Conflict in the Caucasus

Implications for International Legal Order

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Caucuses in the Caucasus: The Application of the Right of Self-Determination

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Introduction

> The peoples of South Ossetia and Abkhazia have several times spoken out at referendums in favour of independence for their republics. It is our understanding that after what has happened [with the bombardment by Georgia of] Tskhinval [in South Ossetia] and what has been planned for Abkhazia, they have the right to decide their destiny by themselves. ... Considering the freely expressed will of the Ossetian and Abkhaz peoples and being guided by the provisions of the United Nations Charter, the 1970 Declaration on Principles of International Law Governing Friendly Relations between States, the CSCE Helsinki Final Act of 1975 and other fundamental international instruments, I signed Decrees on the recognition by the Russian Federation of South Ossetia's and Abkhazia's independence.[1]

In August 2008, the Russian President, Dmitry Medvedev, after receiving the support of the Russian Parliament, decided to recognise the independence of South Ossetia and Abkhazia from the state of Georgia.[2] According to the official statement by the President, quoted above, this action was based on international law. Each of the documents directly referred to in the statement has provisions about self-determination of peoples as do 'other fundamental international instruments', which include the International Covenant on Economic, Social and Cultural Rights 1966 (ICESCR) and the International Covenant on Civil and Political Rights 1966 (ICCPR), to

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both of which Russia is a party.[3] During the conflict, the Georgian government and other governments similarly appealed for international law to be applied.[4]

This chapter will explore the extent to which there is a right of self-determination of the South Ossetian and Abkhaz people, and the application of that right under international law. In so doing, it will consider the actions by both the Georgian and Russian governments, and the extent to which they were consistent with this international law. This discussion will also raise issues about the requirements of a rule of law based international legal order.

The right of self-determination in international law

The use of self-determination in an international legal context[5] primarily developed during the immediate post-First World War period, with both United States President Wilson and Lenin supporting self-determination.[6] In 1945, the Charter of the United Nations proclaimed that one of the purposes of the United Nations (UN) was 'respect for the principle of equal rights and self-determination of peoples'.[7] As will be discussed below, since that time, self-determination of peoples has been restated, clarified and reinforced in the international law instruments referred to by President Medvedev – the Declaration on Principles of International Law 1970 and the Helsinki Final Act 1975 – as well as in the two major human rights treaties referred to above (the ICESCR and the ICCPR), in decisions and opinions of the International Court of Justice (ICJ), in resolutions of the Security Council and the General Assembly, and in state practice.

While the UN Charter upheld the 'principle' of self-determination of peoples, the two international human rights Covenants made clear that self-determination was a human right. Common Article 1 of the Covenants (being the only substantive human right protected in both Covenants) provides:

> 1. All peoples have the right of self-determination. By virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development.
>
> 2. All peoples may, for their own ends, freely dispose of their natural wealth and resources without prejudice to any obligations arising out of international economic co-operation, based upon the principle of mutual benefit, and international law. In no case may a people be deprived of its means of subsistence.

> 3. The States Parties to the present Covenant, including those having responsibility for the administration of Non-Self-Governing and Trust Territories, shall promote the realization of the right of self-determination, and shall respect that right, in conformity with the provisions of the Charter of the United Nations.

Further, the Declaration on Principles of International Law, which is generally considered to be internationally agreed clarifications of the principles in the UN Charter, states that:

> By virtue of the principle of equal rights and self-determination of peoples enshrined in the [UN] Charter, all peoples have the right freely to determine, without external interference, their political status and to pursue their economic, social and cultural development, and every State has the duty to respect this right in accordance with the provisions of the Charter.[8]

This Declaration confirms that the principles of the UN Charter must now be understood as providing for the self-determination of peoples as a human right, which is binding under international law on all states.

It is evident from these international instruments that the right of self-determination is a right that is applicable in economic, social and cultural contexts, as well as in political contexts. It is also clear that it is a right of 'peoples' as distinct from individuals.[9] However, the Covenants do not give much greater clarity on the definition of the right.[10]

The right of self-determination outside of the colonial context

Initially the right of self-determination was applied solely to colonial territories. In 1960, self-determination was considered in the context of 'the necessity of bringing to a speedy and unconditional end colonialism in all its forms and manifestations'.[11] The ICJ has consistently held that the right of self-determination applies to all peoples in all colonial territories,[12] and state practice confirms this. The position is evident not only from the vast number of colonial territories that have exercised their right of self-determination to become members of the UN but also because of the acceptance by the colonial powers that they have a legal obligation to allow this exercise.[13] Some writers have concluded from this consistent state practice, *opinio juris*, and lack of any denial by states, that the right of self-determination of colonial peoples is now a matter of *jus cogens*.[14]

However, state practice shows that the right of self-determination has definitely been applied outside the colonial context. For example, when East and West Germany were united into one state in 1990, it was expressly stated in a treaty signed by four of the five permanent members of the UN that this was done as part of the exercise of the right of self-determination by the German people.[15] The right of self-determination is also referred to in the context of the dissolution of the Soviet Union and Yugoslavia,[16] and internally within states (see further below). Additionally, the ICJ confirmed that the right of self-determination applies to the Palestinian people in its *Wall* advisory opinion.[17] Indeed, the ICJ has gone further and has declared that the right of self-determination is 'one of the essential principles of contemporary international law' and has 'an *erga omnes* character'.[18] This means that there is an obligation on all states to protect the right of self-determination. As such it is clear that self-determination is not merely an obligation on colonial powers and so the right applies to peoples beyond the colonial context.

Since 1960, the right of self-determination has not been expressed in any international or regional instruments solely in the context of colonial territories. For example, the Declaration on Principles of International Law provides:

> [All States should bear] in mind that subjection of peoples to alien subjugation, domination and exploitation constitutes a violation of the principle [of equal rights and self-determination of peoples], as well as a denial of fundamental human rights, and is contrary to the Charter of the United Nations.[19]

Therefore, the right of self-determination applies to any peoples in any territory (including non-colonial territories) who are subjected to 'alien subjugation, domination and exploitation'. Indeed, it would be contrary to the concept of a human right if the right of self-determination could only be exercised once (such as by colonial peoples) and then not again. So, all peoples in all states have the right of self-determination.

Definitions of 'peoples'

There have been many attempts to establish a definition of 'peoples'.[20] However, they have all struggled to find an 'objective' definition that can be applied to all relevant groups around the world, or even be appropriate for those in colonial territories. This is because a key aspect is self-identification, where the group identifies themselves consciously

as a 'people'. This is an essential part of the definition of a 'people', not least because 'nations and peoples, like genetic populations, are recent, contingent and have been formed and reformed constantly throughout history',[21] often due to the oppression that they have received or to attain certain ends.[22]

While external recognition by a state or group of states can be very useful for the group (such as the recognition by many states of the Palestinian people),[23] it is not conclusive of the group being a people for the purposes of the right of self-determination. Indeed, if such external state recognition was conclusive it would allow the possibility of the existence of a human right (as distinct from the ability of a human right to be exercised) being dependent on the whims of governments. Above all, dependence on the government itself for the existence of a right would undermine the concept of a human right as being, for example, inherent in human dignity.

In fact, in many situations, it is clear as to who are the 'peoples' with the right of self-determination. This can be because the relevant national constitution, legislation or practice indicates this. For example, the Scots in the United Kingdom, the Basques in Spain and the Aceh people in Indonesia are all accepted as peoples with the right of self-determination.[24] There is also, as will be shown below, universal acceptance that the right of self-determination applies to all peoples in colonial territories, and significant state practice that applies it beyond the colonial context. Consistent oppressive actions by those in power over another group may also indicate an acceptance of the group as a 'people', not least because it may be catalyst for the self-identification of the group as a people with the right of self-determination.

