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# The Kosovo Precedent and the 'Moral Hazard' of Secession

NINO KEMOKLIDZE\*

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## I. Introduction

Kosovo's declaration of independence on 17 February 2008 and the support it has received from the overwhelming majority of Western countries has raised some serious concerns in many parts of the world where states suffer from protracted secessionist movements. Azerbaijan, Georgia, Moldova, and Russia have been particularly alarmed by Kosovo's Western-backed quest for full independence from Serbia as they face secessionist tendencies within

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\* Nino Kemoklidze is a PhD Candidate at the Centre for Russian and East European Studies (CREES), The University of Birmingham, UK. Her PhD work concerns problems of nationalism and ethnic violence in Georgia. The research upon which this article is based was conducted at the Australian National University. The author wishes to express her thanks to anonymous referees of the journal for their most valuable comments on earlier versions of this article as well as journal editors for their most generous editorial assistance. Many thanks and deepest appreciation for their most helpful feedback are also due to Dr. Heather Rae, Dr. Paul Keal, Dr. Murielle Gozette, Steven de Klerk, Katharina Hoffmann, Keah Molomby, Laurence Cooley, William Francis, Heidi Hutchison, Michele Acuto, Madalina Nan, Daniel Schuurman. Last but not least she would like to thank those who provided her with comments and constructive criticism on this paper at various conferences during February-July 2009. Needless to say, the views (and any errors) expressed here are those of the author alone.

their own state boundaries. Political analysts in these countries and elsewhere<sup>1</sup> have argued that Kosovo will have a 'demonstration effect' and will set a precedent for other secessionist movements in different parts of the world.<sup>2</sup>

As recent developments in the Caucasus have demonstrated, these fears are not altogether irrational. Following the Georgian-Russian military confrontation in August 2008, on 26 August, Russian President Dmitry Medvedev signed a decree officially recognizing the independence of Georgia's two break-away regions—South Ossetia and Abkhazia.<sup>3</sup> 'The peoples of South Ossetia and Abkhazia have every right to gain independence,' declared the Federation Council speaker Sergei Mironov one day earlier, 'and one of the main legal principles for recognizing independence is the fundamental principle of international law—the right of people to self-determination.'<sup>4</sup>

However, in addition to evoking the ideas of 'the free will of the people' and 'the right of peoples to self-determination' to justify their recognition of Georgia's breakaway territories, Russian officials have also emphasized the importance of what the academic literature on self-determination and secession identifies as the 'remedial' right to secession—secession justified as

<sup>1</sup> Among others in Cyprus, Greece, Romania, Slovakia, and Spain—the member states of the European Union (EU) that have not recognised Kosovo's independence.

<sup>2</sup> The claim of precedent is that Kosovo would be 'the first subfederal unit of the communist federations [Czechoslovakia, Yugoslavia and the USSR] to be considered for international recognition'; Rick Fawn, 'The Kosovo—and Montenegro—Effect' (2008) 84 Int'l Affairs 269 at 280 [Fawn]. Before that, 'only entities named as republics within these three federations have gained international recognition'; thus, analysts fear that Kosovo 'will create a universal standard that can and must be applicable to other such entities'; *ibid.* at 280-1. They further fear that a proliferation of secessions would lead to 'balkanization'—an emergence of small, weak states, which could destabilise the international states system; Lee C. Buchheit, *Secession: The Legitimacy of Self-Determination* (New Haven, Conn.: Yale University Press, 1978) at 28 [Buchheit]. See also: Alexis Heraclides, 'Secession, Self-Determination and Nonintervention: In Quest of a Normative Symbiosis' (1992) 45 J. Int'l Affairs 399 at 408; Christopher Heath Wellman, 'A Defense of Secession and Political Self-Determination' (1995) 24 Phil. & Pub. Affairs 142 at 161; Margaret Moore, 'Introduction: The Self-Determination Principle and the Ethics of Secession' in Margaret Moore, ed., *National Self-Determination and Secession* (Oxford: Oxford University Press, 1998) at 4 [Moore].

<sup>3</sup> 'Russia's President Dmitry Medvedev Recognized the Independence of South Ossetia and Abkhazia' *Pravda* (26 August 2008), online: Pravda <[http://english.pravda.ru/russia/kremlin/26-08-2008/106214-russia\\_ossetia\\_abkhazia-0](http://english.pravda.ru/russia/kremlin/26-08-2008/106214-russia_ossetia_abkhazia-0)> [Pravda].

<sup>4</sup> 'Russian Parliament Recognizes South Ossetia, Abkhazia Independence' *Huliq* (25 August 2008), online: HuliqNews <<http://www.huliq.com/5/66830/russian-parliament-recognizes-south-ossetia-abkhazia-independence>>.

a remedy to certain injustice(s).<sup>5</sup> Accusing Georgia's President Mikheil Saakashvili of ethnic cleansing and genocide of ethnic Ossetians, President Medvedev claimed this to be one of the primary justifications of his decision to recognize South Ossetian and Abkhazian independence. 'Saakashvili chose genocide to fulfil his political plans,' said Medvedev, 'Georgia chose the least human way to achieve its goal—to absorb South Ossetia by eliminating a whole nation.'<sup>6</sup>

The rhetoric of the Russian political establishment regarding Georgian 'genocide' and 'ethnic cleansing' of Ossetians during the August 2008 events is not surprising.<sup>7</sup> Since the 1990s, there has been an 'attempt to link recognition of new states to the protection of human rights and specific guarantees for minorities.'<sup>8</sup> As a result, there has also been 'a change in the legitimising strategy adopted by the leaders of unrecognised states'<sup>9</sup> as well as by the leaders of the states who are willing to recognize them. Before, the claims to independent statehood were mainly justified based on the right to national self-determination with an emphasis on 'communal identity and

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<sup>5</sup> The most prominent advocate of this right is Allen E. Buchanan who has coined the term Remedial Right Only theories of secession. See, for instance his *Secession: The Morality of Political Divorce from Fort Sumter to Lithuania and Quebec* (Boulder, Colo.: Westview, 1991) and 'Theories of Secession' (1997) 26 Phil. & Pub. Affairs 30 [Buchanan 1997]. Remedial Right Only theorists emphasize different sets of injustices in order to justify a group's right to remedial secession. Along with human rights grievances, they also point to the importance of certain historical, economic, and cultural grievances. Among others, see Anthony H. Birch, 'Another Liberal Theory of Secession' (1984) 32 Pol. Studies 596 at 599 [Birch]; Lea Brilmayer, 'Secession and Self-Determination: A Territorial Interpretation' (1991) 16 Yale J. Int'l L. 177 at 189; Anthony Matthew, 'Bougainville and Papua New Guinea: Complexities of Secession in a Multi-Ethnic Developing State' (2000) 48 Pol. Studies 724.

<sup>6</sup> Pravda, *supra* note 3. Although there was no full-blown military confrontation in Abkhazia in the summer 2008 (though some analysts were predicting violence in Abkhazia as opposed to South Ossetia), Russia's recognition of Abkhazian independence can be considered as a 'preventive' action so that Abkhazia 'would never again have to endure what he [Medvedev] described as oppressive Georgian rule'; Clifford J. Levy, 'Russia Backs Independence of Georgian Enclaves' *The New York Times* (26 August 2008), online: [The New York Times <http://www.nytimes.com/2008/08/27/world/europe/27russia.html>](http://www.nytimes.com/2008/08/27/world/europe/27russia.html) [Levy].

<sup>7</sup> Throughout this article, by 'August events' I refer to the military confrontation in South Ossetia in August 2008 when Georgian armed forces tried to retake control over South Ossetia's capital Tskhinvali, evoking Russian military response and the so-called Five-Day War between these two countries, followed by Russian recognition of South Ossetian and Abkhazian independence as well as its occupation of some of the territories in Georgia proper.

<sup>8</sup> Hurst Hannum, 'Self-Determination, Yugoslavia, and Europe: Old Wine in New Bottles?' (1993) 3 Transnat'l L. & Contemp. Probs 57 at 69.

