vice President Dick Cheney issued a statement declaring that “Russian aggression must not go unanswered”. On 12 August, US 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 US 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 7 August.

58 Matt Spetalnick & Sanjeev Miglani, Cheney: ‘Russian aggression must not go unanswered,’ REUTERS.COM (Aug. 10, 2008, 9:27pm) (citing a statement issued by Cheney’s office, which also referred to “this threat to Georgia’s sovereignty and territorial integrity.”)

59 Georgia conflict: Key statements, supra note 40.

60 Georgia conflict: Key statements, supra note 40. On 17 August Bush referred to Russia’s “invading forces.”

61 Press Release, Declaration of Universal Mobilization by Georgian President Mikhail Saakashvili (Aug. 8 2008), available at http://www.president.gov.ge/en/PressOffice/News?2324 (last viewed Dec. 2011) (“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 classic international aggression.”). Saakashvili referred to Russian aggression in most of his speeches. Description of Russian actions as aggression predate the war. Anne Penketh, Georgia Says Russia Fired Missile in ‘Act of Aggression,’ INDEPENDENT (Aug., 8 2007) http://www.independent.co.uk/news/world/europe/georgia-says-russia-fired-missile-in-act-of-aggression-460672.html.
For their part, Russia and South Ossetia deployed similar language, though with the opposite valence: As early as the afternoon of 7 August South Ossetian authorities reported “large-scale military aggression against the Republic of South Ossetia[,]”62 – 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’”.63 On 19 August, Russian Foreign Minister Sergei Lavrov invoked aggression in 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”.64 Unsurprisingly, “all sides have declared their own actions to be ‘defensive’”65 – that is, as falling within the one exception to the prohibition on force that the UN Charter clearly identifies.66

62 Chronicle of a Caucasian Tragedy, SPIEGEL.DE, supra note 37 (quoting unnamed South Ossetian authorities).

63 Alexis Crow, Georgia-Russia Conflict Timeline (includes South Ossetia and Abkhazia), ROYAL UNITED SERVICES INST., available at http://rusi.org/research/studies/european/commentary/ref:C48A08074B93E4/. Russia used the term ‘aggression’ liberally, even before the war. See, e.g., Kazbek Basayev, Russia Accuses Georgia of Open Aggression, REUTERS.COM (July 4, 2008, 9:22am), available at http://www.reuters.com/article/idUSL04712416_CH_2400 (reporting Russian accusations that Georgia killed two people in mortar raid against South Ossetia: “Moscow considers it unacceptable when Tbilisi. . .is committing undisguised acts of aggressions 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.’”)(ellipsis original)).

64 Georgia conflict: Key statements, supra note 40.

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

66 U.N. Charter art. 51 (providing for a right of self-defense). I have not found of 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
Needless to say, no US official 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.

US comments about Russian aggression were often linked to the closely related concept of territorial integrity. 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.


67 SHAW, INTERNATIONAL LAW, supra note 54, at 333-34; MALMVIG, STATE SOVEREIGNTY AND INTERVENTION, supra note 15, at 1-22. International documents more commonly refer to ‘sovereign equality.’

68 YORAM DINSTEIN, WAR, AGRESSION, AND SELF-DEFENCE 83ff. (1994). 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”) & art. 2, para. 7 (prohibiting interference with a state’s domestic jurisdiction); G.A. Res. U.N. GAOR, 25th Sess., U.N. Doc. A/RES/2625(XXV). Declaration of Principles of International Law Concerning Friendly Relations and Co-operation Among States in Accordance with the Charter of the United Nations, art. 1 (24 October 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.” 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. Conference on Security and Co-Operation in Europe Final Act, Aug. 1, 1975, 14 I.L.M. 1292 (Helsinki Declaration) available at http://www.osce.org/mc/39501.
As early as 8 August – the first full day after the conflict broke out – the US described Russia’s actions as a violation of territorial integrity, and continued to invoke this description throughout the crisis, as on 15 August, 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. . . .

As with aggression, US officials did not describe all Russian actions within Georgia as violations of territorial integrity: vociferous US opposition to the invasion co-existed with acknowledgement that some Russian forces were legally based in South Ossetia, a position the US never repudiated. American 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 framing of Georgia’s actions as occurring within its own sovereign sphere, and therefore an internal matter. For the US this was largely given; for

69 Rice, Russia Move into Georgia, supra note 50 (“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. . .”)

70 Georgia conflict: Key statements, supra note 40. Also citing Rice using very similar language about 1968 two days earlier.
Georgia, it was the express justification for their actions. Thus on the evening of 7 August, “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[.]”

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 such terms would have been not only contrary to the political sensibilities of the US 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 with 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 that Russia had prevailed decisively in the conflict.

Later, Russia directly challenged Georgia’s

71 Chronicle of a Caucasian Tragedy, SPIEGEL.DE, supra note 37; Tagliavini Report, supra note 10, Vol. III, 595-626. See also Michael Cecire, Doubting Der Spiegel – What is Order No. 2?, GEORGIAN DAILY, April 27, 2009, available at http://georgiandaily.com/index.php?option=com_content&task=view&id=11271&Itemid=130. Der Spiegel is referring to the supposed ‘Order No. 2,’ but a similar comment was made on television by General Kurashvili; other Georgian officials distanced themselves from this characterization. Private communication from Jonathan Kulick. 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.” Id.

72 ICG, REPORT NO. 183, supra note 21, at 9 (“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
territorial 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?\(^{73}\)

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**

Regardless of 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\(^ {74}\) are said to be in occupation,

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\(^{73}\) See discussion of Russia’s recognition of the separatist regions, below.

and have obligations towards the civilian population and the displaced sovereign. Occupation is not *per se* illegal, though occupation 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; or even if legal, Russia could have violated its obligations as an occupier.

In the Georgian War, the US 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

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76 Parsons, *Moving the Law of Occupation, supra* note 75, 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 American and British occupation of Iraq in 2003, are instances of transformative occupations requiring resort to legal authority outside the traditional law of occupation framework. . . . these occupations occurred under legal frameworks authorized by the U.N. Charter and the approval of the U.N. Security Council.” (citations omitted). *Id.*

77 Benvenisti, *The International Law of Occupation, supra* note 75, 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 illegality of Russia’s continuing presence was primarily expressed about Russia’s failure to uphold undertakings made in the ceasefire agreement. The agreement, brokered by French President Nicolas Sarkozy on 12 August and signed by Georgia and Russia on 15 and 16 August respectively, provided for 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.

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. “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.”).