Exercises of the right of self-determination

The Declaration on Principles of International Law 1970 set out the principal methods to show how the right of self-determination can be exercised. It provided that:

> The establishment of a sovereign and independent State, the free association or integration with an independent State or the emergence into any other political status freely determined by a people constitute modes of implementing the right of self-determination by that people.[25]

While the vast majority of peoples in colonial territories exercised their right of self-determination by attaining independence, this was not the only method of exercise that was either available or was used.[26]

In non-colonial situations, a range of exercises of the right of self-determination have occurred. While many have been by attaining independence, such as Bangladesh from Pakistan and Montenegro from its union with Serbia, others have been by merger (e.g., the two Yemens), or by free association (e.g., Bougainville with Papua New Guinea). These are all exercises of external self-determination, as there has been a change in the international relationships between the peoples exercising their right of self-determination and the original state/colonial power, as well as with other states and international actors.

Self-determination can be exercised by internal means, where there is a change in the internal relationships and administrations within a state but no change in the external relationships. The Organisation of Security and Co-operation in Europe (OSCE – previously the CSCE), which comprises all the Western and Eastern European States, the then Soviet Union, the United States and Canada, accepted that self-determination could be exercised by external and internal methods. In its Helsinki Final Act in 1975 – specifically referred to by Russian President Medvedev in the statement quoted at the beginning of this chapter – it was declared:

> By virtue of the principle of equal rights and self-determination of peoples, all peoples have the right, in full freedom, to determine, when and as they wish, their *internal and external* political status, without external interference, and to pursue as they wish their political, economic, social and cultural development.[27]

The Declaration on Principles of International Law expressed internal self-determination as being where 'a government [is] representing the whole people belonging to the territory without distinction as to race, creed or colour'.[28] The Canadian Supreme Court considered that internal self-determination in relation to the peoples of the province of Québec enabled the 'residents of the province freely [to] make political choices and pursue economic, social and cultural development within Québec, across Canada, and throughout the world ... [and be] equitably represented in legislative, executive and judicial institutions.'[29]

Accordingly, there is a range of internal exercises of the right of self-determination. After all, 'customary and treaty law on internal self-determination [do not] provide guidelines on the possible distribution of power among institutionalized units or regions'.[30] For example, outside the colonial context there has been devolution of some legislative powers to Scotland and Wales in the United Kingdom, control

over cultural and linguistic matters within the Swiss cantons, and a form of federalism in Bosnia-Herzegovina, Iraq and Sudan. These methods are often called 'forms of autonomy' or 'internal governance'. In many instances, the method of exercise has been by agreement with the government for significant autonomy within a state, such as Crimea in Ukraine, Mindanao in the Philippines and the northern regions of Mali.[31]

All these examples show that there are many possible exercises by peoples of their right of self-determination. While independence – called 'secession' when it is from an existing independent state – is often seen as the only option in non-colonial contexts; it is but one option of very many forms of exercise, and not normally the first option lawfully able to be exercised under international law. The Supreme Court of Canada made this clear when it was considering the position of the province of Québec's potential request for independence:

> International law contains neither a right of unilateral secession nor the explicit denial of such a right, although such a denial is, to some extent, implicit in the exceptional circumstances required for secession to be permitted under the right of a people to self-determination, e.g., the right of secession that arises in the exceptional situation of an oppressed or colonial people. ... The recognized sources of international law establish that the right to self-determination of a people is normally fulfilled through internal self-determination – a people's pursuit of its political, economic, social and cultural development within a framework of an existing state. A right to external self-determination (which in this case potentially takes the form of the assertion of a right to unilateral secession) arises in only the most extreme of cases and, even then, under carefully defined circumstances.[32]

What the Court is indicating – which is consistent with the generally accepted position – is that, in most instances outside the colonial context, independence will not be considered the legitimate first step in the exercise of the right of self-determination. However, there may be exceptional circumstances where the people could exercise their right of self-determination by external self-determination where it is a 'last resort', as all other means of exercise of the right have been tried and have failed.[33]

The exercise of the right of self-determination must be by the people themselves. The ICJ confirmed this when it emphasised 'that the

application of the right of self-determination requires a free and genuine expression of the will of the peoples concerned'.[34] In most instances the will of the people can be determined by a popular consultation, such as by referendum or elections. For example, the European Union (EU) created Arbitration Committee of the International Conference on the Former Yugoslavia (the 'Badinter Committee') decided that the will of the peoples in Bosnia-Herzegovina had to be ascertained, possibly by a referendum carried out under international supervision.[35] However, there may be exceptional circumstances where there is no consultation, such as where the position is clear in all the circumstances and is not manipulated by a state, a government or international institutions. For example, during the dissolution of the Soviet Union few referenda were held.[36] In ensuring that the genuine will of the people is clear, it is important that the views of all within the group, including those of women and minorities, are heard and listened to equally.

Limitations on the right of self-determination

As with almost all human rights, the right of self-determination has limitations on its exercise. These limitations are to protect the rights of others (such as the rights of others to self-determination) or the general interests of the society (such as public order, public health, *et cetera*).[37]

The limitation on the exercise of the external right of self-determination to protect the general interests of the relevant society that is most often asserted by governments is 'territorial integrity'. This limitation on the right of self-determination was expressed in the Declaration on Principles of International Law:

> Nothing in the foregoing paragraph [recognising the right of self-determination] shall be construed as authorizing or encouraging any action which would dismember or impair, totally or in part, the territorial integrity or political unity of sovereign and independent States conducting themselves in compliance with the principle of equal rights and self-determination of peoples as described above and thus possessed of a government representing the whole people belonging to the territory without distinction as to race, creed or colour.[38]

This is an important potential limitation on the exercise of the right. However, it is only a justifiable limitation in certain situations, namely when an exercise of external self-determination (such as independence) is being sought and when a state is 'possessed of a government representing the whole people belonging to the territory without

distinction as to race, creed or colour'. In other words, it can only be a legally justifiable limitation on the exercise of the right of external self-determination when a state is already enabling full internal self-determination for those people.

A particular aspect of this limitation on the exercise of the right of self-determination is the international legal principle of *uti possidetis juris*. This principle provides that states emerging from colonial administrative control must accept the pre-existing colonial boundaries. Its purpose was to achieve stability of territorial boundaries and to maintain international peace and security.[39] While this has been uniformly accepted as a principle applicable solely to colonial territories, it was surprisingly applied by the Badinter Committee to the former Yugoslavia.[40] This latter application was probably incorrect, as it confused historically established boundaries that had not resulted from colonial determinations with colonial determined boundaries. It should also be noted that many of the colonial boundaries were created to preserve the interests of the colonial states and were not related to natural or cultural boundaries understood by the peoples on the ground.[41] Therefore, the principle of *uti possidetis juris* is of questionable legitimacy as a limitation on the right of self-determination. It should only apply, if at all, in the (now very few) situations of decolonization.

Therefore, when the Russian President Medvedev claimed that Russia's actions were 'guided by the provisions of the United Nations Charter, the 1970 Declaration on Principles of International Law Governing Friendly Relations Between States, the CSCE Helsinki Final Act of 1975 and other fundamental international instruments', he was including all of the international law concerning the right of self-determination as set out above. It is necessary to determine if the actions by Russia and by Georgia were in compliance with this international law.