<sup>9</sup> Nina Caspersen, 'Separatism and Democracy in the Caucasus' (2008) 50 Survival 113 at 114 [Caspersen].

historic continuity.’<sup>10</sup> Increasingly, this argument has been combined with a claim to remedial secession.<sup>11</sup>

The proponents of remedial secession argue that a group has a ‘unilateral right to secede’ (that is ‘the right to secede without consent or constitutional authorization’) if a group’s physical survival is threatened by actions of the state (such as genocide and/or ethnic cleansing) or it suffers ‘continuing’ and ‘drastic’ violations of basic human rights.<sup>12</sup> In this way, according to remedial rights theorists, the international community will be able to better protect the rights of ethnic minorities against state-perpetrated violence.<sup>13</sup>

However, close examination of the cases of Kosovo (formerly Autonomous Province of Kosovo in Serbia) and South Ossetia (a *de facto* autonomous district (*Oblast*) of Georgia) stimulate alternative conclusions based upon the broader consequences and deeper realities of such actions.<sup>14</sup> The question I address in this article is whether, in most cases, the negative consequences of recognizing a right to secession in the twenty-first century outweigh the benefits, suggesting that recognition of such a right should not be allowed.<sup>15</sup> I focus on an internationally *recognized* right to secede (whether

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<sup>10</sup> *Ibid.*

<sup>11</sup> As Cheterian notes, in Kosovo as well, ‘the EU has been arguing that ethnic repression (Serb repression of Kosovo Albanians under Milosevic) justify the legitimacy of a territorial entity, and not ethnic separatism, or national self-determination’; Vicken Cheterian, ‘Impact of Kosovo Recognition on the Caucasus Conflicts’ (2009 forthcoming) at 5, brackets in original [Cheterian 2009 forthcoming].

<sup>12</sup> Allan E. Buchanan, *Justice, Legitimacy, and Self-Determination: Moral Foundations for International Law* (Oxford: Oxford University Press, 2004) at 331 [Buchanan 2004]; Birch, *supra* note 5 at 599; Buchanan 1997, *supra* note 5 at 37. As Buchanan argues, in this case the right to secede is ‘understood as a remedial right only, a last-resort response to serious injustices’; Buchanan 2004 at 331.

<sup>13</sup> Buchanan 2004, *ibid.*

<sup>14</sup> Because the major military stand-off between Russia and Georgia took place in South Ossetia, I limit the focus of this article on that particular case; although the case of Abkhazia will also be mentioned at times throughout the article.

<sup>15</sup> Some scholars use the terms ‘secession’ and ‘partition’ interchangeably; I, however differentiate between them and adopt Kaufmann’s definition of these terms, according to which partition is understood as ‘separation[] jointly decided upon by the responsible powers: either agreed between the two sides (and not under pressure of imminent military victory by one side), or imposed on both sides by a stronger third party’; Chaim Kaufmann, ‘When All Else Fails’ (1998) 23 *Int’l Security* 120 at 125 (parentheses in original). On the other hand, secession is understood ‘as new states created by the unilateral action of rebellious ethnic group’; *ibid.* My main concern in this article is secession and not partition, as defined above.

moral or legal<sup>16</sup>), understood as the right to be *recognized* as a legitimate sovereign state. Thus, when referring to the 'moral hazard' of secession in this article, I refer to the moral hazard of international *recognition* of unilateral secession.

From my investigation I conclude that rather than protecting ethnic minorities from state perpetrated violence, remedial secession may further foster violence by unintentionally creating a so-called moral hazard. By raising expectations that in cases of severe state violence the likelihood of recognizing a group's right to secede from the host state increases, remedial secession may, in fact, unintentionally encourage further violence. Although secession may be morally justified under certain conditions, recognizing this as a group's right could have unintended negative consequences that should not be underestimated.<sup>17</sup>

Of course, the idea of the moral hazard of secession is not new, having been examined in some depth by various scholars; although most of the work in this direction has focused more on humanitarian intervention than on secession *per se*.<sup>18</sup> The topic of the Kosovo precedent has also been very

<sup>16</sup> In doing so I acknowledge that the questions of legitimacy can be decided on moral or legal grounds, or a mixture of both.

<sup>17</sup> In this way, my argument draws on the consequentialist ethics. Unlike a deontological view of morality, which suggests that 'some acts are morally obligatory regardless of their consequences for human weal or woe', consequentialism, as the term suggests, makes moral judgements based on the possible *consequences* of certain actions; Robert G. Olson, 'Deontological Ethics' in P. Edwards, ed., *The Encyclopedia of Philosophy* (New York: Macmillan & The Free Press, 1967) at 343. In other words, 'the only relevant factor deciding whether any action or practise is morally right or wrong is its overall consequences'; Anthony Ellis, 'Utilitarianism and International Ethics' in Terry Nardin & David Mapel, eds., *Traditions of International Ethics* (Cambridge: Cambridge University Press, 1992) at 158.

<sup>18</sup> Alan J. Kuperman is among those who have written extensively on the moral hazard of humanitarian intervention. Among others, see his *The Limits of Humanitarian Intervention: Genocide in Rwanda* (Washington, D.C.: Brookings Institution Press, 2001); 'The Moral Hazard of Humanitarian Intervention: Lessons from the Balkans' (2008) 52 *Int'l Studies Q.* 49 [Kuperman 2008a]; and 'Mitigating the Moral Hazard of Humanitarian Intervention: Lessons from Economics' (2008) 14 *Global Governance* 219 [Kuperman 2008b]. In fact, his very broad definition of 'humanitarian intervention', encompassing 'any international action that is primarily motivated by the humanitarian desire to protect civilian targets of state violence,' also includes 'recognising independence of secessionist entities'; Kuperman 2008a at 51-2. James D. Fearon addresses the issue of moral hazard of secession more directly when outlining the perverse consequences of partition; see 'Separatist Wars, Partition, and World Order' (2004) 13 *Security Studies* 394 [Fearon]. On the moral hazard of humanitarian intervention, see also Diana Johnstone, 'Notes on the Kosovo Problem and the international Community' (1998), online: University of the West of England <<http://www.ess.uwe.ac.uk/Kosovo/Kosovo-controversies2.html>> [Johnstone]; Timothy W. Crawford, 'Pivotal Deterrence and the Kosovo War: Why the Holbrooke Agreement Failed' (2001) 116 *Pol. Sci. Q.* 499 [Crawford]; Christopher

prominent among academic, journalistic, and political circles.<sup>19</sup> However, while many have argued either in favour of or against the applicability of the Kosovo precedent to the South Ossetian case, the moral hazard of secession in the cases of Kosovo and South Ossetia has thus far remained underspecified. In demonstrating the causal linkages between the recognition of Kosovo's independence and the August 2008 events in Georgia, I argue that the moral justification cited in support of the recognition of Kosovo—that after suffering 'genocidal violence' at the hands of the Serbs, the Kosovar Albanians could no longer reside peacefully side-by-side with the Serbs in a single political entity—has (unintentionally) created suitable political conditions for a moral hazard in another region.<sup>20</sup>

In the following section, I first examine some of the challenges created by secession that the international community is facing. I focus on the problems of recognizing a new political entity in an international system, and touch upon the ambiguity and ambivalence that surrounds international law on secession. Next, I define the concept of the moral hazard of secession before explaining how the recognition of Kosovo perpetuates the conditions of moral hazard. I also outline some of the other problems associated with remedial secession. Finally, in the concluding section I offer an overview of alternate solutions to full-fledged independence that could be used to meet the needs of ethnic minorities.

## II. Complexities of Secession

### 1. Problems of Recognition

Even though there is much discussion in contemporary politics about 'globalisation, the erosion of the state and the increasing irrelevance of territory,' recognition of a political entity as a legitimate sovereign state (*de jure* independence) remains 'the top prize' for every secessionist movement.<sup>21</sup> However, despite numerous attempts to explain and analyze the right of different ethnic groups to self-determination, there is no systematic approach to this issue in international law. There is much inconsistency in both the

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Marsh & Mark Heppner, 'When Weak Nations Use Strong States: The Unintended Consequences of Intervention in the Balkans' (2003) 31 Nationalities Papers 281 [Marsh & Heppner].

<sup>19</sup> Among others, see: Sebastian Schaffer, 'The Kosovo Precedent – Directly Applicable to Abkhazia and South Ossetia' (2009) 3 Caucasian Rev. Int'l Affairs 108; Dominik Tolksdorf, 'Kosovo Precedent – Applicable Many Parts of the World, But Not Directly in the South Caucasus' (2009) 3 Caucasian Rev. Int'l Affairs 103.

<sup>20</sup> By the term genocidal violence Kuperman (2008a) refers to both genocide and ethnic cleansing; *supra* note 18 at 50. In this article I use this term in the same way.