Text of the Peace Accord, N.Y. TIMES, available at http://graphics8.nytimes.com/packages/pdf/world/2008/08/20080813_GEORGIA_ACCORD.pdf (French original and English translation by the New York Times; parentheticals are handwritten additions to the original); Communique of the President of France (“these. . . may only be implemented in the immediate proximity of South Ossetia to the exclusion of any other part of Georgian territory”; “these ‘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.”) & Administration of the President of France would like to make Three Additional Clarifications (trans. Gov. Georgia), available at http://mfa.gov.ge/files/557_13910_582611_Agreements.pdf. During negotiations, a set of modifications proposed by Georgia were 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; NATO Secretary General Jaap de Hoop Scheffer warned on 19 August that “Russia has to honour all points in the agreement” or face a freeze in relations; following Russia’s recognition of South Ossetia’s independence on 26 August, the G-7 states condemned Russia’s “continued occupation of parts of Georgia” (referring to several checkpoints Russia maintained in Georgia proper) and

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.)

The legal effect on Russia’s obligations of France’s clarifications is unclear.


80 Press Release, U.S. Secretary of State Condoleezza Rice, Recent Events in Georgia (Aug. 13 2008) [hereinafter Rice, Recent Events in Georgia] (suggesting that Russia was violating a ceasefire). French Foreign Minister Bernard Kouchner had early broached a different ceasefire plan, and negotiations for the final plan extended from 12 to 16 August, with considerable confusion about when the various parties entered into what obligations.

81 Georgia conflict: Key statements, supra note 40 (adding “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.”).
called on Russia to implement the peace agreement;\textsuperscript{82} and in September 2008, the State Department said any further deployments in South Ossetia would violate the agreement.\textsuperscript{83}

Logically, South Ossetia – which believed itself an independent state – would have characterized Georgian forces on its claimed territory as illegal occupiers, but I have not found any such statement; Russia seems not to have used the language of occupation, as logically it would not, since it still acknowledged Georgia’s formal sovereignty, and a state cannot occupy its own territory. In any event, given the course of the war, Georgian forces were not in a position to be accused of occupation for very long.

\textbf{C. Recognition of breakaway states}

26 August, Russia recognized the independence of South Ossetia and Abkhazia. These entities had long claimed independence, but no state had recognized them.\textsuperscript{84} International law places separatists in an ambiguous and difficult position: It is not illegal for a region to secede and

\textsuperscript{82} Joint Statement on Georgia by Foreign Ministers of Canada, France, Germany, Italy, Japan, the United States and the United Kingdom, Aug. 27 2008, Office of the Spokesman, State Department. Washington D.C. [hereinafter Joint Statement on Georgia] (“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. . .”).

\textsuperscript{83} Press Release, Statement by Sean McCormack, State Department, Recent Russian Actions in Georgia (Sept. 10 2008) (“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. . .”)

\textsuperscript{84} Abkhazian Ambassador to South Ossetia handed the credentials to the President of South Ossetia, Ministry of Foreign Affairs Republic of Abkhazia, Dec. 10, 2010, available at http://www.mfaabkhazia.net/en/node/617 (last visited Dec. 2011). South Ossetia and Abkhazia recognized each other on 17 November 2006, and diplomatic relationships were subsequently established on 26 September 2007.
constitute a new state, but neither is there any right to do so.⁸⁵ 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.⁸⁶ An occupier is under a special obligation to maintain the existing legal system and respect the sovereignty of the occupied state, which might suggest that there is a higher threshold for a state’s recognizing secessionist entities on territory it occupies.⁸⁷

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 UN Security Council Resolutions supported by

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⁸⁶ John Dugard & David Raic, The Role of Recognition in the Law and Practice of Secession, in SECESSION: INTERNATIONAL LAW PERSPECTIVES 95 (Marcelo G. Kohen 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”. 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.); ALEKSANDAR PAVKOVIC & PETER RADAN, CREATING NEW STATES: THEORY AND PRACTICE OF SECESSION (2007) (describing the practice of secession through a series of case studies. Coggins 2006, 2: discussing low odds of success for secession); Bridget L. Coggins, Secession, Recognition & the International Politics of Statehood 2 (2006) (dissertation presented at Ohio State University), available at http://etd.ohiolink.edu/send-pdf.cgi/Coggins%20Bridget%20L.pdf?osu1154013298.

⁸⁷ Parsons, Moving the Law of Occupation, supra note 75; Grant Harris, The Era of Multilateral Occupation, 24 BERKELEY J. INT’L L. 1 (2006) (outlining the obligations of occupation but also arguing that a changed framework allows occupiers to usurp the occupied state’s sovereignty under certain conditions; making a similar argument).
Almost every Western statement throughout the crisis reaffirms Georgia’s sovereignty and territorial integrity, even insisting that any final deal must be consistent with that baseline. For Western states, non-recognition of the separatists was a necessary 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.

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; these included disproportionate use of force and acts of ethnic cleansing. *Jus in bello* applies to conflicts whether or not lawfully

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88 Joint Statement on Georgia, *supra* note 82.

89 Interview with Secretary Condoleezza Rice, Situation in Georgia with Charles Gibson of ABC News, in Washington D.C. (Aug. 12, 2008) (“I think it’s important that there is an international mediation going on to find modalities for moving forward. But I want to make clear a couple of very important principles. Territorial integrity of Georgia has to be preserved, the democratically elected Government of Georgia has to be respected, Abkhazia and South Ossetia are within Georgia’s internationally recognized boundaries, and any resolution of this conflict has got to recognize those principles.”).

90 C. J. Chivers, *Russia Keeps Troops in Georgia, Defying Deal*, N.Y. TIMES, 2 April 2009, *available at* 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).

91 Yoram Dinstein, *The Conduct of Hostilities Under the Law of International Armed Conflict* (2004) (different obligations apply in international and non-international armed conflicts; Russia’s involvement unquestionably made this war international); Geneva Convention Relative to the Protection of Civilian Persons in
undertaken;\(^{92}\) 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.\(^{93}\) On 17 August, for example, US Secretary of State Rice declared that “Russia overreached, used disproportionate force against a small neighbor and is now paying the price for that because Russia’s reputation. . . is frankly, in tatters”.\(^{94}\) Some criticisms focused on aerial bombardment and the targeting or indiscriminate killing of civilians, yet the main thrust of US critiques were 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 \textit{per se} disproportionate.\(^{95}\) That is, in the US critique disproportionality served primarily as evidence of a \textit{jus ad bellum} violation.\(^{96}\)

\(^{92}\) ADAM ROBERTS \& RICHARD GUELFF, DOCUMENTS ON THE LAW OF WAR 1 (3rd ed. 2004)

\(^{93}\) AMNESTY, CIVILIANS, \textit{supra} note 4; HUM. RTS. WATCH, UP IN FLAMES, \textit{supra} note 4.

\(^{94}\) \textit{Georgia conflict: Key statements, supra} note 40.

\(^{95}\) Rice, Recent Events in Georgia, \textit{supra} note 80 (“[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
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.\(^97\) 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.\(^98\) Both Georgia and Russia accused each other of committing genocide or ethnic cleansing,\(^99\) 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.

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\(^{96}\) We will consider this in detail in the next section.

\(^{97}\) CRYER, INTERNATIONAL CRIMINAL LAW, supra note 2, at 204 (“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.”)


