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The Kosovo Crisis: A Dostoievskian Dialogue on International Law, Statecraft, and Soulcraft

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ARTICLES

The Kosovo Crisis: A Dostoievskian Dialogue on International Law, Statecraft, and Soulcraft

*Robert J. Delahunty**
*Antonio F. Perez***

ABSTRACT

The secession of Kosovo from Serbia in February 2008 represents a stage in the unfolding of a revolution of “constitutional” dimensions in international law that began with NATO’s 1999 intervention in Kosovo. NATO’s intervention called into question the authority and viability of the UN Charter system for maintaining international peace. Likewise, the West’s decision in 2008 to support Kosovo’s secession from Serbia dealt another blow to the post-War legal rules and institutions for controlling and mitigating great power rivalry. Russia’s later support for South Ossetia’s secession from Georgia demonstrated the potential that the Kosovo precedent has for destabilizing the international legal order.

This Article takes the form of a five-act play, consisting of a series of speeches and exchanges between characters drawn from Fyodor Dostoievski’s classic novel, The Brothers Karamazov. The dialogue moves on three levels. The first level is that of

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“normal” international law—the characters engage in a prolonged debate over the legality of Kosovo’s secession that explores the usual modalities of international legal argument. The intention here is to demonstrate that when the internal conceptual resources of international law have been exhausted, they yield no decisive answer to the question of the legality of Kosovo’s secession. The second level is an attempt to grasp the consequences for the international order of Russia’s re-emergence as a Great Power and (even more basically) of the emergence of a “multi-polar” world. The third level is an examination of the basic, but usually unstated, philosophical and theological presuppositions of “the Western idea” and “the Russian idea.” The speeches in this final act of the drama intend to show how these two rival understandings yield corresponding views of the international order and, more particularly, of the proper scope and limits of international law.

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INTRODUCTION

In 2080, the 200th anniversary of the publication of Fyodor Dostoevski's celebrated novel *The Brothers Karamazov*,¹ the Editors discovered a remarkable document while doing research in the archives of the Kremlin in Moscow. The document was written in the decade before the outbreak of the so-called Third World War (2021–2023). Readers will, of course, recall that the Third World War, like the First (1914–1918), arose from the interaction between the nationalism of a small power and a great power's misunderstanding of that force.² Because of its interest, the Editors have decided to translate, edit, and publish the document.

The authors of the document (identified only as “Andrei S***” and “Alexander S***”) appear to have been officials in the Russian foreign ministry, probably instructors in public international law, who were training students to become members of the Russian diplomatic corps. The document may have grown out of conversations between the instructors and their students. It has the form of a drama or dialogue. As in Dostoevski's original novel, the document describes a series of exchanges among the four Karamazov brothers. Just as Dostoevski's novel portrayed the Karamazov brothers as representing different views that reflected the tensions facing late-imperial Russia as it was entering a new era, so perhaps the authors of the document believed that post-Soviet Russia, in the Putin–Medvedev years, was entering a similar era of change. The authors had observed firsthand the collapse of Soviet communism, the disintegration of the USSR, NATO's ensuing projection of power into Central and Eastern Europe and other areas of former Soviet dominance, and the economic and political traumas that Russia underwent in the 1990s. They witnessed Vladimir Putin's successful efforts thereafter to restore Russia's great-power status.³ They

1. FYODOR DOSTOIEVSKI, *THE BROTHERS KARAMAZOV* (Richard Pevear & Larissa Volokhonsky, trans., 2000) (1880).

2. See ROBERT KAGAN, *THE RETURN OF HISTORY AND THE END OF DREAMS* 34–36 (2008) (suggesting that careless management resulting in misunderstanding among the great powers as to Taiwan could yield the same kind of unintended consequences that gave rise to the First World War).

3. See, e.g., Jean Radvanyi, *A Major Foreign Player Again*, *LE MONDE DIPLOMATIQUE*, Dec. 2007, available at <http://mondediplo.com/2007/12/10foreignpolicy> (noting the positive effect of the political strategies adopted by Putin). Some commentators denied that Putin's policies were successful. See Michael McFaul & Kathryn Stoner-Weiss, *The Myth of the Authoritarian Model: How Putin's Crackdown Holds Russia Back*, *FOREIGN AFF.*, Jan.–Feb. 2008, at 68, 68. For penetrating analyses of the nature of the Putin régime and its grand strategy, see MARSHALL I. GOLDMAN,

watched as the Putin–Medvedev era’s reinstatement of traditionally Russian, hierarchical forms of governance and its reinvigoration of Russia’s sense of cultural and moral exceptionalism led to deepening conflicts with the West on political, strategic, and ideological grounds.⁴ Like some Western analysts of the period, they were

PETROSTATE: PUTIN, POWER, AND THE NEW RUSSIA (2008) and EDWARD LUCAS, *THE NEW COLD WAR: PUTIN’S RUSSIA AND THE THREAT TO THE WEST* (2008).

One should not, however, be too swift to reach the conclusion that Russia is, or will soon become, an “autocracy,” as some analysts have done. In *Russia in Search of Itself*, the leading Russian historian and scholar James H. Billington portrays a society engaged in ranging, many-sided, and vigorous debate with itself as it tries to define its post-Soviet identity. Billington argues that “[t]he variety and vitality of public debate about the nature and destiny of Russia . . . suggest[] that democratic government is already largely legitimized in Russia.” JAMES H. BILLINGTON, *RUSSIA IN SEARCH OF ITSELF* 138–39 (2004). He acknowledges that despite the ongoing public conversation, there are “many possible doomsday scenarios for Russian democracy.” *Id.* at 128. But he offers grounds for a guarded optimism:

[I]f Russia were to succumb to negative nationalism and take a sharp autocratic turn, it would probably not last for long. Repression would be difficult to sustain in a vast country that has been so dramatically opened up to political freedoms and to the outside information age. Nor does Russia have a large enough population or the military resources to sustain the kind of aggressive foreign policy that hypernationalistic states generally need to maintain their legitimacy.

Id. at 88.

Billington’s depiction is supported by the findings of the well-known Polity IV Project, which studies the political régime characteristics of various countries from 1800 to the present and ranks the autocratic and democratic qualities of those régimes on a 21-point scale designed to measure régime authority characteristics (ranging from fully institutionalized autocracies to fully institutionalized democracies). Polity IV Project, <http://www.systemicpeace.org/polity/polity4.htm> (last visited Dec. 19, 2008). As defined by the Polity IV Project, institutionalized democracy has three elements: (1) the existence of institutions and procedures through which citizens can express their preferences; (2) institutionalized constraints on executive power; and (3) guarantees of civil liberties. Autocracies, by contrast, suppress political competition, choose their chief executives through a regularized process within the political élite, and impose few restraints on those executives once in office. *Id.* A “Polity Score” is calculated by subtracting the Autocracy score (0–10) from the Democracy score (0–10). *Id.* A country that receives a score of +7 or higher may be considered a “full democracy.” MONTY G. MARSHALL & KEITH JAGGERS, *POLITY IV PROJECT, POLITY IV PROJECT: DATASET USERS’ MANUAL* 34 (2006), <http://www.systemicpeace.org/inscr/p4manualv2006.pdf>. In 2005 and 2006, the Polity IV Project found that Russia scored a +7. *POLITY IV PROJECT, POLITY IV COUNTRY REPORT 2006: RUSSIA 1* (2006), <http://www.systemicpeace.org/polity/Russia2006.pdf>. Although slightly lower than the scores for most G-8 states, Russia—by this measure—is a democracy, rather than an autocracy. Compare *POLITY IV PROJECT, POLITY IV COUNTRY REPORT 2006: UNITED KINGDOM 1* (2006), <http://www.systemicpeace.org/polity/UnitedKingdom2006.pdf> (calculating the country’s Polity score as +10) and *POLITY IV PROJECT, POLITY IV COUNTRY REPORT 2006: CHINA 1* (2006), <http://www.systemicpeace.org/polity/China2006.pdf> (noting a Polity score of -7).

4. Some analysts have observed with dismay the widening rift between Russia and the West—equally attributable to the West and Russia. See Dmitri K. Simes, *Losing Russia: The Costs of Renewed Confrontation*, *FOREIGN AFF.*, Nov.–Dec. 2007, at 36, 37–42 (detailing factors contributing to the disintegration of the relationship between the U.S. and Russia, including Western intervention in Kosovo in 1999);

inclined to regard these conflicts not merely as traditional great-power rivalries but as “civilizational” in nature.⁵ They had heard Russia’s foreign minister argue that the end of the Cold War marked the end of a 500-year period of Western global domination, that the world had entered into a “post-American” era, and that an emerging global leadership had to be “truly representative both geographically and civilizationally.”⁶

The Editors can confidently date the creation of the document to mid-summer 2008. That period saw two major Russian initiatives, both linked to the Kosovo crisis, one of which was diplomatic and the other of which was military.

First, in summer 2008, the Russian governmental leadership launched a broad diplomatic campaign on behalf of Serbia’s claim to Kosovo, which had seceded from Serbia the previous February and which was recognized by many states, especially EU members.⁷ Two critically important speeches by Russia’s leaders articulated a new Russian foreign policy doctrine that emphasized the core role of international institutions and public international law—the United Nations Charter above all. President Dmitri Medvedev laid out these

Dmitri Trenin, *Russia Leaves the West*, FOREIGN AFF., Jul.–Aug. 2006, at 87, 87–88 (describing circumstances surrounding Russia’s shift in foreign policy); Nina Bachkatov, *EU-Russia Relations Worsen*, LE MONDE DIPLOMATIQUE, Jan. 2007, available at <http://mondediplo.com/2007/01/06russia> (analyzing causes of EU-Russia rifts and the need for peaceable relations); Francis Fukuyama, *Russia and a New Democratic Realism*, FIN. TIMES, Sept. 2, 2008, at 11 (noting the diminishing influence of the U.S. and its effect on U.S.-Russian relations); William Pfaff, *Who Is Responsible for U.S. Russian Policy?*, Aug. 20, 2008, <http://www.williampfaff.com/modules/news/article.php?storyid=336> (advocating a new approach towards U.S.-Russian policies); see also Azar Gat, *The Return of Authoritarian Great Powers*, FOREIGN AFF. Jul.–Aug. 2007, at 59, 67–68 (suggesting that economically successful “authoritarian” capitalist systems such as Russia’s might eventually prevail over the “democratic” systems of the West).

5. See SAMUEL HUNTINGTON, *THE CLASH OF CIVILIZATIONS AND THE REMAKING OF WORLD ORDER* 29 (1997) (noting the increased significance of civilizational differences on the global political stage).

6. Sergei Lavrov, *Russia and the World in the 21st Century*, RUSS. GLOBAL AFF., July–Sept. 2008, <http://eng.globalaffairs.ru/numbers/24/1210.html>.

7. See Syed Hamad Ali, *Who Recognises Kosovo?*, THE NEW STATESMAN, July 28, 2008, <http://www.newstatesman.com/middle-east/2008/07/kosovo-serbia-recognition> (noting that 43 of 192 United Nations Member States currently recognize Kosovo). While Kosovo has been recognized by most of the major Western states, some countries (e.g., Spain, Cyprus, and Slovakia) have withheld recognition, fearful of secessionist movements of their own. Stephen Orth, Nadine Michel & Maïke Jansen, *Separatist Movements Seek Inspiration in Kosovo*, SPIEGEL ONLINE INT’L, Feb. 22, 2008, <http://www.spiegel.de/international/europe/0,1518,druck-537008,00.html>. Major non-Western powers withholding recognition currently include Russia, China, and India. Most Middle Eastern and Latin American states have also withheld recognition. For a regularly updated list of states recognizing Kosovo, see *Who Recognized Kosovo? The Kosovar People Thank You*, <http://kosovothankyou.com/> (last visited Dec. 19, 2008).

themes in an address to Russia's ambassadors on July 15, 2008.⁸ Shortly before, in a major policy statement on June 20, 2008, Russian Foreign Minister Sergei Lavrov argued that

there is no reasonable alternative to a global political architecture relying on the United Nations and the rule of international law. Let us not forget that the UN was created even before the beginning of the Cold War for use in a multipolar international system. In other words, its potential can be fully tapped only now.⁹

At about the same time, the Russian government announced that it would assist the government of Serbia in securing a vote in the UN General Assembly to obtain from the International Court of Justice (ICJ) an advisory opinion on the legality of Kosovo's secession;¹⁰ condemned UN Secretary-General Ban Ki-moon for exceeding his legal authority by facilitating the plans of the European Union (EU)¹¹

8. Dmitri Medvedev, President of Russia, Speech at the Meeting with Russian Ambassadors and Permanent Representatives to International Organizations (July 15, 2008), *available at* http://www.kremlin.ru/eng/speeches/2008/07/15/1121_type82912_type84779_204155.shtml.

Medvedev stated:

We need to reform international institutions while strengthening the central role of the United Nations. Our position on this remains unchanged. The United Nations is the only thing humanity has come up with in the last hundred years to help maintain global security.

We need multilateral diplomacy for a more equitable, democratic system of relations. The same framework should involve mechanisms of collective leadership by leading states, those states that have a special responsibility for the situation in the world. And such leadership must be a [sic] truly representative in geographic terms and in terms of different civilizations. This is the foundation of the modern democratic architecture of international relations.

Id.

9. Lavrov, *supra* note 6.

10. Sergey Lavrov, Russian Minister of Foreign Affairs, Transcript of Remarks and Response to Media Questions at Joint Press Conference with Serbian Minister of Foreign Affairs Vuk Jeremic (July 17, 2008), *available at* http://www.un.int/russia/new/MainRoot/docs/off_news/170708/newen1.htm. The General Assembly subsequently adopted Resolution A/RES/63/3 (Oct. 8, 2008), which endorsed Serbia's proposal to seek an advisory opinion from the ICJ on the legality of Kosovo's secession. See Press Release, Backing Request by Serbia, General Assembly Decides To Seek International Court of Justice Ruling on Legality of Kosovo's Independence, U.N. Doc. GA/10764 (Oct. 8, 2008), *available at* <http://www.un.org/News/Press/docs/2008/ga10764.doc.htm>. The General Assembly may seek advisory opinions from the ICJ pursuant to Article 96(1) of the United Nations Charter, U.N. Charter art. 96, para. 1, and Article 65(1) of the Statute of the International Court of Justice, Statute of the International Court of Justice art. 65, ¶ 1, June 26, 1945, 59 Stat. 1031, U.N.T.S. 993.

11. The European Union was formally established in 1993 but originated in 1957 as the six-member European Economic Community. The latter was itself the outgrowth of the 1951 Coal and Steel Community. See Ernest A. Young, *Protecting Member State Autonomy in the European Union: Some Cautionary Tales from American Federalism*, 77 N.Y.U. L. REV. 1612, 1621-40 (2002) (discussing the origins of EU).

to replace the United Nations Mission in Kosovo (UNMIK) with its own civil administration (EULEX);¹² and called for the International Criminal Tribunal for Yugoslavia (ICTY), a UN organ created by the Security Council, to be disbanded because of its alleged bias against Serbia.¹³ The combination of these initiatives demonstrated that Russia intended to use international law aggressively against the West, not least over the question of Kosovo. In effect, Russia seemed to be saying to the West that it would claim its share of “ownership” over UN organs, including the UN Secretariat; that it expected what it saw as honesty and impartiality from Security Council instrumentalities such as the ICTY; and that, if the West used its powers in the Security Council to thwart Russian aims, Russia would seek recourse in what it hoped would be more sympathetic UN fora, such as the General Assembly and the ICJ.

Second, on August 8, 2008, Russia began large-scale military operations in the former Soviet Republic of Georgia.¹⁴ The ostensible purpose of Russia’s invasion was to defend the secessionist Republic of South Ossetia from an attack by Georgia, a former Soviet Republic under the leadership of the President Mikheil Saakashvili.¹⁵ Saakashvili’s ties to the United States were exceptionally close: he had applied for NATO membership, sent Georgian troops to Iraq and Afghanistan, and named the avenue that led to the Tbilisi Airport in

12. *Russian Ambassador: UN Chief Exceeding His Authority*, RUSSIA TODAY, July 26, 2008, <http://www.russiatoday.com/news/news/28052>; *Russia Lashes Out at UN Over Kosovo*, RUSSIA TODAY, July 8, 2008, <http://www.russiatoday.com/news/news/27224>; see also Charles Hawley, *UN Begins Transfer of Kosovo Authority to EU*, SPIEGEL ONLINE INT’L, Aug. 19, 2008, <http://www.spiegel.de/international/europe/0,1518,573024,00.html> (noting that developments in Kosovo left the EU in a “legal limbo”).

13. Guy Faulconbridge, *Hague Tribunal Should Be Phased Out: Russia*, REUTERS, July 10, 2008, <http://www.reuters.com/article/worldNews/idUSL103183420080710>.

14. E.g., Jenny Norton, *Ossetian Crisis: Who Started It?*, BBC NEWS, Aug. 19, 2008, <http://www.news.bbc.co.uk/2/hi/europe/7571096.stm>; *A Scripted War; Russia and Georgia*, THE ECONOMIST, Aug. 16, 2008, at 24, 24.

15. Some analysts suggested that Russia’s true purpose was to retain control over the delivery of natural gas from Central Asia by creating instability in Georgia, thus deterring investors from putting up the capital to build a gas pipeline that skirted Russia and ran through Georgia. James Traub, *Taunting the Bear*, N.Y. TIMES, Aug. 9, 2008, at WK.1. Undoubtedly Russia perceived the planned pipeline as a threat to its vital interests. GOLDMAN, *supra* note 3, at 149–51; LUCAS, *supra* note 3, at 177–79; Vicken Cheterian, *Georgia: Too Little Change*, LE MONDE DIPLOMATIQUE, July 2007, available at <http://mondediplo.com/2007/07/10georgia>. Others argued that Russia feared the rise of democratic, pro-Western governments like Georgia’s in its traditional spheres of influence. E.g., Robert Kagan, Op-Ed., *Russia, Not the West, Is Pushing Too Hard*, DALLAS MORNING NEWS, Aug. 13, 2008, available at http://www.dallasnews.com/sharedcontent/dws/dn/opinion/viewpoints/stories/DN-kagan_13edi.ART.State.Edition1.4d6ee4a.html.

honor of U.S. President George W. Bush.¹⁶ As several foreign policy analysts pointed out, the Russian leadership described South Ossetia as “Russia’s Kosovo,” comparing their military operations in Georgia to the West’s intervention in Kosovo.¹⁷ Russia’s legal argument on behalf of its intervention in Georgia was in critical respects the mirror image of the Western argument in support of NATO’s campaign against Serbia in 1999.¹⁸ In the Security Council debate of August 8, 2008, Russian delegate Vitaly Churkin claimed that Russia had intervened to prevent Georgia from carrying out “ethnic cleansing” in South Ossetia: “How else could the events be described, when hospitals, schools and residential areas were being destroyed and when thousands of people were leaving the Republic?”¹⁹ Russia also announced plans to investigate Georgian President Saakashvili with a view toward criminal charges before an international tribunal,²⁰ much as former Serbian President Milosevic had been tried before the ICTY.²¹ The shadow of Kosovo thus fell over the Russian invasion of Georgia, both by feeding Russia’s desire to revenge itself on the West and by providing Russia with legal

16. See Marc Almond, Editorial, *Plucky Little Georgia? No, the Cold War Reading Won't Wash*, THE GUARDIAN (London), (Aug. 9, 2008), at 29, available at <http://www.guardian.co.uk/commentisfree/2008/aug/09/georgia.russia1>. Almond notes that at the time of the Russian invasion, Georgia was spending 70% of its national budget on its military and harbored revanchiste designs against South Ossetia because of the defeat it had suffered there in 1992. *Id.*

17. Quentin Peel, *Wounded Pride Ignites an Accidental War*, FIN. TIMES, Aug. 10, 2008, at 9; see also Robert McMahon, *In Russia-Georgia Conflict, Balkan Shadows*, COUNCIL ON FOREIGN REL., Aug. 12, 2008, <http://www.cfr.org/publication/16931/> (agreeing with Peel’s characterization of events in Georgia).

18. See NOAM CHOMSKY, *FAILED STATES 95–97* (2007) (observing that the common Western justification for action in Kosovo involved the protection of human rights).

19. Press Release, Security Council, Security Council Hears Conflicting Russian, Georgian Views of Worsening Crisis as Members Seek End to Violence in Day’s Second Meeting on South Ossetia, U.N. Doc. SC/9418 (Aug. 8, 2008). A careful reading of Churkin’s argument shows that he based the right of Russian forces to intervene on Georgia’s violation of a 1996 agreement signed by Georgia, the South Ossetian parties, and the Organization for Security and Cooperation in Europe, and on a prior 1992 “basic agreement” between Russia and Georgia on the principles for the settlement of the Georgian–Ossetian conflict. Churkin claimed that Georgia had violated the terms of these agreements by using force against the Ossetians, including by attacks on Russian peacekeepers. Thus, Churkin concluded, Russia was acting as a peacekeeper and “was present on Georgian territory on an absolutely legal basis and in line with international agreements.” *Id.*

20. See *Saakashvili May Be Put on Trial in Russia, Say Prosecutors*, RUSSIA TODAY, Aug. 14, 2008, <http://www.russiatoday.com/news/news/29005> (stating that in light of investigation some individuals are “calling for a trial before an international tribunal”).

21. *ICTY: Milosevic Trial Exposed Belgrade’s Role in Wars*, HUM. RTS. WATCH, Dec. 14, 2006, <http://www.hrw.org/english/docs/2006/12/14/yugosl14800.htm> (describing evidence exposed during the trial of Slobodan Milosevic before the International Criminal Tribunal for the Former Yugoslavia).

arguments for use against the West to justify Russia's recognition of South Ossetia (as well as Georgia's other breakaway province, Abkhazia). Russia's case with respect to Georgia reworked arguments that the West itself had fashioned with respect to Kosovo,²² calling into question the internal consistency of Russia's overall legal position.²³

While the document's authors were of course unaware of the role that the events they discussed would play in the outbreak of a new war, they were apparently attempting to think through the implications of the new Russian policies from the perspective of public international law, which at that point was dominated by the assumptions of liberal capitalism (sometimes called "globalization").²⁴ President Medvedev had focused on the Kosovo crisis as evidence of the breakdown of international law,²⁵ accordingly, the authors were

22. See Ivan Simic, *Russian Recognition of South Ossetia and Abkhazia: New Political Reality*, PRAVDA, Aug. 29, 2008, <http://english.pravda.ru/opinion/columnists/106242-0/> (noting the argument that draws parallels between Western and Russian justifications for intervention in Kosovo and Georgia, respectively).

23. The authors, writing in the summer of 2008, foresaw the possibility of Abkhazian and South Ossetian secession, in light of the precedent the West had set in Kosovo. See *infra* text accompanying note 389; see also George Friedman, *Georgia and Kosovo: A Single Intertwined Crisis* (Aug. 25, 2008), available at http://www.stratfor.com/weekly/georgia_and_kosovo_single_intertwined_crisis. They did not, however, address the possible implications Russian recognition of Abkhazian and South Ossetian secession might have for Russia's legal position with respect to Kosovo. Further research in the archives may be required to discern their views on this question.

24. Compare THOMAS FRIEDMAN, *THE LEXUS AND THE OLIVE TREE* 239–41 (2000) (noting the potential effect of globalization on conflict prevention) with HUNTINGTON, *supra* note 5, at 29 (describing civilizational differences as a leading source of post-Cold War conflict). In a June 20, 2008 speech, Foreign Minister Lavrov denounced "the global financial economic architecture" that was "largely created by the West to suit its own needs" and called for "a financial-economic basis" that "would conform to the polycentricity of the contemporary world." Sergey Lavrov, Russian Minister of Foreign Aff., Summary of Remarks at the International Symposium "Russia in the 21st Century" (June 20, 2008), available at http://www.norway.mid.ru/news_fp/news_fp_74_eng.html.

25. Medvedev emphasized the Kosovo developments as illustrative of an emerging characteristic of the post-Cold War international environment, one that now required a Russian response:

I am convinced that with the end of Cold War the underlying reasons for most of bloc politics and bloc discipline simply disappeared. We simply do not need to return to that paternalistic system whereby some states decide for all the others. The behaviour of states in the international arena is now much more varied and independent.

But I would like to emphasise that this behaviour should not involve actions that constitute a violation of international law. This represents an unacceptable disregard for the very idea of individual security, which lies at the heart of the concept of the security of states themselves.

Unfortunately, some of the most painful recent episodes have involved precisely this sort of violation, in particular, the unilateral proclamation of independence of Kosovo and the subsequent recognition of it as a state. Legal

seeking to find new foundations on which international law might be erected. Their objectives were both practical and philosophical. In practical terms, they were exploring ways in which international law and institutions might be refashioned so as to narrow the widening conflicts between Russia and the West. But they also believed that the differences between the West and Russia reflected in the Kosovo affair required a fundamental reconsideration of the premises of the international legal system and the state of affairs in Europe.²⁶ Kosovo, in short, was the immediate stimulus for considering different understandings of the international legal order and, beyond that, fundamental differences in world views. The Editors speculate that, given their extensive citation to Western, principally U.S., sources, the authors intended their document to reach the U.S. legal and political intelligentsia so as to influence the thinking of the new administration taking power in 2009.

The authors assigned the representation of the various legal and doctrinal positions to different Karamazov brothers. Dmitri Karamazov, a military officer in Dostoevski's novel, emerges as the spokesman for the views of Putin's and Medvedev's Russia on international law. Ivan Karamazov, in the novel a youthful writer and intellectual, defends the legal position of the EU and other Western powers. Alyosha Karamazov, a Russian Orthodox seminarian in the novel, here seeks to moderate the conflict between the brothers and to reconcile their views into a more just and comprehensive synthesis. Smerdyakov, who in the novel is the illegitimate son of the brothers' father Fyodor Karamozov and who is employed as a household servant on the Karamazov estate, appears to represent no coherent principle at all but rather is the spirit of

decisions in such an instance must be achieved by reaching agreement among all parties involved in such a process and affected by these decisions.

It would certainly have been simpler for us to distance ourselves from this problem and say that, for the European Union, Kosovo is almost what Iraq proved to be for the United States. And certainly our partners have been guided by their own sense of responsibility, their own plans for stabilization. All this is true. But meanwhile, much more importantly, once again international law has been undermined, along with one of the fundamental principles of coexistence among states, one that affects the way Europe and the world will develop.

Medvedev, *supra* note 8.