<sup>21</sup> Caspersen, *supra* note 9 at 113.

question of whether national self-determination also means a right to secession and of under what conditions a state should be granted legal (*de jure*) recognition.<sup>22</sup>

Many argue that the idea of self-determination was first born during the American and the French Revolutions.<sup>23</sup> The principle of national self-determination as a moral issue dominated much of Europe's politics throughout the nineteenth century (especially its latter half), but it was not until World War I that its impact on international law and international relations was really felt.<sup>24</sup> In this regard, American President Woodrow Wilson's articulation of the concept of national self-determination in his famous Fourteen Points speech in 1918 is of particular importance.<sup>25</sup> However, even then, self-determination remained a political *principle*, as opposed to a legal *right*, and was followed only when powerful players in world politics so desired.<sup>26</sup>

It was only during the post-World War II period that 'international conventions established the *right* of peoples to national self-determination.'<sup>27</sup> What followed in the decades to come was the era of decolonization which saw the emergence of some fifty new states as a result of the rapid and uncontrolled disintegration of European colonies, especially in the 1960s and

<sup>22</sup> See Lung-chu Chen, 'Self-Determination as a Human Right' in William Michael Reisman & Burns H. Weston, eds., *Toward World Order and Human Dignity: Essays in Honor of Myres S. McDougal* (N.Y.: Free Press, 1976) at 216 and Benyamin Neuberger, 'National Self-Determination: Dilemmas of a Concept' (1995) 1 *Nations & Nationalism* 297 at 298 [Neuberger].

<sup>23</sup> Hurst Hannum, 'International Law' in Alexander J. Motyl, ed., *Encyclopedia of Nationalism* (London: Academic Press, 2001) at 406-7 [Hannum 2001].

<sup>24</sup> *Ibid.* at 407.

<sup>25</sup> See Woodrow Wilson, 'The Fourteen Points' in P. Williams, Donald M. Goldstein & Jay M. Shafritz, eds., *Classic Readings and Contemporary Debates in International Relations*, 3rd ed. (Belmont, CA: Thomson Wadsworth, [1918] 2006) and Umozurike Oji Umozurike, *Self-Determination in International Law* (Hamden, Conn.: Archon Books, 1972). There is much debate about what exactly Wilson meant by 'national self-determination'. Many argue that Wilson viewed national self-determination as 'the right of communities to govern themselves, not the right of every ethnos to its own polity' as it was originally understood, especially in the East European context (Allen Lynch, 'Woodrow Wilson and the Principle of "National Self-Determination": A Reconsideration' (2002) 28 *Rev. Int'l Studies* 419 at 435). For a similar point see also Elie Kedourie, *Nationalism*, 4th ed. (New York: Collier, 1993).

<sup>26</sup> Hannum 2001, *supra* note 23 at 407.

<sup>27</sup> Neuberger, *supra* note 22 at 298 (emphasis original). It started with the inclusion of the principle of self-determination in the UN Charter and reached its peak in subsequent UN resolutions. See, for instance, Article 1(2) and Article 55 of the UN Charter and the 1970 *Declaration on Principles of International Law concerning Friendly Relations and Cooperation among States in accordance with the Charter of the United Nations*.

70s.<sup>28</sup> As a result, the right to self-determination was now applied 'not to ethnic or national groups, but, rather, multi-ethnic people under colonial rule'<sup>29</sup> and the right to secession was exclusively associated with the process of decolonization.<sup>30</sup>

The end of the Cold War in 1991 brought a dramatic increase in the elaboration of the human rights language and major alterations to the political map of the world. Since then, the persuasiveness of secessionist movements and 'successful attempts at secession' has indeed been unprecedented.<sup>31</sup> However, as Taras and Ganguly point out, the multitude of successful secessions following the dissolution of the Soviet Union and Yugoslavia 'signalled a modification of the international normative regime on secession only to the degree that it formally recognised the consequences of a political bloc losing the cold war [*sic*]' and in general, international law remained largely mute on the issue of a group's right to secede.<sup>32</sup>

By the end of the 1990s, however, the events that unfolded in Kosovo raised some hopes that the era of this uncertainty was over. Not only was Kosovo considered to be an example of a successful humanitarian intervention, but at that time, a possible case of remedial secession. Although

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<sup>28</sup> Istvan Bibo, *The Paralysis of International Institutions and the Remedies: A Study of Self-Determination, Concord among the Major Powers, and Political Arbitration* (Hassocks [England]: Harvester Press, 1976) at 31. However, even though the formation of these new states was 'reflecting the right of self-determination,' in practise, little has changed 'in the technique of applying the principle [of self-determination]'; *ibid.* (emphasis added). For instance, these former colonies were not allowed to adjust their new borders according to ethno-linguistic distributions; rather, they were left with the frontiers created at the time of their original conquest (*ibid.*)—a practise continued after the collapse of the Soviet Union and the disintegration of Yugoslavia.

<sup>29</sup> Moore, *supra* note 2 at 3. In other words, as Hannum (2001) argues, there was a paradigmatic shift from 'ethnic (or religious, linguistic, or cultural) self-determination' of the post-World War I period to 'territorial self-determination' in the post-World War II era; *supra* note 23 at 410 (brackets in original).

<sup>30</sup> Gerry J. Simpson, 'The Diffusion of Sovereignty: Self-Determination in the Post-Colonial Age' in Mortimer N. S. Sellers, ed., *The New World Order: Sovereignty, Human Rights, and the Self-Determination of Peoples* (Oxford; Washington, D.C.: Berg, 1996) at 38.

<sup>31</sup> Allen E. Buchanan, 'Democracy and Secession' in Margaret Moore, ed., *National Self-Determination and Secession* (Oxford: Oxford University Press, 1998) at 14. Bangladesh is a good example of how few exceptions there have been from the application of the above-mentioned 'colonial-territorial right to self-determination' in the second half of the twentieth century; Hannum 2001, *supra* note 23 at 412. Between the years 1945 and 1990 Bangladesh was the *only* successful separatist movement that acquired internationally recognised independence, when it seceded from Pakistan in 1971; Raymond C. Taras & Rajat Ganguly, *Understanding Ethnic Conflict: The International Dimension* (New York: Longman, 2005) at 53 [Taras & Ganguly].

<sup>32</sup> Taras & Ganguly, *ibid.* at 53. See also Alexis Heraclides, *The Self-Determination of Minorities in International Politics* (Totowa, N.J.: F. Cass, 1991) at 22 [Heraclides 1991].



originally the independence of Kosovo was not explicitly supported by Western nations this became the policy a decade later.<sup>33</sup> The Western states, however, have continuously stressed the unique nature of Kosovo (so-called *sui generis*) and have argued that its recognition as a sovereign state will not be considered as a precedent for any future decision-making.<sup>34</sup>

What, one may ask, is so unique about the case of Kosovo? Coppieters argues that the recognition of Kosovo is exceptional but by no means unique: 'unique cases do not refer to general principles, whereas exceptions do. Exceptions are rule-bound.'<sup>35</sup> He asserts that the case of Kosovo is 'an exception to the general rule of territorial integrity' and that it is '[d]ue to the lack of clear principles justifying the recognition of a unilateral declaration of secession ... that the EU [and the rest of the Western world] is talking in terms of a unique case.'<sup>36</sup>

However, despite the West's insistence on the uniqueness of Kosovo, the Russian government has justified its recognition of South Ossetian and Abkhazian independence on very similar grounds. The majority of the political West defends its recognition of Kosovo's independence by citing the injustices done to the Kosovars by the Milosevic regime.<sup>37</sup> Further, the

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<sup>33</sup> Marsh & Heppner, *supra* note 18 at 288. Marsh and Heppner believe that the main reasons behind this change of policy are those ugly events that surrounded Kosovo at the end of the 90s: 'if Serbs and Kosovo Albanians could not live in peace before, how can they do so following all of the bloodshed? ... recent atrocities are not easily forgotten'; *ibid.* Cheterian, however, asserts that the main reason is to be found in Western fears that if a political solution to the Kosovo question was not found immediately, the situation there could deteriorate and further destabilize not only Kosovo itself but neighbouring fragile states as well. Renewed unrest in Kosovo in March 2004 further confirmed these fears; *supra* note 11 at 4. See also, Jake Lynch, 'Kosovo Riots Renew Old Debates' (19 March 2004), online: BBC News <<http://news.bbc.co.uk/1/hi/world/europe/3550789.stm>>.

<sup>34</sup> Bruno Coppieters, 'The Recognition of Kosovo: Exceptional but not Unique' in *What is 'Just' Secession? (Is Kosovo Unique?)*, European Security Forum Working Paper No. 28 (February 2008) at 3 [Coppieters]. Thus, as Coppieters points out, the West's decision to recognise Kosovo's declaration of independence in 2008 is very different from the decision of 1999 regarding NATO's intervention in the Balkans. Back then, many Western states 'were eager to discuss a reform of the international legal framework for international humanitarian intervention, in the light of general moral principles'; *ibid.* at 6. At present, however, the West 'has no interest in loosening the validity of the principle of territorial integrity, which is the inevitable result of such a normative discussion on the question of secession'; *ibid.*

<sup>35</sup> *Ibid.* at 3.