\(^{99}\) Here is Russian President Dmitri Medvedev on 11 August: “The ferocity in which the actions of the Georgian side were carried out cannot be called anything else but genocide. . . .” Georgia accused Russia of ethnic cleansing on several occasions. Georgia conflict: Key statements, supra note 40. Here is the National Security Council secretary on 9 August: “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.” Maria Golovnina, Georgia Accuses Russia of Ethnic Cleansing, REUTERS.COM (Aug. 9, 2008, 8:09am), available at http://www.reuters.com/article/idUSL9329769.
In sum, the legal categories that US leaders deployed centered on the sovereignty and territorial integrity of Georgia. They also demonstrated a patterned 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 the particular harms of war. Georgia’s actions, by contrast, were seen very differently in relation to these legal categories: However unwise they have been – however difficult a position they had put the US 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 What Happened in the War Be Characterized in Law?

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

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100 American 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) – but they did make a consistent distinction between Russian forces legitimately and illegitimately on Georgian territory.
condemnations they made concerned *jus ad bellum* violations of sovereignty: Russia’s invasion of Georgia, its continued occupation, its recognition of breakaway regions, even critiques of Russia’s disproportionate conduct all implicated a territorial interpretation.

These are curious grounds for legal criticism, because as we shall now see, many of Russia’s acts were probably perfectly legal, or at least so indeterminate as to provide dubious grounds for condemnation – while the things that were easiest to condemn 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 West’s preferred analysis.

**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 7 August, Georgia significantly escalated the level of conflict, initiating major military operations by shelling and attacking Tskhinvali, killing 18 Russian peacekeeping troops in the process.101 Russia was evidently ready – probably it was seeking just such an opportunity – and struck back with overwhelming force the next day. This sequence is decisive.102

101 *Chronicle of a Caucasian Tragedy*, SPIEGEL.DE, supra note 37.

The first serious wrongful use of force normally constitutes aggression.  

‘First’ appears straightforward enough, though it will turn out to do very little independent work. ‘Serious’ means non-trivial – not just a stray bullet or an accidental crossing of a frontier, or even minor military operations. ‘Wrong’ is not a moral assessment but means ‘lacking justification’ – that force 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, and unauthorized – and it usually must be 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 Tshkinvali on 7 August, before Russia’s deployment on 8 August. Georgia contests this, claiming that Russian forces moved through the Roki tunnel from North Ossetia early on 7 August. 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 18 years. Those incidents were principally between Georgian and South Ossetian or Abkhazian units, though some involved Russian forces (such as destruction of a Georgian drone over Abkhazia). If Russia in fact deployed earlier on the 7th, or if these prior incidents themselves were at least of sufficient seriousness, then on 7 August Georgia could plausibly have been responding to them in self-defense. This in turn could mean that on 8 August Russia was not responding, but continuing a conflict it had begun by an earlier violent action. Let us see how these possibilities work out.

103 *Definition of Aggression, supra* note 54.
To use force in self-defense, a state must be responding to some prior and sufficiently serious act or threat. Not every cross-border incursion is aggression (although all are violations of sovereignty and territorial integrity) – there must be a measure of gravity or seriousness.\textsuperscript{104} A state is not allowed to retaliate 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.\textsuperscript{105} But if prior uses of force are serious enough, then actions taken in response constitute legitimate self-defense, not aggression.

Analysis of ‘first’ and ‘serious’ are thus related. The Russian incursion from 8 August – involving large armored and infantry formations, sustained aerial bombardment, and occupation of territory – would clearly qualify on grounds of seriousness.\textsuperscript{106} But so would the Georgian

\textsuperscript{104} Definition of Aggression, supra note 54, at Annex, Art. 2 (“The first use of armed force by a State in contravention of the Charter shall constitute \textit{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 would not be justified in the light of other relevant circumstances, including the fact that \textit{the acts concerned or their consequences are not of sufficient gravity.”)(emphasis added); 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).

\textsuperscript{105} Thomas M. Franck, On Proportionality of Countermeasures in International Law, 102 Am. J. Int’l L. 715, 719-20 (2008) (“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.”); May, The International Criminal Court, supra note 56, at 322-25 (“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”).

\textsuperscript{106} Definition of Aggression, supra note 54, at Annex, Art. 3 (providing a non-exhaustive list of acts constituting aggression).
action the day before,\textsuperscript{107} and if the Russians were in fact responding to that, they would not be committing aggression. The standard account says this is what happened, but even 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 its own extensive preparations: reassigning artillery to Gori after the completion of joint Georgian-American operation Immediate Response 2008 rather than returning them to barracks; making “frantic requests” for offensive weaponry from Israel; assembling 12,000 troops on the Ossetian boundary.\textsuperscript{108}

And, of course, on 7 August, it was Georgia that sent those forces into South Ossetia and initiated a large, sustained artillery bombardment, before any comparably serious military action by Russia. Enlightening in this regard is Georgia’s application to the International Court of Justice, which 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

\textsuperscript{107} Except, of course, that Georgia’s action was conducted entirely on its territory – but more on this shortly.

\textsuperscript{108} Chronicle of a Caucasian Tragedy, SPIEGEL.DE, supra note 37. 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, Aug. 16, 2008, available at http://www.telegraph.co.uk/news/worldnews/europe/georgia/2570754/Georgia-conflict-How-a-flat-tyre-took-the-Caucasus-to-war.html – but 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 7 August, whichever side started the war was presumably doing so. This is normal practice – diplomats occasionally, awkwardly, find themselves in the enemy capital as the bombs begin to fall.
government of Georgia refers to a Georgian “limited operation” followed by a “well-planned” Russian invasion.\(^{109}\)

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 7 August. There is a view that a sequence of prior incidents, none in itself rising to a sufficient level of seriousness, can be cumulated to constitute a sufficient trigger for a right of self-defense.\(^{110}\) On this view, Georgia was responding to a string of insults, and in attacking exactly when it did on 7 August was simply choosing the time and manner of its legitimate response.\(^{111}\) 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 cumulation), Russia’s subsequent acts would have been unlawful.

\(^{109}\) ICJ, *Racial Discrimination Georgia v. Russian*, para. 77-78. 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.

78. 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.

Concern about the facts is not the only reason for this strategy, of course; Georgia had limited jurisdictional options in bringing a contentious case against Russia to the ICJ. CRYER, *INTERNATIONAL CRIMINAL LAW*, supra note 2, at 223-24, 276-78.


\(^{111}\) Radio Free Europe, *Roundtable: Causes And Effects Of The Russia-Georgia War*, 9 August 2009, http://www.rferl.org/content/Roundtable_Causes_And_Effects_Of_The_Russia_Georgia_War/1795469.html (“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.”)
But unless they were serious enough, prior incidents do not count for purposes of aggression – that is, they neither constitute aggression themselves nor provide a trigger to justify another state’s use of force. 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, and this was not a valid exercise of military force under Sochi.