26. On this subject, Medvedev observed:

I am convinced that we have reached a stage in world development that requires substantive, even philosophical approaches. We need to regularly consult history or, for obvious reasons, its most negative scenarios will repeat themselves. We must draw lessons from it and stop trying to revise history to suit the prevailing political conditions.

Id.

negation and anarchy.²⁷ In important respects, the dialogue echoes the great debate between “Westernizers” and “Slavophiles” that has been going on since the reforms of Czar Peter the Great and that even now “somehow endures” in Russia.²⁸

The authors sought to unfold progressively the foundational assumptions of competing understandings of international law as revealed in the differing Western and Russian responses to the Kosovo crisis. They started their dialogue by having the Karamazov brothers discuss the conventional materials of international law applicable to the Kosovo situation—in particular, United Nations Security Council Resolution (SCR) 1244 (1999).²⁹ The characters thereafter consider the underlying principles and policies of international law, and then explore conflicting perspectives about what ought to be the basic mode of interpretation of such constitutional instruments as the UN Charter. At the end of the dialogue, two new characters—also taken from Dostoevski’s novel—make an appearance. These characters are, respectively, the Grand Inquisitor and Father Zossima. In Dostoevski’s novel, the Grand Inquisitor is a character, perhaps Ivan’s alter ego, in a piece of imaginative writing that Ivan narrates in a lengthy conversation with Alyosha. In that setting, the Grand Inquisitor is thought to embody Dostoevski’s extremely hostile vision of the role of Latin Christianity in forming Western Europe’s culture and mentality.³⁰ In the dialogue

27. Perhaps he is even a Russian nihilist inspired by Turgenev’s *Fathers and Sons* (1862) or modeled on characters in Dostoevski’s own earlier novels, such as Kirilov in *The Possessed* (1872). See generally FYODOR DOSTOYEVSY, *THE POSSESSED* 222–26 (Andrew R. MacAndrew trans., 1980); IVAN TURGENEV, *FATHERS AND SONS* 21 (Michael R. Katz trans., 1994).

28. JOHN LUKACS, *THE END OF THE TWENTIETH CENTURY AND THE END OF THE MODERN AGE* 58–59 (1993) (discussing the historical pattern of controversies between Westernizers and Slavophiles). Even current debates within Russian foreign policy élites reveal differences that are similar to those between traditional Slavophiles and Westernizers. See William Zimmerman, *Slavophiles and Westernizers Redux: Contemporary Russian Elite Perspectives 2* (National Council for Eurasian and East European Research, Working Paper, Aug. 10, 2005), available at http://www.ucis.pitt.edu/nceeer/2005_819-09g_Zimmerman.pdf (describing the 20th century reprise of the Westernizer-Slavophile divide of the mid-nineteenth century); see also NICOLAS BERDYAEV, *THE RUSSIAN IDEA* 34–71 (1948) (leading Russian Orthodox thinker’s survey of Russian nineteenth century thought on the country’s nature, history, and global mission—taking into account traditional Westernizing and Slavophil perspectives).

29. S.C. Res. 1244, U.N. Doc. S/RES/1244 (June 10, 1999).

30. Although Dostoevski’s legend of the Grand Inquisitor “may be interpreted chiefly as directed against Roman Catholicism and revolutionary socialism . . . in actual fact the subject is broader and deeper. It is the theme of the kingdom of Caesar, of the rejection of the temptation of the kingdoms of this world.” BERDYAEV, *supra*, note 28, at 122. For studies of the Grand Inquisitor legend in *The Brothers Karamazov*, see NICHOLAS BERDYAEV, *DOSTOEVSKY* 188–212 (Donald Attwater trans., 1960); A. BOYCE GIBSON, *THE RELIGION OF DOSTOEVSKY* 182–93 (1973); KONSTANTIN MOCHULSKY, *DOSTOEVSKY: HIS LIFE AND WORK* 617–22 (Michael A. Minihan trans.,

presented here, however, the authors gave the Grand Inquisitor the role of explaining the underlying premises behind the Western, specifically European, view of international law, thus deepening Ivan's earlier articulation of the fundamental objects and purposes of that law. In the novel, Father Zossima is a Russian Orthodox monk, Alyosha's spiritual mentor and guide. In the dialogue, as in the novel, Zossima is the counterpoint to the Grand Inquisitor.

In translating, editing, and publishing this document, the Editors express no views about the various opinions set forth in it. The Editors do, however, share the underlying view of all of the document's protagonists that much debate over issues of public international law is disingenuous. Unfortunately, many of the lawyers, lawyer-diplomats, and legal academics who debate questions of public international law are lacking in the self-consciousness that would lead them to inquire into their own basic, but unstated, presuppositions.³¹ Perhaps by presenting this document, the Editors may stimulate more and deeper reflection of that kind.

KOSOVO: BACKGROUND

Our readers will doubtless need some review of the situation in Kosovo as it stood seventy-two years ago in the summer of 2008. The central facts are these:

Until its declaration of independence in February 2008, Kosovo (or, in Albanian, "Kosova") was formally a province of about 4,200 square miles (somewhat smaller than the state of Connecticut) located in southern Serbia.³² In 1999, Kosovo was the scene of the last of the four "Yugoslav wars"—Slovenia (1991), Croatia (1991–1992), Bosnia (1992–1995), and Kosovo (1999)—that attended the breakup of the former Socialist Federated Republic of Yugoslavia

1971); ROWAN WILLIAMS, *DOSTOEVSKY: LANGUAGE, FAITH, AND FICTION* 26–35, 76–83 (2008); Albert Camus, *The Rejection of Salvation*, in *THE BROTHERS KARAMAZOV* 836, 840 (Constance Garnett trans., 1976); D.H. Lawrence, *The Grand Inquisitor*, in *THE BROTHERS KARAMAZOV*, *supra* at 829, 829–36.

31. Unfortunately, the Cold War experience has distorted the consciousness of several generations of people, above all political elites, making them think that any global policy must be ideologized . . . [A]t least two generations of political leaders were educated in a definite ideological system of coordinates, and sometimes are simply unable to think in categories lying outside of it.

Lavrov, *supra* note 24.

32. See generally NOEL MALCOLM, *KOSOVO: A SHORT HISTORY* (1998) (detailing the history of the Yugoslav state).

(SFRY or the former Yugoslavia).³³ Prior to 1999 and for many decades before that, the population of Kosovo was overwhelmingly Albanian in ethnicity and Moslem in faith.³⁴ Historically, however, Kosovo was an important part of the religious and cultural inheritance of the Serbs, a Slavic and Orthodox Christian people, and was known to them as “Old Serbia.”³⁵

The former Yugoslavia became an independent state in December 1918, almost immediately after the end of the First World War.³⁶ From the beginning it was an ethnically and religiously divided state, predominantly populated by Slavic peoples, of which the two largest groups were the Serbs and the Croats.³⁷ The state was formed by the unification of the two southern states of Serbia and Montenegro with the former Austro-Hungarian territories of Croatia, Dalmatia, and Bosnia-Herzegovina.³⁸ (Serbia had previously seized Kosovo from the decaying Ottoman Empire during the First Balkan War (1912) and had thereafter annexed it.)³⁹ Relations between the major ethnic groups in the Yugoslav state from 1918 onward were difficult: the Croats feared and resented what they considered to be Serb domination of the state, while the Serbs had joined the state precisely because they had intended to build it around themselves.⁴⁰ Nonetheless, geopolitical realities, including the apprehension of encroachments by Italy, Hungary, or Bulgaria,

33. PHILIP BOBBITT, *THE SHIELD OF ACHILLES: WAR, PEACE, AND THE COURSE OF HISTORY* 432 (2002). In addition to the four violent secessions from the former Yugoslavia, a fifth secession occurred when the then-union of Serbia and Montenegro in the Federal Republic of Yugoslavia (FRY) ended with the peaceful secession of the latter on June 3, 2006. Yehuda Z. Blum, *Was Yugoslavia a Member of the United Nations in the Years 1992–2000?*, 101 AM. J. INT’L L. 800, 800 n.2 (2007). Montenegro was admitted into the United Nations on June 28, 2006. G.A. Res. 60/264, U.N. Doc. A/RES/60/264 (June 28, 2006).

34. PIOTR EBERHARDT, *ETHNIC GROUPS AND POPULATION CHANGES IN TWENTIETH-CENTURY CENTRAL-EASTERN EUROPE* 385–94 (Jan Owsinski trans., 2003).

35. Peter Popham, *Serbia Endorses Bomb Attack on Kosovo Border*, *THE INDEPENDENT* (London), Feb. 20, 2008, at 18 (noting the view of Serbs “who are bitterly resentful of the fact that the province known as the historic heartland of ‘Old Serbia’ should have broken free”).

36. See DAVID FROMKIN, *KOSOVO CROSSING* 128–30 (1999) (describing the events leading to the recognition of Yugoslavia as a nation); MARGARET MACMILLAN, *PARIS 1919*, at 109–24 (2001) (detailing the circumstances of Yugoslavia’s origin).

37. For a magisterial account of the peoples of the former Yugoslavia, their origins, and their ideologies before unification, see IVO BANAC, *THE NATIONAL QUESTION IN YUGOSLAVIA: ORIGINS, HISTORY, POLITICS* 21–115 (1984).

38. See *id.* at 115–40 (detailing the establishment of the Yugoslav state).

39. See *id.* at 296 (describing the Serbian occupation and annexation of Kosovo in 1912–13).

40. See MACMILLAN, *supra* note 36, at 110 (describing the “separate nationalisms” growing in the region).

tended to hold the union together.⁴¹ Inter-ethnic conflict broke out, however, with the invasion of Yugoslavia by Nazi Germany in the spring of 1941.⁴² Joining in the German victory “was the Croatian Ustase leader Ante Pavelic, who became Croatia’s wartime leader” and eventually oversaw the killing of nearly half a million ethnic Serbs.⁴³ Resistance to the German occupation was divided between forces loyal to the pre-war monarchy and Communist partisans led by Josip Broz, himself an ethnic Croat who was better known by his *nom de guerre* “Tito.”⁴⁴

The Communist movement took power at the conclusion of the Second World War and proclaimed the Federal People’s Republic of Yugoslavia in November 1945.⁴⁵ This Yugoslav state was constituted on the principle of what might be called ethno-federalism.⁴⁶ The state’s “federal” structure consisted of six constituent “republics”—Serbia (including the province of Kosovo), Croatia, Slovenia, Macedonia, Bosnia-Herzegovina, and Montenegro, whose boundaries were defined, with the notable exceptions of the Albanian majority in Kosovo and the Hungarian majority in Vojvodina, largely in terms of population distribution by ethnicity.⁴⁷ According to the 1991 census,

41. See FROMKIN, *supra* note 36, at 141–43 (noting the perceived external threats to the Yugoslav state which allowed “the new borders to harden in the public mind”).

42. See MALCOLM, *supra* note 32, at 290 (detailing the circumstances of the German invasion and Yugoslavia’s unconditional surrender).

43. FROMKIN, *supra* note 36, at 145.

44. See *id.* at 146 (noting that Broz became better known as “Tito”); MALCOLM, *supra* note 32, at 297–302 (describing the two resistance movements that emerged during the German invasion).

45. See RICHARD C. FRUCHT, *EASTERN EUROPE* 431 (2005) (noting that the Communist-controlled Constituent Assembly established the Federal People’s Republic of Yugoslavia on November 29, 1945).

46. This federal structure was sacrosanct, it being seen as one of the pillars of the communist Yugoslavia that emerged as a result of the Partisan struggle during World War II. Thus it appeared as a cardinal figure of all of communist Yugoslavia’s constitutional documents [from 1946 to 1974]. However, in reality the Yugoslav state in the immediate post-World War II years was a highly centralised [sic] state due to political control exercised by the highly centralised [sic] [Communist Party of Yugoslavia]. In this respect the leadership role of Tito was crucial.

PETER RADAN, *THE BREAK-UP OF YUGOSLAVIA AND INTERNATIONAL LAW* 147 (2002).

47. As one scholar reports:

The boundaries of the constituent republics corresponded more or less to the territorial distribution of particular ethnic groups, so that each ethnic group inhabited a particular constituent republic. However, some ethnic groups, such as the Serbs, formed significant minorities within constituent republics other than their own. There were also ethnic groups which did not have their own constituent republic, such as the Albanians and the Hungarians, who were

the last before the Yugoslav wars began, “five of the six republics were substantially mono-ethnic”; Bosnia was the exception.⁴⁸ Slovenia was 88% Slovene; Croatia 78% Croat; Serbia 66% Serb; Macedonia 65% Macedonian; Montenegro 62% Montenegrin.⁴⁹ Because Albanian Kosovars boycotted the 1991 census, their exact numbers are unknown, but they are believed to have been 85% of the population of Kosovo.⁵⁰ However, substantial ethnic Serb minority populations existed outside Serbia, particularly in the Republics of Croatia and Bosnia-Herzegovina. Serbia’s acceptance of the post-1945 system of internal borders was therefore conditional upon the Yugoslav federation’s remaining centralized.⁵¹

Persisting ethnic tensions within the former Yugoslavia, though in general successfully suppressed by the Tito régime, led to constitutional changes in 1963 and again in 1974.⁵² Under the 1974 constitution, which remained in force until the SFRY’s breakup, a Presidential Council directed the government’s affairs at the federal level.⁵³ The Council consisted of the heads of the six republics together with the heads of the autonomous provinces Kosovo and Serbia.⁵⁴ The chair of the Council rotated among its members.⁵⁵ The 1974 constitutional arrangements “gave the autonomous provinces of Kosovo and Vojvodina a status equivalent in most ways to that of the six republics themselves,” including the right to issue their own constitutions, and confirmed rights earlier granted to the autonomous provinces to a role in federal economic decision making and even foreign policy.⁵⁶ Indeed, some analysts contend that Yugoslavia’s Communist régime had deliberately “‘gerrymandered’ the Constitution ‘as a means of weakening the state’s largest ethnic element,’ the Serbs.”⁵⁷ As a result, the 1974 constitution was extremely unsatisfactory to many Serbs, who preferred a more

concentrated respectively in the autonomous provinces of Kosovo and Vojvodina, within Serbia.

THOMAS D. MUSGRAVE, *SELF-DETERMINATION AND NATIONAL MINORITIES* 114 (1997).

48. MICHAEL MANN, *THE DARK SIDE OF DEMOCRACY* 363 (2005).

49. *Id.*

50. *Id.*

51. RADAN, *supra* note 46, at 152.

52. See FROMKIN, *supra* note 36, at 146 (noting the manner in which ethnic unrest contributed to changes to the constitution).

53. See HEIKE KRIEGER, *THE KOSOVO CONFLICT AND INTERNATIONAL LAW* 1 (2001) (describing this presidential council as a “federal presidency” composed of “two representatives of each republic and one from each autonomous province”).

54. See *id.* (detailing the composition of the collective federal presidency).

55. See *id.* (describing the rotational leadership of the collective presidency).

56. MALCOLM, *supra* note 32, at 327. Malcolm suggests that the 1974 constitution did not take the further step of making Kosovo a “republic” largely for fear that it might secede and join with Albania. *Id.* at 328.

57. MANN, *supra* note 48, at 365 (quoting WALKER CONNOR, *ETHNONATIONALISM* 333 (1994)).

centralized state,⁵⁸ despite ethnic Serbian predominance in the federal Yugoslav Army and the federal governmental apparatus.⁵⁹ A well-known memorandum written in 1986 by sixteen members of the Serb Academy of Arts and Sciences set forth the causes of Serb dissatisfaction with the existing Yugoslav state.⁶⁰ In particular, the authors of the memorandum claimed that Kosovo was experiencing the “physical, political, legal and cultural” genocide of the province’s Serb population, owing to the intimidation and discrimination they allegedly encountered at the hands of the Kosovar Albanian provincial authorities.⁶¹ The complaints expressed by these Serbian intellectuals, while controversial, were by no means groundless. As one scholar points out, there is “a strong argument” that the failure of the Kosovar Albanian majority after the grant of provincial autonomy in 1974 to reassure the Kosovar Serb minority that its rights and interests would be respected lay behind much of the trouble that was to ensue in the 1980s.⁶²

During the Cold War, Yugoslavia, as a “non-aligned” (if also Communist) state, occupied a special place in NATO strategy that gave it continuing access to Western credit and Western markets. The conclusion of the Cold War, however, coupled with the foreign debt crisis of the late 1980s, cost Yugoslavia its niche position in the global economy and exposed it to competition from newly independent Central European states. The resulting strains destabilized Yugoslavia, encouraged its most “Westernized” components (Slovenia and Croatia) to seek independence, and fed the rise of nationalist and secessionist movements throughout the federation.⁶³ In the late 1980s, Slobodan Milosevic, a former Communist opportunistically drawing on Serbian nationalism, began to emerge as Serbia’s leading political figure.⁶⁴ Milosevic first gained prominence in April 1987 in the small town of Kosovo Field, next to the site of the famous battle of June 28, 1389, in which the forces of the Serb medieval empire under Prince Lazar Hrebeljanović were defeated by the army of the Ottoman Sultan Murad I.⁶⁵ Milosevic, visiting the town as a Communist Party deputy leader, witnessed Kosovar Albanian police

58. See *id.* at 364–65 (describing Serbian frustrations with the 1974 constitutional changes).

59. See *id.* at 365 (noting the degree of Serbian predominance).

60. Memorandum of the Serbian Academy of Arts and Sciences (1986), available at <http://www.ess.uwe.ac.uk/Kosovo/Kosovo-Background17.htm>.

61. *Id.*

62. Michael Mccgwire, *Why Did We Bomb Belgrade?*, 76 INT’L AFF. 1, 4 (2000).

63. *Id.* at 2.

64. MANN, *supra* note 48, at 369–76 (detailing the rise of Milosevic beginning in the late 1980s).

65. Some scholars question whether the Serb forces even suffered defeat at Kosovo Field. In any case, Serbia’s loss of independence was not complete until 88 years later, with the fall of Smederevo. BRANIMIR ANZULOVIC, HEAVENLY SERBIA: FROM MYTH TO GENOCIDE 38–39 (1999).

beating Serbs—an event he may have prearranged—and was televised exclaiming, “[N]ever again will you be beaten.”⁶⁶ Milosevic became President of Serbia in May 1989⁶⁷ and, in breach of the 1974 constitution, revoked Kosovo’s and Vojvodina’s status as autonomous provinces in 1989.⁶⁸ Thereafter Milosevic instituted a program of discrimination against Kosovo’s ethnic Albanian majority, leading to their exculsion from employment, education, and health care benefits.⁶⁹ The Albanian Kosovars fought back and, in a referendum organized by para-governmental institutions, voted for independence.⁷⁰ Likewise, an underground parliament and government, led by Ibrahim Rugova as President, were created in 1992.⁷¹

Kosovo was not itself the site of major armed conflict during the second (Croatian) and third (Bosnian) Yugoslav wars, but it was keenly interested in the 1995 Dayton Accords, under which the international community imposed a settlement to the war in Bosnia.⁷² The Albanian Kosovars had expected that the Dayton Accords would grant them some future status, but instead they found

66. MANN, *supra* note 48, at 370.

67. KRIEGER, *supra* note 53, at 524.

68. MANN, *supra* note 48, at 370. Serbia’s leadership had sought on various to change Kosovo’s *de facto* status as a republic under the federation’s 1974 constitution but had been unsuccessful because of the objections of the other republics. RADAN, *supra* note 46, at 197. However, continued pressure by the Kosovar Albanians for formal republican status for Kosovo throughout the 1980s provoked Serbia to take unilateral action to change its constitution in 1989 and again in 1990 to curtail Kosovo’s autonomy. *Id.* The two key events were a 1989 amendment to the Serbian constitution, followed by a new constitution for Serbia in 1990. *Id.*

Some scholars date the current crisis in Kosovo to these 1989–1990 constitutional changes, which were accompanied by other Milosevic-inspired measures against the Albanian Kosovars. MIRANDA VICKERS, *BETWEEN SERB AND ALBANIAN: A HISTORY OF KOSOVO* 234–35 (1998); Richard Caplan, *International Diplomacy and the Crisis in Kosovo*, 74 INT’L AFF. 745, 748, 751 (1998).

69. See Caplan, *supra* note 68, at 751 (describing Albanian expulsion from employment and education); HUMAN RIGHTS WATCH/HELSINKI, *OPEN WOUNDS: HUMAN RIGHTS ABUSES IN KOSOVO* 126 (1993) (explaining that in July and August 1990 the health care system in Kosovo was placed under “emergency management” by the Serbians leading to massive layoffs of Kosovar Albanian healthcare workers).

70. See Assembly of the Republic of Kosova, *Results of the Referendum* (Oct. 19, 1991), reprinted in *FORMER YUGOSLAVIA THROUGH DOCUMENTS: FROM ITS DISSOLUTION TO THE PEACE SETTLEMENT* 765–66 (Snezana Trifunovska ed. 1999) (stating that of the 1,051,357 eligible voters of Kosova, 87.01% participated in the referendum, and of those 87.01%, 99.87% voted in favor of independence).

71. For a detailed account of political developments in Kosovo between 1989 and 1992, see RADAN, *supra* note 46, at 198–200.

72. See Paul C. Szasz, *Introductory Note, General Framework Agreement for Peace in Bosnia and Herzegovina, Bosn. & Herz.-Croat.-Yugo.*, Dec. 14, 1995, 35 I.L.M. 75 (1996) [hereinafter *Dayton Peace Accords*] (explaining the implementation of the General Framework Agreement and the role of the international community in concluding the treaty).

themselves ignored.⁷³ Their frustration led to the formation of the Kosovo Liberation Army (KLA), which began an insurgency targeting Serb security forces.⁷⁴ The Serbian authorities retaliated with a program of systematic reprisals and village clearances against the Albanian Kosovars.⁷⁵ These measures intensified throughout 1998.⁷⁶ On September 23, 1998, the UN Security Council adopted Resolution 1199 (1998), which expressed “[g]rave concern[]” over “excessive and indiscriminate use of force” by the Serb security forces and military that had “resulted in numerous civilian casualties and . . . the displacement of over 230,000 persons from their homes.”⁷⁷ The Resolution further expressed alarm over an “impending humanitarian catastrophe” and reaffirmed the Council’s commitment to “a peaceful resolution of the Kosovo problem which would include an enhanced status for Kosovo, a substantially greater autonomy, and meaningful self-administration.”⁷⁸ Nonetheless the inter-ethnic conflict grew worse, culminating in a massacre in the village of Raçak in January 1999 that left forty-five Albanian Kosovars dead.⁷⁹

In February 1999, the so-called Contact Group—France, Germany, Italy, Russia, the United Kingdom, and the United States⁸⁰—summoned Serb and Albanian Kosovar negotiators to a conference in Rambouillet, France, in order to secure their agreement to an interim settlement.⁸¹ The talks failed: the Kosovar Albanian delegation was persuaded to sign on to the Rambouillet plan only

73. See Mark S. Ellis, *The Consequences of the Kosovo Conflict on Southeastern Europe*, 34 INT’L LAW. 1193, 1194 (2000) (explaining that Dayton created expectations among Kosovar Albanians for “some degree of independence” but that Kosovo was left off the agenda at Dayton and this signaled to Kosovo’s leaders that their efforts to gain international support would be fruitless).

74. See MALCOLM, *supra* note 32, at 353–55 (explaining that after Kosovo was ignored at Dayton, some Kosovar Albanians began taking more “direct action” including shootings and bombings targeted at Serb officials and that by the summer of 1997 a group calling itself the “Kosovo Liberation Army” was claiming responsibility for the attacks).

75. See MANN, *supra* note 48, at 387 (explaining how Serb police attempted to wipe out the KLA in 1998); see also Eleanor Lumsden, *An Uneasy Peace: Multilateral Military Intervention in Civil Wars*, 75 N.Y.U. J. INT’L L. & POL. 795, 828–29 (2003) (noting that Serbian forces began to carry out reprisals on both the rebel forces and Albanian villagers and civilians).

76. See generally Lumsden, *supra* note 75, at 829 (noting that in 1998 Milosevic began a program of ethnic cleansing of Kosovar Albanians).

77. S.C. Res. 1199, pmb., U.N. Doc. S/RES/1199 (Sept. 23, 1998).

78. *Id.*

79. Timothy W. Crawford, *Pivotal Deterrence and the Kosovo War: Why the Holbrooke Agreement Failed*, 116 POL. SCI. Q. 499, 519 (2001).

80. Marc Weller, *The Rambouillet Conference on Kosovo*, 75 INT’L AFF. 211, 212 (1999).

81. IVO H. DAALDER & MICHAEL E. O’HANLON, *WINNING UGLY: NATO’S WAR TO SAVE KOSOVO* 76–77 (2000).

with extreme difficulty, while the Serbs refused to sign at all.⁸² Soon after, the Serbs renewed their offensive against Kosovo.⁸³ At that point, Western military forces in the North Atlantic Treaty Organization (NATO) intervened with air strikes against Serbia and its forces in Kosovo.⁸⁴ The NATO air war began on March 24, 1999, and continued until June 9, 1999.⁸⁵ The NATO countries did not secure authorization from the UN Security Council under Chapter VII of the UN Charter for their use of force.⁸⁶ Following NATO's air attacks, Serb forces in Kosovo massively intensified their efforts at ethnic cleansing, driving over 800,000 Albanian Kosovars out of Kosovo.⁸⁷

On June 10, 1999, Milosevic agreed to withdraw Serb forces from Kosovo, opening the way to an international settlement.⁸⁸ This settlement was embodied in SCR 1244 (1999), which forms the first major topic discussed in the following dialogue.⁸⁹ Broadly speaking, SCR 1244 authorized the establishment of a United Nations civil administrative mission, UNMIK, in Kosovo, and the deployment of a NATO-led security force (KFOR) into that province.⁹⁰ Kosovo was thus placed under a transitional UN administration pending the outcome of a negotiation process intended to resolve its final political status.⁹¹

82. For analysis of the Rambouillet Conference, see Mccgwire, *supra* note 62, at 7–10, 13–15. Mccgwire argues that the Western powers in the Contact Group set up the Conference to fail, thus positioning themselves to make war on Serbia. *Id.* at 13.

83. See JOHN JANZEKOVIC, *THE USE OF FORCE IN HUMANITARIAN INTERVENTION: MORALITY AND PRACTICALITIES* 179 (2006) (describing how the “Serbian military and police forces immediately stepped up the intensity of their operations against the ethnic Albanians in Kosovo” once the Serb delegation walked out of the Rambouillet conference).