<sup>36</sup> *Ibid.* at 3-4. Cheterian is more bold in arguing that '[w]hat was so special about Kosovo was not the nature of the conflict and the legitimacy of the case of Kosovo Albanians for self-determination, but the fact that the province was in Europe, and the deep involvement of NATO and EU countries to stabilize and govern the region'; *supra* note 11 at 4.

<sup>37</sup> See Marsh & Heppner, *supra* note 18 at 288; Coppieters, *supra* note 34; Fawn, *supra* note 2; Cheterian, 2009 forthcoming, *supra* note 11.

Western leaders have argued 'that the recognition of Kosovo is in accordance with the wishes of the people of this territory, the stability of the region and even with the real interests of Serbia.'<sup>38</sup> Similarly, Russian officials have argued that Ossetians and Abkhazs could no longer reside side-by-side with the Georgians under one state after President Saakashvili's attempts 'to eliminate a whole nation' of South Ossetia.<sup>39</sup> As President Medvedev argued, '[t]here was a special situation in Kosovo, there is a special situation in South Ossetia and Abkhazia. Speaking about our situation, it is obvious that our decision is aimed at preventing the genocide, the elimination of a people, and helping them get on their feet.'<sup>40</sup>

As I argue in the next section, the above-mentioned statements by the Russian officials indicate a serious moral hazard that may arise from evoking a right to secede in response to human rights violations. Even if not legally binding, remedial secession justified on the basis of averting genocide or ethnic cleansing of minority groups may do more harm than good, and its consequences should not be understated.<sup>41</sup>

## 2. *Moral Hazard of Secession*

The term moral hazard is adopted from the field of economics where it refers to 'the phenomenon in which the provision of protection against risk (often by insurance) unintentionally promotes irresponsible or fraudulent risk-taking, and thereby perversely increases the likelihood of the undesired outcome.'<sup>42</sup> Similarly, international recognition of secession may create moral hazard by promoting irresponsibility and/or a deliberate 'fraud' on the part of political and/or military elites. As Kuperman argues, political elites of different ethnic minorities, for instance, may decide to secede from the host state even if they are well aware that the state will prevent their secession

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<sup>38</sup> Coppieters, *supra* note 34 at 4.

<sup>39</sup> Pravda, *supra* note 3.

<sup>40</sup> Levy, *supra* note 6. Medvedev was also quoted saying that the recognition 'was not an easy choice, but it is the only possibility to save the lives of the people [of South Ossetia and Abkhazia]'; Pravda, *supra* note 3. Mironov has also stated that Russia considered 'recognition of the independence of Abkhazia and South Ossetia as a necessary condition to ensure security for these nations'; Pravda, *supra* note 3. See also 'Russia Recognizes Abkhazia, South Ossetia' *Radio Free Europe/Radio Liberty* (26 August 2008), online: Radio Free Europe/Radio Liberty (RFE/RL) <[http://www.rferl.org/content/Russia\\_Recognizes\\_Abkhazia\\_South\\_Ossetia/1193932.html](http://www.rferl.org/content/Russia_Recognizes_Abkhazia_South_Ossetia/1193932.html)>.

<sup>41</sup> Birch argues along the same lines that before the international community endorses the right to secession as a remedy to an existing and/or past wrong, it should consider seriously 'the possibility that righting it might lead to another wrong'; *supra* note 5 at 602.

<sup>42</sup> Kuperman 2008a, *supra* note 18 at 50 (parentheses in original).

and engage militarily.<sup>43</sup> This decision may be made even when the elites are aware that a group has no capacity to defend against state retaliation. In this way they may be provoking a state (even if unintentionally) to use force and violence against its ethnic minorities. In another scenario, a group may intentionally provoke the state to engage in fierce fighting by deliberately attacking it, knowing that retaliation on behalf of the state may involve violence against the group's civilians.<sup>44</sup>

Based on extensive fieldwork and information gained from interviews with the top ranking commanders of the Kosovo Liberation Army (KLA), Kuperman has long identified and raised awareness of the moral hazard of humanitarian intervention in the case of Kosovo and elsewhere.<sup>45</sup> He asserts that the KLA deliberately sought the escalation of violence in 1998, provoking Milosevic's regime to ethnic cleansing of Kosovar Albanians.<sup>46</sup> This resulted in growing media attention which in return boosted support of the international community towards the Kosovars, ultimately ending with NATO's military intervention in Serbia on their behalf.<sup>47</sup>

Of course, the KLA could not have been certain about the prospect of international intervention; but its expectations derived mainly from the events of the earlier years of the 1990s, in particular the case of Bosnia.<sup>48</sup> As many analysts have pointed out, there is significant circumstantial evidence to suggest that the settlement on Bosnia reached at the 1995 Dayton Accords further intensified Kosovo's drive for independence.<sup>49</sup> Moreover, the lesson of that agreement for the Kosovars seemed to be that civilian suffering, killing and displacement were more likely to attract Western support and attention than non-violent means of resistance.<sup>50</sup>

Exactly the same problems arise when it comes to the moral hazard of secession. The point here is that, as Marsh and Heppner argue, the 'irredentist groups in one part of the world seem to take cues from the

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<sup>43</sup> *Ibid.* at 51.

<sup>44</sup> *Ibid.*

<sup>45</sup> See *supra* note 18.

<sup>46</sup> Kuperman 2008a, *supra* note 18.

<sup>47</sup> Kuperman (2008a) dismisses all the other hypotheses as to why Kosovars switched from earlier pacifist means to violent means and argues that the only rationale in the KLA's, at first glance suicidal, actions in the late 1990s was a clear prospect of outside humanitarian intervention on their behalf; *supra* note 18. See also Johnstone, *supra* note 18; Crawford, *supra* note 18; Marsh & Heppner, *supra* note 18; Simon Jenkins, 'NATO Prepares to Reap the Balkan Whirlwind' (21 March 2001), online: MonteNet <<http://www.montenet.org/2001/jenkins.html>>.

<sup>48</sup> Kuperman 2008a, *supra* note 18 at 61.

<sup>49</sup> See Marsh & Heppner, *supra* note 18 at 281; Fearon, *supra* note 18 at 406.

<sup>50</sup> Crawford, *supra* note 18 at 504.

successes and failures of other groups in what are perceived similar situations.’<sup>51</sup> In a 1996 Report from a roundtable held by the United States Institute of Peace, in conjunction with the US State Department, Carley affirmed that ‘[s]ecession can be a legitimate aim ... in response to gross and systematic violations of human rights.’<sup>52</sup> The problem, as Fearon comments, is that making the implicit criterion for international recognition of secession ‘some level of violence and chaos gives the leaders of nationalist insurgencies an incentive to reach for this level.’<sup>53</sup> And as I show below, it also creates an incentive for important regional and international players to manipulate many of the world’s ‘unsettled conflicts’,<sup>54</sup> and to use the different inter- and intra-ethnic disputes in strategic regions to their advantage. The events that unfolded in Georgia in August 2008 are a good example of this.

### III. The Recognition of Kosovo as Perpetuating the Conditions of Moral Hazard

As Amnesty International highlights, ‘the exact circumstances surrounding the onset of hostilities in August 2008 in South Ossetia remain the subject of dispute ... [and] ... numerous alleged facts and figures have been extremely difficult to independently verify.’<sup>55</sup> Thus, at this point and without access to

<sup>51</sup> Marsh & Heppner, *supra* note 18 at 281.

<sup>52</sup> Patricia Carley, *Self-Determination: Sovereignty, Territorial Integrity, and the Right to Secession* (Washington, D.C.: United States Institute of Peace, 1996) at vii. On this report see also Jeremy R. Smith, ‘The Return of the Referendum: Self-Determination, International Organisations, and Disputed territories in the South Caucasus and Moldova’ (2006) 11 European Research Working Paper Series, The University of Birmingham.

<sup>53</sup> Fearon, *supra* note 18 at 406.

<sup>54</sup> A term used by Fawn instead of ‘frozen conflicts’. The latter, he argues, does not reflect the real situation on the ground which is often far from being static and ‘frozen’; *supra* note 2 at 269.