It is not clear that any of those prior incidents would have qualified on grounds of seriousness: No external observer suggested they did before the outbreak of the war – 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 7 August in response to the actual level of incidents that summer (or the incidents over the previous 18 years). They probably cannot excuse Georgia’s serious actions on 7 August – which in turn can excuse Russia’s serious actions on the 8th (if they meet other criteria, to which we will shortly turn). In any case, the cumulation theory is controversial,112 and even if we accept it, we necessarily would

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be acknowledging that the attack on 7 August was a categorical expansion – the first act that, on its own, was undeniably serious enough to potentially constitute aggression and generate a right of response.

The third component of aggression is wrongfulness – the lack of legal authority. This too is closely related to ‘first’ and ‘serious,’ because a rightly authorized party can use serious force, and even use it first, without committing aggression. In Georgia’s case, of course there is no question of aggression: even if it went first with serious and unauthorized force, it 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. 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?

Russia had also 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; it evacuated women and children from Tskhinvali by 6 August; and on 3 August, the Russian Foreign Ministry warned that an “extensive military conflict” was imminent – a statement

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113 Popjanevski, From Sukhumi to Tskhinvali, supra note 39, 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.”).

114 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.

115 Chronicle of a Caucasian Tragedy, SPIEGEL.DE, supra note 37; Pavel Felgenhauer, After August 7: The Escalation of the Russia-Georgia War, in THE GUNS OF AUGUST 2008: RUSSIA’S WAR IN GEORGIA 165 (Svante E. Cornell & S. Fredrick Starr eds., 2009) (“this 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.”)
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 – either for attack or for counterattack, or both – could simply show that both sides accurately understood the rising risks; after all, that is what militaries are supposed to do.

Preparations could provide the basis for a claim of anticipatory self-defense if they were of a sufficiently threatening nature, along the lines of the 1967 Six Day War, though under the traditional Caroline test this would require a credible belief that Russia was preparing an imminent invasion. It is plausible to characterize Georgia’s actions in early August as anticipation of an impending Russian invasion – but equally plausible to characterize Russia’s actions as anticipation of 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 response, rather than a first

116 U.N. Charter art. 51 (The text of the UN 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); Steven R. Ratner, Aggression, in CRIMES OF WAR: WHAT THE PUBLIC SHOULD KNOW 37 (Roy Gutman et al., eds., 2007) (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).

117 R.Y. Jennings, The Caroline and McLeod Cases, 32 AM. J. INT’L L. 82 (1938); ICJ, Nicaragua v. USA, supra note 112; International Court of Justice (ICJ), Legality of the Threat or Use of Nuclear Weapons (Nuclear Weapons), 8 July 1996, Advisory Opinion, http://www.icj-cij.org/docket/files/95/7495.pdf; CHRISTINE D. GRAY, INTERNATIONAL LAW AND THE USE OF FORCE 105-08 (2008). The self-defense tests articulated in the Nicaragua and Nuclear Weapons cases are arguably narrower than Caroline, allowing less room for anticipation. 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 any definition of aggression.
wrongful use – after all, Georgia’s own version of events requires one to believe that it counterattacked with at least equal speed.

If we turn to Russia’s affirmative justification, we see that it is grounded in a right to respond to Georgia’s own unjustified actions. Even though Georgia never attacked Russian territory, it did use serious force against Russian peacekeepers, killing 18 in its initial assault; this plausibly implicated Russia’s general right to self-defense or its specific rights under Sochi. I am not aware of any state that believes its inherent right of self-defense is co-terminus 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.

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 7 August, Georgia crossed with main force. 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. 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 or passive personality logic for enforcement jurisdiction.\textsuperscript{119} These claims are more controversial,\textsuperscript{120} as is the status of Russia’s

\textsuperscript{118} Ratner, Aggression, supra note 116, at 37 ("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.")

\textsuperscript{119} CRYER, INTERNATIONAL CRIMINAL LAW, supra note 2, at 223-24, 242-43 ("Passive personality jurisdiction is jurisdiction exercised by a State over crimes committed against its nationals whilst they are abroad.").
dual nationals;\textsuperscript{121} 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.\textsuperscript{122} So, it is plausible that, in attacking on 8 August, Russia was responding to the Georgian assault on at least two grounds: defending its peacekeepers, and defending territory in South Ossetia for which Russia had a defined peacekeeping responsibility.

Finally, it may be that Russia provoked Georgia, but it is not clear why that matters. Russia may have wanted war, but Georgia didn’t have to oblige. An enemy’s actions cannot be merely

\textsuperscript{120}Popjanevski, From Sukhumi to Tskhinvali, supra note 39, at 158 (“endangerment of a state’s citizens does not automatically create a basis for intervention militarily on another state’s territory”; citing Report of the International Commission on Intervention and State Sovereignty, The International Development Research Centre (Dec. 2001) [hereinafter ICISS Report]); GRAY, INTERNATIONAL LAW, supra note 117, 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, the USA, Israel and UK – have argued for this right, but this view has not attracted many adherents). On passive personality, see CRYER, INTERNATIONAL CRIMINAL LAW, supra note 2, at 223-24, 42-43 (“In most instances the assertions of such jurisdiction is controversial.”).

\textsuperscript{121}Tagliavini Report, supra note 10, Vol. II, 169-78 (Strongly criticized 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 both 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.).

\textsuperscript{122}GRAY, INTERNATIONAL LAW, supra note 117, at 108-09 (States which have used force to rescue their nationals have preferred to invoke Article 51 although some, like the UK, have also suggested that customary international law allowed a right of intervention to protect nationals.); ICISS Report, supra note 120, 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 7 August – sustained shelling of populated areas, the killing of peacekeepers – would likely allow a response in the eyes of most states.
metaphysically provocative; they must meet (at least) the criteria of the *Caroline* test – they have to be real, or threatening in a concrete and immediate sense,\(^{123}\) 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.\(^{124}\) Unless one accepts that events prior to 7 August constituted serious actual uses of force or *Carolignian* threats, singly or cumulated, it was Georgia which 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.\(^{125}\)


\(^{124}\) May, *The International Criminal Court*, supra note 56, at 325 (“‘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.” 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.

\(^{125}\) Popjanevski, *From Sukhumi to Tskhinvali*, supra note 39, at 160 (“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.”).
In sum, Georgia’s actions on 7 August 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. 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 8 August, 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 considered justified. 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 in entering undisputed Georgian territory, would not be constructed as per se 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 it one could find a claim of aggression against Russia. This view, which was the one accepted by American officials at the time, has been largely contradicted by the standard account, but 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.

**B. Illegal occupation and violation of the ceasefire**

Russia occupied Georgian territory; any state that seizes the territory of another through force and exercises effective control over it is in occupation. But as we have seen, this is not necessarily illegal; the fact that there are laws governing the conduct of occupying forces suggests as much. This is why the ceasefire proved a more effective vehicle for Western condemnation, since it contractually specified actions that Russia, even as an occupier, might not otherwise have been obliged to take.