84. *Id.* at 180 (noting that the U.S. and NATO began Operation Allied Force after the Serbs refused to comply with the Rambouillet peace proposal).

85. NATO's Role in Relation to the Conflict in Kosovo, <http://www.nato.int/kosovo/history.htm> [hereinafter NATO's Role] (last visited Dec. 19, 2008).

86. See JANZEKOVIC, *supra* note 83, at 181 (explaining that NATO acted without a UN mandate).

87. For a full account of the 1999 war and its background see DAALDER & O'HANLON, *supra* note 81.

88. See NATO's Role, *supra* note 85 (describing the NATO withdrawal from Kosovo on June 10 after verifying the withdrawal of Yugoslav forces following the conclusion of the Military-Technical Agreement on June 9, 1999).

89. S.C. Res. 1244, *supra* note 29.

90. *Id.* ¶ 5; see also United Nations Interim Administration in Kosovo, *UNMIK Fact Sheet* (July 2008), available at <http://www.unmikonline.org/intro.htm> (discussing the establishment of UNMIK).

91. See Enrico Milano, *Security Council Action in the Balkans: Reviewing the Legality of Kosovo's Territorial Status*, 14 EUR. J. INT'L L. 999, 1003 (2003) (describing the UN transitional administration); see also S.C. Res. 1244, *supra* note 29, ¶ 11(a) (“promoting the establishment, pending a final settlement, of substantial autonomy and self-government in Kosovo”).

The costs of the United Nations' activities in administering Kosovo were substantial: since 1999, the U.N. has spent approximately US\$53 billion in Kosovo, or roughly US\$2,800 per capita per year—"160 times the average yearly per capita aid for all developing countries combined."⁹² Nonetheless, Kosovo remains impoverished, with close to half its residents living on less than US\$4.80 a day and with youth unemployment at around 75%, and it is reported to be riddled with corruption and dominated by organized crime figures.⁹³ Allegations of corruption and criminality have also been leveled against UNMIK administrators.⁹⁴ Moreover, despite the presence of KFOR, ethnic violence, now largely directed against Serbs, has persisted in Kosovo.⁹⁵

As detailed more fully in the dialogue, the political process failed to resolve the question of Kosovo's final status in a manner acceptable to all the parties of interest. In the view of the Western powers, it appeared that any agreement between the Serbian authorities and the Kosovar Albanians was simply out of reach. On February 17, 2008, Kosovo declared its independence from Serbia.⁹⁶ On February 18, the EU Foreign Ministers agreed to provide a wide range of political, military, diplomatic, and financial support to the new state of Kosovo.⁹⁷ Several major Western governments, including the U.S., UK, France, Germany, and Italy, swiftly recognized Kosovo as a sovereign, independent state.⁹⁸ The Serbian government, supported by Russia, has vigorously contested the legality both of Kosovo's secession and of the Western powers' support for it.⁹⁹

Kosovo's Albanians differ from their Serb neighbors ethnically, religiously, and linguistically.¹⁰⁰ The pre-1998 history of Serb-

92. Walter Mayr, *The Slow Birth of a Nation*, SPIEGEL ONLINE INT'L, Apr. 24, 2008, <http://www.spiegel.de/international/world/0,1518,549441,00.html>.

93. *Id.*

94. *Id.*

95. See INDEPENDENT INTERNATIONAL COMMISSION ON KOSOVO, THE FOLLOW-UP OF THE KOSOVO REPORT: WHY CONDITIONAL INDEPENDENCE? 19 (2001), available at <http://www.alb-net.com/pipermail/albsa-info/2001-November/002393.html> (finding KFOR's inability to restrain violence against Kosovo's Serb minority "the greatest single failure since the NATO intervention" and "a moral disgrace").

96. Dan Bilefsky, *Kosovo Declares Independence*, INT'L HERALD TRIB., Feb. 18, 2008, at 1.

97. Press Release, Council of the European Union, 2851st Council Meeting, General Affairs and External Relations 2 (Feb. 18, 2008), available at http://www.consilium.europa.eu/ueDocs/cms_Data/docs/pressData/en/gena/98818.pdf.

98. Nicholas Kulish & C.J. Chivers, *Kosovo Independence Gets Mixed Reaction Worldwide*, SAN DIEGO UNION-TRIB., Feb. 19, 2008, at A11.

99. See *id.* (explaining that the Serbian President described Kosovo as a "false state" and that Russia believed the declaration to be "null and void").

100. See Jonathan I. Charney, *Self-Determination: Chechnya, Kosovo and East Timor*, 24 VAND. J. TRANSNAT'L L. 455, 460 n.18 (2001) (noting that the Albanians in Kosovo are distinct from the "majority population in terms of language, ethnicity,

Albanian relations was unquestionably marked by severe conflict, including mass ethnic cleansing.¹⁰¹ Yet, the closely entwined histories of Kosovo and Serbia also included periods of coexistence and symbiosis. From a long-term perspective, “Kosovo was essentially a pluralistic society, where various ethnic groups coexisted, many languages were spoken and all major religions of the Balkans were represented.”¹⁰² Kosovo today, however, is effectively a “cleansed,” mono-ethnic zone. Since NATO’s intervention in 1999, about two-thirds of the ethnic Serb population of Kosovo, or some 200,000 people, have been forced out.¹⁰³

religion, culture, and social organization”); *see also* MALCOLM, *supra* note 32, at 10–40 (discussing the development of the culture, language and religion of the Albanians).

101. *See, e.g.*, MALCOLM, *supra* note 32, at 335 (describing the deaths of Kosovar Albanians in the 1980s).

102. GER DULZINGS, RELIGION AND THE POLITICS OF IDENTITY IN KOSOVO 9 (2000).

103. *See* MANN, *supra* note 48, at 356 (noting that during 1999, Kosovar Albanians pressured almost 200,000 Serbs, amounting to two-thirds of the population, to leave Kosovo).

THE KOSOVO COLLOQUIES: A DRAMA IN FIVE ACTS

*Andrei S*** and Alexander S****

Characters:

- Dmitri:* A Russian army officer and military lawyer; half-brother of Ivan and Alyosha
- Ivan:* A westernizing, secular Russian journalist with a legal training, perhaps including post-graduate study at a famous U.S. law school
- Alyosha:* A seminarian; the youngest brother
- Smerdyakov:* A servant in the Karamazov household; the illegitimate child of Fyodor Karamazov, father of Dmitri, Ivan, and Alyosha
- The Grand Inquisitor:* The Cardinal–Archbishop of Seville and the friend and teacher of Ivan
- Father Zossima:* A Russian Orthodox monk and Alyosha’s spiritual guide

Act I: *Kosovo and the United Nations Security Council*

Alyosha:

Honored guests, Brothers: The conversation we are about to engage in is not simply for the purpose of entertainment. True, one of our long, light-filled Russian summer evenings lies before us. We have dined well. And we have the joy of each other's company. But the matter we are discussing is one of fundamental importance to our country and the world. You might not think so at first. Our subject is the legality of Kosovo's declaration of independence in February 2008 and the role of the great powers of the Western world—the European Union (EU) and the United States—in bringing about and seeking to entrench that independence. In itself, the fate of Kosovo might seem to be inconsequential. What is it but a poor, small, backward region of the Balkans, "*véritable périphérie de la périphérie*," as one French scholar put it?¹⁰⁴ But when we reflect, we shall see that much is at stake. I think the legal question from which we start will gradually unfold into questions of much greater magnitude. We shall be driven to consider how best to fulfill the purposes of the United Nations Charter—or whether to supplant the Charter with some other kind of constitutional order in world affairs. We shall have to examine the relation between the discourse of public international law and the rivalries of the great powers, including our own country. And we may even have to consider whether the differences that have emerged in the international community over the fate of Kosovo are not merely the outcome of different understandings of international law or even of the clash of vying great powers' interests and ambitions but rather rest on fundamental differences between visions of the world—differences, if I may so put it, not simply between the West and Russia but between the Western "idea" and the Russian "idea."¹⁰⁵

Although you, Brother Dmitri, are a soldier and you, Brother Ivan, are a journalist, both of you are lawyers. Brother Smerdyakov, I understand you benefited from years of informal training at the feet of your master, our father, Fyodor Karamazov. So I hope and expect that you all will demonstrate finely honed legal skills. Let us together prove the falsehood of the Marquis de Custine's remark that

104. See DUIJZINGS, *supra* note 102, at 5 (quoting French social geographer Michel Roux).

105. Dostoevski himself used the formula "the Russian idea" as early as 1856, and frequently thereafter. JAMES P. SCANLON, *DOSTOEVSKY THE THINKER* 198 n.3 (2002). The term was widely used by Russian intellectuals throughout the nineteenth century and has again become current in the post-Soviet period. *Id.*

the strength of the Russians “does not lie in mind, but in war”!¹⁰⁶ But in showing our adroitness at legal argument, let us always remember that our aim is to discover what is true and just.

Dmitri:

Brother Ivan, your U.S. and Western European friends—I will usually refer to them collectively as “the West”—have violated international law by setting up the Albanian Kosovar entity in Kosovo as an independent “state.” And, as President Medvedev has recently emphasized, our Russia takes international law—and above all, the law of the United Nations Charter—extremely seriously, considering it to be the basis of stability and peace in international affairs.¹⁰⁷

Here I will argue that, under the ordinary rules for the interpretation of treaties, Security Council Resolution (SCR) 1244 (1999),¹⁰⁸ which governs the international community’s dealings with Kosovo, bars the West’s action. One need only pick up the Resolution to read that it “reaffirm[s] the commitment of all Member States to the sovereignty and territorial integrity of the Federal Republic of Yugoslavia and the other States of the region.”¹⁰⁹ By unilaterally bringing about the secession of Kosovo from the Federal Republic of Yugoslavia—or Serbia, as it now is¹¹⁰—and attempting to sustain that “state” in being without either Serbia’s consent or the Security Council’s approval, the Western powers, in my view, have clearly violated their obligation under Article 25 of the UN Charter “to accept and carry out the decisions of the Security Council.”¹¹¹

The Vienna Convention on the Law of Treaties and SCR 1244. International treaty law governs under the proper interpretation of SCR 1244, for that Resolution represents a solemn international agreement or “treaty” whose interpretation is governed by the provisions of the Vienna Convention on the Law of Treaties (VCLT).¹¹² Thus, SCR 1244 should be read in accord with its text,

106. MARQUIS DE CUSTINE, *EMPIRE OF THE CZAR: A JOURNEY THROUGH ETERNAL RUSSIA* 616 (Daniel J. Boorstin ed., 1989) (1843).

107. See Medvedev, *supra* note 8 (“[I]nternational law . . . is the set of rules that has been and remains the most solid foundation for relations between nations.”).

108. S.C. Res. 1244, *supra* note 29.

109. *Id.* pmb1.

110. See *supra* note 33 and accompanying text (describing the history of secessions from the Federal Republic of Yugoslavia).

111. U.N. Charter art. 25.

112. See *R. (on the application of Al-Jedda) v. Sec’y of State for Defence* [2007] UKHL 58, [2008] 1 A.C. 332 (appeal taken from Eng.) (U.K.) (holding that Security Council Resolutions have legal effect under UN Charter art. 103 of superseding contrary treaties, including European Convention on Human Rights); see also Sir Michael Wood, *The Hersch Lauterpacht Memorial Lectures, The UN Security Council*

object and purpose and, as necessary, its negotiating history as reflected in the Security Council debate concerning its adoption.¹¹³ SCR 1244, so read, clearly contemplated that the final political status of Kosovo would be decided through negotiations between the Albanian Kosovar entity and Serbia, would not involve the dismemberment of Serbia's territory without its consent, and would be subject to review and approval by the Security Council.

The plain meaning of SCR 1244 deprives any state, including Serbia itself, of any rights it might previously have enjoyed under general principles of international law unilaterally to effect or to recognize changes in the political status of Kosovo. SCR 1244 reserved the question of Kosovo's final political status for later determination by the international community acting through the Security Council.¹¹⁴ The text, as well as the debate of the Security Council when it adopted the Resolution, establishes clearly that the Security Council was to remain seized of the matter.¹¹⁵ That continues to be true today. The February 2008 Security Council debate over Kosovo's declaration of independence demonstrated vigorous dissent from the West's narrow interpretation of SCR 1244.¹¹⁶ Because a treaty may be amended only by a subsequent

and International Law, First Lecture: The Legal Framework of the Security Council (Nov. 7, 2006), available at http://www.lcil.cam.ac.uk/lectures/2006_sir_michael_wood.php (surveying case law to the effect that under art. 103 mandatory provisions of Security Council Resolutions binding on Member States set aside to the extent of the conflict any contrary obligations under other treaties).

113. See Michael C. Wood, *The Interpretation of Security Council Resolutions*, 2 MAX PLANCK Y.B. U.N. L. 73, 89–95 (1998) (stating that interpretation of Security Council resolutions should take into consideration the “plain meaning,” “the object of its object and purpose,” and the “travaux préparatoires”).

114. See S.C. Res. 1244, *supra* note 29, ¶¶ 10, 11(e), 21 (describing the role of the transitional administration as including the “development of provisional democratic self-governing institutions” and referencing the political process to “determine Kosovo's future status” while deciding to “remain actively seized in the matter”).

115. Thus, Mr. Dejammet, the French delegate, stated that “[t]he Security Council will remain in control of the implementation of the peace plan for Kosovo. . . . Those of us who wish to recall the primacy of the Security Council for the maintenance of international peace and security, as established by the Charter, have been satisfied.” U.N. SCOR, 54th Sess., 4011th mtg. at 12, U.N. Doc. S/PV.4011 (June 10, 1999). Mr. Burleigh, the U.S. delegate, stated that “[i]t is important to note that this resolution provides for the civil and military missions to remain in place until the Security Council affirmatively decides that conditions exist for their completion.” *Id.* at 14. Others besides the major Western powers took a similar view. For instance, the Argentine delegate, Mr. Petrella, stated that the resolution “lays the foundation for a definitive political solution to the Kosovo crisis that will respect the sovereignty and territorial integrity of the Federal Republic of Yugoslavia” and “confirms the central and irreplaceable role of the United Nations.” *Id.* at 19.

116. See Press Release, Security Council, Security Council Meets in Emergency Session Following Kosovo's Declaration of Independence, With Members Sharply Divided on Issue, U.N. Doc. SC/9252 (Feb. 18, 2008), available at <http://www.un.org/News/Press/docs/2008/sc9252.doc.htm> (describing statements by the Serbian, Russian

agreement of the parties,¹¹⁷ in this case requiring the assent or abstention of Russia as a veto-bearing member of the Security Council, the original “standstill” agreement reflected in SCR 1244 must govern the rights and duties of all the members of the United Nations. SCR 1244 was adopted pursuant to Chapter VII, which makes it binding on states and, through them, international organizations—including the EU—pursuant to articles 25 and 48 of the UN Charter.¹¹⁸

Prior Understanding of and Practice Under SCR 1244. My interpretation is hardly novel. In 2005, the Western powers in the Contact Group for Kosovo joined with Russia in agreeing that “[t]he UN Security Council will remain actively seized of the matter [of Kosovo’s final political status]. *The final decision on Kosovo’s status should be endorsed by the UN Security Council.*”¹¹⁹ Although the Security Council’s membership and that of the Contact Group are not identical, all of the Council’s permanent members except the People’s Republic of China belong to the Contact Group. Hence it would not be unreasonable to see this statement as a “subsequent agreement between the parties regarding the interpretation of [SCR 1244] or the application of its provisions,”¹²⁰ or at least as “subsequent practice in the application of [SCR 1244] which establishes the agreement of the parties regarding its interpretation.”¹²¹

Furthermore, this straightforward interpretation of SCR 1244 fully comports with the background interpretive principles respecting Serbia’s “essentially . . . domestic jurisdiction”¹²² and its “sovereign equality”¹²³ which form part of the relevant “context” under the VCLT for interpreting SCR 1244.¹²⁴ These textually-grounded

and Chinese delegations that Kosovo’s declaration of independence was “a flagrant violation of resolution 1244”).

117. See Vienna Convention on the Law of Treaties art. 39, May 23, 1969, 1155 U.N.T.S. 331 [hereinafter VCLT] (entered into force Jan. 27, 1980) (“A treaty may be amended by agreement between the parties.”). For purposes of this Article, the Authors treat as identical the VCLT and the language of the proposed treaty governing the law of treaties relating to international organizations. See Vienna Convention on the Law of Treaties Between States and International Organizations or Between International Organizations, Mar. 21, 1986, 25 I.L.M. 543 (not entered into force). Whether there is an emerging customary law of treaty interpretation for international organizations in contexts other than Security Council resolutions that differs from the rules of the VCLT is a question better left for another day.

118. U.N. Charter arts. 25, 48.

119. *The Contact Group’s Guiding Principles for a Settlement of Kosovo’s Status*, KIM INFO NEWSLETTER, Nov. 14, 2005, http://www.kosovo.net/news/archive/2005/November_15/2.html (emphasis added).

120. VCLT, *supra* note 117, art. 31(3)(a).

121. *Id.* art. 31(3)(b).

122. U.N. Charter art. 2, ¶ 7.

123. *Id.* art. 2, ¶ 1.

124. VCLT, *supra* note 117, art. 31(3).

interpretative principles may be disregarded by the members of the United Nations, if at all, only when the Security Council unambiguously decides to limit their application in order to address threats to international peace and security pursuant to Chapter VII. No one, much less the Security Council, has authoritatively determined that such a threat to international peace and security justifies the Albanian Kosovar entity in declaring Kosovo's independence or other states in recognizing it.

Alyosha:

Brother Ivan, perhaps you would like to speak to this reasoning? Dmitri's interpretation of the text of the Resolution certainly seems plausible.

Ivan:

Thank you, Brother Dmitri, for your lucid presentation. Unfortunately I cannot agree with your interpretation of SCR 1244. As I shall argue, that Resolution simply does not speak to the question of whether Kosovo was at liberty to declare its independence from Serbia.

The highest and best authority for the interpretation of SCR 1244 would, of course, be the Security Council itself.¹²⁵ But the very fact that we are having this conversation demonstrates that the Security Council was unable as a collective body to agree upon a definitive interpretation. So we must try to interpret it on our own.

The Text of SCR 1244. Without necessarily accepting your view that a SCR is on all fours with a treaty, Dmitri, I agree with you that primacy must be given to a good faith interpretation of the Resolution "in accordance with the ordinary meaning to be given to [its] terms."¹²⁶ And the Resolution does indeed "reaffirm[] the

125. See *Delimitation of the Polish-Czechoslovakian Frontier (Question of Jaworzina)*, Advisory Opinion, 1923 P.C.I.J. (ser. B) No. 8, at 37 (Dec. 6) (articulating the international legal principle of *ejus est interpretare legem cuius condere*, "it is an established principle that the right of giving an authoritative interpretation of a legal rule belongs solely to the person or body who has power to modify or suppress it"); see also Wood, *supra* note 113, at 82–83 (explaining that "[o]nly the Security Council, or some body authorized to do so by the Council, may give an authentic interpretation in the true sense.")

126. VCLT, *supra* note 117, art. 31(1); see also *Legal Consequences for States of Continued Presence of South Africa in Namibia (South West Africa) Notwithstanding Security Council Resolution 276*, Advisory Opinion, 1971 I.C.J. 16, at 53 (June 21) (noting considerations in interpreting a Security Council resolution are "the terms of the resolution to be interpreted, the discussions leading to it, the Charter provisions invoked and, in general, all circumstances that might assist in determining the legal status of the resolution of the Security Council.").

commitment of all Member States to the sovereignty and territorial integrity of the Federal Republic of Yugoslavia and the other States of the region.”¹²⁷ Moreover, in defining the scope of this commitment, this preambular clause adds “as set out in . . . Annex 2.”¹²⁸ Annex 2, in turn, provides for “a political process toward the establishment of an interim political framework agreement providing for substantial self-government for Kosovo” and also that the fulfillment of this objective will be sought in accordance with the subordinate principle of “taking full account of . . . the principles of sovereignty and territorial integrity of the Federal Republic of Yugoslavia.”¹²⁹

But how much weight should we give to this rather formulaic declaration? The Resolution’s reference to Yugoslavia’s “territorial integrity” appears only in the preamble, not in its operative part. When we examine the operative paragraphs of the Resolution, however, we find no such commitment to maintain the sovereignty of Serbia over Kosovo in perpetuity.¹³⁰ Preambles to SCRs are of little interpretative worth because “they tend to be used as a dumping ground for proposals that are not acceptable in the operative paragraphs.”¹³¹

What we find instead in the *operative* part of the Resolution—that is, SCR 1244, paragraph 1—is the Council’s clear and emphatic decision “that a political solution to the Kosovo crisis shall be based on the principles” set forth in the annexes attached to the Resolution, which are to be treated as integral parts of its text.¹³² Further, the operative language of the Resolution in paragraphs 11(a) and 11(f) “[d]ecides” that the main responsibilities of the UN civil presence in Kosovo will include “[p]romoting the establishment, pending a final settlement, of substantial autonomy and self-government in Kosovo” and, “[i]n a final stage, overseeing the transfer of authority from Kosovo’s provisional institutions to institutions established under a political settlement.”¹³³ No one could have known in advance what the contents of that final political settlement would be: they might as well have included independence for Kosovo as Serbia’s continuing sovereignty over it. Thus, the Resolution did not preclude independence as an outcome any more than it promoted it—it was

127. S.C. Res. 1244, *supra* note 29, pmb1.

128. *Id.*

129. *Id.* annex 2, ¶ 8.

130. *Id.* Serbian Foreign Minister Vuk Jeremic was therefore mistaken, in Ivan’s view, to assert that SCR 1244 “placed a Chapter VII obligation—a binding obligation—on all the member-states of the United Nations to respect the borders of [his] country.” Vuk Jeremic, Minister of Foreign Affairs of the Republic of Serbia, Remarks Before the Foreign Affairs Committee of the European Parliament (Feb. 20, 2008), http://www.kosovo.net/news/archive/2008/February_21/1.html.

131. Wood, *supra* note 112, at 87.

132. S.C. Res. 1244, *supra* note 29, ¶ 1.

133. *Id.* ¶ 11(a), (f).

simply neutral as between those alternatives.¹³⁴ Further, the substantial autonomy that the Resolution contemplated for Kosovo was plainly an interim arrangement intended to survive only pending a final settlement rather than an affirmation of Serbia's inextinguishable sovereignty over Kosovo.

The Annexes to the Text. The same conclusions are fortified by a careful reading of the two Annexes to SCR 1244, which constitute an integral part of the Resolution's text.¹³⁵ Both Annexes call for a "political process" directed towards the establishment of "an interim political framework agreement" that will take account of "the principles of sovereignty and territorial integrity" of Serbia.¹³⁶ But while the Resolution thus affirmed the continuation of Serbian sovereignty on an interim basis, it did not address whether that sovereignty would be an element of the final settlement of the Kosovo crisis. In short, then, nothing in the operative language of SCR 1244 barred Kosovo's independence.

The Rambouillet Accords. Finally, let me also draw attention to the references in both of the Annexes to the 1999 Rambouillet Accords. Although the Rambouillet Accords did not expressly hold out the promise of independence for Kosovo, Chapter 8 of those Accords did contemplate the convening in 2002 of "an international meeting . . . to determine a mechanism for a final settlement of Kosovo, on the basis of *the will of the people*, opinions of relevant authorities, each Party's efforts regarding the implementation of this Agreement, and the Helsinki Final Act."¹³⁷ Certainly there is more than a little ambiguity in this clause. It does not represent an explicit commitment to a binding referendum on independence for Kosovo; indeed, the word "referendum" is not used. Further, the allusion to the Helsinki Final Act could well be taken to affirm the principle of the inviolability of borders.¹³⁸ Moreover, considerations

134. See Bartram S. Brown, *Human Rights, Sovereignty, and the Final Status of Kosovo*, 80 CHI.-KENT L. REV. 235, 260 (2005) (stating the Resolution avoids choosing any particular final status) (citing S.C. Res. 1244, *supra* note 29, ¶ 11(a)).

135. S.C. Res. 1244, *supra* note 29, annex 1–2.

136. *Id.*

137. Rambouillet Accords, Proposed Interim Agreement for Peace and Self-Government in Kosovo, Feb. 23, 1999, ch. 8, art. 1, ¶ 3, available at <http://www.commondreams.org/kosovo/rambouillet.htm> (emphasis added).

138. See Final Act of the Conference on Security and Cooperation in Europe princ. III, Aug. 1, 1975, 14 I.L.M. 1292 (discussing participating states' shared principles regarding the inviolability of frontiers), available at <http://www1.umn.edu/humanrts/osce/basics/finact75.htm>. Under a very natural and persuasive reading, the Helsinki Final Act does not recognize a right of secession. See ANTONIO CASSESE, *SELF-DETERMINATION OF PEOPLES: A LEGAL APPRAISAL* 289 n.17 (1995) (stressing that, under the Helsinki Declaration, minority groups are not entitled to secession); Hurst Hannum, *Rethinking Self-Determination*, 34 VA. J. INT'L L. 1, 29 (1993) (arguing the

other than the will of the people, including the opinions of international law experts, were to be taken into account in devising the mechanism for a final settlement.¹³⁹ Nonetheless, when the article speaks of deciding Kosovo's final political status on the basis of the will of the people, it unmistakably envisages that the Kosovar people would play the leading role in decision for or against independence. Furthermore, the U.S. Secretary of State Madeleine Albright, in a February 22, 1999 communication to the Kosovar Albanian delegation at Rambouillet, realistically described the relevant language of the Accords "as confirming a right for the people of Kosovo to hold a referendum on the final status of Kosovo after three years."¹⁴⁰

So while it would be an exaggeration to say that, by incorporating the Rambouillet Accords, SCR 1244 overtly guaranteed an eventual referendum in Kosovo on the question of independence, it should have been entirely obvious to all the parties concerned that SCR 1244, like the Rambouillet Accords, placed substantial weight on the will of the people of Kosovo in deciding their final political status. Indeed, as I have already noted, the text of Annex 2 alone is sufficient to warrant an interpretation of SCR 1244 that prefers the vindication of the Kosovars' right to self-government to Yugoslavia's right to territorial integrity.

Alyosha:

Ivan, I noticed that you hesitated to agree that SCR 1244 is a treaty subject to the governing rules of the VCLT. Could you tell us why? It would be best if we could get as much agreement as possible.