The context of the right of self-determination in the Caucasus

The statement by the Russian President quoted at the beginning of this chapter was made in a particular context. This context was historical and political, in terms of the break-up of the Soviet Union, developments within Georgia and, more recently, the declaration of independence by Kosovo, and arose after a period of armed conflict between Russia and Georgia. There has also been involvement of the international community in the region for some time.

Historical contexts

Before the new Bolshevik military forces (the Red Army) invaded Georgia in 1921, it had been a Democratic Republic since the end of World War I following the collapse of the Russian Empire.[42] Georgia was then integrated into the new Soviet Union, initially as part of the Transcaucasian Soviet Federative Socialist Republics with Armenia and Azerbaijan, and then as a separate Soviet Socialist Republic (Georgian SSR) from 1936. Abkhazia and Adjara[43] were made 'Autonomous Republics' within the Georgian SSR, with their own constitutions.[44] As Autonomous Republics, they had a level of autonomy, including being responsible for the economic and social development in their territories, and jurisdiction for all matters not falling within the scope of the Soviet Union or the Georgian SSR.[45] South Ossetia was considered an 'Autonomous Region', with a lesser degree of autonomy,[46] which meant, for example, that the Ossetian language could be used and taught in schools.

With the end of the Cold War and the crumbling of the communist party governments in Eastern Europe, nationalist sentiments developed, especially from 1988 onwards, within the central Georgian SSR's territory and also among the population of the Autonomous Region of South Ossetia. The South Ossetian regional council wanted to gain the same Autonomous Republic status as Abkhazia and Adjara, and a political party was formed with this aim. However, the central Georgian SSR's government resisted this, and in 1990 it adopted a law forbidding regional political parties and proclaimed that Georgian was to be the principal language across the entire territory. As a reaction to these new restrictions, South Ossetia declared its independence from Georgia (to become a Soviet Socialist Republic) on 20 September 1990 and adopted its own constitution. The Georgian SSR's elections later that year were boycotted by the South Ossetians, which eventually led to the central Georgian SSR's government ending the autonomous status of South Ossetia.[47]

In early 1991, South Ossetia sought to secede from Georgia and unite with the North Ossetian Autonomous Region within the Russian Soviet Socialist Republic. An armed conflict then occurred between Georgian SSR forces and South Ossetian forces. On 9 April 1991 Georgian SSR declared its independence from the Soviet Union and on 21 February 1992 it restored the constitution of the 1921 Democratic Republic of Georgia,[48] with nine regions but without providing any guidance with regard to the status of Abkhazia and Adjara (or South Ossetia).

On 23 July 1992, the Supreme Council of Abkhazia reinstated its 1925 Constitution, which stated that Abkhazia is 'united on the basis of [a] Union Treaty with the Georgian Soviet Socialist Republic'.[49] This triggered an armed conflict between the newly independent Georgia's forces and the Abkhaz forces, following which Abkhazia declared its independence, adopting a new constitution on 26 November 1994 in which it declared itself a 'sovereign democratic State'.[50] Adjara did not declare independence – though for some time it stayed *de facto* outside the control of the central Georgian government – and remained free of direct armed conflict; its autonomy is now defined by Georgia's law on Adjara and the region's new constitution.[51]

Russia mediated the ceasefire agreement (the 'Sochi' agreement) between Georgia and South Ossetia in 1992, after a UN fact-finding mission to the region.[52] The OSCE (the CSCE at the time) both facilitated these negotiations and monitored the ceasefire. This agreement created a Joint Control Commission (JCC) – of which the EU became an observer in 2001 – and a peacekeeping body, the Joint Peacekeeping Forces group (JPKF), which was under Russian command. While the armed conflict with South Ossetia had effectively ceased in 1992, the tension in the region remained and thus a settlement memorandum was signed in 1996. This memorandum indicated respect for both territorial integrity and self-determination rights, without qualifying precisely the level of autonomy granted to South Ossetia.[53]

Russia also mediated the ceasefire agreement between Georgia and Abkhazia in 1993, with the peacekeeping forces being provided by the Commonwealth of Independent States (CIS), though only Russia offered troops.[54] The UN sent an observer mission in 1993 (UNOMIG) that was mainly focused on supervising the implementation of the ceasefire agreement.[55] Further negotiations by the UN resulted in the 2002 Boden proposal, according to which Abkhazia would be a distinct sovereign entity under the Georgian Constitution, though this proposal was rejected by the Abkhazians.[56] The EU also attempted peace efforts, including through the Group of Friends of Georgia with regard to the conflict in Abkhazia.[57]

During this period, referenda on independence were held in Abkhazia and South Ossetia. The referenda took place on 3 October 1999 in Abkhazia[58] and on 12 November 2006 in South Ossetia, each with a very large majority in favour, though ethnic Georgians boycotted the vote.[59]

The ceasefires largely remained in place from 1992/1993 until early 2008. Tensions were still present, especially between the Georgian

and Russian governments, with each maintaining military forces on their borders with South Ossetia, and Russia having bases in Georgia itself until 2007.[60] Russia also appears to have been providing considerable support to the South Ossetian and Abkhaz groups seeking independence, including military support (see further below).[61] They also issued Russian passports to inhabitants of both Abkhazia and South Ossetia.[62] The tensions were such that the UN Security Council unanimously passed Resolution 1808 in April 2008, which reaffirmed:

> [T]he commitment of all Member States to the sovereignty, independence and territorial integrity of Georgia within its internationally recognised borders and supports all efforts by the United Nations and the Group of Friends of the Secretary-General, which are guided by their determination to promote a settlement of the Georgian-Abkhaz conflict only by peaceful means and within the framework of the Security Council resolutions.[63]

On 8 August 2008, armed conflict occurred between Georgia, and South Ossetia, Abkhazia and Russia. The main conflict lasted 5 days. The ceasefire agreement was negotiated by the EU and an EU monitoring group was put in place in Georgia.[64] Subsequently, the EU established a fact-finding mission (the Independent International Fact-Finding Mission on the Conflict in Georgia (IIFFMCG)) to assess the responsibilities with regard to the events of August 2008.[65]

On 21 August 2008, meetings were held in South Ossetia and Abkhazia to ask Russia to support their independence. On 23 August 2008, Eduard Kokoity, the President of South Ossetia, travelled to Moscow to present his appeal to the Federation Council of Russia, and on 25 August 2008, Sergei Bagapsh, the President of Abkhazia, made a similar appeal. The latter added 'that Abkhazia and South Ossetia will never be part of Georgia'. The Russian Federation Council agreed with these appeals, and the Russian President issued decrees recognizing the independence of South Ossetia and Abkhazia as states.[66] To date the only other states that have recognised South Ossetia and Abkhazia as independent states are Nicaragua, Venezuela and Nauru.

Kosovo

Early in 2008 a situation elsewhere in Europe occurred that is of relevance to the situation in the Georgian region. On 17 February 2008, the Kosovo Assembly issued a unilateral declaration of independence.