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 25 checkpoints within Georgia proper. Yet although French and American leaders produced highly precise formula for what the ceasefire required, the actual six-point text was hardly clear: for example, it called for withdrawal of Russian forces to their prewar positions but also allowed Russia to take

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126 Popjanevski, *From Sukhumi to Tskhinvali*, supra note 39, 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.”).
unspecified ‘additional security measures’.\textsuperscript{127} Even subsequent French clarifications appear to indicate that Russian forces could remain in a defined zone within Georgia proper for an indeterminate period.\textsuperscript{128} Quite simply, the text is ambiguous, and ambiguity counsels 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 26 August, on the Russian account, a sovereign South Ossetia became competent to enter new relations (which it promptly did), rendering the ceasefire moot. 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.\textsuperscript{129}

\textit{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, and 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

\begin{footnotes}
\item[127] Text of the Peace Accord, \textit{supra} note 78, at Point 5.
\item[128] See note 78 \textit{supra}, discussing the French position on the “additional security measures.”
\item[129] An occupier cannot annex land or take other actions that undermine the sovereignty of the occupied state. However, this would improperly collapse the question. If South Ossetia’s secession were otherwise valid, Georgia would no longer be sovereign, and nothing would preclude Russian recognition.
\end{footnotes}
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 look like violations of international law. However, because secession is a political act, it is not in fact

130 Roman Muzalevsky, War in Georgia and Its Aftermath: Russian National Security and Implication for the West, 3 USAK Y.B. INT’L POL. & L. 334 (2010); George Khutsishvili, The Abkhazia and South Ossetia Cases: Spoilers in a Nearly Collapsed Peace Process, in CHALLENGES TO PEACE-BUILDING: MANAGING SPOILERS DURING CONFLICT RESOLUTION 286-95 (Edward Newman & Oliver Richmond eds., 2006) (“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 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.”).

131 G.A. Res. 1514 (VX), Declaration on the Granting of Independence to Colonial Countries and Peoples, Dec. 14, 1960, U.N. Doc. A/RES/1514(VX); U.N. G.A., International Covenant on Civil and Political Rights, art. 1, 999 U.N.T.S. 171 (Dec. 16, 1966); HURST HANNUM, AUTONOMY, SOVEREIGNTY, AND SELF-DETERMINATION: THE ACCOMODATION OF CONFLICTING RIGHTS (1996). Self-determination is a right of “all peoples[,]” 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 OPPENHEIM’S INTERNATIONAL LAW 712 (9th ed. Robert Jennings & Arthur Watts eds., 1996) (noting that “the principle has often appeared in practice to be an adjunct of the decolonialisation [sic] process rather than an autonomous principle. . . .”); International Court of Justice (ICJ), Advisory Opinion: Accordance with international law of the unilateral declaration of independence in respect of Kosovo 141, ¶¶78-83 (July 22, 2010) (“international 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….”).
clear what constraints actually operate on states in their recognition policies.\textsuperscript{132} One of the classical criteria governing recognition is the factual independence and capacity of the \textit{de facto} entity, and South Ossetia and Abkhazia had met those criteria since the early 1990s.\textsuperscript{133} States have on occasion recognized new states out of the territory of other states, and there are few cases of a state being formally sanctioned for recognizing a new state.\textsuperscript{134} 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.\textsuperscript{135}

\textsuperscript{132} IAN BROWNLEE, \textit{PRINCIPLES OF PUBLIC INTERNATIONAL LAW} 289-91 (4\textsuperscript{th} ed. 1990) (“Recognition, as a public act of state, is an optional and political act and there is no legal duty in this regard”); K. William Watson, \textit{When in the Course of Human Events: Kosovo’s Independence and the Law of Secession}, 17 TUL. J. INT’L & COMP. L. 267-93 (2008) (on the political nature of recognition).

\textsuperscript{133} Convention on the Rights and Duties of States (Montevideo Convention), Dec. 26, 1933, 165 L.N.T.S. 19 (reprinted in 28 \textit{Am. J. Int’l L.} (Supp.) 75 (1934)) art. 1 (Four criteria for statehood: “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.”) & art. 3 (“The political existence of the state is independent of recognition by the other states.”). Even so, \textit{de facto} states are often not recognized – examples include Northern Cyprus, Transdniestria, Somaliland, and of course South Ossetia and Abkhazia until 2008.

\textsuperscript{134} States have accused each other of illegal conduct in recognizing breakaway regions. ICJ, \textit{Advisory Opinion}, supra note 131. Serbia recently 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. \textit{See, e.g.}, United Nations Security Council Meeting, \textit{Russian Recognition Decrees on Abkazia and S. Ossetia}, 28 August 2008, 5969\textsuperscript{th} 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.”); \textit{APA News}, 26 August 2008 (quoting officials from U.K., Sweden, France, Germany and Ukraine, all criticizing Russia’s recognition).

\textsuperscript{135} Reference re Secession of Quebec, Aug. 28, 1998, 2 S.C.R. 217 (“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
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 UN administration while remaining formally a part of Serbia. Attempts to find a mutually acceptable negotiated solution stalled; finally, in February 2008, the US and several major European states recognized Kosovo’s unilateral declaration of independence from Serbia.\footnote{ICJ, \textit{Advisory Opinion}, supra note 131; P. D., \textit{Reactions to ICJ Kosovo Ruling: To recognise or not to recognize}, \textit{The Economist Blog}, July 29, 2010, http://www.economist.com/blogs/easternapproaches/2010/07/reactions_icj_kosovo_ruling.}

The US denied that Kosovo’s independence was a precedent – citing the existence of a UN administration, the history of ethnic cleansing, and other supposedly unique factors.\footnote{“Security Council Meeting,” Feb. 18, 2008, U.N. Doc. S/PV.5839, at 19 (“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.”)} 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\footnote{Solveig Righter & Uwe Halbach, \textit{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); Shaun Walker, \textit{The Kosovo Precedent}, PROSPECT, April 27, 2008 (“in recognizing Kosovo, the west has admitted that there are sometimes circumstances when a country’s territorial integrity can be violated without its consent”); \textit{Kosovo Precedent for 200 territories}, B92, Jan. 23, 2008 (quoting comments of Sergei Lavrov, Russian Foreign Minister: “A precedent is objectively...”)} – especially those, like South Ossetia, that could claim a measure of 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.”}
of internationalization of their conflict. Politically, the catalytic effect of Western recognition of Kosovo was undeniable, increasing Russia’s determination and capacity to act in parallel in the Caucasus. 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 even though there have not been many recognitions, that alone does not suggest Russia has done anything illegal.

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.”); Ronald D. Asmus, A little War that Shook the World: Georgia, Russia, and the Future of the West 87ff. (2010).

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.