<sup>55</sup> Amnesty International, *Civilians in the Line of Fire: The Georgia-Russia Conflict* (London: Amnesty International Publications, 2008) at 6. There has been much controversy over who started the August war. The Georgian parliament set up a temporary commission to investigate the circumstances that led to the war. Its report, published on 18 December 2008, concluded that the ‘well prepared and planned intervention was conducted in Georgia from Russian side. However, the Commission also revealed significant failures of the Government of Georgia, National Security policy performance and management and military management’. For more on this, see ‘The War between Russia and Georgia, Its Initial Conditions, Chronology, Legal Evaluation and Deficiencies Revealed in Activities of the Government of Georgia’, *Parliament of Georgia* (18 December 2008), online: Parliament of Georgia <[http://www.parliament.ge/index.php?lang\\_id=ENG&sec\\_id=1315&info\\_id=22018](http://www.parliament.ge/index.php?lang_id=ENG&sec_id=1315&info_id=22018)>. The EU, on the other hand, began its own investigation by launching the Independent International Fact-Finding Mission on the Conflict in Georgia (IIFFMCG) headed by Swiss diplomat Heidi Tagliavini, who in 2002-06 served as the Head of the United Nations Observer Mission in Georgia (UNOMIG). The results of the IIFFMCG’s findings were published on 30 September 2009. On the one hand the report accuses Georgia of starting the hostilities in South Ossetia; on the other hand, Russia is also

primary sources and materials, the real motives of the leaders on each of the three sides involved (Georgian, Ossetian, and Russian) can only be speculated upon. Therefore unlike Kuperman,<sup>56</sup> who conducts in-depth interviews with the top ranking KLA military commanders and bases his argument that the KLA deliberately sought the escalation of violence in 1998 on those sources, I am unable to provide such empirical evidence.

The official Russian version of the story holds that Georgia conducted 'genocide' in South Ossetia, indiscriminately killing and injuring the civilian population, many of whom had Russian passports; therefore, Russia was defending its innocent citizens and was reacting to a Georgian 'invasion' of South Ossetia.<sup>57</sup> Georgian authorities, on the other hand, argue that their actions were in defence of Georgian villages in and near South Ossetia that were subjected to intensified raids from Ossetian paramilitaries in the weeks preceding the war. As then Georgian Prime Minister Lado Gurgendzede declared, '[Georgian] Government troops were forced to launch measures for the establishment of peace in the region after separatist forces responded to President Saakashvili's peace initiatives by shelling Georgian villages.'<sup>58</sup>

The situation in the region had indeed escalated to its worst point since summer 2004 when clashes between Georgians and Ossetians left dozens dead. According to Financial Times reporters, '[m]ost accounts agree that it

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accused of violating laws of war and perpetuating war crimes against Georgian civilians. The overall conclusion of the commission, however, seems to be that '[w]hile it is possible to identify the authorship of some important events and decisions marking its course, there is no way to assign overall responsibility for the conflict to one side alone. They have all failed'; *Independent International Fact-Finding Mission on the Conflict in Georgia*, (September 2009) at 32, online: <[http://91.121.127.28/ceiig/pdf/IIFFMCG\\_Volume\\_I.pdf](http://91.121.127.28/ceiig/pdf/IIFFMCG_Volume_I.pdf)>. For more on the commission and its report see <<http://91.121.127.28/ceiig/Index.html>>.

<sup>56</sup> See Kuperman 2008a, *supra* note 18.

<sup>57</sup> Vicken Cheterian, 'The August 2008 War in Georgia: From Ethnic Conflict to Border Wars' (2009) 28 *Central Asian Survey* 155 at 156 [Cheterian 2009]. How South Ossetians ended up with Russian passports is of course another matter which is beyond the scope of this article. It is interesting to note here though that there is no mention among Russian politicians of continuous human rights abuses in Chechnya, one of the federal republics within Russia itself. As some analysts argue, human rights abuses there have been at on no lesser a scale, if not more so than in Bosnia or Kosovo; Anthony Loyd, *My War Gone By, I Miss It So* (Penguin Books: London, 1999). When trying to explain why Chechnya did not deserve the same right of secession as South Ossetia or Abkhazia, the Russian foreign minister, Sergey V. Lavrov declared: 'You know what they [Chechens] did to their own place ... They turned it into a place where international terrorists were feeling at home'; therefore, it was necessary for Russia to re-take control over the territory; Levy, *supra* note 6.

<sup>58</sup> 'Peace Enforcement Measures Underway in S. Ossetia – PM' *Civil.Ge* (8 August 2008), online: *Civil.Ge Daily News Online* <<http://www.civil.ge/eng/article.php?id=18952&search=lado%20gurgendzede>>.

was South Ossetian separatists who committed the first act of escalation when they blew up a Georgian military vehicle on August 1, wounding five Georgian peacekeeping troops.<sup>59</sup> However, Georgia responded with fierce measures as well, killing six South Ossetian militiamen.<sup>60</sup> This was the start of the unofficial fighting in South Ossetia—at least a week before the deadly fighting broke out on 7 August 2008 when small arms fire between Georgian troops and Ossetian paramilitaries gave way to heavier weapons like mortars and grenade launchers.<sup>61</sup> According to the Georgian side, however, the most decisive factor in triggering the assault on Tskhinvali on the night of 7 August were reports received regarding the movement of some 150 Russian military vehicles from North Ossetia (one of the federal republics of the Russian Federation) into neighbouring South Ossetia.<sup>62</sup> It was because of this ‘clear-cut invasion’, according to President Saakashvili, that ‘we started to open fire with artillery, because otherwise they would have crossed the bridge and moved into Tskhinvali.’<sup>63</sup>

One way or another, as Belton *et al.* argue, the Kremlin’s reaction was very swift.<sup>64</sup> In fact, ‘[s]o swift ... that some analysts believe that, while it did not appear to precede the Georgian assault on Tskhinvali, as Mr Saakashvili claims, it may have been planned in advance, with Mr Saakashvili simply falling into a well prepared Russian trap.’<sup>65</sup> Weeks (and even months) before the onset of violence, political analysts who closely followed the events in the Caucasus raised alarms regarding the possible escalation of violence in the region. They argued that Moscow might have ‘already made a tentative political decision to commence serious military action in Abkhazia and/or

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<sup>59</sup> Catherine Belton, Jan Cieski, Charles Clover and Dan Dombey, ‘Countdown in the Caucasus: Seven Days that Brought Russia and Georgia to War’ *Financial Times* (26 August 2008) [Belton *et al.*], online: Virtual Collector <<http://virtualcollector.blogspot.com/2008/08/countdown-in-caucasus-seven-days-that.html>>.

<sup>60</sup> *Ibid.*

<sup>61</sup> *Ibid.* See also C. W. Blandy, ‘Georgia and Russia: A Further Deterioration in Relations’ (2008) 08/22 Advanced Research and Assessment Group Caucasus Series at 6 [Blandy 2008]; Cheterian 2009, *supra* note 57 at 159.

<sup>62</sup> Cheterian 2009, *supra* note 57 at 161. See also Belton *et al.*, *supra* note 59.

<sup>63</sup> Belton *et al.*, *supra* note 59. The Kremlin of course denies these accusations and argues that it only crossed the Roki tunnel, connecting North and South Ossetia, after the initial Georgian assault on Tskhinvali; *ibid.*

<sup>64</sup> *Ibid.*

<sup>65</sup> *Ibid.* See also Cheterian 2009, *supra* note 57 at 163; C. W. Blandy, ‘Provocation, Deception, Entrapment: The Russo-Georgia five Day War’ (2009) 09/01 Advanced Research and Assessment Group Caucasus Series [Blandy 2009].

South Ossetia in the coming months' and that 'Western indifference may be ill-timed.'<sup>66</sup>

In a number of reports prepared for the Defence Academy of the United Kingdom, C. W. Blandy gives a detailed account of various incidents—what he calls 'the series of "provocations"' between Russia, Georgia and its break-away regions—preceding the outbreak of violence in South Ossetia in 2008.<sup>67</sup> In spring 2008, Russia significantly increased its military presence in the North Caucasus, conducting a major military exercise—Kavkaz-2008—and setting up encampments throughout the Transcaucasus Highway from Vladikavkaz to the Roki tunnel on the border between North and South Ossetia.<sup>68</sup> Knowing that a heavily-armoured Russian force was positioned right at the entrance to the Roki tunnel, South Ossetian leaders further increased night-time raids on Georgian villages situated within and outside the conflict zone.<sup>69</sup> The main purpose of such activities indeed seemed to be to provoke 'a hasty, hot-tempered overreaction' from the Georgian side.<sup>70</sup> In the aftermath of the Five-Day war, Whitmore came to a similar conclusion that there were 'mounting indications that Russia had been planning an attack on Georgia in advance, and was just waiting for a pretext to carry it out.'<sup>71</sup> The 'pretext' came when on August 7, the Georgian President made a fatal decision to commence artillery bombardment of Tskhinvali and the civilian population of the city came under intense fire.<sup>72</sup>

Further, as Cheterian points out, '[t]he August war came at a moment of acute tension between Russia and the West.'<sup>73</sup> The Russian leadership has continuously opposed Ukraine's and Georgia's aspirations to join the NATO

<sup>66</sup> Pavel Felgenhauer, 'The West Is Confused About What To Do in Abkhazia' (2008) 5 Eurasia Daily Monitor—The Jamestown Foundation. See also Vladimir Socor, "'De-Recognition" of Georgia's Territorial Integrity Disqualifies Russia As "Peacekeeper"' (2008) 5 Eurasia Daily Monitor—The Jamestown Foundation; Thomas de Waal, 'Bullies of the Caucasus' (15 May 2008), online: Institute for War and Peace Caucasus Reporting Service <[http://www.iwpr.net/?p=crs&s=f&o=344630&apc\\_state=henpcrs](http://www.iwpr.net/?p=crs&s=f&o=344630&apc_state=henpcrs)>.