Fifty-seven states, including the United Kingdom and the United States, have (to date) recognised Kosovo as being independent.[67] The Serbian and the Russian governments (and others) rejected this independence as being contrary to international law.[68] Interestingly, the independence of Kosovo is mentioned in the Russian President's statement of 26 August 2008 in which he recognised the independence of South Ossetia and Abkhazia.[69]

In October 2008, the General Assembly requested an advisory opinion of the ICJ on 'whether the unilateral declaration of independence of Kosovo is in accordance with international law'.[70] Hearings have been held and the opinion is expected in mid-2010. It is of note that the submission by the government of Kosovo (amongst others) is that the question as to whether the people of Kosovo have a right of self-determination is not relevant in terms of the question asked of the ICJ, as the question only asks if the declaration of independence was valid under international law.[71]

While the issue of the lawfulness under international law of the declaration of independence of Kosovo is outside the scope of this chapter, there are a few issues in that situation that are important to note. First, the Badinter Committee recognised that the Republics of the former Socialist Federal Republic of Yugoslavia (SFRY) had a right of self-determination, though this right had to be exercised in particular ways, such as to respect minority rights and requiring evidence of consent by the peoples concerned.[72] However, it did not include Kosovo within its considerations. This was because Kosovo was not a Republic of the SFRY but was an 'Autonomous Province' within the Republic of Serbia, though the Serbian government, prior to the dissolution of the SRFY, ended most of its autonomous powers. Second, the Badinter Committee considered that:

> [T]he demise of the Socialist Federal Republic of Yugoslavia, unlike that of other recently dissolved States (USSR, Czechoslovakia), resulted not from an agreement between the parties but from a process of disintegration that lasted some time, starting, in the Commission's view, on 29 November 1991, when the Commission issued opinion No. 1, and ending on 4 July 1992, when it issued opinion No. 8.[73]

This means that some of the former Yugoslav Republics that had declared independence before 29 November 1991 had done so by express acts of secession and those Republics, such as Montenegro,

which had done so after this time had become independent due to dissolution. Third, the territorial integrity arguments of the Serbian government were recognised but, since Security Council Resolution 1244 (1999), Kosovo and Serbia had been governed separately, and the United Mission in Kosovo (UNMIK) had been exercising authority (legislative, executive and judicial) on the territory since then.[74] Thus, there had been international territorial administration of Kosovo, which arguably meant that there was no remaining territorial integrity of Serbia that Serbia could claim. Finally, after eight years of this separation of governance of Kosovo and after many negotiations, in March 2007 the Special Envoy of the UN Secretary-General recommended that Kosovo become independent under the supervision of the international community, due to the fact that after 'one year of direct talks, bilateral negotiations and expert consultations, it has become clear to me that the parties are not able to reach an agreement on Kosovo's future status'.[75]

There is one other issue concerning the unilateral declaration of independence of Kosovo that is relevant to this chapter. When many of the states recognised Kosovo as an independent state, they expressly stated that this was a '*sui generis*' situation.[76] They sought to indicate that this was a unique situation and could not be used as a precedent for either its application to other situations or for recognition in similar situations. Asserting that the situation is *sui generis* is neither definitive to prevent a precedent or effective in terms of decisions on recognition. Indeed, almost every situation of the exercise of the right of self-determination, especially outside the colonial context, is unique. The exercise of the right of self-determination by the people of Bangladesh, the peoples of the new states of the former Yugoslavia, the peoples in the new states from the dissolution of the Soviet Union, and by the German people in the merging of the two Germanys, were all unique. Whether a particular exercise by a peoples of their right of self-determination, such as by a unilateral declaration of independence, is lawful under international law would be decided in the particular context of that situation, as was made clear by the Canadian Supreme Court in the *Québec* opinion.[77] This context will include, as discussed above, the ability of the people concerned to exercise internal self-determination (autonomy) within the broader state, the negotiation/consultation possibilities within the broader state, and the extent to which there are other exceptional circumstances that may impact on the question of self-determination. Above all, the situation in Kosovo can never be *sui generis* as a matter of precedential impact on the development of international law.[78]

Application of the right of self-determination to Abkhazia and South Ossetia

Internal self-determination

It is evident from the historical context above that the central Georgian government has treated both Abkhazia and South Ossetia as having a large measure of autonomy, perhaps even *de facto* independence, since the early 1990s.[79] Thus, it could be considered that they now have a large degree of internal self-determination, albeit more through force and ceasefires than directly through negotiated constitutional arrangements. Indeed, the IIFFMCG Report considered that, due to the breadth of their autonomy, Abkhazia was a 'state-like entity' and South Ossetia was 'an entity short of statehood'.[80]

The external identification of Abkhazians as a distinct people for at least 60 years, with a clearly accepted and maintained autonomy by the Soviet Union and then the Georgian SSR, as well as their self-identification, makes it clear that they are a people. South Ossetians did not have the same acknowledged depth of autonomy as the Abkhazians but were nevertheless externally accepted by the Soviet Union and the Georgian SSR as having sufficient distinctive identity as a people. Nevertheless their self-identity appears to be as South Ossetians (though possibly as Ossetians, in that they have a link with North Ossetians).[81] It is clear that the external acceptance, the passing of legislation and practices in the area are all supportive of the position that both the Abkhazians and the South Ossetians are people with a right of self-determination.

External self-determination

Both Georgia and Russia are parties to all the major international treaties that protect the right of self-determination, and so accept the right to self-determination as an international legal obligation. International law generally requires, outside the colonial context, that internal self-determination is the first method of exercise of the right of self-determination. The reason for this is primarily because of the principle of the territorial integrity of the existing state. Security Council Resolution 1808 (2008) made this clear when it affirmed 'the sovereignty, independence and territorial integrity of Georgia within its internationally recognised borders'.

However, as noted above, this principle does not apply where a state is not allowing internal self-determination. There was some significant internal self-determination of Abkhazia and South Ossetia, at least until the early 1990s. Since that time, there have been actions by the central

Georgian government that can be seen to limit the exercise of internal self-determination, including by restricting South Ossetian language use. The issue is, therefore, whether there are exceptional circumstances sufficient to warrant overcoming the principle of territorial integrity.

It is only in exceptional circumstances that the people of part of an existing state who have had internal self-determination can exercise their rights by external self-determination. These exceptional circumstances may include the dissolution of a state, as happened in the former Yugoslavia, and possibly where the scale of the ongoing violations of the right of self-determination (and other rights) is such that external self-determination is a 'last resort' as all other means of exercise of the right have been tried and have failed.[82]

Even in those exceptional circumstances, the peoples must respect the rights of others. For example, in the *Québec* opinion, the Canadian Supreme Court noted that the rights of the indigenous ('aboriginal') peoples in the province were also affected by the right of self-determination of the Québécois:

> We ... acknowledg[e] the importance of the submissions made to us respecting the rights and concerns of aboriginal peoples in the event of a unilateral secession, as well as the appropriate means of defining the boundaries of a seceding Québec with particular regard to the northern lands occupied largely by aboriginal peoples. However, the concern of aboriginal peoples is precipitated by the asserted right of Québec to unilateral secession.[83]

The Court not only acknowledged the rights of the indigenous people but also accepted the human rights and constitutional rights of other parts of Canada. It determined that, even if there had been a clear majority of the people of Québec who wished to secede, they could not do so without negotiations with the other parts of Canada. However, this does not necessarily give a permanent veto power to the other parts of Canada, as the internal right of self-determination of the people of Québec must not be oppressively restricted. Nevertheless, as noted above, it is essential that all minority rights (and the human rights of all) must be fully respected and guaranteed by all peoples exercising the right of external self-determination.