Radio Free Europe/Radio Liberty, Will Sarkozy Plan Rubber-Stamp Georgia’s Loss of Abkhazia, South Ossetia?, (August 13, 2008), available at http://ferl.org/content/Sarkozy_Plan_Georgia_Abkhazia_Ossetia/1190775.html (“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.”); see also David J. Smith, The Saakashvili Administration’s Reaction to Russian Policies Before the 2008 War, in THE GUNS OF AUGUST 2008: RUSSIA’S WAR IN GEORGIA 127-32 (Svante E. Cornell & S. Fredrick Starr eds., 2009) (discussing the implications of Kosovo’s independence for Georgian and Russian policy towards Abkhazia and South Ossetia); Hafkin, The Russo-Georgian War Of 2008, supra note 53.

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 (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. . . ”).
And, of course, hidden beneath the naked opportunism of Russia’s actions is the nature of the opportunity Georgia created on 7 August, for Russia’s decision to recognize the separatists – a step it had failed to take for over 15 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. 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.

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 a fair fight. Russia unquestionably deployed overwhelmingly 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.142

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142 Robert Haddick, *This Week at War: The Long Death of the Powell Doctrine*, FOREIGN POLICY, March 5, 2010, http://www.foreignpolicy.com/articles/2010/03/05/this_week_at_war_the_powell_doctrine_is_dead (noting that one
Far more central to US critiques were claims 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?

On the law, the claim seems problematic. Proportionality does figure as part of the *jus ad bellum*, where it is used to determine the validity of the conflict as a whole. However, it is more often deployed as part of the *jus in bello* to analyze discrete attacks, precisely because it is difficult to evaluate proportionality *ad bellum*. Given the uncertainty inherent in defining any war’s aims, measuring the proportionality *ad bellum* – really *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.\(^\text{144}\)

\footnote{Larry May, *Aggression and Crimes Against Peace* 117-9 (2008) (discussing *jus ad bellum* and *jus in bello* proportionality principles, and noting that the former is principally oriented toward measuring if the losses caused by a war outweigh the gains). On the differences, and overlap, between theater and incident proportionality, see United Nations, *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).}

\footnote{¶29 ("[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.")}
Specifically, while the right of self-defense is limited to proportional means – this is really just a corollary of seriousness analysis, which defines an acceptable range of responses\textsuperscript{145} – this does not mean an otherwise authorized defender is 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,\textsuperscript{146} but this has never been read to imply a constraint on otherwise militarily valid operations within the national territory of the combatant states themselves.\textsuperscript{147} More broadly, a right of necessary and proportional self-defense implies a right to defend oneself effectively, and this can reach to a Napoleonic level: Canonical examples include America’s prosecution of the war against Japan well beyond the Hawaiian Islands and the Philippines, including its 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

\textsuperscript{145} M\textsc{ay}, A\textsc{ggression} A\textsc{n}d C\textsc{rimes} A\textsc{gainst} P\textsc{eace}, \textit{supra} note 143, at 126-29 (There is 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.”); ICJ, \textit{Nuclear Weapons, supra} note 117; O’Connell, M. E., \textit{Preserving the Peace: The Continuing Ban on War Between States, 38 CAL. W. INT’L L.J. 41 (2007); International Court of Justice (ICJ), Case concerning Oil Platforms (Iran v. U.S.), Nov. 6, 2003, Judgment, Rep. 161, ¶ 77 (finding US action disproportionate to original attack).

\textsuperscript{146} Christopher Greenwood, \textit{The Concept of War in Modern International Law}, 36 INT’L & COMP. L.Q. 283 (1987) (“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.” ).

\textsuperscript{147} Christopher J. Greenwood, \textit{Scope of Application of Humanitarian Law}, in \textsc{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. . .”); D\textsc{instein}, W\textsc{ar}, A\textsc{ggression} A\textsc{n}d S\textsc{elf-Defence, supra} note 68, at 20-24 (“In principle, all the territories of the belligerent States, anywhere under their sovereign sway, are inside the region of war[]” and only noting exceptions based on formal neutralization arrangements).
These examples suggest that, once a defensive right is triggered, combatants have considerable discretion to pursue the logic of military advantage, and that objective evaluation of actions taken in self-defense includes a considerable – vast – margin of appreciation.

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. 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 a country: The much-discussed drive towards Tbilisi stopped halfway to the capital – about 25 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, and if the harm or the operational scope required to neutralize the harm is great enough, the right of self-defense is commensurately expansive. The Georgian operations on 7 August were hardly the bombing of Pearl Harbor or the breaching of the Polish frontier, but they

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149 The Georgian forces that attacked on 7 August began their operations from bases in Gori, received their supplies from Georgia proper, and were commanded from Tbilisi.
were significant military operations involving the mobilization of military resources and infrastructure across much of Georgia; if those operations gave Russia a responsive right to use force, it stretches credulity to imagine that right did not reach to the broader territory beyond the zone of peacekeeping operations – that is, to Georgia proper, and as much as necessary.

But apart from the weakness of its specific critique, what is of interest is how American claims that Russia’s actions were geographically disproportionate conflated the two halves of the laws of war. Criticisms of Russia’s insertion of forces into ‘Georgia proper’ as disproportionate conflated territorial integrity with the *jus in bello* norms of proportionate response – 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.\(^{151}\)

\(^{150}\) Wood, *Russian Actions in Georgia*, *supra* note 50 (“Deputy Secretary of State John D. Negroponte. . .said 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.”)

\(^{151}\) Popjanevski, *From Sukhumi to Tskhinvali*, *supra* note 39, 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, *The International Criminal Court*, *supra* note 56, 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).
The effect of the US’ 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 reverse the 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 \textit{in bello} variety, it was not criticized for any \textit{ad bellum} violations – how could it, after all, since it was attacking its own territory?\footnote{Hum. RTS. Watch, Up in Flames, 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 indeed. 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.}

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So, did Russia act illegally? Did anyone? US policymakers uniformly proclaimed that Russia 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.\footnote{Georgia was accused of engaging in disproportionate warfare of the tactical, \textit{jus in bello} kind – but this simply demonstrates, again, the difference between the limited role proportionality plays in the \textit{jus ad bellum} and its capacious role in the \textit{jus in bello}.} But these were not the things US 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 – resorting to greatly increased 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 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. Because of course, 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 20th 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 – 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 in 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 – in doctrine – this is not supposed to happen.

As we have seen, the modern, Charter regime prescribes a limited universe of violence: a use of force is either authorized, in self-defense, or it is violative. 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.\(^{154}\) The just war tradition – with which this Article is not directly concerned, but which underpins discussions of aggression\(^ {155}\) – likewise does not readily

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contemplate the idea of universally just war, in which all parties have a justification to fight.\textsuperscript{156} It is possible that no party is justified – or, in Charter terms, that no party is legally authorized to use force – but hardly that all are.

It is completely obvious that Georgia did not violate the classical \textit{jus ad bellum}, for the simple if formalistic reason that its forces fought entirely on its own territory – in that space in which, traditionally, the resort to force was unregulated. It is equally obvious that Russia’s forces – those that weren’t 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 \textit{ad bellum} disproportionality. But, as we saw in Part III, those claims don’t actually work; although the US and its allies issued vociferous criticisms, the clearly 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 \textit{jus in bello} kind.