Helsinki language "must be understood in the context of the principles of the inviolability of frontiers (principle III) and the territorial integrity of states (principle IV). . . . There was no suggestion at Helsinki . . . that the right of self-determination could justify secession by an oppressed minority."). *But see* RADAN, *supra* note 46, at 64-65 (criticizing Cassese's interpretation of the Helsinki Final Act).

139. Thus, as the Select Committee on Foreign Affairs of the UK House of Commons found, "[t]he language was carefully chosen to leave open the possibility of a referendum without committing the international community to one." Select Committee on Foreign Affairs, Fourth Report, 1999-2000, H.C. 28-I, ¶ 59, *available at* <http://www.publications.parliament.uk/pa/cm199900/cmselect/cmfaaff/28/2809.htm>.

140. *Id.* ¶ 60 (quoting Albright's letter); *see also* Mccgwire, *supra* note 62, at 8.

To persuade the KLA to sign [the Rambouillet Accords], the United States is reported to have committed itself to early elections, to retention by the militias of their personal weapons, to preventing any future Yugoslav challenges to the interim or final political status of Kosovo, and to considering the issue of independence if regional and international circumstances permitted [I]t seems that the clincher was an informal promise by Madeleine Albright that a referendum on self-determination would be held after three years.

Mccgwire, *supra* note 62, at 8.

Ivan:

Dmitri supposes that SCRs are literally treaties. I think instead that they are *treaty-like*. I do not think that SCRs can literally be treaties within the meaning of the VCLT if only because they are not “international agreement[s] between States.”¹⁴¹ Rather, on their very face, they are the decisions of a collective but unitary body, the Security Council. Further, they enter into force without any of the customary formalities of a proper treaty—they are not ratified, for instance.¹⁴² Considering them as treaties rather than as *treaty-like*, Dmitri seems to regard them as a species of international legislation. And it is certainly true that, under UN Charter Article 25, they create legal obligations that the member states have agreed to “accept and carry out.”¹⁴³ I see them, however, as the orders of an executive body—which the Security Council surely resembles¹⁴⁴—rather than as formal treaties or laws. As executive orders, they of course impose legal obligations on those subject to them. But they are usually addressed to particular contingencies and circumstances, and so should not be understood as remaining in force indefinitely unless the Council formally revokes or modifies them.¹⁴⁵ If the underlying circumstances change sufficiently, the obligations they once created will cease to be binding. We must not allow the analogy between SCRs and treaties, however helpful or illuminating it may be in many cases, to hold us too tightly in its grip.

Alyosha:

So we cannot even agree on what rules to follow in *interpreting* SCR 1244! Perhaps you would like to speak to this matter, Dmitri?

141. See VCLT, *supra* note 117, at art. 2, ¶ 1(a) (defining a treaty as “an international agreement concluded between States”).

142. Rather, member nations are automatically bound by the U.N. Charter to “accept and carry out the decisions of the Security Council” without any ratification procedure. U.N. Charter art. 25.

143. *Id.*

144. Analogizing the Security Council to an “executive” under national law may be helpful, but only if not pressed too far. See Wood, *supra* note 112, ¶ 22 (arguing the Security Council only acts as an executive in one area of U.N. activity, “the maintenance of international peace and security”).

145. See, e.g., S.C. Res. 629, pmb., ¶ 1, U.N. Doc. S/RES/629 (Jan. 16, 1989) (addressing the limited scope of affairs in Namibia and South Africa and calling for specific, discrete action on the part of the Secretary-General); see also David M. Malone, *Security Council*, in THE OXFORD HANDBOOK ON THE UNITED NATIONS 124–25 (Thomas G. Wiess & Sam Daws eds., 2007) (describing the difficulty in implementing Security Council Resolutions containing broad sanctions and ambitious agendas, and describing the limited, regional nature of most resolutions).

Dmitri:

What I think is altogether missing from Ivan's clever but sophistic construal of the text of SCR 1244 is any appreciation of the object and purpose of the Resolution. And still less does Ivan consider the Resolution's relationship to the larger objects and purposes of the United Nations Charter. Even if you do not agree, Ivan, that the VCLT applies in full to the interpretation of the Resolution, surely you will concede that we may consider the Resolution's object and purpose in construing the meaning of its text?¹⁴⁶

Ivan:

Of course.

Dmitri:

So, then, what is the object and purpose of SCR 1244? At a very basic level, the Resolution reflects the agreement of the great powers to manage the problem of Kosovo *collectively* and so to avoid unilateral actions. And why that choice for collective, consensual decision making? To ensure order and stability in the great powers' relations.

Remember that the doctrine of the "self-determination of peoples"—which is now invoked by the Albanian Kosovars and their Western sponsors to justify the claim to an independent state of Kosovo¹⁴⁷—was precisely what, in light of distribution of so many ethnic groups across the frontiers of the post-Versailles states, led Europe to war in 1939.¹⁴⁸ Hitler, too, could and did invoke that doctrine in the Rhineland, in Austria, in the Sudetenland, and finally in Danzig.¹⁴⁹ The post-World War II world was not about to permit the frontiers of Europe to be revised again by the unilateral actions of nationalist leaders. The UN Charter's mechanism of

146. See VCLT, *supra* note 117, art. 31, ¶ 1 ("A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose.").

147. Raymond Detrez, *The Right to Self-Determination and Secession in Yugoslavia*, in *CONTEXTUALIZING SECESSION* 124 (Bruno Coppieters & Richard Sakwa eds., 2003).

148. James E. Falkowski, *Secessionary Self-Determination: A Jeffersonian Perspective*, 9 B.U. INT'L L.J. 209, 224 (1991).

149. Ryan Goodman, *Humanitarian Intervention and Pretexts for War*, 100 AM. J. INT'L L. 107, 113 (2006) (citing AMOS YODER, *WORLD POLITICS AND THE CAUSES OF WAR SINCE 1914*, at 58 (1986)); Elizabeth Warner, *Unilateral Preferences Granted to Foreign National Minorities by a Kin-State: A Case Study of Hungary's "Status Law"*, 35 GEO. J. INT'L L. 371, 390 (2004).

collective decision making was intended to address and remedy problems such as that.¹⁵⁰ SCR 1244, which of course is a creature of the Charter, needs to be interpreted in light of the Charter's larger objects and purposes. Central to those objects and purposes is a determination to protect the general peace and order of Europe, in preference both to particularist claims of self-determination by ethnic or national minorities and to unilateral efforts by the leading European powers to project their own power into contested areas like the Balkans. SCR 1244 must be read to further international governance and, accordingly, international stability, rather than to invite renewed international anarchy.

Ivan:

Brothers, Dmitri challenges me to show that my interpretation of SCR 1244 is consistent with that Resolution's, and the UN Charter's, broader objects and purposes. Very well. I shall argue that the open and acknowledged failure, after nine years, of the negotiations over the future of Kosovo called for in the Resolution—despite the intensive efforts of the United Nations and the EU–U.S.–Russia troika as intermediaries—clearly justified Kosovo's decision to declare its independence from Serbia. My argument will enable me to answer Dmitri's objection that the position of the Western powers poses a threat to the peace and order of Europe. On the contrary, I shall argue that the creation of an independent state of Kosovo represents a major step toward bringing peace, order, human rights, and economic progress to a vital but troubled part of Europe.

The Future Status Process. To do this, I must first explain how the process of seeking an agreed-upon settlement to the problem of Kosovo—as we all agree the Resolution contemplated—played out in the nine years between 1999, when the Council adopted that Resolution, and 2008, when Kosovo declared its independence. Sadly, that process ran into the ground. What we must also grasp, however, is that despite its ultimate failure, the process was characterized by conscientious efforts to implement the Council's intention of reaching consensus, to use the good offices of UN intermediaries to the fullest extent possible, and to accommodate fairly the interests of all the parties most closely concerned with the future of Kosovo, including Russia.

Let us begin by considering the “future status” process in some detail, focusing first on the role of the UN from 2005 onward, and

150. See U.N. Charter art. 1, ¶ 3 (stating that a purpose of the U.N. is to “achieve international cooperation”).

then on the efforts of the EU–U.S.–Russia troika in the months immediately preceding Kosovo’s independence.¹⁵¹

The Ahtisaari Report. In 2007 the Special Envoy of the Secretary-General reported on Kosovo’s future status to the Secretary-General in the Ahtisaari Report that, although he and his team had “held intensive negotiations with the leadership of Serbia and Kosovo over the course of the past year” to achieve “a political settlement that [would] determine[] the future status of Kosovo,” it had become

clear . . . that the parties are not able to reach an agreement on Kosovo’s future status. . . . [B]oth parties have reaffirmed their categorical, diametrically opposed positions: Belgrade demands Kosovo’s autonomy within Serbia, while Pristina will accept nothing short of independence. . . . It is my firm view that the negotiations’ potential to produce any mutually agreeable outcome on Kosovo’s status is exhausted. No amount of additional talks, whatever the format, will overcome this impasse.¹⁵²

Finding that “Kosovo’s state of limbo cannot continue,” the Special Envoy accordingly recommended that “the only viable option for Kosovo is independence.”¹⁵³ The Secretary-General, in transmitting this report to the Security Council, stated: “I fully support . . . the recommendation made by my Special Envoy.”¹⁵⁴ Thus, two highly placed and objective observers from the United Nations—one of whom

151. The future status process got underway based on the recommendation of the October 2005 report of Kai Eide, the Secretary-General’s special envoy, charged with undertaking a comprehensive review of the situation in Kosovo. The Secretary-General, *Letter Dated 7 October 2005 from the Secretary-General Addressed to the President of the Security Council*, at 1, delivered to the Security Council, U.N. Doc. S/2005/635 (Oct. 7, 2005), available at <http://www.unosek.org/docref/KaiEidereport.pdf>.

152. Special Envoy of the Secretary-General, *Report of the Special Envoy of the Secretary-General on Kosovo’s Future Status*, ¶¶ 1–3, delivered to the Security Council, U.N. Doc. S/2007/168 (Mar. 26, 2007) [hereinafter Ahtisaari Report] (prepared by Martti Ahtisaari), available at www.unosek.org/docref/report-english.pdf.

153. *Id.* ¶ 4.

154. The Secretary-General, *Letter Dated 26 March 2007 from the Secretary-General Addressed to the President of the Security Council*, at 1, delivered to the Security Council, U.N. Doc. S/2007/168 (Mar. 26, 2007). Further, Secretary-General Ban Ki-Moon stated in 2007 that “any further delay or prolongation of this issue [of Kosovo’s final status] is not desirable, not only for Balkan states, but also for all European countries” and that “if Kosovo’s future status remains undefined, there is a real risk that the progress achieved by the United Nations and the Provisional Institutions in Kosovo can begin to unravel.” See Press Release, Statement Issued on 20 July 2007 by Belgium, France, Germany, Italy, United Kingdom and the United States of America, Co-Sponsors of the Draft Resolution on Kosovo Presented to the UNSC on 17 July, at 1 (July 20, 2007) (quoting the Secretary-General), available at <http://www.unosek.org/docref/2007-07-20%20-%20Statement%20issued%20by%20the%20co-sponsors%20of%20the%20draft%20resolution.pdf>.

was to be awarded the Nobel Peace Prize in 2008¹⁵⁵—have found that the negotiations over the future of Kosovo had completely and irretrievably broken down by the spring of 2007.

The Contact Group. What is more, the EU–U.S.–Russia troika on Kosovo came to effectively the same conclusion in their Report of December 4, 2007.¹⁵⁶ For four months from August 2007 onward, Representatives of the EU, the U.S., and Russia, with the blessing of the Secretary-General and the support of the Special Envoy, joined representatives of Belgrade and Pristina in “the most sustained and intense high-level direct dialogue since hostilities ended in Kosovo in 1999.”¹⁵⁷ They explored a wide variety of possible solutions to the question of Kosovo’s future, “ranging from independence to autonomy, as well as alternate models such as confederal arrangements, and even a model based on an ‘agreement to disagree,’ in which neither party would be expected to renounce its position but would nonetheless pursue practical arrangements designed to facilitate cooperation and consultation between them.”¹⁵⁸ They also discussed “other international models, such as Hong Kong, the Aland Islands and the Commonwealth of Independent States (CIS).”¹⁵⁹ But in the end, “the parties were unable to reach an agreement on the final status of Kosovo. Neither party was willing to cede its position on the fundamental question of sovereignty” over Kosovo.¹⁶⁰

155. Mr. Ahtisaari was awarded the Nobel Peace Prize in 2008, largely for his efforts in Kosovo. Press Release, The Norwegian Nobel Committee, The Nobel Peace Prize 2008 (Oct. 10, 2008), available at http://nobelprize.org/nobel_prizes/peace/laureates/2008/press.html.

156. REPORT OF THE EU/U.S./RUSSIA TROIKA ON KOSOVO (Dec. 4, 2007), available at <http://www.swp-berlin.org/transfer/kosovo/troikareport.htm> [hereinafter TROIKA REPORT].

157. *Id.* ¶ 12.

158. *Id.* ¶ 10.

159. *Id.*

160. *Id.* ¶ 11.

Indeed, now that Kosovo has been, to all practical purposes, removed from the control of the Serbian administrative and legal system, it is even more unrealistic to imagine that Kosovar Albanians could be willing again to accept the presence of Serb officials, to pay taxes to Belgrade or to seek passports from a state that expelled half of them, destroying their identity papers to make sure the bond was permanently severed, even if different people, are, at least for the time being, in charge.

INDEPENDENT INTERNATIONAL COMMISSION ON KOSOVO, THE FOLLOW-UP OF THE KOSOVO REPORT: WHY CONDITIONAL INDEPENDENCE? 24–25 (2001), available at <http://www.alb-net.com/pipermail/albsa-info/2001-November/002393.html>; see also Press Release, Joint Statement by UN Ambassadors of the United Kingdom, France, Croatia, Belgium, Italy, Germany and the United States (Feb. 17, 2008), available at <http://ukun.fco.gov.uk/en/newsroom/?view=News&id=3297494> (Kosovo’s independence “represent[s] the conclusion of a status process that has exhausted all avenues in pursuit of a negotiated outcome.”).

In these circumstances, it was surely no violation of SCR 1244, or more generally of fundamental Charter values and principles, for Kosovo to declare its independence two months later, and for the U.S. and several major EU states to recognize the reality of that new nation. Over the period from 2005 to the end of 2007, both the UN and the most interested outside powers—the EU, Russia, and the U.S.—had sought to bring Serbia and Kosovo to the final status agreement envisaged by SCR 1244.¹⁶¹ The Secretary-General's Special Envoy and his team spent over a year seeking to find a compromise solution.¹⁶² After the failure of that UN initiative, the troika of major powers, with UN sanction and support, energetically sought to bridge differences that proved to be irresoluble.¹⁶³ And in the end, the Western powers supported an outcome—the independence of Kosovo—that the UN Secretary-General's Special Envoy had firmly recommended and that the UN Secretary-General had endorsed. Far from showing a lack of concern for the values of the Charter, the wishes of the Security Council, and what might be called the comity of Europe—Eastern no less than Western—the Western powers' conduct, therefore, has shown the purest and most conscientious regard for all of them.

Rather than threatening the peace and order of the Balkans, or indeed of Europe—as, Brother Dmitri, you assert—the Western powers' actions in supporting Kosovo's independence will contribute significantly to those ends—unless, of course, Russia seizes on the occasion as yet another pretext for returning to its autocratic past.¹⁶⁴ As the Special Envoy said,

Uncertainty over its future status has become a major obstacle to Kosovo's democratic development, accountability, economic recovery and inter-ethnic reconciliation. Such uncertainty only leads to further stagnation, polarizing its communities and resulting in social and political unrest. Pretending otherwise and denying or delaying resolution of Kosovo's status risks challenging not only its own stability but the peace and stability of the region as a whole.¹⁶⁵

Dmitri:

I was certain, Brother Ivan, that sooner or later you would refer us to the Ahtisaari Report.¹⁶⁶ Let me say first that the Special Envoy was overreaching insofar as he suggested that the impasse in

161. TROIKA REPORT, *supra* note 156, ¶¶ 3–4.

162. *Id.* ¶ 3.

163. *Id.* ¶ 11.

164. See Kagan, *supra* note 15 (describing the 2008 Russian conflict in South Ossetia as part of Russia's determined efforts to stop the pro-Western trend in the region).

165. Ahtisaari Report, *supra* note 152, ¶ 4.

166. *Id.*

negotiations undercut the continuing applicability of SCR 1244.¹⁶⁷ Even if the Special Envoy judged that the situation was in impasse, he could not speak for the Security Council as a whole, which made no finding that further negotiations were pointless, much less that Kosovo was at liberty to secede from Serbia.

The West's Bad Faith in the Negotiations. You claim that the final status negotiations broke down despite the conscientious efforts of the West to bring the dispute to an end on terms agreeable to all. I deny that. Indeed, the so-called troika has unraveled. The West demonstrated obvious bad faith in the very period on which you concentrate—that is, the period after the Secretary-General presented the Ahtisaari Report to the Security Council in the spring of 2007. The United States thereupon circulated in the Council a draft resolution that would have replaced SCR 1244 and laid the groundwork for Kosovo's independence.¹⁶⁸ That draft, and later revisions of it through the early- to mid-summer of 2007, failed to win the support of Russia, which persisted in objecting to an imposed settlement for Kosovo without Serbia's consent.¹⁶⁹ Notwithstanding the failure to achieve consensus within the Security Council, while visiting Italy and Albania in June 2008, President Bush made several public statements unequivocally supporting independence for Kosovo.¹⁷⁰ Secretary of State Rice also told the Kosovo Unity Team in a meeting on July 23, 2007, that the United States supported Kosovo's independence.¹⁷¹ Given that firm, unequivocal, and public backing from the United States for Kosovo's independence *even while final status negotiations were still ongoing*, how could Kosovo have accepted anything less than independence?¹⁷² The United States and

167. Perhaps the Special Envoy was attempting to reprise his earlier experience in birthing Namibian independence as the Secretary-General's special representative for the implementation of UN Resolution 435 (Sept., 29, 1978) in 1988–1990, pursuant to SC Resolutions 629 and 632 (1989). See S.C. Res. 435, ¶ 2, U.N. Doc. S/RES/435 (Sept. 29, 1978) (reiterating the Security Council's objective to transfer power to the people of Namibia); S.C. Res. 629, *supra* note 145, ¶ 1 (setting a date for the implementation of Resolution 435); S.C. Res. 632, ¶¶ 1–2, U.N. Doc. S/RES/632 (Feb. 16, 1989) (expressing approval for the Secretary-General's report on Namibia and deciding to implement Resolution 435).

168. Warren Hoge, *U.S. May Bypass the U.N. for Kosovo Independence*, N.Y. TIMES, July 14, 2007, at A6.

169. *Id.*

170. JULIE KIM & STEVEN WOEHLER, CONGRESSIONAL RESEARCH SERVICE REPORT FOR CONGRESS: KOSOVO AND U.S. POLICY: BACKGROUND AND CURRENT ISSUES 20 (June 20, 2008), available at <http://www.usembassy.it/pdf/other/RL31053.pdf>.

171. Sue Fleming, *Kosovo Tells U.S. It Will Not Declare Independence*, REUTERS, July 23, 2007, available at <http://uk.reuters.com/article/worldNews/idUKN2336789720070723>.

172. The troika's final, intensive meetings with Kosovar and Serbian negotiators did not begin until August 2007—i.e., *after* President Bush and Secretary Rice had made their comments. See TROIKA REPORT, *supra* note 156, ¶ 4 (Dec. 4, 2007)

its allies were plainly determined to secure independence for Kosovo, regardless of SCR 1244 and regardless of the Security Council's wishes. As they had done in 2003 over Iraq, the United States and its allies, having failed to receive the Council's authorization for its proposed course of action, simply took the matter into their own hands, in violation of their Charter obligations.¹⁷³ Indeed, on this occasion, their conduct was even more egregious than it had been over Iraq in 2003, for then they had at least a colorable argument that the resumption of hostilities against Iraq was authorized by the SCR 1441 (2002) and its predecessors, SCR 678 (1990) and 687 (1991),¹⁷⁴ while on this occasion, there was plainly no basis whatsoever for arguing that their conduct was authorized by SCR 1244.

Ivan:

I can only say, Dmitri, that the Albanian Kosovars hardly needed the encouragement of the West to hold out for independence. In a 1991 referendum that took place in Kosovo right under the noses of the Serbian authorities, a claimed 87% of the voters of the province took part, and 99% of them voted in favor of independence.¹⁷⁵ That was well before the ethnic cleansings of 1998 and 1999. Moreover, between 1999 and 2008, the Kosovars grew accustomed to living without Serbia's interference. If they were intransigent during the final status negotiations, those are the reasons why, Dmitri; they did not need the West to stiffen their backs.

Dmitri:

Even if the attitude of the Albanian Kosovars has not changed, that of the Serbians has. The eight years that have passed since adoption of SCR 1244 have also witnessed fundamental changes in the internal political order of Serbia. Serbia has democratized. Slobodan Milosevic was overthrown in 2000, then extradited to stand trial on war crimes charges before the ICTY in the Hague.¹⁷⁶ Other

(explaining that the troika's four-month effort began in August 2007 as a renewed effort following earlier rounds failed of negotiations). Rice made her comments in July 2007. Fleming, *supra* note 171. Bush made his in June. KIM & WOEHREL, *supra* note 170, at 20.

173. JOHN F. MURPHY, *THE UNITED STATES AND THE RULE OF LAW IN INTERNATIONAL AFFAIRS* 170 (2004) (citing Steven R. Weisman & Felicity Barringer, *Powell Attacks Validity of the Work by Weapons Inspectors in Iraq*, N.Y. TIMES, Mar. 17, 2003, at A1).

174. *See id.* at 169–73 (describing various possible interpretations of SCR 1441).

175. MALCOLM, *supra* note 32, at 347; VICKERS, *supra* note 68, at 251.

176. Suzanne Daley, *Milosevic Faces Single Trial Asked by Hague Prosecution*, N.Y. TIMES, Feb. 2, 2002, at A4.

alleged Serbian war criminals, most recently Radovan Karadzic,¹⁷⁷ have been arrested and surrendered to the Hague. Your view gives Serbia no credit for those changes, Ivan.

Our question is whether the continuing impasse in the negotiations between Serbia and the Kosovo entity nullified SCR 1244. I say that it did not. Despite the impasse, SCR 1244 remained in force and imposed a persisting obligation to refer the matter back to the Security Council. The customary international law of treaty interpretation, which applies also to this Resolution, obligates the parties to resolve interpretative disagreements in "good faith."¹⁷⁸ That obligation, in turn, requires the disputing parties to act only on the basis of mutual consent, not unilaterally. This at least the International Court of Justice (ICJ) taught us in the *Gabcikovo-Nagymaros* case.¹⁷⁹ The implication of a continuing duty to resolve a disputed question by mutual consent accords with common law and civil law notions of good faith in negotiation of adjustments to changing circumstances in contract performance.¹⁸⁰ Thus, general principles of treaty interpretation that should govern the reading of SCR 1244 further support the continuing need for a *collective* determination of the Kosovo situation.

Ivan:

Dmitri, your view of the durability of the Resolution reminds of a story of "Russian peculiarity" that Otto von Bismarck tells in his *mémoires*.¹⁸¹ Bismarck was serving in 1859 as Prussia's Ambassador to the Court of Czar Alexander II. During the Imperial Court's customary spring promenade in the palace gardens, the Czar happened to notice a solitary sentry standing in the middle of the vast palace lawn. The Czar asked the sentry why he had been stationed at that isolated spot, and the sentry could only answer, "Those are my orders." The Czar made further inquiries and learned that a sentry had been ordered to stand both summer and winter at that spot. But he could not learn the source of the original order. Finally, an old servant came forward with a story that his father had told him as a youth. One spring morning many decades before, the Czarina Catherine the Great had caught sight of a snowdrop in bloom

177. See Julian Borger, *Radovan Karadzic, Europe's Most Wanted Man, Arrested for War Crimes*, THE GUARDIAN (U.K.), July 22, 2008, available at <http://www.guardian.co.uk/world/2008/jul/22/warcrimes.internationalcrime/print> (reporting on Karadzic's arrest in July 2008 on charges of genocide and war crimes).

178. VCLT, *supra* note 117, art. 31.

179. *Gabcikovo-Nagymaros Project* (Hung. v. Slov.), 1997 I.C.J. 7, 56 (Sept. 25).

180. RESTATEMENT (SECOND) OF CONTRACTS § 205 (1981).

181. 1 OTTO VON BISMARCK, BISMARCK: THE MAN & THE STATESMAN 250 (A.J. Butler trans., 1898).

unusually early. She gave the order that that flower was not to be plucked. And so, for perhaps eighty years after, a sentry had been stationed at the same place, all the year round! No doubt, once he had learned of the origin of this custom, Czar Alexander must have ordered it abolished. But surely the Palace Guard should have taken the initiative earlier?

Dmitri:

And your views remind me of another part of Bismarck's *mémoires*, Dmitri—the place where that old cynic says that “eternal duration is assured by no treaty between Great Powers,” that even the Triple Alliance merely had “the significance of a strategic position,” and that one must never depart “from the attitude of *toujours en vedette*.”¹⁸² The same kind of cynicism prompted a later German chancellor to declare that the treaty that guaranteed Belgian neutrality was merely “a scrap of paper,” so that Germany was free to invade Belgium in 1914.¹⁸³ Judge for yourselves where such cynicism leads.

Alyosha:

Brothers, brothers, do not be angry!

Smerdyakov:

Dmitri, I heard you refer briefly to the West's contradictory views about the need for the Security Council to authorize the resumption of hostilities in Iraq in 2003. On that occasion, the Anglo-Americans found themselves on one side of the question of the persisting effects of earlier Resolutions by the Council, and the continental European powers—Russia, France, and Germany—were arrayed on the other side.¹⁸⁴ I would enjoy hearing you say more about that.

Dmitri:

Certainly, Smerdyakov. You are alluding, of course, to those EU member states' 2003 rejection of the Anglo-American claims that the

182. See 2 OTTO VON BISMARCK, *BISMARCK: THE MAN & THE STATESMAN* 284 (A.J. Butler trans., 1898) (“Always on guard.”).

183. The Chancellor in question was Theobald von Bethmann-Hollweg, who disputed the interpretation given to his remark. ‘*Scrap of Paper*,’ *German Version*, N.Y. TIMES, Jan. 25, 1915, at 1.

184. Steven R. Weisman & Felicity Barringer, *Powell Attacks Validity of the Work by Weapons Inspectors in Iraq*, N.Y. TIMES, Mar. 6, 2003, at A17.