The August 2008 conflict, and the violations that occurred during it, must be considered in this perspective. The IIFFMCG Report determined that the state of Georgia was responsible for the escalation of the conflict and it must share the responsibilities for the serious human

rights violations, including civilian casualties, which resulted from this conflict.[84] In relation to the use of force by Georgia, the general international legal position is set out in the Declaration on Principles of International Law:

> Every State has the duty to refrain from any forcible action which deprives peoples referred to above in the elaboration of the present principle of their right to self-determination and freedom and independence.[85]

So a state cannot use disproportionate force against a people seeking the right of self-determination. It is also the case that the Geneva Convention Protocols 1977 extend to wars of national liberation, being 'armed conflicts which peoples are fighting against colonial domination and alien occupation and against racist regimes in the exercise of their right of self-determination'.[86]

Although the 2008 Caucasus conflict has ceased, tension in the region remains high; another armed conflict is plausible, and a large number of internally displaced persons remain.[87] There has been attempts to put into place interim measures that would replace the Russian military forces and border guards in Abkhazia and South Ossetia by certain international presences, but the current negotiations indicate that there is 'no progress in working out solid security guarantees for Abkhazia and South Ossetia on the Geneva discussions'.[88]

Nevertheless, a situation of tension does not, by itself, provide an exceptional circumstance of a last resort to enable a people to exercise their right of self-determination by external self-determination methods. In this instance, there must be negotiations in good faith between the government of Georgia and representatives of the peoples of Abkhazia and South Ossetia. This would place a responsibility on Georgia to guarantee in law and practice that the peoples of Abkhazia and South Ossetia will have significant autonomy over their regions, perhaps by using a form of federalism, as an exercise of their right of internal self-determination. Where this guarantee is made and fully carried out (preferably with international monitoring) then the right of external self-determination does not arise. Further, external self-determination could not be exercised in this situation where the peoples who may be seeking such exercise refused to negotiate in good faith. If such a guarantee was given by Georgia, then the representatives of Abkhazia and South Ossetia would also need to guarantee in law and practice that they would protect the rights of minorities (including

ethnic Georgians) in their regions and allow all internally displaced peoples (if they so wished) to return to the regions.[89]

If, and only if, all negotiations carried out in good faith break down, and all avenues of resolution were truly exhausted – which is not yet the situation here – then the peoples may be able to exercise their right of external self-determination. If this happens then external self-determination does not need to be by secession/independence. For example, there could be exercise of a free association with Georgia or with Russia in which Abkhazia and South Ossetia have sovereignty over all matters except over their defence and foreign affairs, or the possibility of the merging of South and North Ossetia into a single autonomous region within Russia. Should any of these forms of exercise of external self-determination occur, it is essential that there is a full and appropriate consultation of the peoples, including taking into account the wishes of ethnic Georgians in the regions (some of whom may have left the regions due to the conflict).[90]

Russia and the right of self-determination in Abkhazia and South Ossetia

Request to support peoples exercising the right of self-determination

The peoples of Abkhazia and South Ossetia are entitled to support from other states when forcible action occurs against them as a people seeking to exercise their right of self-determination. This is clear from the Declaration on Principles of International Law:

> Every State has the duty to refrain from any forcible action which deprives peoples referred to above in the elaboration of the present principle of their right to self-determination and freedom and independence. In their actions against and resistance to such forcible action in pursuit of the exercise of their right to self-determination, such peoples are entitled to seek and to receive support in accordance with the purposes and principles of the Charter of the United Nations.[91]

The support that these peoples can receive must be in accordance with the purpose and principles of the UN Charter. This would ensure that the general principles of the use of force, such as proportionality, necessity and consent are applied.[92] However, action by a state that was effectively an occupation of the territory of the entity or the use of force

by that state that was disproportionate would fall outside the principles of the UN Charter.

In this situation, Russia assisted the peoples of Abkhazia and South Ossetia when force was used against them by Georgia in relation to their exercise of the right of self-determination. The initial actions by the Russian troops in protecting the Abkhazians and South Ossetians could be considered being consistent with international law as these actions were in response to the support requested by these peoples.[93]

However, this support must remain in accordance with the purposes of the United Nations and international law (as noted by the Russian President in the opening epigraph). What occurred was that Russian military forces fought over territory that was well outside the Abkhazia and South Ossetia regions, and remained in those regions once the immediate need for protection has ceased.[94] As James Green argues in the next chapter of this volume, this is contrary to the UN Charter principles and so amounted to a breach of international law.

Support for self-determination forces

Russia maintained a militarised presence in the relevant entities for many years, and also provided substantial military and financial support to the South Ossetians and the Abkhazians.[95] Such substantial military, financial and other support to peoples seeking the right of self-determination could mean that Russia is internationally legally responsible for breaches of human rights by those peoples during the conflict. This was held by the European Court of Human Rights in *Ilaşcu v Moldova and Russia*,[96] in relation to violations of human rights that occurred in Transdniestria, a region of Moldova under the control of a group calling itself the 'Moldavian Republic of Transdniestria' (MRT), which was seeking external self-determination. One of the claims before the Court was that Russia had been assisting and supporting the MRT through military and political means. When considering the responsibility of Russia, the Court took into account the history of the situation in which Russia had given long-term military and political support to the MRT, which included its participation in the fighting to help the MRT set up their regime. As a result, the Court held that:

> All of the above proves that the 'MRT', set up in 1991–1992 with the support of the Russian Federation, vested with organs of power and its own administration, remains under the effective authority, or at the very least under the decisive influence, of the Russian Federation, and in any event that it survives by virtue of the military,

economic, financial and political support given to it by the Russian Federation.[97]

Thus the Court held that the acts of the MRT were attributable to Russia, and Russia was in breach of its obligations under the European Convention on Human Rights (ECHR).[98] It would appear that Russia has provided very similar support to the peoples of Abkhazia and South Ossetia, and so it would be responsible for violations of the ECHR by those peoples.

There are a range of other issues that raise international legal concerns about the extent to which Russia may have interfered in the territorial sovereignty of Georgia while supporting the peoples of Abkhazia and South Ossetia. These include the recognition by Russia of Abkhazia and South Ossetia as separate states from Georgia, the granting of Russian passports to people in those regions, and actions in Russia against Georgians.[99] However, these are issues that are outside the scope of this chapter.

The Caucasus and International Legal Order

It is clear that the peoples of Abkhazia and of South Ossetia have a right of self-determination. They have exercised this right through internal self-determination for many decades, albeit with some interruption and, more recently, through ceasefires after armed conflict. An exceptional circumstance of a last resort to enable them to exercise their right of external self-determination has not yet arisen, as there must first be full negotiations in good faith with the central Georgian government, in case a guarantee of their full internal self-determination over their regions is achievable. Representatives of the peoples of Abkhazia and South Ossetia (and Adjara, if they wish) must be fully involved in any discussions (and caucuses) to resolve this situation, and the international community can assist in this. If a last resort situation does arise in the future, then there is a range of methods of exercise of external self-determination that are possible, and not only secession/independence.

The role of Russia is also important in any long-term solution. While the initial support by Russia to the Abkhazians and South Ossetians to resist the use of force by Georgia against them was in accordance with international law, the breadth, depth and extent of their subsequent actions meant that they did not remain within the parameters of international law. Russia may also be internationally responsible for violations of human rights (and probably also violations of international

humanitarian law) by the Abkhazian and South Ossetian forces, both during the conflict and subsequently, for which they provide substantial military and financial support. There are also many other regions within Russia where peoples seek to exercise their right of self-determination for which this situation will be seen as a precedent and not as *sui generis*.