This puts the puzzle before us: How can all parties in a conflict be justified? On this, the doctrine is right: logically – tautologically – they cannot. To resolve this, we must see that the reasons why Russia was \textit{not} in violation of the \textit{jus ad bellum} also point to the reasons why Georgia \textit{was}. And what was specifically problematic in Georgia’s actions shows there are compelling grounds

\textsuperscript{156} \textit{Cf. Corneliu Bjola, Legitimising the Use of Force in International Politics: Kosovo, Iraq and the Ethics of Intervention} 27 (2009) (“Drawing on arguments put forward by Augustine, Aquinas, and Vitoria, some just war theories argue that war should be waged only \textit{to correct and/or punish} an injustice that has already occurred. Others, though, go even further and claim that the \textit{prevention} of an injustice that is about to happen also constitutes a just cause for war.”)(emphasis original). Correction and prevention leave little scope for \textit{mutual} justification.
to rethink the general legal categories we have – to reconceive what we mean by sovereign territory.

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 wasn’t allowed to exercise its. 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 – 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[.]”¹⁵⁷ But of course there already was one: The Sochi Agreement is, functionally, an internationalized mechanism for regulating an internal conflict.

¹⁵⁷ Text of the Peace Accord, supra note 78. The French original has “Dans l’attente d’un mécanisme international[.]” (French original and English translation by the New York Times; parentheticals are handwritten additions to the original).
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?

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, which gave Russia responsive rights to enforce the regime’s terms with military force. The singular feature of that regime was its reconceptualization of Georgia’s territory: Under the internationalized regime established at Sochi, Georgia did not have the right to move its military forces into or otherwise exercise sovereignty over contested parts of its own territory. Sochi effectively created a layered territoriality within Georgia, with rights pertaining to other states (Russia) and other actors (South Ossetia, the OSCE).

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

**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 not to achieve doctrinal purity, however – on the contrary, it is to drag doctrine towards relevance. For it is precisely the rigid formalism of the *jus ad bellum* that makes it difficult to see Georgia as the violating party: Under general international law, it was and is definitionally 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 clear prohibition in international law on a state using force within its own territory to suppress insurrections. 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 – but an expansion that would 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; increasingly, they are subject to the many of the same rules as international conflicts. Under the influence of human rights and a re-emergent international criminal law, the law of armed conflict has undergone a dramatic deormalization: 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 menu of crimes against humanity track more closely with human rights law, to give a few examples. Increasingly, 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, or R2P, applied in the recent

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158 See especially Tadić, Case No. IT-94-1-A, Appeals Judgment (“an armed conflict exists whenever there is a resort to armed force between states.”) (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 HUM. RTS. WATCH, UP IN FLAMES, 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.”); CRYER, INTERNATIONAL CRIMINAL LAW, supra note 2, at 229-32 (discussing the gradual expansion of the principles applicable in international armed conflicts to internal armed conflicts).

159 Cf. Brian D. Tittemore, Belligerents in Blue Helmets: Applying International Humanitarian Law to United Nations Peace operations, 33 STAN. J. INT’L L. 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.”).

160 MAY, AGGRESSION AND CRIMES AGAINST PEACE, supra note 143, at 273-96; John Langan, The Element of St. Augustine’s Just War Theory, 12 J. RELIGIOUS ETHICS 19 (1984); OSCAR SOLERA, DEFINING THE CRIME OF
authorization of force against Libya.\textsuperscript{162} Although existing forms of humanitarian intervention like R2P do not formally address \textit{jus ad bellum} norms, they increasingly describe limitations on states’ scope of action in the \textit{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 deforming initiatives into the \textit{jus ad bellum} are still quite limited.\textsuperscript{163} They have not extended to aggression – which remains fully, formalistically limited to the international plane\textsuperscript{164} – and only imperfectly reach the most critical


\textsuperscript{162}S.C. Res. 1973, S/RES/1973(March 17, 2011 ); Jayshree Bajoria, \textit{Libya and the Responsibility to Protect}, COUNCIL ON FOREIGN RELATIONS (March 24, 2011), http://www.cfr.org/libya/libya-responsibility-protect/p24480 (“Reiterating the responsibility of the Libyan authorities to protect the Libyan population and reaffirming that parties to armed conflicts bear the primary responsibility to take all feasible steps to ensure the protection of civilians”).

\textsuperscript{163}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.

\textsuperscript{164}Ironically, R2P and humanitarian intervention generally are vulnerable to challenge precisely on the grounds that they constitute a form of illegal aggression. Cf. U.N. Security Council, 3988\textsuperscript{th} Meeting Record, 24 March 1999, 2-3, available at http://www.securitycouncilreport.org/atf/cf/%7B65BFCF9B-6D27-4E9C-8CD3-CF6E4FF96FF97D/kos%20SPV3988.pdf, 2-3 (Comments of Russian Mr. Lavrov for the Russian Federation: “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
part of internal conflicts, namely the challenge such conflicts often issue to the very existence of the state’s sovereignty authority. This suggests that the Georgian War – which, understood as the operation of an internationalized mechanism for regulating a persistent challenge to a state’s sovereign order, clearly touches these issues – has something to tell us about the path to developing more robust restrictions on internal sovereign violence.¹⁶⁵

A typology of internal conflicts and the tools to address them is well beyond the scope of this Article – it might well be the direction this argument suggests for further research – but it is worth briefly noting the ways in which the Sochi Agreement represents a model that moves farther than others towards creating a functional ban on internal aggression.

Unlike existing R2P models, all of which contemplate high levels of human suffering before intervention can be undertaken,¹⁶⁶ the Sochi regime gave Russia the right to use necessary and

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¹⁶⁵ R2P and humanitarian intervention were not invoked in any significant way during the Georgian War: Georgia and its allies would 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. See U.N.S.C. Report, Update Report No. 4, Protection of Civilians in Armed Conflict (Jan. 13, 2006), available at http://www.securitycouncilreport.org/site/c.gILW/eMTIsG/b.1357007/k.EA5/UPDATE_REPORT_NO_4brPROTECTION_OF_CIVILIANS_IN_ARMED_CONFLICTBR13_JANUARY_2006.htm (“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.”).

proportionate means to counter whatever level of incursion Georgia undertook.\textsuperscript{167} Related to this, the Sochi regime created a standing, pre-existing trigger mechanism. R2P models are \textit{post hoc} and reactive – this is true even though some emphasize preventative work – and require either a vote by the Security Council or a long process of deliberation.\textsuperscript{168} Sochi required no deliberation; once the regime’s territory was breached or its peacekeepers attacked, Russia was licensed to act. It was this feature that allowed the mechanism to react so quickly and effectively.\textsuperscript{169} These features look much more like the automatic, inherent right of self-defense in the \textit{jus ad bellum}.