U.S. and UK could invade Iraq pursuant to SCRs 678 (1990), 687 (1991), and 1441 (2002) without obtaining a new SCR authorizing the resumption of hostilities.¹⁸⁵ I think that some reflection on that important episode of the Council's history will provide yet another argument against Ivan's interpretation of SCR 1244.

The Security Council and Iraq (2003). Brothers, I do not wish to reopen the controversy that the leaders of continental Europe had with the Anglo-Americans in 2003. The debate has been endless.¹⁸⁶ But you will no doubt recall that SCR 1441 provided that, if the Council's designated agents, led by Hans Blix, determined that Iraq was not in compliance with its disarmament obligations under SCR 687, then the Council would meet to "consider the situation," and it concluded by stating that the Council remained "seized" of the matter.¹⁸⁷ Russia made clear her view that a fresh SCR would be necessary to determine the consequences that would flow should Mr. Blix's team find persisting Iraqi violations.¹⁸⁸ This understanding was affirmed in the French statement at the adoption of SCR 1441, asserting that, upon a report by Mr. Blix that Iraq had violated its obligations, "the Council would meet immediately to evaluate the seriousness of the violations and draw the appropriate conclusions."¹⁸⁹ Indeed, the Press Release of the Security Council

185. MURPHY, *supra* note 173, at 169 (citing Bob Sherwood, *Military Force: Pre-Emptive Defence or Breach of International Law?*, FIN. TIMES, Mar. 11, 2003, at 17).

186. The debate at the 100th annual meeting of the American Society of International Law, with Professors Ruth Wedgwood, for the United States, Philippe Sands against the United States, and Christine Chinkin, Yoram Dinstein and Judge Diane Wood serving as the bench is reprinted in *Debate: Adjudicating Operation Iraqi Freedom*, 100 ASIL PROC. 179, 179-202 (2006); see also Lori Fisle Damrosh & Bernard H. Oxman, *Agora: The Future Implications of the Iraq Conflicts*, 97 AM. J. INT'L L. 553, 553-57 (2003), reprinted in THE AMERICAN SOCIETY OF INT'L LAW, SELECTIONS FROM THE AMERICAN JOURNAL OF INT'L LAW: FUTURE IMPLICATIONS OF THE IRAQ CONFLICT (Jan. 2004) (describing the range of views that exists, with excerpts from relevant Security Council Resolutions and from Contemporary Practice of the United States Relating to International Law); William H. Taft & Todd F. Buchwald, *Preemption, Iraq, and International Law*, 97 AM. J. INT'L L. 557, 557-63 (2003) (presenting the U.S. State Department Legal Advisor's statement and defense of U.S. legal position).

187. S.C. Res. 1441, ¶¶ 12, 14, U.N. Doc. S/RES/1441 (Nov. 8, 2002).

188. The Russian Ambassador stated that "in the event of any kind of disagreement about disarmament matters—it is the heads of UNMOVIC and IAEA who will report that to the Security Council, and it is the Council that will consider the situation that has developed." U.N. SCOR, 57th Sess., 4644th mtg. at 8, U.N. Doc. S/PV.4644 (Nov. 8, 2002).

189. The French ambassador made reference also to a joint statement to be issued later that day by France, Russia, and China "stressing the scope of the text of the resolution just adopted." *Id.* at 5. In that joint statement, the three veto-wielding members of the Security Council that did not invade Iraq made clear their understanding that they had not authorized the other two permanent members of the Council to invade Iraq. Russia, France, and China declared:

itself reports the view of the Council's member states, particularly its permanent members, that the Council itself would be the final decision maker in determining the significance and consequences of any violations by Iraq.¹⁹⁰ Russia and France—joined by Germany, which shortly thereafter took a seat as a non-permanent member of the Security Council—have maintained that view throughout the occupation of Iraq, even when acquiescing in the adoption of subsequent SCRs intended to deal with the consequences of the invasion.¹⁹¹

This history is relevant to our discussion of SCR 1244 because of the doctrine of estoppel. Estoppel is a generally accepted principle of international law that serves as a subsidiary means of interpretation of a treaty—including, as I maintain, an SCR.¹⁹² Thus, even if the

Resolution 1441 (2002) adopted today by the Security Council excludes any automaticity in the use of force. In this regard, we register with satisfaction the declarations of the representatives of the United States and the United Kingdom confirming this understanding in their explanations of vote, and assuring that the goal of the resolution is the full implementation of the existing Security Council resolutions on Iraq's weapons of mass destruction disarmament. All Security Council members share this goal.

Press Release, Joint Statement from the Popular Republic of China, the Federation of Russia, and France (Nov. 8, 2002), available at http://www.un.int/france/documents_anglais/021108_cs_france_irak_2.htm.

190. Also speaking after the vote, Council members said that their views had been taken into account in the final version of the draft, which was co-sponsored by the United States and the United Kingdom. The representative of France welcomed the two-stage approach required by the resolution, saying that the concept of "automaticity" for the use of force had been eliminated. The representatives of China and the Russian Federation stressed that only UNMOVIC and the IAEA had the authority to report violations by Iraq of the resolution's requirements.

Press Release, Security Council, Security Council Holds Iraq in "Multilateral Breach" of Disarmament Obligations, Offers Final Chance to Comply, Unanimously Adopting Resolution 1441 (2002), U.N. Doc. SC/7564 (Nov. 11, 2002).

191. Thus, SCR 1483 (2003) did not (in Dmitri's view) ratify this invasion, for Russia, Germany, and France made clear in supporting that Resolution that it was their intent to ensure respect for international humanitarian law by the occupying powers and to rebuild the framework for collective decision making. See U.N. SCOR, 58th Sess., 4761st mtg., at 3–7, U.N. Doc. S/PV.4761 (May 22, 2003) (an ambassador from each country describing its intent in supporting the Resolution).

192. See *Temple of Preah Vihear (Cambodia v. Thailand)*, 1962 I.C.J. 6, 39–51 (June 15) (treating estoppel as a general principle of international law); *id.* at 143–44 (Spender, J., dissenting) (stating elements of estoppel concept); VCLT, *supra* note 117, art. 31, ¶ 3(c) (instructing courts to consider as a general rule of interpretation "[a]ny relevant rules of international law applicable in the relations between the parties"); MARTTI KOSKENNIEMI, FROM APOLOGY TO UTOPIA: THE STRUCTURE OF INTERNATIONAL LEGAL ARGUMENT 357–58 (2005) (describing bases of estoppel doctrine and noting difficulty of distinguishing it from "acquiescence"). See generally HERSCH LAUTERPACHT, PRIVATE LAW SOURCES AND ANALOGIES OF INTERNATIONAL LAW WITH

EU could construct a plausible interpretation of SCR 1244 that would free its member states to intervene in the internal affairs of Serbia, at least some of its leading member states that had previously taken the opposite position at to SCR 1441 would be estopped from adopting that interpretation.

So, Ivan, why now do Germany and France abandon Russia in their approach to the interpretation of SCRs? Can it really be that these members of the EU have now changed their minds about the meaning of SCR 1441? Should it not now be clear that the correct position is that another SCR is required in order to determine the consequences of Kosovo's purported secession? Is not recognition of this declaration by the members of the EU no less a threat to the Republic of Serbia than was the Anglo-American invasion to the territorial integrity and political independence of Iraq? Or does Western hypocrisy know no bounds?

Ivan:

This is nothing but smoke and mirrors, Dmitri, disguised as argument. If the cases were identical, then of course you might have a legitimate argument that some members of the EU who also happen to sit as permanent members of the Security Council should have to explain their apparent change of legal position. But we do not even have to reach such questions, because the cases are plainly inapposite. SCR 1244, under Dmitri's reading, goes to the question of state recognition—an area that could at best be described as an implied or incidental Chapter VII power of the Council, but which is in general a power retained by the member states. Indeed, insofar as the Charter expressly vests anything resembling the power of recognizing states in the organs of the United Nations, it *divides* that power between the Security Council and the General Assembly.¹⁹³ By contrast, the Anglo-American coalition's use of force against Iraq in defiance of SCR 1441 went to the very heart of the Council's Chapter VII powers concerning international peace and security. You mistake a penumbral power for a core one. So even if a state argued that SCR 1441 barred the use of force while the Council was seized of the matter, that would not compel it to take the same position with respect to a resolution that reached beyond use of force issues. But I suppose the Cartesians at the Quai d'Orsay would have still more to say in demolishing your suggestion.

SPECIAL REFERENCE TO INTERNATIONAL ARBITRATION (1970) (discussing use of general principles of private law, such as estoppel, to fill in the gaps of public international law).

193. See U.N. Charter art. 4, ¶ 2. ("The admission of any such state to membership in the United Nations will be effected by a decision of the General Assembly upon the recommendation of the Security Council.")

Alyosha:

Brothers, we seem to be unable to agree on the meaning of SCR 1244. Our attempt to discover that meaning has led us to consider how the various parties understood, and sought to implement, the Resolution during the final status negotiations. And that discussion in turn has brought us to consider the changes that have taken place in both Serbia and Kosovo in the eight years since the Resolution was adopted. I am wondering now whether we need to isolate and discuss a related, but distinct, question: not what the Resolution *means*, but whether it remains *in effect*.

Rebus Sic Stantibus. Let me be more precise. Let us assume, for the sake of the argument, that Dmitri is right about the Resolution's original *meaning*. Suppose, that is, that as originally understood in 1999, SCR 1244 imposed an obligation to return the question of Kosovo's final status to the Council, thus impliedly forbidding Kosovo from seceding. My question is whether the Resolution, so understood, was still *in effect* in early 2008? Or in other words, would the *rebus sic stantibus* doctrine, as formulated in VCLT Article 62, justify the termination of or withdrawal from that obligation by the parties to it?¹⁹⁴ You may recall the tests that Article 62 sets forth:

- (1) A "fundamental change of circumstances . . . has occurred with regard to those existing at the time of the conclusion" of SCR 1244;
- (2) That change "was not foreseen by the parties";
- (3) The "existence of [the] circumstances" that obtained when SCR 1244 was adopted "constituted an essential basis of the consent of the parties to be bound" by it; and
- (4) "The effect of that change is radically to transform the extent of the obligations still to be performed" under SCR 1244.¹⁹⁵

Ivan:

Alyosha, my argument to this point has concerned the *meaning* of SCR 1244, not whether it remains *in effect*. Reading it as I do, I do not take it to have imposed an obligation to refer the question of Kosovo's final status back to the Council once it had become clear that the negotiations had reached a truly irresolvable impasse. Nonetheless, accepting for the sake of the argument your assumption

194. See VCLT, *supra* note 117, art. 62 (setting forth the doctrine in which a fundamental change in circumstances may be invoked as a ground for terminating or withdrawing from a treaty).

195. *Id.*

about the Resolution's original meaning, I would indeed contend that under Article 62's *rebus sic stantibus* doctrine, the parties are relieved of any continuing obligation to prolong negotiations, whether between Kosovo and Serbia or in the Council.

Application of the Tests. Plainly, the expectation that Kosovo and Serbia would eventually come to an agreement over Kosovo's final status was "essential" to the adoption of SCR 1244, which would have made no sense on any other assumption. Moreover, after years of intense but fruitless effort to reach such an agreement, it is fair to say that a "fundamental change of circumstances" that "was not foreseen" in 1999 has in fact occurred. So the key question is whether the effect of that change "is radically to transform" the obligations still to be performed.

If we consider the parties to SCR 1244 to be only the members of the Security Council, and look only to their still-to-be-performed obligations, it might at first appear that no such radical transformation has occurred—in 2008, as in 1999, they are only obliged (in Winston Churchill's expression) to "jaw jaw."¹⁹⁶ But what if the parties are taken to include Kosovo and Serbia? If one believes, as I do, that SCR 1244 imposed special obligations on both Kosovo and Serbia, then is it not reasonable to consider whether those obligations have been radically transformed in the intervening nine years since SCR 1244 was adopted? If so, then I think it can hardly be denied that Kosovo's obligations have become appreciably and intolerably more burdensome. Dmitri's interpretation of SCR 1244 would permit Serbia to hold Kosovo hostage indefinitely, enabling it to block the province's political and economic development in perpetuity simply by refusing to come to terms with it. But that liability, surely, was not part of the original agreement that SCR 1244 embodied.

The same conclusion follows even if you were to reply that SCR 1244 gave Russia (as a permanent member of the Council), rather than Serbia, the leverage to stymie Kosovo's future development indefinitely. On the contrary, SCR 1244 plainly assumed that the Council would also reach an agreement on Kosovo's final status within a reasonable period of time. Postponing the decision on Kosovo's final status indefinitely until the Council can reach agreement would be to force Kosovo to undergo unforeseen and irreparable harm. For that reason, even under the VCLT, the *rebus sic stantibus* doctrine would justify the determination that there was no further obligation under SCR 1244 to resume final status negotiations within the Council.

196. See RESPECTFULLY QUOTED: A DICTIONARY OF QUOTATIONS 359 (Suzy Platt ed., 1989), available at <http://www.bartleby.com/73/1914.html>.

Dmitri:

Pre-VCLT Law. Let me remind you that it was Russia's attempt to invoke this doctrine in the light of the shifting balance of power in the decades following the Crimean War that led to the decisive rejection of the *rebus sic stantibus* doctrine in modern international law.¹⁹⁷ The 1871 London Declaration on *rebus sic stantibus* embodied that rejection, and its basic policy was carried forward in the commitment in Article 26 of the VCLT to *pacta sunt servanda*,¹⁹⁸ together with the narrow exception carved out in Article 62.¹⁹⁹ And not for nothing has international law come to that conclusion: few doctrines have been as mischievous. What could do more to destabilize inter-state relations that were solemnly ratified in a treaty than to allow any party to that treaty to decide for itself that its obligations had grown so burdensome that it was no longer bound to perform them? Treaties would soon become "scraps of paper" indeed in such a legal universe.

Contemporary Practice of States. In current practice, moreover, when states want to address the problem of changing circumstances by allowing parties unilateral rights to opt out, particularly in international security contexts such as arms control agreements, they use explicit language in so-called extraordinary events clauses, which are explicitly self-judging.²⁰⁰ Nothing like such a clause can be found in SCR 1244.

197. David J. Bederman, *The 1871 London Declaration, Rebus Sic Stantibus and a Primitive View of the Law of Nations*, 82 AM. J. INT'L L. 1, 10–14 (1988). In his 1870 essay *Treaty Obligations*, the British philosopher John Stuart Mill acknowledged some force in Russia's claim to be no longer bound by the 1856 treaty that had ended the Crimean War, but criticized Russia because:

[S]he showed no desire whatever that the wound [she] inflicted upon the confidence, so necessary to mankind, in the faith of treaties, should be the smallest possible. She showed herself perfectly indifferent to any such consequence. She made her claim in the manner most calculated to startle mankind, and to destroy their faith in the observance of all treaties which any one of the contracting parties thinks it has an interest in shaking off.

John Stuart Mill, *Treaty Obligations*, in THE COLLECTED WORKS OF JOHN STUART MILL, VOL. XXI—ESSAYS ON EQUALITY, LAW AND EDUCATION (John M. Robson ed., 1984), available at http://oll.libertyfund.org/?option=com_staticxt&staticfile=show.php%3Ftitle=255&chapter=21690&layout=html&Itemid=27.

198. VCLT, *supra* note 117, art. 26.

199. *Id.* art. 62.

200. See, e.g., Treaty on the Non-Proliferation of Nuclear Weapons art. X, July 1, 1968, 21 U.S.T. 483, 729 U.N.T.S. 161 (stipulating a "supreme [national] interests" exception).

The Rationale of the Doctrine. Moreover, the rationale for this doctrine is plainly inapplicable when the parties to an agreement have agreed, as they have here, to future collective determination of the issue. Can there be any doubt that permitting new unilateral determinations on matters that were to be decided collectively would be inconsistent with the procedural decision embedded in SCR 1244—namely, that the status of Kosovo would be decided at a later date by the Security Council itself, rather than by individual members states acting on the basis of their own judgment alone? Finally, as Article 62(2)(a) of the VCLT makes clear, to the extent that SCR 1244 confirms the boundaries of Serbia so as to include Kosovo, the doctrine of fundamental change of circumstances is simply inapplicable.²⁰¹

Ivan:

Pre-VCLT Law. I draw rather different conclusions from your sources, Dmitri. The London Declaration reads in its entirety:

[I]t is an essential principle of the Law of Nations that no Power can liberate itself from the engagements of a Treaty, nor modify the stipulations thereof, unless with the consent of the Contracting Parties by means of an amicable agreement.²⁰²

The idea at the core of the London Declaration is that no state should be “a judge of its own cause”—and “*rebus sic stantibus* is the ultimate form of self-judgment.”²⁰³ Very well; but what if an “amicable agreement” among the contracting parties simply is not possible? Must a state remain bound by its treaty obligations, no matter how radically conditions have changed since the treaty’s adoption, unless all the other contracting parties “amicably agree” to relieving it of its obligation? The London Declaration is silent on the question of what is to happen if there is no chance whatever of an “amicable agreement.” And that, unfortunately, is the case here. So under pre-VCLT customary law, at least as reflected in the London Declaration, we seem to have no answer to the question whether SCR 1244 was violated either by Kosovo’s unilateral act of secession or by the Western powers’ support of that act.

201. VCLT, *supra* note 117, art. 62(2)(a) (stating that the doctrine of fundamental change in circumstances “may not be invoked as a ground for terminating or withdrawing from a treaty” if “the treaty establishes a boundary”).

202. The London Declaration, Jan. 17, 1871, 18 Martens Nouveau Recueil 278 (1873), as quoted in Bederman, *supra* note 197, at 3.

203. Bederman, *supra* note 197, at 38–39 (emphasis added).

Alyosha:

Brothers, what do you think the Security Council would have done if Kosovo had not declared independence and the final status question had been referred back to it?

Smerdyakov:

Let me answer, Alyosha! Doing that would merely have substituted one impasse for another. First, the permanent members of the Council obviously disagree with one another, and their disagreements are as deep and unyielding as the disagreements between Belgrade and Pristina.

Second, even if the members of the Council truly wished to break the impasse, what, realistically, could they do? The Council would surely have been unwilling to authorize Kosovo to secede, if only because some Members would undoubtedly question whether the Council's Chapter VII powers enable it to carve out part of the territory of a member state, in arguable contravention of Article 2(4) of the Charter. On the other hand, the Council would surely also have been unwilling to authorize Serbia to reassert its sovereignty over Kosovo, even nominally: to do that would risk the renewal of violence in the area. After nine years of enjoying some form of autonomy from Belgrade, Pristina is in no mood to surrender its gains, and the Council hardly wishes to see everything that it has accomplished in Kosovo under the régime of SCR 1244 go up in smoke. Partition also is not an option: both Belgrade and Pristina are adamantly opposed to that. Would the Council decide on some other compromise, then, such as the so-called Hong Kong solution—one state, two systems—or co-equal status for Kosovo as a “republic” in a union with the republics of Serbia and Montenegro? No again, because both parties to the future status negotiations have also rejected those formulas, and the Council would surely find it difficult, or rather impossible, to force such a solution on two, or even three, unwilling, uncooperative parties.

Ivan:

You see, Dmitri, your legal theory faces a recalcitrant reality: there must be an end to process when a decision is absolutely inescapable, but it is also certain that process cannot yield a result.

Dmitri:

But do *you* see, Ivan, that your very pragmatic outcome faces a recalcitrant *law*?

Smerdyakov:

It's all about the land, who owns the land. As always! Get it if you can, keep it if you can. Ha, ha!

Act II: *International Law's Relation to the Charter:
Questions of International Legal Method*

Alyosha:

Bravo, Brothers! Both of you have given stout-hearted defenses of your positions. But your arguments leave me more uncertain than ever how to decide between you. I doubt one can ever come to the truth about these questions until the basic presuppositions that underlie your positions are revealed. You must disclose how your differing interpretive methods relate to your views of the foundational principles in international law. I have in mind chiefly the principles governing the status of peoples and states, such as self-determination and recognition. If you remain at the level of what I might call mere legal dialectic—as you have hitherto done—then I think the question of the legality of Kosovo's secession will remain irresoluble. Let us see if we can come to agreement as to which of your views better fits with our common understanding of these foundational principles. Then perhaps we can say we have found the truth as to this matter.

Smerdyakov:

Alyosha, I would like to hear Ivan's description first. Indeed, one might even say the burden of persuasion is on Ivan to show why the Kosovars have any special rights here, since, under the principle of the *S.S. Lotus Case*, the presumption must be that states are free to act with respect to areas of their jurisdiction unless an established rule of international law limits that freedom.²⁰⁴ And Kosovo is part of Serbia.

Alyosha:

Isn't that the very question that we are discussing, Brother Smerdyakov? Do you really mean that this matter can be decided by who carries the burden of persuasion? This is no some trivial matter to be litigated in the courts, in which gaps about the meaning of the law are decided, implicitly, by procedural rules. We are discussing a matter of fundamental concern, the very existence of states in a moral and legal order, not some case about chickens, in which, when it is

204. S.S. "Lotus" (Fr. v. Turk.), 1927 P.C.I.J. (ser. A) No. 10, at 4, 26–27 (Sept. 7), available at http://www.worldcourts.com/pcij/eng/decisions/1927.09.07_lotus/.

unclear whether either party can carry the burden of persuasion, the procedural posture of the case dictates the substantive result.²⁰⁵

Smerdyakov:

What an evasive circularity you have created for us, Alyosha. But don't we have to decide who speaks first; isn't there a first-mover advantage in legal argument as much as in our beloved national game of chess? I prefer to counterattack, with the black pieces. Should we not be similarly explicit in explaining the relation between substance and procedure in the international law game? If, for example, our procedure gives Dmitri the burden to speak first, might it not be because we think that states are merely the forms through which peoples exercise their collective rights, privileging Ivan's position that the Kosovars have a right to a state as our default position. Similarly, if we impose that burden on Ivan, is it not because we believe states are the true constituent elements, the real right holders, in the international legal system, giving Dmitri the high ground in the argument? Isn't the truth—as you call it—merely the decision adopted based on the procedural forms that structure the decision-making process, including the identity of our speakers and the order of their speeches and the order of our voting, if any?²⁰⁶

Alyosha:

Not at all, Brother. I will admit that your sophistries raise important methodological questions about the pursuit of truth, but they do not call into question the fact that our Brothers' debate is premised on the proposition that we can come to a correct answers here, so long as we let the conversation continue without arbitrary

205. Alyosha's reference to chickens is, of course, an allusion to a staple in the Contracts casebook literature, *Frigalment Imp. Co. v. BNS Int'l Sales Corp.*, 190 F. Supp. 116 (S.D.N.Y. 1960) (holding, after an exhaustive discussion of all available interpretive materials, simply that the movant had not carried the burden of persuasion to show that a contract had been formed; but hinting that, had the other party carried the burden of persuasion, it also probably would not have been able to carry the burden of persuasion). See also Antonio F. Perez, *The Passive Virtues and the World Court*, 18 MICH. J. INT'L L. 399, 429–36 (1997) (discussing continued viability of presumptions of legality generated by the *Lotus* principle in specialized contexts, such as the use of nuclear weapons).

206. For a rational choice theory rationale for this position see KENNETH J. ARROW, *SOCIAL CHOICE AND INDIVIDUAL VALUES* (1970) and WILLIAM H. RIKER, *LIBERALISM AGAINST POPULISM: A CONFRONTATION BETWEEN THE THEORY OF DEMOCRACY AND THE THEORY OF SOCIAL CHOICE* (1982) (emphasizing decision-making incoherence based on effects of procedural rules). There are, of course, many other non-rationalist accounts of this position.

closure.²⁰⁷ Let me ask you, however, to explain further the foundational constitutional questions you claim are relevant here, because I think you have usefully expanded our conversation.

Smerdyakov:

Very well. Then let me try to explain my doubts by asking you to resolve them. Do you or do you not agree that the meaning of Resolution 1244 depends on the meaning of the UN Charter?

Alyosha:

If I may speak for Dmitri and Ivan, our Brothers have acknowledged as much. One clearly describes the Resolution as a treaty made pursuant to the Charter; the other describes it as a creature of somewhat less dignity but still made pursuant to the Charter and to be legally understood as falling within its ambit. In the search for a correct answer, I ultimately see no difference in these two positions, because they each suggest that the meaning of the Charter does, indeed, inform the interpretation of the Resolution.

Smerdyakov:

Precisely. So you will then agree that our Brothers cannot agree on the meaning of SCR 1244 until they have agreed on the nature of the Security Council's powers under the Charter and, further, on the relationship between the United Nations' powers and the powers of states. Another way of expressing this would be to ask the following methodological questions: Does it continue to serve analysis in international law to start with the assumption that states retain all powers they have not delegated expressly to the United Nations? Or is it now more useful to start with the assumption that the international community now exercises all its powers through the United Nations, so much so that even the existence of states is now premised on collective recognition through decisions by the General Assembly and Security Council? I take it that this is very much what was at stake in the ICJ's Advisory Opinion on the Legality of the

207. Alyosha's attitude here is based on his conception of *Christian* charity in seeking mutual understanding of the truth and thus agreement on foundational premises; it is to be distinguished from non-foundational justifications for discourse. See, e.g., JÜRGEN HABERMAS, BETWEEN FACTS AND NORMS: CONTRIBUTIONS TO A DISCOURSE THEORY OF LAW AND DEMOCRACY 3–6 (William Rehg trans., 1996) (advancing a theory of "communicative reason" in which the object of all human speech is mutual understanding largely in terms of procedural fairness); John Rawls, *The Idea of Public Reason Revisited*, 64 U. CHI. L. REV. 765, 801 (1997) (explicating conception of reasoned agreement through "overlapping consensus" on conflicting foundational conceptions).

Threat or Use of Nuclear Weapons, in which a majority could not be found to answer the question whether a state, éven in order to ensure its very survival, could lawfully use nuclear weapons in self-defense.²⁰⁸

Alyosha:

How fiendish! I see, Smerdyakov, that you are simply re-creating at a higher level of abstraction our debate about procedure—i.e., “who carries the burden of persuasion?” If states acting individually are the holders of all residual powers not expressly delegated to their international instrumentality, the United Nations, then states would be presumed to be free to recognize Kosovo. Under this view, Dmitri would bear the burden of persuasion that SCR 1244 bars recognition. If, however, states are constituted through collective recognition in a UN decision—including even the current members of the U.N., when their credentials are accepted and their votes counted—then states would not be free to recognize Kosovo until they had established their right to do so. Under this view, assuming as a threshold matter that the question of Kosovo’s status had become (as it most clearly became in SCR 1244) a subject matter of which the Security Council had become “seized,” then Ivan would bear the burden of establishing that the Western powers may recognize Kosovo. You have simply restated the foundational questions in procedural terms, when we should be addressing foundational questions with no procedural presumptions.