Indeed, the situation raises the broader question of how to apply the right of self-determination in the international system. David Milliband, the United Kingdom Foreign Secretary at the time of the armed conflict in August 2008, wrote:

> The Georgian crisis is about more than vital issues of humanitarian need and rule of law over rule of force. It raises a fundamental issue of whether, and if so how, Russia can play a full and legitimate part in a rules-based international political system, exercising its rights but respecting those of others.[100]

This is a good and appropriate question to ask. One reassurance here is that Russia used international law as its primary justification for its actions, as seen in the statement of its President at the start of this chapter. Russia did so carefully and accurately, even if its actions on the ground did not always match its international statements. This is important because, if a rules-based international order is to be a strong framework of the international system, then international law, including the right of self-determination, needs to be treated seriously as law and not just as a 'handmaiden' to international politics.[101]

There will be other pressures that may also be relevant to ensuring a rules-based international order. Economic pressures will ensure that most states recognise that a state that has a rule of law provides order and stability, transparency, good governance, justice and accountability, which will attract commercial investment, and other states' engagement.[102] This is especially the case in the Caucasus region with its oil and other energy resources. It is the same at the international level as:

> The protection of the interests of all states and the creation of international stability requires that state-to-state relations be subject to a long-term framework [of an international rule of law], which ensures that international law is applied in conformity with principles of justice ... [and enables states to have a] stable, safe and predictable world in which they can better pursue their political and economic goals.[103]

Therefore, it is essential that the situation in the Caucasus is resolved in accordance with the principles of the UN Charter and international law, with full respect for the right of self-determination.

Notes

1. Statement by Russian President, Dmitry Medvedev, to the Russian people, 26 August 2008, as translated in *The Financial Times* (United Kingdom) (26 August 2008).
2. The relevant Presidential Decrees are 1260 (recognising Abkhazia); and 1261 (recognising South Ossetia), online: http://kremlin.ru/doc.asp?ID=047559; and http://kremlin.ru/doc.asp?ID=047560.
3. Russia ratified both the ICESCR and the ICCPR on 16 October 1973 without relevant declarations or reservations for these purposes.
4. See the lengthy statement by the Georgian government to the Independent International Fact-Finding Mission on the Conflict in Georgia (IIFFMCG), IIFFMCG Report (30 September 2009), Volume III, 5–330, online: http://www.ceiig.ch/Report.html. See also the statement by David Milliband, United Kingdom Foreign Secretary, *The Times* (19 August 2008), in which he stated that '[i]nternational law must be obeyed'.
5. Much of the material in this section and the next section is based on R. McCorquodale (2010) 'Group Rights' in D. Moeckli, S. Shah and S. Sivakumaran (eds) *International Human Rights Law* (Oxford: Oxford University Press).
6. See W. Wilson (1918) *War Aims of Germany and Austria*, reproduced in R. Baker, W. Dodd and H. Leach (eds) (1927) *The Public Papers of Woodrow Wilson: War and Peace* (New York: Harper & Brothers), p. 177; and V. Lenin (1950) *The Right of Nations to Self-Determination* (Moscow: Foreign Languages Pub. House), whose views were supported by the new Bolshevik government in Russia in 1917 (see T. Musgrave (1997) *Self-Determination and National Minorities* (Oxford: Oxford University Press), p.17–22).
7. UN Charter, Article 1(2).
8. Declaration on Principles of International Law Concerning Friendly Relations and Co-operation Among States in Accordance with the Charter of the United Nations, Annex to GA Res. 2625(XXV), UNGAOR, 25th Sess., Supp. No. 18, UN Doc. A/8018, adopted without a vote on 24 October 1970 (Declaration on Principles of International Law), section on 'The principle of equal rights and self-determination of peoples', opening para.
9. See, for example, the UN Human Rights Committee (HRC) views in *Ominayak and Lake Lubicon Band v Canada*, Annual Report of the Human Rights Committee, UN Doc. A/45/40 Vol II, Annex IX (1990), p.1.
10. See also Article 20 of the African Charter of Human and Peoples' Rights 1981, 21 I.L.M. 58 (1982).
11. Declaration on Independence for Colonial Countries and Peoples 1960, GA Res. 1514 (XV) (14 December 1960), Preamble.
12. *Namibia* opinion [1971] I.C.J. Rep. 16, para. 52. See also *Western Sahara* case [1975] I.C.J. Rep. 12, paras. 54–55; and per Judge Dillard at p.121.

13. See, for example, the statement by the United Kingdom's representative in the Security Council on 25 May, 1982, (1983) *British Yearbook of International Law*, 54, 371–372.
14. See, for example, A. Cassese (1995) *Self-Determination of Peoples: A Legal Appraisal* (Cambridge: Cambridge Univeristy Press), p.140; and J. Crawford (2002) *The International Law Commission's Articles on State Responsibility: Introduction, Text and Commentaries* (Cambridge, Cambridge University Press) in relation to Article 41.
15. Treaty on the Final Settlement With Respect to Germany 1990, 29 I.L.M. 1186 (1990).
16. See, for example, the terms of the European Community's 'Declaration on Yugoslavia and its Declaration on the Guidelines on Recognition of New States in Eastern Europe and the Soviet Union', 16 December, 1991, 31 I.L.M. 1486 (1992).
17. *Advisory Opinion on the Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory* [2004] I.C.J. Rep., paras. 118 and 122.
18. *East Timor* case [1995] I.C.J. Rep. 90, para. 29. The HRC also requires all states party to the ICCPR to report on their protection of the right of self-determination: HRC General Comment 12 (1984), para. 3.
19. Declaration on Principles of International Law, *supra* note 8.
20. See, for example, the Final Report and Recommendations of an International Meeting of Experts on the Further Study of the Concept of the Right of People for UNESCO, 22 February, 1990, SNS–89/CONF. 602/7. See also R. Kiwanuka (1988) 'The Meaning of "People" in the African Charter of Human and Peoples' Rights', *American Journal of International Law*, 82, 80.
21. E. Kamenka (1988) 'Human Rights, Peoples' Rights' in J. Crawford (ed.) *The Rights of Peoples* (Oxford: Clarendon Press), p.133. See also P. Allott (1992) 'The Nation as Mind Politic', *New York University Journal of International Law and Politics*, 24, 1361.
22. C. Chinkin and S. Wright (1993) 'Hunger Trap: Women, Food and Self-Determination', *Michigan Journal of International Law*, 14, 262 propose, at p.306, that 'food, shelter, clean water, a healthy environment, peace and a stable existence must be the first priorities in how we define or "determine" the "self" of both individuals and groups, instead of the present definitions, which are based on masculinist goals of political and economic aggrandizement and aggressive territoriality'.
23. See J. Crawford (2006) *The Creation of States in International Law*, 2nd edn (Oxford: Oxford University Press), p. 434–448; and V. Kattan (ed.) (2008) *The Palestinian Question in International Law* (London: British Institute of International and Comparative Law).
24. See M. Weller (2009) 'Settling Self-Determination Conflicts: Recent Developments', *European Journal of International Law*, 20, 111.
25. Declaration on Principles of International Law, *supra* note 8.
26. For example, the British and the Italian Somaliland colonies joined into one state of Somalia, and one part of the British colony of Cameroon merged with the French colony of Cameroun to form the new state of Cameroon and the remaining part joined with the existing state of Nigeria.