<sup>67</sup> Blandy 2008, *supra* note 61 at 6. See also Cheterian 2009, *supra* note 57 at 164.

<sup>68</sup> Blandy 2009, *supra* note 65 at 3. For a detailed timeline of these and other events in the Caucasus from April to September 2008 see Mark A. Smith, 'A Russian Chronology: April-June 2008 Foreign Policy' (2008) 08/25A Advanced Research and Assessment Group Chronology Series and 'A Russian Chronology: July-September 2008' (2008) 08/27 Advanced Research and Assessment Group Chronology Series.

<sup>69</sup> Blandy 2009, *supra* note 65 at 6.

<sup>70</sup> Blandy 2008, *supra* note 61 at 9.

<sup>71</sup> Brian Whitmore, 'Scene at Russia-Georgia Border Hinted At Scripted Affair' (23 August 2008), online: RFE/RL <[http://www.rferl.org/content/Russia\\_Georgian\\_Scripted\\_Affair/1193319.html](http://www.rferl.org/content/Russia_Georgian_Scripted_Affair/1193319.html)>.

<sup>72</sup> Blandy 2009, *supra* note 65 at 7.

<sup>73</sup> Cheterian 2009, *supra* note 57 at 164.

Membership Action Plan (MAP) that was discussed at the April 2008 NATO summit in Bucharest, Romania. The United States' intentions to establish a missile defence shield in Eastern Europe (the Czech Republic and Poland) also served as a contributing factor to these growing tensions.<sup>74</sup> However, as Cheterian argues, '[w]ithout taking into account the events of Kosovo in February 2008, it is difficult to understand the Russo-Georgian war six months later.'<sup>75</sup> Some analysts go even further, suggesting that it was Kosovo's recognition as an independent state by the US and key European states that 'provided Moscow with an opportunity to manipulate the Georgian-Abkhaz [and Georgian-South Ossetian] dispute[s] to the detriment of Georgia and its Western allies.'<sup>76</sup>

Careful examination of the events that *preceded* the outbreak of violence in South Ossetia in August 2008, and the rhetoric of Russian, Ossetian and Abkhazian leaders prior to and during the conflict, leads me to the conclusion that Western recognition of Kosovo's unilateral declaration of independence, and the implicit moral criteria justifying this recognition as a result of the injustices done to the Kosovars by the Milosevic regime, may have unintentionally created suitable political conditions for a moral hazard in South Ossetia. In other words, to use Kuperman's term, it may have encouraged 'fraudulent risk-taking'<sup>77</sup> on behalf of South Ossetian leaders while giving ample opportunity for the Russian political and military establishment to manipulate the political situation in Georgia in a way that would lead to a military conflict there.

Russian politicians and analysts have continuously voiced their concerns publicly regarding the possible dangers associated with recognizing Kosovo's independence. In early February 2008, then Russian President and current Prime Minister Vladimir Putin openly warned the international community that 'Western recognition of Kosovar independence would be met by intensified Russian support for irredentism in South Ossetia.'<sup>78</sup> Six

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<sup>74</sup> *Ibid.* See also Blandy 2008, *supra* note 61 at 1.

<sup>75</sup> Cheterian 2009, *supra* note 57 at 164.

<sup>76</sup> Blandy 2008, *supra* note 61 at 2. See also Cheterian 2009, *supra* note 57 at 163.

<sup>77</sup> Kuperman 2008a, *supra* note 18 at 50.

<sup>78</sup> Christopher Hitchens, 'Great Moscow Circus' *The Australian* (22 August 2008), online: The Australian <<http://www.theaustralian.news.com.au/story/0,25197,24220348-7583,00.html>>. Within a few weeks following Kosovo's declaration of independence, Russian political analyst and former director of the Regional Centre of the Organization for Security and Co-operation in Europe (OSCE) Mission in Kosovo Vladimir Kozin further noted that by recognizing '[t]he self-proclaimed "independence" ... of Kosovo, the West ... has created an extremely dangerous precedent for the whole system of international relations and has already complicated the political-military situation [within as well as outside the region]'; Vladimir Kozin,



months later when justifying his recognition of South Ossetian and Abkhazian independence, President Medvedev 'left no doubt that the decision was in part retaliation for the West's support ... for the independence of Kosovo from Serbia, which Russia had opposed.'<sup>79</sup>

This further points to the dangers arising from the potential instrumentalism of remedial secession; powerful regional and/or international players in world politics may use this right as an instrument to advance their own geopolitical interests rather than to protect ethnic minorities. In this way, although the international community might have regarded Kosovo as 'a one-time-only approach', it turned into 'a precedent-setting case',<sup>80</sup> the consequences of which are far-reaching and will be hard to reverse in the future.

#### IV. A Survey of Possible Alternative Solutions

Advocates of the remedial secession theory argue that making state sovereignty conditional upon respecting the human rights of minorities (or in fact of all citizens) at all times, would keep the state conscious that if it fails to do so, the consequences may be humanitarian intervention and/or recognition of minority groups' rights to leave the union.<sup>81</sup> Sovereignty should indeed be conditional and the international community should be able to 'withdraw support for the territorial integrity of the existing state' if the state fails 'to satisfy the conditions upon which its rightful control of the territory depends.'<sup>82</sup> However, there are other, more effective and less hazardous methods that the international community could use to ensure states respect the human rights of all their citizens and adequately address the social-political and economic grievances of minority ethnic groups.<sup>83</sup>

The threat of humanitarian intervention of the West on behalf of Kosovar Albanians did not prevent Milosevic from perpetrating more violence in the hope of maintaining control over Kosovo. Moreover, it left the region with 10,000 deaths and about a million Kosovar Albanians, Serbs and Roma subject to ethnic cleansing. As some would argue, rather than saving lives, the threat of humanitarian intervention in Kosovo may have caused more

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"'Independent' Kosovo: Dangerous Precedent' (28 March 2008) [translated by author], online: Krasnaya Zvezda <[http://www.redstar.ru/2008/03/28\\_03/3\\_02.html](http://www.redstar.ru/2008/03/28_03/3_02.html)>.

<sup>79</sup> Levy, *supra* note 6.

<sup>80</sup> Caspersen, *supra* note 9 at 113.

<sup>81</sup> Buchanan 2004, *supra* note 12 at 336.

<sup>82</sup> *Ibid.*

<sup>83</sup> See Fearon and Kuperman, *supra* note 18.

suffering and destruction.<sup>84</sup> In the same way, I argue that rather than preventing states from perpetrating violence against their ethnic minorities, remedial secession may cause more harm than good. Instead, the international community could use other methods to avert the damage caused by oppressive regimes. As Kaufman argues, if used appropriately, 'substantial financial incentives – aid, trade, and membership in international institutions' could be utilized in order to persuade states to address the legitimate grievances of their minority groups.<sup>85</sup> Ethnic groups should not be given the impression that violence is 'an intermediate stage on the road to recognition of the right of self-determination' and secession.<sup>86</sup>

Alternatively, liberal theorists of secession argue that the international community should make available a right of secession that is not strictly a remedial right.<sup>87</sup> They assert that claims about the degree of disruption that would result from granting statehood to even such small-scale actors as Kosovo and South Ossetia, have generally been exaggerated by state actors; after all, there are quite a few examples of small states that function perfectly well.<sup>88</sup> According to these accounts such a right would, instead, provide 'an effective check on the tyranny of the majority.'<sup>89</sup> On the contrary, however, opponents of the remedial right to secede argue that if the right to secede is readily available, it 'might prove too great a temptation to the minority in moments of heated dispute or political disappointment.'<sup>90</sup> It may also prove 'too great a temptation' to the dissatisfied political leadership of the minority group who would rather be the leaders of independent states than governors of regions within host states.

By outlining a largely anti-secessionist argument I by no means justify 'the tyranny of the majority'. Any acts of oppression or discrimination of any sort directed towards minorities within a host state should be strictly condemned by the international community. In fact, in such circumstances,

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<sup>84</sup> Kuperman 2008a, *supra* note 18 at 66.