Very well. To allow us to move forward, Brother Smerdyakov, will you let me ask our Brothers what their answers might have been *had there been no Security Council Resolution?* If we cannot agree that the Security Council Resolution, taken in isolation, has answered the question, perhaps we can agree than an answer can be found on some other, more general set of grounds? Let us proceed, then, Ivan and Dmitri, to your views on the general international law principles that might govern this situation had there not been a Security Council Resolution. My understanding, based on what you have already said, is that Dmitri believes that the West’s conduct, including recognition of Kosovo, violates Serbia’s sovereign rights, and that Ivan believes that Kosovo is entitled to self-determination and secession. But let me not put any other words into your mouths. Smerdyakov’s timely questions can be deferred for the time being.

208. Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion, 1996 I.C.J. 226 (July 8), available at <http://www.icj-cij.org/docket/index.php?p1=3&p2=4&k=e1&p3=4&case=95>.

Smerdyakov:

Yes, Brothers, by all means proceed. But let me warn you that you will have to return to the questions Brother Alyosha would have us set aside for now and, perhaps, forever. But one must face all difficulties with courage, my Brothers, and it is clear that the “relevant rules of international law,” under VCLT article 31(3)(c), “shall be taken into account” in the interpretation of a treaty, such as the UN Charter itself.²⁰⁹ Perhaps Ivan, you would be prepared to consider even SCR 1244 as a treaty that cannot be properly interpreted without reference to the relevant background rules of international law respecting self-determination, if you were to discover a convenient interpretation of that background. And perhaps, Dmitri, you might become reluctant to call SCR 1244 a treaty (although doing so has enabled you to profit from that “treaty’s” negotiating history), if that assumption required you to accept a conclusion that diminished Russia’s place in the world. So I reserve the right to renew what Alyosha calls my “procedural” questions: first, the relative priority of state sovereignty and the entitlement to self-determination, not just as stated in SCR 1244 but in the context of the UN Charter and international law as a whole, and second, whether the United Nations is a creature constituted by states or the very existence of states depends on their collective recognition by the United Nations in accordance with the United Nations’ purposes and principles.

I invite you then, Brothers Dmitri and Ivan, to enrich your responses to Alyosha’s question regarding non-Charter law with attention to these questions as well. Perhaps my questions will give you an opportunity to reflect on your understanding of the relationship between the law of the Charter and general international law. But beware, because, as you reflect on these matters, I fear that the exigencies of your rhetoric in the very small matter of Kosovo may force you to twist your preferred understandings of the background law and your preferred constitutional theories as to the international legal system as a whole. I will be playing close attention, because your words may well inspire others to act in ways you never imagined possible.²¹⁰

209. VCLT, *supra* note 117, art. 31(3)(c).

210. See FYODOR DOSTOEVSKY, *The Brothers Karamazov*, in THE BROTHERS KARAMAZOV, *supra* note 30, at 588–601 (revealing that Smerdyakov interpreted Ivan’s earlier claim that, in a world in which God does not exist, “all things are possible,” together with Ivan’s departure from the town, to have given him license to murder Fyodor Karamazov).

Act III: Kosovo's Secession and General International Law

Dmitri:

Brothers, I turn now to the question of the legality of Kosovo's secession from Serbia under what we are calling the background principles of international law. Here I will make two main arguments: first, that the principles of international law conferred no right of secession²¹¹ on the Kosovar Albanians, and second, that in enabling Kosovo's secession by military, political, diplomatic, and financial means, the Western powers committed a violation of fundamental international legal norms that they had themselves defended and applied to Yugoslavia.

Although international law is unquestionably committed to "the principle of . . . self-determination of peoples," as per UN Charter Article 1(2),²¹² it by no means follows that any national minority²¹³ may secede at will from an existing state and declare itself an independent state. This is true even if the national minority is numerous, shares a common history, religion, and culture, occupies a contiguous territory in which it is a clear majority, and would be fully viable if formed into a state. The very statement in the UN Charter that recognizes the principle of self-determination of "peoples" subordinates that principle to the end of "develop[ing] friendly relations among nations."²¹⁴ Furthermore, Article 2(4) of the Charter prohibits member states "from the threat or use of force against the

211. Dmitri follows James Crawford's definition of "secession" as "the creation of a State by the use or threat of force without the consent of the former sovereign." JAMES CRAWFORD, *THE CREATION OF STATES IN INTERNATIONAL LAW* 375 (2d ed. 2006). But Dmitri is specifically concerned with what Crawford distinguishes as "secession within a metropolitan State," as opposed to "the secession of a self-determination unit and, in particular, of a non-self-governing territory." *Id.* at 383. In other words, Dmitri is not considering "salt water colonialism." Lea Brilmayer, *Commentaries on Lea Brilmayer, Secession and Self-Determination: A Territorial Interpretation*, 16 *YALE J. INT'L L.* 177 (1991)—*Secession and Self-Determination: One Decade Later*, 25 *YALE J. INT'L L.* 283, 283 (2000). Examples of post-World War II "secessions" of the former kind are the successful case of Bangladesh, the unsuccessful cases of Katanga and Biafra, and the contested cases of Northern Cyprus and Chechnya. Examples of the latter kind include the successful post-War efforts of many former European colonies in Africa and Asia, such as Vietnam, to break away from the overseas powers that controlled them. Algeria is also considered such a case, despite the fact that, under internal French law, it was regarded as a part of metropolitan France. *THE CHARTER OF THE UNITED NATIONS: A COMMENTARY* 57 (Bruno Simma ed., 2d ed. 2002).

212. U.N. Charter art. 1, ¶ 2.

213. A "national minority" here means an ethnic or linguistic minority within a host state. The Kosovo Albanians in Serbia before secession were a national minority in this sense.

214. U.N. Charter art. 1, ¶ 2.

territorial integrity . . . of any state,"²¹⁵ and Article 2(7) shelters from UN intervention "matters which are essentially within the domestic jurisdiction of any state."²¹⁶ Bear in mind that the overarching aim of the UN Charter is "[t]o maintain international peace and security."²¹⁷ States will nearly always resist their own forcible dismemberment, whether at the hands of internal insurgents or at those of outside powers. Because forcible secession will therefore ordinarily pose a threat to international stability and peace, the policy of international law is to disfavor it. To put it bluntly, Woodrow Wilson's statement that "[n]o people must be forced under sovereignty under which it does not wish to live"²¹⁸ is not now, and has never been, the law.

Rather, what has been and is still the general rule of law was stated in 1920 by a Committee of Jurists appointed by the Council of the League of Nations to render an opinion on the claim of the ethnically Swedish population of the Aaland Islands to secede from Finland and become a part of Sweden.²¹⁹ The Committee said:

[I]n the absence of express provisions in international treaties, the right of disposing of national territory is essentially an attribute of the sovereignty of every state. Positive International Law does not recognise the right of national groups, as such, to separate themselves from the State of which they form part by the simple expression of a wish, any more than it recognises the right of other States to claim such a separation.²²⁰

Likewise, the Commission of Rapporteurs appointed by the League of Nations after it received the report of the Commission of Jurists issued a ruling in the Aaland Islands dispute that remains good international law even now.²²¹ Do you think the authors of the UN

215. *Id.* art. 2, ¶ 4.

216. *Id.* art. 2, ¶ 7.

217. *Id.* art. 1, ¶ 1.

218. Woodrow Wilson, Message from President Wilson to Russia on the Occasion of the Visit of the American Mission (June 9, 1917), reprinted in OFFICIAL STATEMENTS OF WAR AIMS AND PEACE PROPOSALS, DECEMBER 1916 TO NOVEMBER 1918, 104, 105 (James Brown Scott ed., 1921).

219. For more on this dispute see generally JAMES BARROS, THE ALAND ISLANDS QUESTION: ITS SETTLEMENT BY THE LEAGUE OF NATIONS (1968); RADAN, *supra* note 46, at 28–30; Nathaniel Berman, "But the Alternative is Despair": *European Nationalism and the Modernist Renewal of International Law*, 106 HARV. L. REV. 1792, 1862–74 (1993); Norman J. Padelford & K. Gösta A. Andersson, *The Aaland Islands Question*, 33 AM. J. INT'L L. 465 (1939).

220. REPORT OF THE INTERNATIONAL COMMISSION OF JURISTS, LEAGUE OF NATIONS OFFICIAL J. 5 (Spec. Supp. No. 3, 1920), as reprinted in MUSGRAVE, *supra* note 47, at 34.

221. The Commission of Rapporteurs stated:

Is it possible to admit as an absolute rule that a minority of the population of a State, which is definitely constituted and perfectly capable of fulfilling its duties as such, has the right of separating itself from her in order to be incorporated in another State or declare its independence? The answer can only be in the negative. To concede to minorities, either of language or of

Charter, or the governments that ratified it and became members of the United Nations, were unaware of these principles in 1945?

And if you should think that these pre-Charter opinions fail to reflect the current state of international law, Brothers, then let me refer you to the very exact and careful statement of the law by the Supreme Court of Canada in its 1998 opinion *Reference re: Secession of Quebec*.²²² While acknowledging that, in the post-Charter legal universe, “the right of a *people* to self-determination” is “now so widely recognized in international conventions that the principle has acquired a status beyond ‘convention’ and is considered a general principle of international law,” nonetheless “international law expects that the right . . . will be exercised by peoples within the framework of existing sovereign states and consistently with the maintenance of the territorial integrity of those states.”²²³ And leading commentators affirm that state practice in the post-Charter world accords with this understanding of the law.²²⁴ Thus, even if one considered the Kosovar

religion, or to any fractions of a population the right of withdrawing from the community to which they belong, because it is their wish or their good pleasure, would be to destroy order and stability within States and to inaugurate anarchy in international life, it would be to uphold a theory incompatible with the very idea of the State as a territorial and political entity.

The Aaland Island Question: Report Submitted to the Council of the League of Nations by the Commission of Rapporteurs, at 27, League of Nations Doc. B.7.21/68/106 (1921), as reprinted in MUSGRAVE, *supra* note 47, at 36.

222. [1998] 2 S.C.R. 217 (Can.). For an analysis of the opinion see Stephen J. Toope, *Self-Determination-Canada-Quebec-Right to Secede Under Constitutional Law and Public International Law-Role of International Law in Canadian Courts*, 93 AM. J. INT'L L. 519 (1999).

223. Reference re: Secession of Quebec, [1998] 2 S.C.R. 217, ¶¶ 113–114, 122 (Can.). More fully, the Court said:

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 the framework of an existing state. A right to *external* self-determination . . . arises only in the most extreme of cases and, even then, under carefully defined circumstances. . . . The international law principle of self-determination has evolved within a framework of respect for the territorial integrity of existing states. The various international instruments that support the existence of a people’s right to self-determination also contain parallel statements supportive of the conclusion that the exercise of such a right must be sufficiently limited to prevent threats to an existing state’s territorial integrity or the stability of relations between sovereign states. . . . There is no necessary incompatibility between the maintenance of the territorial integrity of existing states . . . and the right of a “people” to achieve a full measure of self-determination.

Id. ¶¶ 126–127, 130.

224. For example, according to James Crawford:

Since 1945 the international community has been extremely reluctant to accept the unilateral secession of parts of independent States if the secession is

Albanians to be a “people” within the meaning of the Charter (and other international instruments, such as the International Covenant on Civil and Political Rights, that posit the right of a “people” to self-determination), it still would not follow that they had a right, regardless of the wishes of Serbia, to form a state of their own.²²⁵

The unavailability of secession does not, however, leave the Albanian Kosovars without a remedy. I should note that, even if the Kosovars have a right to self-determination, it derives from their Albanian ethnicity and (typically) Muslim beliefs; and, as recognized by the Badinter Commission (which I will discuss in greater detail shortly), the appropriate response to any claim of self-determination could be to respect an entitlement for Kosovars living in Kosovo to a right of autonomous self-government within Serbia.²²⁶ Or self-determination could include rights of association with, and perhaps even citizenship in, Albania.²²⁷

Alyosha:

Now, I am fully prepared to accept for the sake of argument that general international law concerning self-determination—as you say, both as reflected in the UN Charter and pre- and post-Charter customary international law—does not establish a right to secession. But could you not say that the breakup of the SFRY and the

opposed by the government of that State. In such cases the principle of territorial integrity has been a significant limitation. Since 1945 no State which has been created by unilateral secession has been admitted to the United Nations against the declared wishes of the government of the predecessor State. By contrast there are many examples of failed attempts at unilateral secession, including cases where the seceding entity maintained *de facto* independence for some time.

CRAWFORD, *supra* note 211, at 390 (citation omitted).

225. See Alfred P. Rubin, *Secession and Self-Determination: A Legal, Moral, and Political Analysis*, 36 STAN. J. INT'L L. 253, 259 (2000) (“Neither treaty, practice, nor common law precedent establishes any positive legal right to secession or independence of any people, however grouped.”).

226. Conference on Yugoslavia Arbitration Commission: Opinions on Questions Arising from the Dissolution of Yugoslavia—Opinion No. 2, 31 I.L.M. 1488, 1498–99 (1992), available at <http://www.la.wayne.edu/polisci/dubrovnik/readings/badinter.pdf> [hereinafter Badinter Commission].

227. See *id.* at 1497–98 (determining that “[w]here there are one or more groups within a State constituting one or more ethnic, religious or language communities, they have the right to recognition of their identity under international law”; that “the principle of the right to self-determination serves to safeguard human rights. By virtue of that right every individual may choose to belong to whatever ethnic, religious or language community he or she wishes”; and that “one possible consequence of this principle might be for the members of the Serbian population in Bosnia-Herzegovina and Croatia to be recognized under agreements between the Republics as having the nationality of their choice, with all the rights and obligations which that entails with respect to the States concerned.”).

international recognition of those new states created regional customary international law—a *lex specialis* for the Balkans?

Dmitri:

I doubt even Ivan would be prepared to argue that, my dear Alyosha. It turns out to be the case, with surpassing irony, Brothers, that the Western powers that have just engineered Kosovo's secession insisted on the principle of territorial integrity throughout the 1990s as the former SFRY was breaking up.²²⁸ Moreover, the West consistently applied that principle in the 1990s so as to negate any claims by minority ethnic Serbians to self-determination.²²⁹ To be sure, the West's professed belief in the principle of territorial integrity was opportunistic—a matter of expediency and power politics, not of a principled commitment to the rule of international law. In truth, the West manipulated a "conservative" legal doctrine to achieve extremely radical ends: the voice was Jacob's but the hands were Esau's.²³⁰ Thus, after a very brief period of supporting the territorial integrity of the SFRY as a whole, the West invoked the same principle to assist and enable the secessionist movements in Slovenia, Croatia, and Bosnia-Herzegovina. Nonetheless, Ivan, I will do your Western friends the honor of taking their professions at face value because the very fact that the West had to proclaim its fidelity to the principle of territorial integrity so loudly demonstrates how fundamental that principle is in international law.

We must go back to the summer of 1991, some months after the voters of Slovenia had opted for independence in a referendum of December 1990, and also after the voters of Croatia had chosen the same course in May 1991.²³¹ Faced with looming conflict between these secessionist forces and the federal (Serbian-led) resistance, the Western powers—including the United States, the then-European Community (EC) and its members, and the Conference on Security and Co-operation in Europe (CSCE)—all voiced support for

228. Richard F. Iglar, *The Constitutional Crisis in Yugoslavia and the International Law of Self-Determination: Slovenia's and Croatia's Right to Secede*, 15 B.C. INT'L & COMP. L. REV. 213, 213 (1992).

229. *Id.*

230. *Genesis* 27:22. Esau was, of course, a deeply disfavored character in the Hebrew Bible. Indeed, in commenting on Esau's "contempt" for his own birthright and his willingness to subordinate his principles to the desire for immediate gain, Leon Kass writes that "in no other place in Genesis does the text itself pronounce judgment on the deeds of any character." LEON R. KASS, *THE BEGINNING OF WISDOM: READING GENESIS* 384 (2006).

231. For an excellent account of the diplomatic history of the period, see JAMES GOW, *TRIUMPH OF THE LACK OF WILL: INTERNATIONAL DIPLOMACY AND THE YUGOSLAV WAR 44-79* (1997).

maintaining the SFRY's territorial integrity.²³² For instance, on a June 21, 1990 visit to Belgrade, U.S. Secretary of State James A. Baker III endorsed a statement that the CSCE had issued two days earlier, calling for "democratic development and [the] territorial integrity of Yugoslavia."²³³ Despite this Western opinion, Croatia and Slovenia declared their independence on June 25, 1991.²³⁴ Notwithstanding these declarations, the West initially refused to recognize either secessionist state and continued to demand that the SFRY's international borders remain intact.²³⁵

The first of the four Yugoslav wars then broke out as SFRY military forces were deployed into secessionist Slovenia. This deployment produced a sudden and dramatic policy reorientation in the West.²³⁶ After some initial hesitation, Germany supported Slovenia's bid for independence.²³⁷ Then, rather than holding firm to their previous insistence on the SFRY's territorial integrity, other Western powers began to follow the German lead. An EC Declaration of July 5, 1991, asserting that "a new situation has arisen" as a result

232. During the period [from 1990 through mid-1991] . . . international leaders uniformly called for the continued integrity of Yugoslavia and condemned threats of secession In a visit to Yugoslavia on 25-26 February 1990 Deputy Secretary of State Lawrence Eagleburger made it clear to Slovenian and Croatian leaders that the United States would not advocate the dismemberment of Yugoslavia Nearly sixteen months later Secretary of State James Baker visited Yugoslavia on 21 June 1991 Baker . . . reiterated continued support for Yugoslavia's territorial integrity.

See RADAN, *supra* note 46, at 155-56. Both President George H.W. Bush and the U.S. State Department also expressed support for maintaining Yugoslavia's territorial integrity during this time. *Id.* at 160. Likewise, on June 23, 1991, the EC Foreign Ministers issued a statement declaring that the EC would not recognize any unilateral declaration of independence by either Slovenia or Croatia; and that position was affirmed by the European Council on June 28, 1991. *Id.* at 161.

233. Marc Weller, *The International Response to the Dissolution of the Socialist Federal Republic of Yugoslavia*, 86 AM. J. INT'L L. 569, 570 (1992).

234. Iglar, *supra* note 228, at 213.

235. *Id.*

236. Jill Smolowe, *Yugoslavia: Out of Control*, TIME, July 15, 1991, at 26; see also RADAN, *supra* note 46, at 161-62.

237. Germany's perception of the federal Yugoslav army's intervention in Slovenia and Croatia was colored both by its Cold War experience and by its recent reunification. Germany seems to have interpreted the interventions as an attempt by a Communist political and military leadership to suppress the emergence of two new democratic states that were seeking to exercise their right of self-determination. Moreover, having been reunited not long before, Germany was beginning to test its strength in European and world affairs. GOW, *supra* note 231, at 166-69. In addition, Germany had deep historical and cultural ties to Slovenia and Croatia, reinforced by economic interests. Germany's strong support for an independent, nationalistic Croatia in turn confirmed the fears of the Croatian Serbs that they could not live safely in the new Croatia. MISHA GLENNY, *THE FALL OF YUGOSLAVIA: THE THIRD BALKAN WAR* 112 (1992).

of Slovenia's and Croatia's secession, referred ambiguously both to "the right of peoples to self-determination" and to "the Territorial integrity of states"; the reference to "self-determination" was apparently included at the insistence of Germany.²³⁸ European Commission President Delors stated on July 8, 1991, that the EC had not ruled out the possibility of recognizing Slovenia and Croatia.²³⁹ British Foreign Minister Douglas Hurd was reported to have "qualif[ied] an early statement supporting the 'integrity of Yugoslavia' by adding that this should not include the use of force."²⁴⁰ In other words, the SFRY had the right to its pre-existing international boundaries, but it could not use force against the rebels and secessionists who were seeking to redraw them. Imagine telling President Abraham Lincoln that, while the United States had a right to possess South Carolina, it could not use force against the rebels that had fired on Fort Sumter!

After a change in the rotating federal presidency of the SFRY, the new President ordered federal military forces to withdraw from Slovenia on July 19, 1991.²⁴¹ But hostilities were also breaking out in Croatia, particularly in areas predominantly populated by Serbs. Just as the Croats were attempting to secede from the SFRY, so too the Serbian population of Croatia (roughly 12% of the Croatian Republic's total population or some 600,000 people in all, and a majority in areas like Krajina)²⁴² sought to secede from the breakaway Croatian state.

Brothers, if you are wondering why the Croatian Serbs sought independence from a Croatian nationalist régime, just remember that between 350,000 and 750,000 Serbs were killed in Croatia during the Second World War under the Croatian Ustase Party's pro-Nazi government, and that the Nuremberg Trials found that the Ustase's policy constituted genocide.²⁴³ One Croatian Ustase leader notoriously explained the policy this way in June 1941: "[O]ne-third of the Serbs we shall kill, another we shall deport and the last we shall force to embrace the Roman Catholic religion and thus meld

238. RADAN, *supra* note 46, at 162.

239. *Id.*

240. Weller, *supra* note 233, at 572. Britain's policy, like Germany's, was colored by its own national experience. The British tended to view the conflicts in Yugoslavia through the lens of the conflict in Northern Ireland, or in other words as a matter of irremediable ethnic differences. GOW, *supra* note 231, at 176.

241. Weller, *supra* note 233, at 574.

242. MANN, *supra* note 48, at 363.

243. MUSGRAVE, *supra* note 47, at 230. The secessionist Croatian government under Franjo Tudman did much to aggravate the fears of the Croatian Serbs, who saw the revival of Croat nationalism as a return to Fascism. GLENNY, *supra* note 237, at 11-13.

them into Croats.”²⁴⁴ And, it must be admitted, near the war’s end, Serb partisans slaughtered 100,000 Croats.²⁴⁵ These memories were still fresh in the minds of both Croatians and Serbs: Croatia’s leader Franjo Tudjman himself denied that the Croatian Ustase state was “the creation of fascist criminals” and affirmed that it stood for “the historic aspirations of the Croatian people.”²⁴⁶ Just as “the central problem of a Yugoslav state is the dominance of Serbs over Croats,” so too “the central problem of an independent Croatia is the dominance of Croats over Serbs.”²⁴⁷

The SFRY intervened militarily in Croatia for the stated purpose of maintaining the nation’s unity. Critics saw the intervention as motivated instead by the desire to create a “Greater Serbia”—a new Yugoslav nation dominated by the Serbs.²⁴⁸ The West responded by publicly considering a military intervention of its own in order “to ensure an orderly process of change”—in other words, to enable Croatia to secede.²⁴⁹ At that point, however, the Soviet Union hinted that such Western intervention could lead to a general European war, and the West tabled its plan for an armed intervention.²⁵⁰ Instead, the EC decided to seek intervention by a UN force.²⁵¹ By August 1991, about one-third of Croatia was in the hands of Serb forces.²⁵²

On August 27, 1991, the EC’s concern over the increasing violence in Croatia led it to declare that it was determined “never to recognize *changes of frontiers* which have not been brought about by peaceful means and by agreement.”²⁵³ Thus was announced the West’s purported conversion to the principle of territorial integrity, but as applied to the *internal* boundaries of the SFRY’s six constituent republics, not as to the *international* boundaries of the SFRY as a whole. “[T]he EC was clearly innovating; there was no precedent for determining statehood on this basis.”²⁵⁴ In fact, the West was standing the principle of territorial integrity on its head,

244. GOW, *supra* note 231, at 42 (quoting Deputy Leader and Education Minister Mile Budak).

245. MANN, *supra* note 48, at 353–54.

246. *Id.* at 378.

247. GLENNY, *supra* note 237, at 13.

248. *See, e.g., id.* at 12 (noting Tudjman’s “obsession” with an “all-purpose Yugoslav ideal” and therefore the elimination of individual national identity among many Serbian states).

249. Weller, *supra* note 233, at 575 (remarks attributed to Willem van Eckelen, Secretary-General of the Western European Union).

250. *Id.*

251. *Id.*

252. *Id.* at 584.

253. *Id.* at 575 (quoting EPC Declaration of 27 August 1991, EPC Press Release 82/91, Brussels) (emphasis added).

254. Richard Caplan, *International Diplomacy and the Crisis in Kosovo*, 74 INT’L AFF. 745, 748 (1998).

using it as an engine to drive the dismemberment of the Yugoslav state rather than to preserve its existing boundaries.²⁵⁵

The same August 27 declaration by the EC also called both for a peace conference and for the establishment of “an arbitration procedure” to resolve the differences between the warring parties in the SFRY.²⁵⁶ The peace conference convened on September 7, 1991, under the chairmanship of Lord Carrington.²⁵⁷ The EC charged the conference with “ensur[ing] peaceful accommodation of the conflicting aspirations of the Yugoslav peoples, on the basis of the following principles: *no unilateral changes of borders by force . . .*”²⁵⁸ That policy was repeated at the conference in an October 4 meeting attended by the Presidents of Serbia and Croatia: Minister van den Broek held out to the participants the prospect of Western recognition of the secessionist republics, based in part on “[n]o unilateral changes in borders.”²⁵⁹ At the peace conference’s October 25 meeting, Lord Carrington proposed the creation of “[s]overeign and independent republics with international personality for those that wish it,” coupled with “[i]n the framework of a general settlement, recognition of the independence, within existing borders, unless otherwise agreed, of those republics wishing it.”²⁶⁰

Alyosha:

Ah! So I imagine that you are going to try to persuade us that Western powers were interpreting the idea of “self-determination” to mean self-determination *within the pre-existing boundaries of each republic*, rather than as self-determination *by each ethnic group*, because the ethnic groups sprawled across the Yugoslav federations’ boundaries (as Tito had intended they should²⁶¹). And in that case,

255. Commenting on this *volte-face* in policy near the time of its occurrence, two scholars noted that it left the question “why the presumptive boundaries should not have been those of the whole of Yugoslavia rather than those of its subdivisions which were previously of no international significance.” A.V. Lowe & Colin Warbrick, *Current Developments: Public International Law: Recognition of States*, 41 INT’L & COMP. L. Q. 473, 476 (1992); see also MUSGRAVE, *supra* note 47, at 124 (noting the untraditional nature of the West’s revised position).