Most importantly, 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 concern claims to a separate territorial and sovereign status.\textsuperscript{170} Under the Sochi

\textit{Our Shared Responsibility: Report of the Secretary-General’s High-Level Panel on Threats, Challenges and Change, 2004.}

\textsuperscript{167} It could be objected that in fact, over the past two decades the Sochi regime has tolerated an unacceptably high level of violence – such as the numerous incidents that, on a cumulative theory of self-defense, could justify Georgia’s actions in August 2008.


\textsuperscript{169} 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.

\textsuperscript{170} On the frozen conflicts, see Olga Kamenchuk, \textit{Complexities of Conflict Prevention and Resolution in the Post-Soviet Space: EU-US-Russian Security Dimensions}, 5 EUR. Y.B. MINORITY ISSN. 99 (2005-2006); Christopher
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 a valid claim; 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, 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 – the Russian logic for recognition – is similar to the logic of R2P in describing 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 logic is actually far more expansive, as it contemplates not merely a remedial right of intervention to correct an abusive sovereignty – as happened, say in Libya, and may still happen


171 In Abkhazia, the flight and expulsion of ethnic Georgians in the early 1990s greatly complicates claims about what the Abkhazian population desires; the current population largely favors separation from Georgia, but if the expellees were included, the result would be very different. In South Ossetia it is possible to define significant territories whose pre-1991 populations favor separation.
in Syria – but a right to vindicate the oppressed group’s claims contesting the state’s sovereignty itself.

C. Reasons for pessimism – A mechanism we do not recognize when it works

For these reasons, the Georgian War – though conventionally seen by the US 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, more recent exercises in internationalizing internal conflicts.

Seeing the Georgian War in this way is not necessarily a source of optimism, however. The Sochi regulatory mechanism has been expressed through two wars and 20 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 violence is international war; recent experiences, the history of our species, and the reflections of philosophers who have considered the dangers of apologetic justifications for state violence might recommend against facilely imagining that war solves more problems than it creates.172

Still, the use of war as a regulatory device has great pragmatic appeal – at least, advocates of humanitarian intervention logically must believe it does.173 For me, pessimism about the value of


173 I have argued as much. [Identifying Information Redacted]
the Georgian War as a model for effective intervention norms arises from different sources – two 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 *lex specialis* governed the territory of South Ossetia, altering the sovereign rights and obligations of Georgia and Russia. This regime was effective – it functioned to internationalize that internal conflict – but it was also the product of a specific context, and there is no reason necessarily 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, and this produced 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;\(^\text{174}\) Sochi was therefore partly a product of duress\(^\text{175}\) and partly of a Russian

\[^{174}\text{Alexei Zverev, Ethnic Conflict in the Caucasus 1988-1994, in CONTESTED BORDERS IN THE CAUCASUS (Bruno Coppieers ed., 1996); Omer Kocaman, Russia’s Relations with Georgia within the Context of the Russian National Interests Towards the South Caucases in the Post-Soviet Era: 1992-2005, 1 USAK Y.B. INT’L POL. & L. 357 (2008) (discussing threats by Russian leaders to allow South Ossetia to join Russia and to bomb Tbilisi; linking Georgia’s decision to sign the Sochi agreement to those threats).}\]
imperial strategy, rather than a real compromise channeling South Ossetian or Georgian interests. Russia was not interested in a mechanism for its own sake as an abstract exercise in internationalization; it was exercising power in the service of its own strategic concerns. 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 context-specific system that is not 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 US and others. For while, in principle, we accept 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 the real logic of those mechanisms, and their operation, in practice.

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175 United Nations, *Vienna Convention on the Law of Treaties*, 1155 U.N.T.S. 331, arts. 51-52 (May 23, 1969). Duress is a bar to the formation of treaty under the Vienna Convention, but there is no reason to 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.

176 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.

177 Smith, *The Saakashvili Administration’s*, supra note 140, at 125. Russia was also not principally motivated by sympathy for the separatist regions. Smith notes that the South Ossetia was not central to Russian policy, which was more concerned with Georgia’s independent policy and moves towards NATO.
Sochi was about as close as one gets to an internationalized regime for governing internal conflicts: Russian and OSCE involvement was a means to prevent excessive Georgian zeal from terminating an internal dispute, and it was a regime which the US had accepted, even taken part in, across the better part of two decades. Yet when the mechanism actually began to operate, US officials appeared 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 began to debate and criticize the operation of the mechanism as if it were a pure violation, which America labeled aggression. Even though it and other actors were fully aware of the underlying internal dispute, the US relied exclusively on the rules of general international law and the \textit{jus ad bellum}, which all but preordained the outcome of American analysis, 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 obvious inadequacy of those

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178 David Wippman, \textit{Kosovo and the Limits of International Law}, 25 \textit{Fordham Int’l L. J.} 129 (2001). 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 independence and South Ossettia’s. Hanna Jamar & Mary K. Vigness, \textit{Applying Kosovo: Looking to Russia, China, Spain and Beyond After the International Court of Justice Opinion on Unilateral Declarations of Independence}, 11 \textit{German L. J.} 913 (2010) (differentiating Kosovo as based on unique circumstances).

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general rules was actually exacerbated precisely because the situation appeared to be one in which the rules would be apposite – a cross-border tank war between recognized states that looked like a brief, bloody reversion to classical type, and was called precisely that. The net effect was to distract attention away from the actually existing mechanism – the *lex specialis* and the rules it incorporated that looked very much like self-defense norms – and focus it, instead, onto the formalistically irrelevant general system.

This does not mean that the US and other states were somehow fooled into adopting the policies they did because of the particular language of the law on aggression; whatever the influence of language and of legal categories, it is not so determinative or so direct. Western powers had plenty of reasons to support Georgia, just as they found reasons to combine strong rhetoric with cautious inaction once the war broke out. Certainly American policymakers’ statements were consistent with their previously declared political preferences. There is no evidence, and no reason to suppose, that the US took any position it wouldn’t otherwise have merely because of linguistic or doctrinal constraints.

Yet equally, it would go too far to suppose that, in defining American interests, US policymakers were unaffected by the legal environment: At a minimum, norms of sovereignty, aggression and

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territoriality have made the general legal vocabulary less available for critiquing internal conflicts – even when a specific legal regime like Sochi had been put in place. For the law of aggression to be utterly, distractingly silent on internal conflicts is understandable as a matter of politics, but it is no less incomplete, no less unresponsive to the nature and dynamics of those conflicts because of that.

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 – its constitutional order[180] – over areas whose present populations don’t want to be ruled by it. There may be excellent answers, but they are hard to find in an international legal order that renders even 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 or critique acts of violence into pathways that distract us from what it is that those critiques should really be engaged with.[181]

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 internal conflicts and our own imperfect efforts to regulate them. Our defective jus ad bellum produces legal outcomes that merely replicate existing policy

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[180] 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 discomfort with such a purpose as a plausible basis for committing violence against one’s own citizens.

[181] Thanks to Gabriella Blum for this general idea and phrasing, in a personal communication.
preferences or – more troublingly – channel the choices policymakers make away from engagement with substantive disputes between political communities and towards formulaic, enchanted logics.