<sup>85</sup> Kuperman 2008a, *supra* note 18 at 73.

<sup>86</sup> Veton Surroi, 'The Albanian National Question: The Post Dayton Pay-Off' (May 1996) 41 War Report cited in Kuperman 2008a, *supra* note 18 at 70.

<sup>87</sup> In other words, the members of a seceding group need not suffer any injustices in order to earn the right to secede. See Harry Beran, 'A Liberal Theory of Secession' (1984) 32 Pol. Studies 21 and 'More Theory of Secession: A Response to Birch' (1988) 36 Pol. Studies 316 [Beran 1988]; David Miller, *On Nationality* (Oxford: Clarendon Press, 1995); Daniel Philpott 'In Defence of Self-Determination' (1995) 105 Ethics 352; Moore, *supra* note 2.

<sup>88</sup> Taras & Ganguly, *supra* note 31 at 55. Lichtenstein, Luxemburg, Monaco, Andorra, San Marino and Vatican City would be examples from Europe.

<sup>89</sup> Beran 1988, *supra* note 87 at 319.

<sup>90</sup> Buchheit, *supra* note 2 at 29.

these minority groups may indeed have every right to leave the union. However, I also argue that consequences are morally relevant and before endorsing the right to secede, it is important that the international community carefully balances 'the good against the evil.'<sup>91</sup> Close examination of the nexus between the cases of Kosovo and South Ossetia leads me to the conclusion that the possible outcomes of recognizing a right to secession are graver than the possible outcomes of available alternatives.

Rather than foolhardily endorsing the right to secede, more attention and resources need to be devoted towards devising and/or strengthening various institutional arrangements within states that would accommodate minority needs. Such institutional mechanisms include but are not limited to: (a) territorial and cultural autonomies, (b) federalism—division of powers of a state between a central (federal) government and its territorial subdivisions,<sup>92</sup> (c) condominium—'the principle of two states *sharing* sovereignty over a territory.'<sup>93</sup>

Of course each of the above-mentioned institutional mechanisms is not without problems and cannot be considered as a 'cure-all prescription.'<sup>94</sup> The major problem with granting a large degree of self-rule to territorially concentrated groups and setting up regional autonomies, for instance, is that the line between self-rule and central-rule becomes rather blurred and raises the question of when the demands for more 'home-rule' end.<sup>95</sup> In other words, these institutional devices may become the very first steps towards

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<sup>91</sup> Warren S. Quinn, 'Actions, Intentions, and Consequences: The Doctrine of Doing and Allowing' (1989) 98 Phil. Rev. 287 at 287. In this way, as already mentioned earlier, by raising awareness of the negative consequences of secession, I am setting up a consequentialist argument. As Jackson states, '[c]onsequentialism approaches the question of whether an action is right or wrong in terms of a comparison of the possible outcomes of the action with the possible outcomes of each available alternative to that action'; Frank Jackson, 'Decision-Theoretic Consequentialism and the Nearest and Dearest Objection' (1991) 101 Ethics 461 at 462. I approach the question of whether there can be an internationally recognized right to secede in a similar way.

<sup>92</sup> Myron Weiner, 'Peoples and States in a New Ethnic Order?' (1992) 13 Third World Q. 317 at 332 [Weiner].

<sup>93</sup> *Ibid.* (emphasis in original).

<sup>94</sup> Svante E. Cornell, 'Autonomy as a Source of Conflict: Caucasian Conflicts in Theoretical Perspective' (2002) 54 World Politics 254 at 247.

<sup>95</sup> Michael Hechter, *Containing Nationalism* (New York: Oxford University Press, 2000) at 141. The same can be argued in regards to ethno-federalism, 'whose boundaries are designed to coincide with ethno-linguistic concentrations' of the population; Jack L. Snyder, *From Voting to Violence: Democratization and Nationalist Conflict* (New York; London: Norton, 2000) at 327. In all these cases certain steps are taken towards institutionalising ethnicity, by which, as Snyder argues, a state instantly puts itself in danger of 'unnecessarily politicising and locking in inimical cultural distinctions'; *ibid.* at 40.

an ultimate secession of the region. Moreover, in a heterogeneous state, granting autonomous rights to one group always carries a risk that other minority groups might also demand the same rights, thus, creating another set of moral hazards.

However, as Kuperman argues, the best way to lower the risk of moral hazard is to 'aid[] non-violent protest groups rather than rebels.'<sup>96</sup> No state will ever be able to please everyone at the same time. There will always be groups that will fail to persuade the majority on certain issues and that will be dissatisfied with certain policies. But if they have a right to voice their grievances through political channels, the resort to violence will be a far less appealing option.<sup>97</sup> Thus, if there is a genuine commitment on all sides of the conflict, the above-mentioned institutional devices 'can be effective instruments for satisfying nationalist aspirations for decentralisation and self-government without redrawing international boundaries.'<sup>98</sup>

Heterogeneity should not be viewed as intrinsically prone to violence, and secession should not be seen as a means to create more homogeneous, and therefore more stable and peaceful communities. In the world which is home to over six billion people and where more than 90 percent of the world population lives in multinational or multiethnic states,<sup>99</sup> it would be impossible to create (and sustain) states with single ethnic, religious, or linguistic groups.<sup>100</sup> Thus, the prospects of 'internal' self-determination<sup>101</sup> should be given priority and explored fully, despite some drawbacks.<sup>102</sup>

<sup>96</sup> Kuperman 2008b, *supra* note 18 at 231.

<sup>97</sup> See Buchheit, *supra* note 2; Heraclides 1991, *supra* note 32; Allan E. Buchanan, 'The Making and Unmaking of Boundaries: What Liberalism Has to Say' in Margaret Moore & Allen E. Buchanan, eds., *States, Nations, and Borders: The Ethics of Making Boundaries* (Cambridge: Cambridge University Press, 2003).

<sup>98</sup> Weiner, *supra* note 92 at 332. As Weiner affirms, it is of crucial importance that the international community emphasizes the fact that 'modern states need not be centralised, that centralism has outlived its usefulness'; *ibid.*

<sup>99</sup> Thomas Fleiner, *et al.*, 'Federalism, Decentralisation and Conflict Management in Multicultural Societies' in Raoul Blindenbacher & Arnold Koller, eds., *Federalism in a Changing World, Learning From Each Other: Scientific Background, Proceedings, and Plenary Speeches of the International Conference on Federalism 2002* (Montreal; London: McGill-Queen's University Press, 2003) at 197.

<sup>100</sup> In fact, a nation-state in its classic understanding of a state comprised of a single nationality is very rare. While the number of potential nations is very high, currently there are less than 200 sovereign states in the world, out of which one can only identify around 15 states in which state and nation completely coincide; see Neuberger, *supra* note 22 at 299 and Ruth Lapidoth, *Autonomy: Flexible Solution to Ethnic Conflicts* (Washington, D.C.: United States Institute of Peace Press, 1997) at 47 [Lapidoth 1997].

Alongside the development of more flexible institutional mechanisms to accommodate conflicting ethnic claims, it is also necessary to use the term sovereignty in a more flexible way. As Lapidoth argues, 'in a case of diffusion of power, both the central government and the regional or autonomous authorities could be the lawful bearer of a share of sovereignty, without necessarily leading to the disappearance or dismemberment of the state.'<sup>103</sup> What many analysts often forget is that the idea of sovereignty understood 'in its classic connotation of total and indivisible state power has been eroded by modern technical and economic developments and by certain rules of modern constitutional and international law.'<sup>104</sup> For instance, membership in supranational organizations, such as the EU, has had an enormous impact on the notion of sovereignty and 'has gradually reduced the substantive amount of powers implied in [it].'<sup>105</sup>

Gottlieb further argues in favour of opening up new political space to accommodate separatist demands.<sup>106</sup> He proposes the so-called 'states-plus-nations approach'—'the extension of the international system of states to make room also for a system of nations.'<sup>107</sup> Gottlieb affirms that '[t]his can occur through the gradual opening of international organisations' to include nations (alongside states) as its members and granting them 'new international status ... albeit in a manner that does not require the creation of

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<sup>101</sup> 'Internal' self-determination deals 'with the internal structure and politics of the state,' such as the internal constitutional framework, democratic rule or autonomous and federal arrangements within a state; Neuberger, *supra* note 22 at 299.