256. Weller, *supra* note 233, at 576 (citing Press Release, EPC Declaration of 27 August 1991, EPC Press Release 82/91).

257. *Id.* at 577.

258. *Id.* (citing Extraordinary EPC Meeting, Declaration on Yugoslavia of 3 September 1991, EPC Press Release (Sept. 4, 1991), The Hague) (emphasis added).

259. The Secretary-General, *Report of the Secretary-General Pursuant to Paragraph 3 of Security Council Resolution 713*, annex II, § 1(c), U.N. Doc. S/23169 (Oct. 25, 1991).

260. *Id.* annex VI § 1.1(c), (e).

261. See *Yugoslavia: Tito’s Daring Experiment*, TIME, Aug. 9, 1971, available at <http://www.time.com/time/magazine/article/0,9171,903055-1,00.html> (discussing Tito’s decentralized expansion).

self-determination for Kosovo should require the consent of the people *within the republic boundaries within which Kosovo fell*, rather than simply being left to the Albanian Kosovars as a distinct ethnicity inhabiting an area that was not co-extensive with a former republic.

Dmitri:

Precisely. The West has viewed self-determination in Yugoslavia as a civic or republican, rather than an ethnic, concept.²⁶² Indeed, when Milosevic proposed in October 1991 that Yugoslavia's boundaries be rearranged through popular referenda held on an ethnic rather than a republican basis, the West showed no interest whatsoever.²⁶³

We can see the origins of the West's policy still more clearly when we turn to the other track of the EC's August 27 declaration—the work of the Arbitration Commission. Commonly known as the Badinter Arbitration Commission (for its chair, the French judge Robert Badinter), the commission consisted of judges chosen from five Western European constitutional courts (France, Germany, Italy, Spain, and Belgium) to advise the peace conference on legal issues.²⁶⁴ And Ivan, you must permit me to say that in the work of this commission, law was truly and successfully conscripted into the service of power.

Smerdyakov:

You don't get to become the head of a constitutional court unless you know how to dance to politicians' fiddles! Even Fyodor Martens, the greatest international lawyer our Russian Empire ever produced, trimmed his doctrines to please his Czar—why should these judges have been any better?²⁶⁵

262. For the distinction between "classical" and "romantic" theories of the self-determination of peoples, see RADAN, *supra* note 46, at 8–23. The former conception is based on a common statehood or territorial government, the latter on a common ethnicity, language, or culture. *Id.*

263. GOW, *supra* note 231, at 58–59.

264. Badinter Commission, *supra* note 226, at 1488–89.

265. On Martens, see Vladimir Vasilievich Pustogarov, *Fyodor Fyodorovich Martens (1845–1909)—A Humanist of Modern Times*, 312 INT'L REV. RED CROSS 300 (1996), available at <http://www.icrc.org/Web/Eng/siteeng0.nsf/html/57JN52>. Martens' change of doctrine to suit the Czar's wishes has been dramatized in JAAN KROSS, PROFESSOR MARTENS' DEPARTURE (Anselm Hollo trans., 1994) at 44–46, 48–52, 102–03.

Dmitri:

Between 1991 and 1993, the Badinter Commission handed down some fifteen opinions relating to legal issues arising out of the collapse of the SFRY. Of these, the most relevant to us are Opinions Nos. 1, 2 and 3. Taken together, they surgically dismantled the SFRY in order to create new states for non-Serbs. But at the same time, they denied ethnic Serbs the correlative right to secede from these new non-Serb dominated states. Let me take each opinion in turn.

Opinion 1. Opinion No. 1 responded to a request from Lord Carrington whether (as Serbia maintained) the republics that had declared independence were attempting “secession,” or whether (as those republics argued) the SFRY was in the process of “disintegration or breaking-up.”²⁶⁶ The question was significant because, in the case of dissolution (unlike that of secession), “there is, by definition, no predecessor State continuing in existence whose consent to any new arrangements can be sought.”²⁶⁷ From the West’s point of view, it was politically important to find that the SFRY was being dissolved so that the West could avoid the imputation that it was supporting secessionist movements and thus contributing to the destabilization of other troubled areas of the world.²⁶⁸ Obliging, in its Opinion No. 1, the Badinter Commission found the SFRY “[was] in the process of dissolution.”²⁶⁹ This finding was plainly erroneous: even Slovenia and Croatia, in their declarations of independence, seemed to acknowledge that they were *seceding* from the SFRY.²⁷⁰ However, the finding permitted the West to pursue its policy of promoting the independence of the breakaway republics without having to secure the SFRY’s consent.²⁷¹

The EC was now in a position to set forth the terms on which it would recognize these republics. Although “recognition” is normally no more than the declaration that a putative state has met certain common criteria for statehood²⁷² (conditions that, incidentally, the

266. Badinter Commission, *supra* note 226, at 1494.

267. CRAWFORD, *supra* note 211, at 390.

268. See MUSGRAVE, *supra* note 47, at 200–03 (discussing this characterization).

269. *Id.* at 200.

270. See *id.* at 200–03 (developing this and other criticisms of Opinion No. 1); see also RADAN, *supra* note 46, at 204–16.

271. MUSGRAVE, *supra* note 47, at 203.

272. Convention on the Rights and Duties of States art. 1, Dec. 26, 1933, 165 L.N.T.S. 19, available at <http://www.mtholyoke.edu/acad/intrel/interwar/rights.htm> (setting forth the common criteria for statehood).

Republic of Bosnia-Herzegovina would surely not have met²⁷³, the EC decided to use recognition as a political and diplomatic tool. Because recognition, even on the declaratory theory, is a discretionary political act, I will concede that the EC was within its rights to have made recognition conditional.²⁷⁴ The EC's recognition policy had two main goals, both "tailored to fit EC interests."²⁷⁵ First, the policy sought to extract commitments from the new states to honor certain Western values regarding the rule of law, democratization, human rights, and the protection of minorities—in essence, what are called Helsinki norms;²⁷⁶ second, the policy "internationalized" the conflict in Yugoslavia, thus permitting deeper EC diplomatic intrusions into Yugoslav affairs without Belgrade's consent and creating a legal predicate for possible future military intervention if the Yugoslav federal army sought to change the new states' boundaries.²⁷⁷ "[A]s new states the former republics would have sovereign rights and be entitled to a greater degree of international protection, including collective military action taken in defence of those rights."²⁷⁸

On December 16, 1991, the EC issued its *Guidelines on the Recognition of New States in Eastern Europe and in the Soviet Union*, together with a *Declaration on Yugoslavia*.²⁷⁹ These documents announced the tests that the EC and its members required the new states to meet in order to be recognized. The EC *Guidelines* included a commitment of "respect for the inviolability of all frontiers which can only be changed by peaceful means and by common agreement."²⁸⁰ In the accompanying *Declaration on Yugoslavia*, the EC required the new republics to "accept[] the commitments included in the . . . *Guidelines*."²⁸¹ The new republics were invited to apply for recognition by submitting applications through the Badinter Commission.²⁸²

273. See MUSGRAVE, *supra* note 47, at 206 (noting that Bosnia-Herzegovina lacked a government capable of exercising sovereignty over large parts of their putative population or territory).

274. *Id.* at 204.

275. Weller, *supra* note 80, at 588.

276. Caplan, *supra* note 68, at 749.

277. See MUSGRAVE, *supra* note 47, at 117 (discussing the latter objective).

278. Caplan, *supra* note 68, at 747–48.

279. Press Release, European Political Corporation, Declaration on Yugoslavia and on the Guidelines on the Recognition of New States, Doc. P. 129/91 (Dec. 16, 1991), 31 I.L.M. 1485 (1992) [hereinafter Declaration of Yugoslavia and the Recognition of New States]. The United States had adopted a similar recognition policy. See FOREIGN POL'Y BULL. Nov.–Dec. 1991, at 39, 42.

280. Declaration of Yugoslavia and the Recognition of New States, *supra* note 279, at 1487.

281. *Id.* at 1485.

282. *Id.* at 1486–87.

Opinion 2. To this point, we have seen how the West used the doctrine of “territorial integrity” or the “inviolability of frontiers” *offensively*, to accomplish the dismemberment of the SFRY. Now we shall see how Opinion No. 2 of the Badinter Commission used that doctrine *defensively*, to defeat claims by minority ethnic Serbs to secede from these new states—states where they were at serious risk of oppression and persecution. On November 20, 1991, Lord Carrington asked the Badinter Commission for its advice on the question: “Does the Serbian population in Croatia and Bosnia-Herzegovina, as one of the constituent peoples of Yugoslavia, have the right to self-determination?”²⁸³

The question was obviously a fundamental one. Although the Badinter Commission’s finding that the SFRY was in the process of dissolution had made it unnecessary to justify the secession of the new republics on the ground of their people’s right to self-determination, there was obviously an argument that, just as the Croats or Bosnians had a right to a state in which they formed an ethnic majority, so, too, in fairness, had the ethnic Serbs of those areas. Furthermore, by the early 1990s, the Wilsonian vision of the self-determination of peoples, despite its potentially destabilizing consequences,²⁸⁴ was enjoying increasing support.²⁸⁵ Moreover, the SFRY’s internal borders between its constituent republics had never been intended as international frontiers (and might have been drawn differently had that possibility been contemplated)—as Marshal Tito put it, they were “only an administrative division.”²⁸⁶ Should they nonetheless have been considered inviolable? Finally, a resolution that permitted the Serbian populations of Croatia and Bosnia to withdraw from those new states—even though it would have entailed difficult and contentious exercises in drawing up appropriate national boundaries and might have necessitated population exchanges—could well have contributed to the peace of the former Yugoslavia. But the Badinter Commission resolutely set its face against any such policy. Instead, it adopted a full-throated form of the doctrine of the sanctity

283. Badinter Commission, *supra* note 226, at 1497–98.

284. See Pascal Boniface, *Pandora’s Box*, LE MONDE DIPLOMATIQUE, Jan. 1999, <http://mondediplo.com/1999/01/19states>.

285. See, e.g., ALLEN BUCHANAN, SECESSION: THE MORALITY OF POLITICAL DIVORCE FROM FORT SUMTER TO LITHUANIA AND QUEBEC (1991) (developing a theory of the conditions under which secession is morally justified); Avishai Margalit & Joseph Raz, *National Self-Determination*, 87 J. PHIL. 439 (1990) (discussing the moral justification for national self-determination). A robust but somewhat later argument in support of the prima facie right of any group within a territory to a government of its own is found in Daniel Philpott, *In Defense of Self-Determination*, 105 ETHICS 352 (1995).

286. RADAN, *supra* note 46, at 152.

of borders,²⁸⁷ with the modest caveat that minority groups and their members have rights to “recognition of their identity” and nationality of their choice.²⁸⁸ Of course, the right to recognition of their identity was a far cry from the right to recognition as an independent state—or even as an autonomous, self-governing region within a multi-ethnic state. The policy of preserving even newly-fashioned international borders trumped even the least compelling forms of the right of a people to self-determination.

Opinion 3. Finally, in its Opinion No. 3, the Badinter Commission addressed Lord Carrington’s question: “Can the internal boundaries between Croatia and Serbia and between Bosnia-Herzegovina and Serbia be regarded as frontiers in terms of public international law?”²⁸⁹ In its brief answer, the Commission gave some substance to its brief allusion in Opinion No. 2 to the doctrine of *uti possidetis*:

The boundaries between Croatia and Serbia, between Bosnia-Herzegovina and Serbia, and possibly other adjacent independent states may not be altered except by agreement freely arrived at. . . .

Except where otherwise agreed, the former boundaries become frontiers protected by international law. This conclusion follows from the principle of respect for the territorial *status quo* and, in particular, from the principle of *uti possidetis*.²⁹⁰

And relying on this doctrine, as you would have expected, my Brothers, the Commission obliged Lord Carrington with the answer he wanted—the internal boundaries of the SFRY could alchemically become frontiers of new states.

Now, it would be easy for me to criticize the Badinter Commission opinions, as many legal scholars have done.²⁹¹ For instance, I could quarrel with the Commission’s reading of the

287. See Badinter Commission, *supra* note 226, at 1498 (“Whatever the circumstances, the right to self-determination must not involve changes to existing frontiers at the time of independence (*uti possidetis juris*) except where the states concerned agree otherwise.”).

288. *Id.* at 1498–99.

289. *Id.* at 1499.

290. *Id.* at 1500. Opinion No. 3 continued stating that:

Uti possidetis, though initially applied in settling decolonisation issues in America and Africa, is today recognized as a general principle, as stated by the International Court of Justice in its Judgment of 22 December 1986 in the case between Burkina Faso and Mali. . . . According to a well-established principle of international law the alteration of existing frontiers or boundaries by force is not capable of producing any legal effect.

Id. (citation omitted).

291. *E.g.*, RADAN, *supra* note 46, at 204–43, 251–53.

relevant ICJ case law;²⁹² or reject its reliance on the *uti possidetis* doctrine, a construct developed in the context of decolonization;²⁹³ or question whether it was applied here only as a tool of European power politics,²⁹⁴ or was instead ignorant of the realities of nationalism;²⁹⁵ or whether, in despair of these realities,²⁹⁶ it prematurely sought to settle the matter,²⁹⁷ thus yielding boundaries

292. MUSGRAVE, *supra* note 47, at 234–35 (arguing that the Commission misread and misapplied the ICJ's remarks in the *Burkina Faso* case on the subject of *uti possidetis*); HANNUM, *supra* note 138, at 55 (demonstrating a similar criticism); Michla Pomerance, *The Badinter Commission: The Use and Misuse of the International Court of Justice's Jurisprudence*, 20 MICH. J. INT'L L. 31, 55 (1998) (noting that scholars have frequently questioned the commission's reliance on ICJ jurisprudence).

293. Arguably, a doctrine that public international law had developed to protect the nascent Latin American republics of the early nineteenth century from European predations, and that had then been used to safeguard the newly emerging African states of the mid-twentieth century from each other, should not have been applied outside the context of decolonization. See, e.g., Lowe & Warbrick, *supra* note 255, at 480.

The [Badinter Commission's] reliance on existing boundaries, ambiguous as that is, is redolent of the reliance on colonial administrative boundaries in decolonisation. They provide a practical starting-point and allow for the creation of identifiable States, but here they may not bring even the precarious stability that they have achieved in Africa.

Id.; see also HANNUM, *supra* note 138, at 38 (noting the difficulty of arguing that Slovenia or other secessionist states were in a "neo-colonial" relationship with Serbia/Yugoslavia, and that they did not so contend); HANNUM, *supra* note 138, at 55 ("This [Badinter Commission] opinion is dubious if it purports to identify a rule of international law requiring the maintenance of existing administrative borders outside the colonial context.").

294. As one noted scholar wrote, "*uti possidetis* is not law, but political history preserved in aspic." Thomas M. Franck, *Friedmann Award Address*, 38 COLUM. J. TRANSNAT'L L. 1, 5 (Apr. 12, 1999); see also Enver Hasani, *Uti Possidetis Juris: From Rome to Kosovo*, 27 FLETCHER F. WORLD AFF. 85, 92–93 (2003) (arguing that the Badinter Commission's use (or abuse) of the doctrine merely reflects European balance-of-power politics).

295. See Brilmayer, *supra* note 211, at 284 (questioning whether the Commission operated under the "blindness [that] infects most Western discussions of 'nationalism'").

296. See Lea Brilmayer, *The Moral Significance of Nationalism*, 71 NOTRE DAME L. REV. 7, 21 (1995) (asking whether the true explanation of the Commission's rulings was that they were simply the product of despair: a sense that it was impossible to sort out the merits of competing claims, and fatalism about its practical inability to implement a just solution even if it could decide what it would be).

297. Arguably, greater flexibility over these still-unsettled boundaries has made peaceful compromises more likely and inter-ethnic violence less so. The British diplomat David Owen, one of the co-chairmen of the Steering Committee of the Conference on the Former Yugoslavia, apparently thought so. He wrote that "[t]he refusal to make these borders negotiable greatly hampered the EC's attempt at crisis management in July and August 1991 and subsequently put all peacemaking from September 1991 onwards within a straitjacket that greatly inhibited compromises between the parties in dispute." DAVID OWEN, *BALKAN ODYSSEY* 33–34 (1995).

no better in practical effect than a random revision of borders,²⁹⁸ and indeed actually making matters worse.²⁹⁹ It may well be, as one scholarly commentator observed in summation, that Europe's

approach to the Yugoslav conflict represents a one-time-only reaction to secessionist demands based on no discernible criteria other than the desire of some territorially based population to secede. The principle that borders should not be altered except by mutual agreement has been elevated to a hypocritical immutability and contradicted by the very act of recognizing secessionist states. New minorities have been trapped, not by any comprehensible legal principle, but by the historical accident of administrative borders drawn by an undemocratic government.³⁰⁰

None of these criticisms, however valid they may be, is material to my present argument.

Alyosha:

Surely these were difficult questions upon which reasonable minds could differ, given their novelty and complexity. Instead, you seem to want us to believe that the Badinter Commission's work was so bereft of plausibility that it can only have been motivated by a nefarious agenda.

Dmitri:

Indeed, for my basic point here is that, however defective the reasoning and conclusions of the Badinter Commission may have been, the Western powers accepted, defended, and enforced the principle of territorial integrity *in the Badinter Commission's formulation* throughout the process of Yugoslavia's breakup from 1991 onward, with the effect, and likely the purpose, of weakening Serbia and Serbians living in the new states.

298. As yet another scholar suggests, was *uti possidetis* here a harmful (rather than, as elsewhere, useful) "idiot rule" that mistakenly assumed that "no border is more rational than another, or that the issue of borders is simply so complex and emotional that states will always prove unable to reallocate territory peacefully"? Steven R. Ratner, *Drawing a Better Line: Uti Possidetis and the Borders of New States*, 90 AM. J. INT'L L. 590, 617 (1996).

299. See Hannum, *supra* note 138, at 39 (arguing that by implying that the right to secede is stronger in cases where the central government accords more autonomy to regions and localities, the Badinter Commission's rulings "will encourage states to resist granting precisely those political and economic rights which might constitute the most realistic and effective response to [secessionist] claims for self-determination. In effect, a state would be penalized if it addressed ethnic or regional concerns by devolving power to autonomous regions."); Margalit & Raz, *supra* note 285, at 458 (questioning whether it would "generate a problem as great as it meant to solve" to create "a large-scale new minority problem").

300. Hannum, *supra* note 138, at 55-56.

Smerykov:

And, of course, now that the Albanian Kosovars seek independence, when Kosovo was never a “republic” within the SFRY, that Badinter Commission’s work is consigned to the ash heap of legal history, eh?

Dmitri:

I will simply note, Smerdyakov, that the West adamantly insisted that the former internal administrative borders of Yugoslavia were sacrosanct and could not be breached, no matter how compelling the demands for their revision. Thus, in bringing the hostilities in Bosnia-Herzegovina to a halt in 1995, the West rejected the claims of the Bosnian Serbs to their own republic. Article I of the *General Framework Agreement for Peace in Bosnia and Herzegovina* (the Dayton Accords) specified that “the Parties shall fully respect the sovereign equality of one another, shall settle disputes by peaceful means, and shall refrain from any action, by threat or use of force or otherwise, against the territorial integrity or political independence of Bosnia and Herzegovina or any other State.”³⁰¹ I will grant you that the Dayton Accords effectively partitioned Bosnia and Herzegovina among the main parties to the conflict there—the Serbs on one side, the Bosnian Croats and Muslims on the other³⁰²—and that, in fact, it violated the Western ban on the acquisition of territory in Yugoslavia by force.³⁰³ Nonetheless, even as the Accords effectively created two *de facto* entities, they also preserved “the *de jure* sovereignty and territorial integrity of Bosnia-Herzegovina.”³⁰⁴ Once again, then, the West was treating the principle of territorial integrity—as the Badinter Commission had tendentiously redefined it—as the controlling legal norm that was to govern the settlement of international frontiers in the Yugoslav crisis.

Indeed, on crucial occasions, the West even persuaded the Security Council to affirm the controlling character of this norm. For instance, very early in the Yugoslav crisis, the West secured the adoption of SCR 713 (1991), endorsing the West’s peace conference for Yugoslavia.³⁰⁵ In particular, the Resolution specifically adopted the CSCE’s declaration “that no territorial gains or changes within

301. The General Framework Agreement for Peace in Bosnia and Herzegovina, Bosn. & Herz.-Croat.-Yugo., Dec. 14, 1995, 35 I.L.M. 75, 89.

302. See FROMKIN, *supra* note 36, at 157 (discussing the ethnic partition created by the Dayton Accords).

303. BOBBITT, *supra* note 33, at 465.

304. MUSGRAVE, *supra* note 47, at 121.

305. S.C. Res. 713, ¶ 14, U.N. Doc. S/RES/713 (Sept. 25, 1991).

Yugoslavia brought about by violence are acceptable.”³⁰⁶ Then in 1995, in endorsing the Dayton Accords, SCR 1031 (1995) reaffirmed the Council’s “commitment to a negotiated political settlement of the conflicts in the former Yugoslavia, preserving the territorial integrity of all States there within their internationally recognized borders.”³⁰⁷

Let me return finally to the question of Kosovo’s right to secede. That question, I submit, must be decided in light of the continuous and consistent doctrine and practice of the Western powers in relation to the former Yugoslavia from 1991 onward. I submit, Ivan, that that record has established three things.

First, it has powerfully reinforced the general post-Charter view of international law that the principle of self-determination counts for little when weighed against the right of a state sovereign to preserve its existing international boundaries.

Second, it estops the West from arguing for the application of a different legal standard for Kosovo—a standard that was not applied to any of the other attempted secessions in the former Yugoslavia.

Third, it supports my interpretation of the meaning and effect of SCR 1244’s reference to the territorial integrity of Serbia. That reference cannot be understood, Ivan, as you understand it, as though SCR 1244 stood alone. No, SCR 1244 cannot be read as a discrete and isolated text. Rather, it must be seen as but one element of an unfolding sequence of international legal instruments, including SCRs 731 and 1031, that consistently applied the principle of territorial integrity, as the Badinter Commission had understood it, to the former Yugoslavia.

Alyosha:

Brother Dmitri, forgive me if I seem impatient, but you promised at the beginning of your speech to discuss not only why Kosovo had no right of secession but also why the West’s support for Kosovo’s independence was illegal. Are you going to address that question?

Dmitri:

Yes, thank you, Alyosha. My remarks on that subject will be briefer. According to one distinguished legal scholar and jurist, there is a general agreement in international law

that while States may give military equipment and financial or technical assistance to a liberation movement, they are prohibited from sending armed troops. . . . State practice and the spirit of the UN Charter’s basic provisions on the use of force do not allow third States

306: *Id.* ¶ 8.

307: S.C. Res. 1031, ¶ 2, U.N. Doc. S/RES/1031 (Dec. 15, 1995).

to go so far as to send troops to assist peoples invoking the right to self-determination.³⁰⁸

That conclusion is supported by the ICJ's decision on the merits in the *Nicaragua* case, when the Court stated that "assistance to rebels in the form of provision of weapons or logistical or other support . . . may be regarded as a threat or use of force, or amount to intervention in the internal . . . affairs of other states."³⁰⁹ According to these opinions, even if I am wrong to claim the political and military leadership of Kosovo had no "right" to secede from Serbia, the Western powers were still acting illegally by intervening with force in Kosovo's struggle for independence from Serbia.

To be clear, I am not referring now to NATO's 1999 "humanitarian" intervention, which surely was illegal,³¹⁰ but which at least did not have the declared aim of destroying Serbia's sovereignty over Kosovo. I am referring to the later intervention that took place quietly, and under the form of legality, in February 2008. That intervention coupled the deployment of substantial Western military forces into Kosovo and the establishment of "EULEX Kosovo," an EU bureaucratic arm to "assist" in administering the state of Kosovo,³¹¹ with the formal diplomatic recognition of the Kosovar state. The ultimate purpose of this intervention is "to integrate Kosovo in the long run within Euro-Atlantic

308. ANTONIO CASSESE, *SELF-DETERMINATION OF PEOPLES: A LEGAL REAPPRAISAL* 152–53 (1995).

309. *Military and Paramilitary Activities (Nicar. v. U.S.)*, 1986 I.C.J. 14, 103–04 (June 27). Even more sweepingly, Judge Schwebel stated:

[T]he right of self-determination, freedom and independence of peoples is universally recognized; the right of peoples to struggle to achieve these ends is universally accepted; but what is *not* universally recognized and what is *not* universally accepted is any right of such peoples to foreign assistance or support which constitutes intervention. That is to say, it is lawful for a foreign State or movement to give to a people struggling for self-determination moral, political and humanitarian assistance; but it is not lawful for a foreign State or movement to intervene in that struggle with force or to provide arms, supplies or other logistical support in the prosecution of armed rebellion.

Id. at 351 (Schwebel, J., dissenting on other grounds).

310. See, e.g., Richard A. Falk, *Kosovo, World Order, and the Future of International Law*, 93 AM. J. INT'L L. 847, 852 (1999) (explaining why the 1999 NATO intervention was a rejection of legal standards); Jonathan I. Charney, *Anticipatory Humanitarian Intervention in Kosovo*, 32 VAND. J. TRANSNAT'L L. 1231, 1231–32 (1999) (discussing the illegality of the 1999 NATO intervention). *But see* Abraham D. Sofaer, *International Law and Kosovo*, 36 STAN. J. INT'L L. 1, 1–2 (2000) (attempting to justify the intervention).

311. See European Union Fact Sheet: Eulex Kosovo (Feb. 2008), available at http://www.consilium.europa.eu/cms3_fo/showPage.asp?id=1357&lang=en&mode=g (describing the responsibilities of Eulex Kosovo).

structures”³¹²—in simpler terms, to colonize it. NATO is in Kosovo not just to keep the Serbs out but also to keep the Kosovars down.³¹³

The “state” of Kosovo is nothing but a Potemkin village—or perhaps I should say a kind of Balkan Manchukuo.³¹⁴ It could not survive without artificial life support, in the form of massive military, administrative, financial, and diplomatic sustenance from the U.S. and the EU. A 2007 report by the Institute for European Policy, commissioned by the German Bundeswehr, accused the international community of a “grotesque denial of reality” about Kosovo, which it described as “a Mafia society” whose state had been captured by crime syndicates.³¹⁵ It predicted that “with resolution of the status issue and the successive withdrawal of international forces the criminal figures will come closer than ever to their goal of total control of Kosovo.”³¹⁶ And among the critical issues it identified was the “inexhaustible supply of young people without a future and therefore ready for violence.”³¹⁷ Without substantial infusions of Western aid, it would soon become a failed state in the middle of Europe, exporting crime and terrorism to its neighbors.³¹⁸

So what does the West plan to do in order to sustain the fiction of Kosovo’s independence? According a February 2008 U.S. State Department briefing held soon after the recognition of Kosovo, the Western powers would keep Kosovo in what the State Department

312. Sophie Dagand, *The Prospects for a Future Kosovo: The Role of Security Sector Reform*, 38 EUR. SECURITY REV. 1, 1 (2008).