27. Helsinki Final Act 1975, Principle VIII (emphasis added), Organization for Security and Co-operation in Europe, online: http://www.osce.org/documents/mcs/1975/08/4044_en.pdf.
28. Declaration on Principles of International Law, *supra* note 8.
29. *Reference Re Secession of Québec*, [1998] 2 S.C.R. 217, 37 I.L.M. 1342 (1998), Supreme Court of Canada, para. 136 (*Québec* opinion).
30. Cassese, *supra* note 14, 332.
31. For details of these and other exercises, see Weller, *supra* note 24, 111.
32. *Québec* opinion, *supra* note 29, paras. 112 and 126.
33. See *Aaland Islands* opinion, International Committee of Jurists, (1920) L.N.O.J. Spec. Supp. 3; and *Loizidou v Turkey* 23 E.C.H.R. 513 (1997) per Judges Wildhaber and Ryssdal.
34. *Western Sahara* case, *supra* note 12, para. 55.
35. Badinter Committee, opinion 4, 31 I.L.M. (1992) 1502, para. 4.
36. Referendum in the Soviet Union of 17 March 1991, Commission on Security and Co-operation in Europe, online: http://csce.gov/index.cfm?FuseAction=UserGroups.Home&ContentRecord_id=443&ContentType=G&ContentRecordType=G&UserGroup_id=101&Subaction=Reports&CFID=95720&CFTOKEN=1. See also, Centre for Russian Studies, online: http://www2.nupi.no/russland//elections/March91_ref_1.html. Note that Georgia did not participate in this referendum but held its own referendum on 31 March 1991. See the Decree issued by the Supreme Council of the Republic of Georgia on 'Organization and Holding the Referendum on Preservation of the USSR' issued by the Supreme Council of the USSR, online: http://www.parliament.ge/files/1_933_840995_13.pdf.
37. See, for example, common Article 5(1) of the ICCPR, 19 December 1966, 999 U.N.T.S. 171; and ICESCR, 19 December 1966, 993 U.N.T.S. 3.
38. Declaration on Principles of International Law, *supra* note 8.
39. *Frontier Dispute Case* (*Burkina Faso v. Mali*) [1986] I.C.J. Rep. 554 (Chamber of the ICJ), para. 25.
40. Badinter Committee, opinion 2, 31 I.L.M. (1992) 1497, para. 1.
41. Malcolm Shaw (1986) *Title to Territory in Africa* (Oxford: Clarendon Press), p. 51.
42. For histories of the regions, see, for example, K. Salia (1983) *History of the Georgian Nation* (Paris: N. Salia); and R. Suny (1994) *The Making of the Georgian Nation* (Bloomington: Indiana University Press).
43. Also written as Ajara or Ajaria.
44. See the USSR Constitution of 7 October 1977, Article 82, online: http://www.servat.unibe.ch/icl/r100000_.html.
45. See *ibid*., Article 83 and Article 84.
46. See *ibid*., Article 87(2) and Article 88. Note that 'South Ossetia' does not correspond directly to one of the specific regions within Georgia but covers parts of several regions. It is mostly situated within the northern part of the Shida-Kartli region (in particular the northern district of Java, Kareli and Gori) and smaller parts of neighbouring regions (Racha-Lochhumi and Kverno Svaneti, Imereti and Mtskheta-Mtianeti).
47. Law of the Republic of Georgia on Abolition of the Autonomous Region of South Ossetia of 11 December 1990, online: http://www.parliament.ge/files/426_5649_580559_10.pdf.

48. For more details see the Declaration of the Military Council of the Republic of Georgia, online: http://www.parliament.ge/files/1_5718_330138_27.pdf last accessed 12 July 2010.
49. The Constitution of the Soviet Socialist Republic of Abkhazia of 1 April 1925, Article 4, online: http://www.abkhaz.org/index2.php?option=com_content&do_pdf=1&id=147. Article 5 states that: 'The Abkhaz SSR is a sovereign state, which exercises state authority on its territory independently from any other powers.'
50. See Annual Report of the Secretary-General on the work of the UN 1995, United Nations, online: http://www.un.org/docs/SG/SG-Rpt/ch4d-10.htm.
51. The Law of the Autonomous Republic of Adjara on Structure, Authorities and Rules for Activities of Government of Autonomous Republic of Adjara, online: http://www.adjara.gov.ge/eng/index.php?page=law last accessed 12 July 2010. This provides that the head of the region's government, the Council of Ministers of Adjara, is nominated by the President of Georgia, who can dissolve the Adjaran assembly and government, and overrule local authorities when their measures are contrary to the constitution of Georgia. See also R. Giragosian, 'Crisis in Ajaria: The Military Dimension', Central Asia – Caucasus Institute and the Georgian Forum (May 2004), online: http://iicas.org/2004en/07_05_04_fr_en.htm.
52. Agreement of 24 June 1992, as noted, for example, in Annex 2 of the 17th CSO Meeting of 6 November 1992, Journal No. 2.
53. Update Report No. 2 on Georgia (12 August 2008), Security Council Report, online: http://www.securitycouncilreport.org/site/c.glKWLeMTIsG/b.4423477/k.DB51/Update_Report_No2brGeorgiabr12_August_2008.htm; and see Memorandum on Measures to Provide Security and Strengthen Mutual Trust Between Sides in the Georgian–Ossetian Conflict (17 April 1996), online: http://www.mtholyoke.edu/acad/intrel/georosse.htm.
54. There was also an Agreement between Georgia and Abkhazia: the 'Declaration on Measures for a Political Settlement of the Georgian-Abkhaz Conflict' (4 April 1994), which contained a formal ceasefire accord and a commitment not to use force against each other: see the Letter dated 17 May 1994 from the Permanent Representative of Georgia to the United Nations Addressed to the President of the Security Council, UN Doc. S/1994/583, United Nations Observer Mission in Georgia, online: http://www.unomig.org/data/moscow_agreement.pdf.
55. See Security Council Resolution 858, UN Doc. S/RES/858 (1993). See also Security Council Resolutions 934, UN Doc. S/RES/934 (1994); and 937, UN Doc. S/RES/937 (1994). UNOMIG ceased its activity in June 2009 following a veto exercised by Russia, United Nations, online: http://www.un.org/en/peacekeeping/missions/past/unomig/.
56. The Boden Document on the Principles for Division of Competences between Tbilisi and Sukhumi, Office of the State Minister for Reintegration, online: http://smr.gov.ge/en/abkhazia/documents/bodens_document.
57. This group included France, Germany, Russia, the United Kingdom and the United States, and were called 'Friends of the UN Secretary-General' after 1997.
58. See the 12 October 1999 Declaration of the Abkhazia representatives, Unrepresented Nations and Peoples Organization, online: http://www.unpo.org/content/view/705/236/.