<sup>102</sup> This further raises the issue of whether it is at all in the international community's self-interest to do so—to support decentralisation of a state and to encourage states to 'meet the demands of ... pacifist groups'; Kuperman 2008b, *supra* note 18 at 231. After all, the resources that need to be invested have to come from somewhere and without an immediate threat there seems to be no reason for the international community to 'invest' in state-building process. I, however, argue that it *is* in the self-interest of the international community to act before the conflict has escalated into violence. In this way, it would avoid thousands and sometimes, millions of refugees and internally displaced people fleeing civil wars and various ethnic conflicts. Also, the international community already spends significant resources on different peace-building operations and post-war reconstruction projects in many parts of the world, many of which could be avoided if half of those resources were dedicated to strengthening capacity of non-discriminatory institutions in these states during the pre-war period that will be able to guarantee equal rights for all citizens.

<sup>103</sup> Ruth Lapidoth, 'Sovereignty in Transition' (1992) 45 J. Int'l Affairs 325 at 345 [Lapidoth 1992].

<sup>104</sup> *Ibid.*

<sup>105</sup> *Ibid.*

<sup>106</sup> Gidon Gottlieb, *Nation Against State: A New Approach to Ethnic Conflicts and the Decline of Sovereignty* (New York: Council On Foreign Relations Press, 1993) at 3-5.

<sup>107</sup> *Ibid.* at 3.

new territorial states.<sup>108</sup> For some, such an approach is largely utopian. As Taras and Ganguly argue, '[m]ixing state entities with nonstate ones while not ordering them in a hierarchy seem[s] both common sense and an unrealistic expectation.'<sup>109</sup> Nevertheless, even they admit that 'in the face of intractable ethnic conflicts,' coming up with creative solutions is both important and necessary and 'imagining new structures for organising peoples is not without merit.'<sup>110</sup>

One of the gravest consequences of Kosovo's Western-backed independence, however, is that it cuts short any further discussion about the above-mentioned 'new structures' for organizing nations and states. Moreover, it undermines the idea of autonomy (or federalism) as a conflict-solving tool.<sup>111</sup> As Coppieters comments, it is going to be more and more difficult now to convince secessionist movements such as the ones in South Ossetia and Abkhazia of why federal models are appropriate for them while considered inappropriate in other cases, such as the one in Kosovo.<sup>112</sup>

## V. Conclusion

The post-Cold War period has seen a dramatic increase in demands from ethnic minorities for 'representation, recognition and sovereign power based on "national geo-bodies".'<sup>113</sup> Some argue that these ethnic minorities are the 'victims of modern geography.'<sup>114</sup> Others assert that such (often unlimited) demands for more rights 'by aggrieved (or greedy) groups ... go well beyond protection of minority identity.'<sup>115</sup> The question of how 'to discriminate between insurgent groups that have legitimate grievances and those that do not' remains unresolved and continues to be one of the most significant and pressing dilemmas in both international law and international relations.<sup>116</sup>

<sup>108</sup> *Ibid.* Weiner argues along the same lines that '[p]art of the solution may lie in finding ways to provide international standing to ethnic groups short of state sovereignty ... through representation for ethnic groups within regional and international organisations'; *supra* note 92 at 332.

<sup>109</sup> Taras & Ganguly, *supra* note 31 at 56.

<sup>110</sup> *Ibid.* See also Weiner, *supra* note 92 at 332.

<sup>111</sup> Cheterian 2009 forthcoming, *supra* note 11 at 6.

<sup>112</sup> Coppieters, *supra* note 34 at 5.

<sup>113</sup> Carl Grundy-Warr, 'Lost in Sovereign Space: Forced Migrants in the Territorial Trap' (2002)

11 Asian & Pacific Migration J. 437 at 442.

<sup>114</sup> *Ibid.*

<sup>115</sup> Hurst Hannum, 'Territorial Autonomy: Permanent Solution or Step toward Secession?' in Andreas Wimmer, et al., eds., *Facing Ethnic Conflicts: Toward a New Realism* (Lanham: Rowman & Littlefield Publishers, 2004) at 277 (parentheses in original).

<sup>116</sup> Buchanan 2004, *supra* note 12 at 10.

This article has addressed the hotly debated issue of secession and the complexities associated with the right to secede. The question posed is whether the consequences of recognizing a right to secession are too great to allow it as a right. The main focus is on an internationally *recognized* right to secede, whether moral or legal, and the question is examined through the cases of Kosovo and South Ossetia. Kosovo is particularly pertinent, having been one of the most controversial cases of secessionist movements in Europe. Its declaration of independence in February 2008 has been rigorously backed by the majority of Western states, and as of July 2009 Kosovo is recognized by 62 states out of the 192 UN member states.<sup>117</sup> South Ossetia is important in this regard because its recognition (together with Abkhazia) by Russia, one of the major players in international politics, represents the most recent successful attempt at secession.<sup>118</sup>

In both of these cases, the primary ground for recognizing these break-away regions as independent political entities (at least implicitly if not explicitly) has been gross human rights violations by the central governments of Serbia and Georgia. The terms 'genocide' and 'ethnic cleansing' have been used extensively when talking about these conflicts. This is not surprising, given that secessionist groups often 'seek to advance the most morally persuasive case justifying ... [their] ... actions and objectives.'<sup>119</sup> Claims of discrimination, oppression, and tyranny seem to provide the most morally persuasive 'grounds for leaving a union' and in this way, Kosovo has indeed been a major 'point of reference.'<sup>120</sup>

Based upon careful research and analysis of the cases outlined above, I have concluded that the consequences of recognizing a right to secession could, in most cases, be too great for international law to allow this as a right.

<sup>117</sup> To date, the last country to recognize Kosovo's independence is Dominican Republic (on 11 July 2009). Further, 22 out of the 27 EU member states have also recognised Kosovo. For more information on who has recognised Kosovo as an independent state see <<http://www.kosovothanksyou.com/>>.

<sup>118</sup> Nicaragua is another UN member state that recognized South Ossetia and Abkhazia as independent states on 5 September 2008. However, the country's legislature has yet to ratify the recognition. See Brian Whitmore, 'A Year After the War, South Ossetia and Abkhazia Seek Different Paths' (6 August 2009), online: RFE/RL <[http://www.rferl.org/content/A\\_Year\\_After\\_The\\_War\\_South\\_Ossetia\\_And\\_Abkhazia\\_Seek\\_Different\\_Paths/1794249.html](http://www.rferl.org/content/A_Year_After_The_War_South_Ossetia_And_Abkhazia_Seek_Different_Paths/1794249.html)>. Following Russia and Nicaragua, on 10 September 2009 the Venezuelan President Hugo Chavez also recognised Abkhazian and South Ossetian independence during his visit to Moscow. See 'Chavez Recognizes Abkhazia, S. Ossetia's independence', *Press TV* (10 September 2009), online: Press TV <<http://www.presstv.ir/detail.aspx?id=105861&sectionid=351020704>>.

<sup>119</sup> Taras & Ganguly, *supra* note 31 at 54.

<sup>120</sup> *Ibid.* See also Caspersen, *supra* note 9 at 113.

I have argued that Kosovo's Western-backed move towards independence has raised expectations that in cases of severe state violence the likelihood of recognizing a group's right to secede from the host state increases. The political rhetoric of Russian officials regarding Georgian 'genocide' and 'ethnic cleansing' of Ossetians, and parallels drawn between these two cases, indicate that Kosovo's declaration of independence in February 2008 may have (unintentionally) created suitable conditions for a moral hazard in Georgia a few months later. Both Kosovo and South Ossetia have been considered by the West and Russia respectively as 'one-time or otherwise special exception[s].'<sup>121</sup> However, as Fearon comments, it is unclear '[h]ow many one-time exceptions or special circumstances can be declared.'<sup>122</sup>

Thus, drawing on the consequentialist view of morality, I have argued that before the international community recognizes a group's right to secede from a host state, the consequences of that recognition and the possible harm it may cause should be carefully weighed against the consequences of available alternatives. Further, I have also argued that not only the consequences but also the conditions that give rise to secessionist movements should be studied carefully. Oppression and discrimination of ethnic minorities within a state should be addressed at an earlier stage before the situation has escalated rather than after violence has already erupted. The international community should also more rigorously encourage the use of various institutional arrangements available. Using these mechanisms, the prospects of internal self-determination should be explored fully.

As a step towards the future, the international community should be willing to recognize that the notion of sovereignty may be split into various components, which may be present or absent in varying degrees.<sup>123</sup> It is possible, and necessary, to use the term sovereignty in a more flexible manner, in order to find a compromise between the conflicting concepts of sovereignty and territorial integrity on the one hand, and national-self-determination and the right to secession on the other.

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<sup>121</sup> Fearon, *supra* note 18 at 413.

<sup>122</sup> *Ibid.*

<sup>123</sup> Lapidoth 1997, *supra* note 100 and Lapidoth 1992, *supra* note 103.