59. S. Ostrovsky, 'Thumbs Up for Independence in Separatist Georgian Region', *Agence France-Presse* (13 November 2006).
60. See IIFFMCG Report, *supra* note 4, Volume II, 6.
61. See *ibid*. which also notes that this support was not always consistent.
62. The IIFFMCG Report states that this Russian policy took place 'on a massive scale', *ibid*., Volume II, 8. By granting this nationality, it arguably provided a basis for Russia's intervention on Georgian territory, as Russia was then acting to protect its own citizens. For more on this issue, see the discussion by James Green in Chapter 3.
63. There were no Security Council resolutions directly on South Ossetia, primarily due to the threat of veto by Russia.
64. See European Union Monitoring Mission in Georgia, online: http://www.eumm.eu/en/about_eumm.
65. The IIFFMCG was established by European Union Council Decision 2008/901/CFSP of 2 December 2008 concerning an independent international fact-finding mission on the conflict in Georgia, Official Journal of the European Union 323/66.
66. See Presidential Decrees, *supra* note 2.
67. See the United Kingdom's Written Statement to the ICJ on its *Advisory Opinion on Kosovo*, (17 April 2009), para. 4.12.
68. See Russia's Written Statement to the ICJ on its *Advisory Opinion on Kosovo*, (16 April 2009).
69. See Statement by the Russian President, *supra* note 1: 'We repeatedly called for returning to the negotiating table and did not deviate from this position of ours even after the unilateral proclamation of Kosovo's independence.'
70. General Assembly Resolution 63/3, UN Doc. A/63/L.2 (8 October 2008).
71. Written Statement by government of Kosovo to the ICJ on its *Advisory Opinion on Kosovo*, (17 April 2009), 157–158.
72. See EC Declaration on Guidelines on the Recognition of New States, *supra* note 16, which provides that there must be 'guarantees for the rights of ethnic and national groups and minorities in accordance with the commitments subscribed to in the framework of the CSCE'. This was applied by the Badinter Committee in its various opinions.
73. Badinter Committee, opinion 11, 32 I.L.M. (1993) 1587, para. 2.
74. UN Security Council, Letter dated 26 March 2007 from the Secretary-General to the President of the Security Council, S/2007/168, 3.
75. *Ibid*., 2. There are an array of views on the Kosovo declaration of independence, see, for example, B. Jia (2009) 'The Independence of Kosovo: A Unique Case of Secession' 8 *Chinese Journal of International Law*, 27; D. Fierstein (2008) 'Kosovo's Declaration of Independence', *Boston University International Law Journal*, 26, 417; and J. Vidmar (2009) 'The International Legal Responses to Kosovo's Declaration of Independence', *Vanderbilt Journal of Transnational Law*, 42, 779.
76. See, for example, the United Kingdom's Written Statement to the ICJ on its *Advisory Opinion on Kosovo*, *supra* note 67, paras. 0.17–0.27; and France's Written Statement to the ICJ on its *Advisory Opinion on Kosovo* (7 April 2009), paras. 2.16–2.39.
77. *Québec* opinion, *supra* note 29.

78. See R. Müllerson (2009) 'Precedents in the Mountains: On the Parallels and Uniqueness of the Cases of Kosovo, South Ossetia and Abkhazia', *Chinese Journal of International Law*, 8, 2; and O. Corten (2008) 'Déclarations unilatérales d'indépendence et reconnaissances prématurées: du Kosovo, à L'Ossétie du sud et à L'Abkazie', *Revue générale de droit international publi*c, 112, 721 (and response by P. Weckel (2009) *Revue générale de droit international public*, 113, 257).
79. See, for example, Minority Rights Group International, *World Directory of Minorities and Indigenous Peoples – South Ossetia: Overview*, 2007, online: http://www.unhcr.org/refworld/docid/4954ce12c.html.
80. IIFFMCG Report, *supra* note 4, Volume II, 35. The Report concluded that neither entity should yet be recognised as states as 'the preconditions for statehood are not met'.
81. See *ibid*., Volume II, 129: 'South Ossetia itself had not unambiguously and consistently claimed to be a state: on the one hand the South Ossetian authorities have sought to be recognised as a sovereign and independent state, but on the other hand they have also advocated unification with North Ossetia through integration into Russia.'
82. See also R. Wilde, 'Kosovo: International Law and Recognition', Chatham House meeting, (22 April 2008), 10–11, who notes that such serious breaches of human rights need to be ongoing, as the right to self-determination may not be granted as a form of remedy for past violations, no matter how severe.
83. *Québec* opinion, *supra* note 29, para. 139.
84. IIFFMCG Report, *supra* note 4, Volume II, 231, 236.
85. Declaration on Principles of International Law, *supra* note 8.
86. *Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts* (Protocol I), 8 June 1977, 1125 U.N.T.S. 3, Article 1(4).
87. It is estimated that there are over 220,000 internally displaced persons who have fled the regions since the early 1990s due to the conflict: 'Protection of Internally Displaced Persons in Georgia: A Gap Analysis' (July 2009), UNHCR, online: http://www.unhcr.org/4ad827f59.html. See also the Institute for War and Peace Reporting, *Georgian Conflict Exploitation Concerns* (24 December 2009), CRS No. 525 and General Assembly Resolution 62/249, UN Doc. A/RES/62/249 (29 May 2008). For a detailed examination of the issue of forced displacement following the 2008 conflict, see the contribution by Anneke Smit in Chapter 6.
88. See the declaration of Russia's permanent representative to the OSCE, as reported online: http://www.abkhaziagov.org/en/news/detail.php?ID=28090. See also the IIFFMCG Report, *supra* note 4, Volume I at 38.
89. On the number of internally displaced persons resulting from the conflict, see *supra* note 87.
90. The practice during the dissolution of Yugoslavia varied considerably. In Bosnia-Herzegovina, it was assumed that 50% plus one was sufficient and a boycott by the Serbian population (who comprised over 30% of the population) did not affect the result with over 60% of all those eligible to vote in favour of independence. In Montenegro the EU stated that there had to be majority of 55% of votes cast and there had to be a participation of at least

50% plus one of those eligible to vote. This required majority was probably based on the opinion polls suggesting that approximately half of the population supported independence while a relatively large share of the population strongly opposed it. See 'Crnogorsko javno mnjenje uoči referenduma' (23 December 2000), online: http://www.aimpress.ch/dyn/pubs/archive/data/200012/01223–005-pubs-pod.htm. Our thanks to Jure Vidmar for this reference.

91. Declaration on Principles of International Law, *supra* note 8, section on 'the principle that States should refrain in their international relations from the threat or use of force'.
92. *Ibid*.
93. IIFFMCG Report, *supra* note 4, Volume II, 256: 'the Russian invasion itself did not occur prior to the Georgian operation and therefore did not constitute an armed attack in the sense of Art. 51 [of the UN Charter]'.
94. *Ibid*., Volume II, 263: '[R]ussia was involved in the conflict in several ways. First, Russian peacekeepers who were stationed in South Ossetia on the basis of the Sochi Agreement were involved in the fighting in Tskhinvali. Second, Russian regular troops were fighting in South Ossetia, Abkhazia and deeper in Georgian territory. Third, North Caucasian irregulars took part in the fighting.'
95. *Ibid*., Volume II, 263: 'Russia supported Abkhaz and South Ossetian forces in many ways, especially by training, arming, equipping, financing and supporting them.'
96. *Ilaşcu v Moldova and Russia*, no. 48787/99 (8 July 2004), European Court of Human Rights, online: http://www.echr.coe.int/echr/en/hudoc/.
97. *Ibid*., para. 394.
98. *Ibid*., paras. 392–394.
99. There is a current claim brought by Georgia against Russia to the European Court of Human Rights concerning the arrest, detention and collective expulsion of Georgian nationals from the Russian Federation, no. 13255/07 (26 March 2007). There is also a case brought by Georgia against Russia to the ICJ, being the *Case Concerning Application of the International Convention on the Elimination of All Forms of Racial Discrimination* (*Georgia v Russian Federation*), *Request for the Indication of Provisional Measures*, Order of 15 October 2008, para. 3, International Court of Justice, online: http://www.icj-cij.org/docket/files/140/14801.pdf. In Chapter 4, Sandy Ghandhi provides a detailed examination of the provisional measures order.
100. Milliband, *supra* note 4.
101. See P. Alston (1997) 'The Myopia of the Handmaidens: International Lawyers and Globalization', *European Journal of International Law*, 8, 435; and response by S. Scott (1998) 'International Lawyers: Handmaidens, Chefs, or Birth Attendants? A Response to Philip Alston', *European Journal of International Law*, 9, 750.
102. A. Gerson (2001) 'Peace Building: The Private Sector's Role', *American Journal of International Law*, 95, pp. 101, 111.
103. A. Watts (1993) 'The International Rule of Law', *German Yearbook of International Law*, 36, pp. 15, 25, 41.