313. The West has long been concerned with the possibility that an independent Kosovo could become the core of a “Greater Albania,” as dangerous in its own way as Milosevic’s “Greater Serbia.” See generally Sofaer, *supra* note 310, at 12 (describing the dangers of Milosevic’s actions). A truly independent Kosovo could destabilize the former Yugoslav Republic of Macedonia (which has a large ethnic Albanian minority population) or seek to join itself to Albania. The presence of NATO forces for an indefinite period of time in Kosovo guards against those dangers. As Lord Ismay once said about NATO, it had been formed to “keep the Americans in, the Soviets out and the Germans down.” See *This Week in Homeland Security, Europe and the Atlantic Relationship*, June 13, 2003, <http://www.homelandsecurity.org/NewsletterArchives/061303.htm> (citing this Lord Ismay quote). Today he might say NATO’s presence in Kosovo is designed to keep the Europeans in, the Serbs, Albanians and Macedonians out, and Kosovars down.

314. See Jonathan Eyal, *Is Kosovo Really Independent?*, ROYAL UNITED SERVICES INSTITUTE, <http://www.rusi.org/research/studies/european/commentary/ref:C47B9782C8AAFD/> (last visited Jan. 14, 2009).

315. David Binder, Op-Ed., *Kosovo’s Grim Future: The World Denies Reality*, WASH. TIMES, Aug. 29, 2007, at A19 (quoting INSTITUT FÜR EUROPÄISCHE POLITIK, OPERATIONALISIERUNG VON SECURITY SECTOR REFORM (SSR) AUF DEM WESTLICHEN BALKAN – INTELLIGENTE/KREATIVE ANSÄTZE FÜR EINE LANGFRISTIG POSITIVE GESTALTUNG DIESER REGION (2007), <http://www.balkanforum.org/IEP-BND/iep0001.pdf> [hereinafter INSTITUTE FOR EUROPEAN POLICY REPORT]).

316. *Id.* at A19.

317. *Id.*

318. See *id.* (discussing how the seed of crime and terrorism is planted in Kosovo).

euphemistically called “supervised independence.”³¹⁹ This Western effort would have two main prongs: military and administrative. First, the West intended to maintain in Kosovo the present NATO force (KFOR) of about 17,000 troops.³²⁰ That force originally operated under the authority of SCR 1244; henceforward, it would openly be an operation by NATO alone.³²¹ NATO forces, which have occupied Kosovo since 1999, would therefore remain in place indefinitely. Second, the EU would introduce its civilian mission, EULEX Kosovo, to take the place of UNMIK (which, like KFOR, had been authorized under SCR 1244).³²² Once it reaches full capability, the EULEX Kosovo mission would have 1,900 international police officers, judges, prosecutors, and customs officials and 1,100 local staff.³²³ EULEX Kosovo’s initial mandate would be for two years.³²⁴ Both the U.S. and the EU have also provided enormous financial support to Kosovo. In 2008, the U.S. expected to furnish \$335 million to Kosovo; in 2007, it gave \$77 million.³²⁵ As of February 2008, the EU had given nearly €2 billion to Kosovo and planned to “allocate more resources to Kosovo per capita than to any other place in the world (nearly €330 million).”³²⁶

In short, the West is giving the secessionist movement of Kosovo truly astonishing military, administrative, and financial support. Clearly this assistance is of a level and kind that is well beyond what international law allows third-party states to provide to rebels and insurgents. In particular, the West’s military intervention—accomplished by transforming KFOR from a UN-sanctioned presence into an unauthorized NATO presence—is an “armed attack” on Serbia in violation of the UN Charter.³²⁷

319. Telephone Interview with Nicholas Burns, Undersecretary for Political Affairs (Feb. 18, 2008), <http://www.state.gov/p/us/rm/2008/100976.htm>.

320. *Id.*

321. *See id.* (discussing SCR 1244 and NATO operations in the region).

322. *See UN, NATO Announce Plans to Reorganize Kosovo Security*, SPIEGEL ONLINE INT’L, June 13, 2008, <http://www.spiegel.de/international/europe/0,1518,559471,00.html> (discussing the deployment of the EULEX police mission).

323. Press Release, Council of the European Union, EU Rule of Law Mission for Kosovo (June 2008), available at http://consilium.europa.eu/cms3_fo/showPage.asp?id=1352&lang=en.

324. *Id.*

325. Telephone Interview with Nicholas Burns, *supra* note 319.

326. Press Release, Council of the European Union, The EU in Kosovo (Feb. 2008), available at <http://consilium.europa.eu/uedocs/cmsUpload/080216TheEUinKosovo.pdf>

327. U.N. Charter pmbl. (obligating all member states of the United Nations, in order to achieve the organization’s goals of international peace and security, “to practice tolerance and live together in peace with one another as good neighbors, and to unite our strength to maintain international peace and security, and to ensure by the acceptance of principles and the institution of methods, that armed force shall not be used, save in the common interest.”).

Finally, the Western powers are attempting to sustain Kosovo by diplomatic means. And those efforts constitute yet another international wrong. As you all know, Brothers, international law has usually distinguished two theories of "recognition," the declaratory and the constitutive.³²⁸ On the declaratory theory (the prevailing view), the act of recognition is legally neutral: it is merely the acknowledgement of an established state of affairs, viz., the prior existence of a state or government.³²⁹ On the alternative theory, however, the existence of a state is constituted by international recognition. The act of recognition, on that theory, plainly has both legal effects and normative implications: it serves to create a state and also, in the present case, to redraw international boundaries.³³⁰

No one could plausibly claim that, by recognizing Kosovo, the Western powers were merely acknowledging the existence of an accomplished reality—as happened, for example, when the United States recognized the Soviet Union in 1933 or the People's Republic of China in 1978.³³¹ No, the Western powers were plainly attempting to conjure the secessionist state of Kosovo into existence.

It is accepted international law that the recognition of a new state may be wrongful. This is shown, for example, by the Security Council's condemnation in SCR 541 (1983) of Turkey's recognition of the purported Republic of North Cyprus.³³² In fact, the North Cyprus case bears a significant resemblance to the Kosovo situation. In both, an outside power or powers intervened militarily in order to protect a national minority from the asserted risk of persecution at the hands of an established government, supported that minority's efforts at secession, sought unilaterally to redraw international frontiers, and recognized a secessionist government that was dependent on the invader's continuing military and administrative presence for its very existence.³³³

328. CRAWFORD, *supra* note 211, at 4–5, 19–26.

329. *Id.* at 4, 22–26.

330. *Id.* at 4–5, 19–22.

331. For a brief history of the U.S.'s recognition of the Soviet Union in 1933, see United States Department of State, *Recognition of the Soviet Union, 1933*, <http://www.state.gov/r/pa/ho/time/id/86555.htm>. For an account of U.S. actions in recognizing the Peoples Republic of China in 1978, see Stanley Karnow, *East Asia in 1978: The Great Transformation*, 57 FOREIGN AFF. 589, 596–605 (1978).

332. S.C. Res. 541, ¶ 1, U.N. Doc. S/RES/541 (Nov. 18, 1983).

333. Another example is provided by the unsuccessful attempt of the province of Katanga to secede from the former Belgian Congo in 1960, just eleven days after the Congo had received its own independence. The mineral-rich secessionist province enjoyed substantial outside support, although in the end no other government recognized it. CRAWFORD, *supra* note 211, at 404–05. SCR 169 (1961), however, "completely reject[ed] the claim that Katanga is a 'sovereign independent nation.'" S.C. Res. 169, pmb., U.N. Doc. S/Res/169 (Nov. 24, 1961).

Alyosha:

Well done, Dmitri! Ivan, I see that you have been longing to speak. Now it is your turn, so speak freely and forcefully.

Ivan:

Brothers, my answer to Dmitri can be summed up in one word. That word is “genocide.” I am using the term “genocide” in the way in which the UN General Assembly understood it in GA Resolution 47/121 (1992).³³⁴ The General Assembly condemned the human rights abuses being committed at that time by Serbian forces in Bosnia, in particular “the abhorrent policy of ‘ethnic cleansing,’ *which is a form of genocide.*”³³⁵

And what is ethnic cleansing—a term apparently first introduced into wide currency in 1991–1992 to describe a practice in which the Serb forces in Croatia and Bosnia were just then beginning to engage?³³⁶ According to the 1994 *Final Report of the Commission of Experts* established by SCR 780 (1992),³³⁷ it is “a purposeful policy designed by one ethnic or religious group to remove by violent and terror-inspiring means the civilian population of another ethnic or religious group from certain geographic areas.” Where and how did the Serbs apply this policy in Bosnia in the early to mid-1990s?

The practice of “ethnic cleansing” is carried out in strategic areas linking Serbia proper with Serb-inhabited areas in Bosnia and Croatia. . . . The coercive means used to remove the civilian population . . . include: mass murder, torture, rape and other forms of sexual assault; severe physical injury to civilians; [and so on]. . . . Many of these acts of violence are carried out with extreme brutality and savagery in a manner designed to instill terror in the civilian population, in order to cause them to flee and never to return.³³⁸

In 1998 and still more in 1999, Serbian forces were committing that very form of genocide against the ethnic Albanian population of Kosovo, just as they had done earlier in Croatia and Bosnia. The West intervened in order to prevent the genocide. In 2008, the West recognized the independent state of Kosovo in part to prevent the recurrence of that genocide. If Serbia were permitted to reassert its sovereignty over Kosovo, the Kosovar Albanians would resist with all the force they could muster. And there is a risk that in the ensuing

334. G.A. Res. 47/121, U.N. Doc. A/RES/47/121 (Dec. 18, 1992).

335. *Id.* pmbl. (emphasis added).

336. See BOBBITT, *supra* note 33, at 439–41 (discussing the introduction of the term “ethnic cleansing” into popular discourse).

337. The Secretary-General, *Final Report of the Commission of Experts*, ¶ 130, U.N. Doc. S/1994/674 (May 24, 1994), available at <http://www.his.com/~twarrick/commxyu1.htm>.

338. *Id.* ¶¶ 133–135.

conflict, the Serbs would once again attempt to expel or destroy Kosovo's Albanian population. That risk is unacceptable. Hence the West has acted. There was no alternative. I can, and shall, say more. But that is the essence of the case for the West.

Smerdyakov:

You should read the Genocide Convention, Ivan.³³⁹ First of all, under Article II of that Convention, "genocide" requires an "intent to destroy" a national, ethnic, racial or religious group "as such."³⁴⁰ The ICJ held in 2007 in *Bosnia and Herzegovina v. Serbia and Montenegro* that "ethnic cleansing" does not meet this definition.³⁴¹ It said that

[n]either the intent, as a matter of policy, to render an area "ethnically homogeneous," nor the operations that may be carried out to implement such policy, can *as such* be designated a genocide: the intent that characterizes genocide is "to destroy, in whole or in part" a particular group, and deportation or displacement of the members of a group, even if effected by force, is not necessarily equivalent to destruction of that group, nor is such destruction an automatic consequence of the displacement.³⁴²

So the policy of ethnic cleansing practiced in Bosnia was *not* a genocide—and neither was it when practiced in Kosovo. Besides that, the Appeals Chamber of the ICTY in *Prosecutor v. Krstic* also ruled that "[t]he Genocide Convention, and customary international law in general, prohibit only the physical or biological destruction of a human group. . . . [F]orcible transfer does not constitute in and of itself a genocidal act."³⁴³

Furthermore, the Genocide Convention does not authorize any outside power to intervene when it decides that another state is committing genocide. Not at all. Instead, it requires strict compliance with the Charter's rules for the use of force. It says plainly: "Any Contracting Party may call upon the competent organs of the United Nations to take such action under the Charter of the United Nations as they consider appropriate for the prevention and suppression of acts of genocide."³⁴⁴ Did your Western friends have the Security Council's approval when they intervened in Kosovo in 1999 to stop what they considered genocide? No, they did not. And

339. United Nations Convention on the Prevention and Punishment of the Crime of Genocide, Dec. 11, 1948, 78 U.N.T.S. 277 [hereinafter Genocide Convention].

340. *Id.* art. II.

341. Application of the Convention on the Prevention and Punishment of the Crime of Genocide (*Bosn. & Herz. v. Serb. & Mont.*), 2007 I.C.J. 91, ¶ 190 (Feb. 26).

342. *Id.*

343. *Prosecutor v. Krstic*, Case No. IT-98-33-A, Judgment, ¶¶ 25, 33 (Apr. 19, 2004).

344. Genocide Convention, *supra* note 339, art. VIII.

did they have the Security Council's authorization when they recognized Kosovo in 2008—for the purpose, as you say, of avoiding the recurrence of genocide? No, again they did not! So what justifies their conduct then, Ivan? If it is not law, and it is not mere hatred and revenge, is it morality? And what does “morality” mean in international affairs?

Dmitri:

Ivan, you listened to me patiently, and so I will listen to you. But I must put a question to you now. I do not think that the Serbs' practice of ethnic cleansing amounted to genocide: your accusation overlooks, for one thing, that ethnic cleansing is a counter-guerrilla method of warfare, not solely a political objective.³⁴⁵ You also fail to mention that Serbia itself was swollen with Serb refugees fleeing from ethnic cleansing elsewhere—some 550,000 by 1992. In the month of August 1995 alone, the Croatian Army—with support from the United States—cleansed the Krajina of an estimated 200,000 ethnic Serb inhabitants.³⁴⁶ (This was the operation that Ambassador Richard Holbrook described as merely “a milder form of ethnic cleansing.”)³⁴⁷ All told, between 1991 and the end of 1995, the ethnic Serb population of Krajina had been reduced from 570,000 to 90,000.³⁴⁸ Finally, you neglect to explain that Milosevic's plan to cleanse Kosovo may have been motivated by the desire to resettle his own Serb refugees there, not by the wish to eradicate the Albanian Kosovars as a people.³⁴⁹

But even supposing that Serbia did engage in a form of genocide in 1999, when the Security Council took up the question of Kosovo after NATO's war, the Council did not decide to sever Kosovo from Serbia. Not at all. In SCR 1244, with the West's full consent, it *reaffirmed* Serbia's sovereignty over Kosovo and remitted Kosovo's final political status to negotiations between the parties. If Serbia's “genocidal” actions in 1999 did not persuade the Council to grant

345. See GOW, *supra* note 231, at 41 (noting Mao Tse-Tung's remark that, in a guerrilla war, the fighter is a fish swimming in the sea of the local population, and observing that the Serbian forces viewed ethnic cleansing as a military strategy aimed at draining off the water).

346. McCWire, *supra* note 62, at 2–3. Radan places the figure at 150,000 ethnic Serbs, displaced from the Krajina and Western Slavonia, in two campaigns, one in May 1995 and the other in August 1995. RADAN, *supra* note 46, at 182.

347. RADAN, *supra* note 46, at 250.

348. *Id.* at 250 n.16.

349. MANN, *supra* note 48, at 393. “The argument that Belgrade saw [the expulsion of 800,000 Kosovar Albanians] as a manageable number which could be balanced by the resettlement of the 600,000 Serbs expelled from Bosnia and Croatia is plausible—except that those refugees had consistently chosen to settle elsewhere.” McCWire, *supra* note 62, at 10.

Kosovo independence then, what entitles the West, some nine years afterwards, to make that decision on its own? Especially after Serbia has complied with their wishes by democratizing its institutions and surrendering Slobodan Milosevic for trial at the Hague!

Alyosha:

Brothers, brothers, be patient! Ivan has been kind enough to give us his argument in an admirably succinct form. Now let him develop it. I am sure he will have answers to your questions – whether convincing or not, we shall see.

Ivan:

I will take the argument in five steps. First, I will show that international law recognizes an exception from the general norm of territorial sovereignty that Dmitri has outlined. Second, I will establish that Serbia's past treatment of the Albanian Kosovars fits that exception, thus permitting Kosovo's lawful secession. Third, I will address Dmitri's claims about the West's commitment to the principle of territorial sovereignty in the former Yugoslavia. Fourth and fifth, I will respond to, respectively, Smerdyakov's and Dmitri's objections.

1. *The Exception.* The sources that Brother Dmitri cites on the subject of territorial integrity—the Aaland Islands decisions³⁵⁰ and the Quebec secession case³⁵¹—expressly permit an exception for cases in which an ethnic minority has been severely oppressed by a host government. Thus, the Supreme Court of Canada noted that a “clear case where a right to external self-determination [*i.e.*, secession]” exists when “a people is subject to alien subjugation, domination or exploitation outside a colonial context.”³⁵² The Court pointed out that the exception for that case is rooted in, among other things, the landmark *Declaration on Principles of International Law Concerning Friendly Relations and Co-operation Among States in Accordance with the Charter of the United Nations*.³⁵³ After reaffirming the right of self-determination of peoples, Resolution 2625 stated:

Nothing in the foregoing paragraphs 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*

350. MUSGRAVE, *supra* note 47, at 36.

351. Reference re: Secession of Quebec, [1998] S.C.R. 217, ¶ 133 (Can.).

352. *Id.*

353. *Id.*; G.A. Res. 2625 (XXV), U.N. Doc. A/7247 (Oct. 24, 1970).

above and thus possessed of a government representing the whole people belonging to the territory without distinction as to race, color or creed.³⁵⁴

The legal scholar (now ICJ Judge) Bruno Simma wrote that

a right of secession could... be recognized if the minority discriminated against is exposed to actions by the sovereign State power which consist in an evident and brutal violation of fundamental human rights.³⁵⁵

There is thus a sound legal basis for secession in at least extreme cases. Thus the question: Is Kosovo such a case?

2. *Kosovo's secession as fitting within the exception.* The word "genocide" should not be taken lightly. I do not use it so. Serbia had caused about 2,000 Kosovar Albanian deaths and displaced about 300,000 Kosovar Albanians from their homes in its counter-insurgency campaign of 1998.³⁵⁶ In itself, that was perhaps not attempted genocide, although one must remember that Milosevic and his fellow Serb extremists had already been responsible for at least 100,000 Muslim and Croat deaths.³⁵⁷ In 1999, before NATO's victory brought it to a halt, Serbia forced nearly 1 million Kosovar Albanians out of their homes—nearly 75% of Kosovo's pre-war total of 1.8 million ethnic Albanians.³⁵⁸ Of that 1 million, roughly 800,000 people were forced out of the country, primarily into Albania and Macedonia.³⁵⁹ Perhaps another 500,000 ethnic Albanians were internally displaced within Kosovo, in many cases to hide outdoors.³⁶⁰ The death toll is not known, but estimates ranging from 5,000 to 10,000 ethnic Albanians seem plausible.³⁶¹ Although the West did not invoke the Genocide Convention against Serbia in 1999, both the U.S. State Department and the German Defense Ministry raised the possibility early in the war that genocide was in fact taking place.³⁶² What we now know establishes that it was.

354. G.A. Res. 2625 (XXV), *supra* note 353, annex, pmbl. (emphasis added). It would be reasonable to read the Resolution's reference to "race" in a functional way, so as to include ethnicity. Cf. *Shaare Tefila v. Cobb*, 481 U.S. 615, 617–18 (1987) (treating "Jewishness" as "race" for purposes of U.S. civil rights law).

355. See THE CHARTER OF THE UNITED NATIONS: A COMMENTARY, *supra* note 211, at 58 (specifically mentioning the Serbia government's ethnic cleansing efforts in Kosovo in 1998–1999 as an illustration).

356. DAALDER & O'HANLON, *supra* note 81, at 12; see also S.C. Res. 1199, *supra* note 77, pmbl. (stating that over 230,000 Kosovar Albanians had been displaced from their homes).

357. DAALDER & O'HANLON, *supra* note 81, at 12.

358. *Id.* at 108–09.

359. *Id.* at 109.

360. *Id.*

361. *Id.* at 110.

362. *Id.* at 111–12.

In our post-Holocaust world, there is no international crime more heinous than genocide. The prohibition on genocide is not merely a matter of convention. No, that prohibition is a matter of *jus cogens*, and every state is called on to cooperate in its suppression.³⁶³ The West's 1999 intervention in Kosovo can be, *should* be, justified on that basis. Likewise, this justification extends to its "intervention" (as you call it, Dmitri) in February 2008. The legitimacy of Serbia's claim to sovereignty over Kosovo was discredited by the humanitarian intervention in 1999; the West is now merely following through on the logic of that intervention.³⁶⁴

You will tell me, Brothers, that I am not giving Serbia credit for a change of heart. After all, did it not render Slobodan Milosevic to the ICTY for trial? Has it not democratized its institutions? Are not the leading Serb political parties and factions now eager for their nation to join the EU?

Smerdyakov:

Yes, Ivan! Aren't you forgetting what the indictment and trial of Slobodan Milosevic were about? He was prosecuted before the ICTY for the crimes he was said to have committed against the Kosovars!³⁶⁵ And that trial was supposed to be an object lesson for Serbia and the Serbs. You are seeking revenge for the Kosovars, Ivan, not justice.

Ivan:

There was no injustice, Smerdyakov, in putting Milosevic on trial for his crimes. And there is no injustice in demanding that the Kosovars have political independence. It would be impossible to expect the Albanian Kosovars to forget the past—including the very recent past. And neither should we. The 1999 genocide was not an isolated event: as one Kosovar Albanian jurist put it, a "river of blood" has coursed through the history of the Serb and Albanian peoples.³⁶⁶ Suspicion is justified. And even focusing narrowly on the pre-war

363. See *Jorgic v. Germany*, 2007 Eur. Ct. H.R. 583, ¶ 68 ("[P]ursuant to Article I of the Genocide Convention, the Contracting Parties were under an *erga omnes* obligation to prevent and punish genocide, the prohibition of which forms part of the *jus cogens*.").

364. See Viola Trebicka, *Lessons from the Kosovo Status Talks: On Humanitarian Intervention and Self-Determination*, 32 YALE J. INT'L L. 255, 260 (2007).

365. See generally *Prosecutor v. Milosevic*, Case No. IT-02-54-T, Second Amended Indictment (Oct. 29, 2001) (detailing the crimes allegedly committed by Slobodan Milosevic against Kosovars in Serbia).

366. Hajredin Kuçi, *The Legal and Political Grounds for, and the Influence of the Actual Situation on, the Demand of the Albanians of Kosovo for Independence*, 80 CHI.-KENT L. REV. 331, 344 (2005).

period from 1990 to 1999, one historian observed that “[t]o produce an adequate survey of the human rights abuses suffered by the Albanians of Kosovo . . . would require several long chapters in itself.”³⁶⁷

3. *The West’s view of territorial sovereignty in the former Yugoslavia.* Brother Dmitri, the essence of your legal argument is that the West long ago codified the principle of treating the former Yugoslavia’s internal borders as international frontiers, and insisted that, as such, they be held inviolable. Fair enough. But treating Kosovo differently from the Serb republics in Croatia and Bosnia is amply justified. The Serbs of Croatia and Bosnia inflicted far more suffering on their Croatian and especially Muslim neighbors than they suffered at their hands.³⁶⁸ And, in any case, whatever wrongs they endured are simply not commensurable with the sufferings that Serbia and Serb extremists inflicted on Kosovo. Genocide stands apart from all other war crimes. The Kosovar Albanians were targeted for genocide; the ethnic Serbs of Croatia and Bosnia were not. Hence Kosovo has a claim to independence that the Serb republics did not have.

You also allege, Dmitri, that an independent Kosovo is a sham state, a fiction created and nourished by the West. Well, what if that were so, Dmitri? If the Western military and administrative presence in Kosovo is there to prevent both the renewal of war with Serbia and the internal collapse of Kosovo’s own political structure, is that not a benefit to all concerned—including not only Kosovo and the West but also Serbia and Russia? How can it be wrong to prevent the emergence of a radical, perhaps violent Islamist narco-state in the heart of Europe? And in doing so to preserve the peace of the Continent? If there is any troubling fiction at work here, Dmitri, it is *your* fiction that Serbia’s claim to rule Kosovo has some meaning left to it.

4. *Reply to Smerdyakov’s objections.* Smerdyakov, your first objection is that I am collapsing “ethnic cleansing” into “genocide,” when both the ICJ and the ICTY have carefully distinguished the two. Perhaps so, but again, what of it? Like the General Assembly, I may be using the term “genocide” in a political rather than a legal sense. The heinousness of the atrocity would remain. But I do not agree that I am speaking politically rather than legally. Courts and scholars divide on the question whether ethnic cleansing is “genocide”

367. MALCOLM, *supra* note 32, at 349.

368. See BOBBITT, *supra* note 33, at 444–47 (refuting claims that suggested that Bosnian Muslims and Serbs were equally complicit in atrocities plaguing the region); *id.* at 465 (citing the lack of evidence that Bosnian Serbs were at risk in a multi-ethnic Bosnian State).

in the strict sense of the Convention. The European Court of Human Rights (ECHR) reviewed the situation in its 2007 judgment in *Jorgic v. Germany*.³⁶⁹ It found that, although the ICJ and the ICTY had ruled as you say, the national courts of Germany, including its greatly respected Federal Constitutional Court, had interpreted the Convention and its implementing statute in Germany more broadly, so that “genocide” encompassed ethnic cleansing.³⁷⁰ It also found that scholarly opinion was split on the question of whether the ethnic cleansing committed by the Serbs in Bosnia constituted genocide.³⁷¹ Finally, it upheld a criminal conviction of a Bosnian Serb defendant for genocide under Germany’s implementing statute, ruling that the German national courts’ interpretation of both their statute and Article II of the Convention was reasonable.³⁷² So you are with the ICJ and the ICTY; I am with the UN General Assembly and the Federal Constitutional Court of Germany.

Second, Smerdyakov, you argue that, even if the West was attempting to suppress genocide in Kosovo in 1999, it nonetheless failed to comply with the Charter’s strictures on the use of force. I concede that; but what of it? As I have said, the international order as a whole is committed to suppress genocide and other crimes against humanity: a violation of the peremptory norm against genocide (or other crimes against humanity) is a violation of a duty *erga omnes*. Call it morality rather than law, if you will. But the intervention was justified.

5. *Reply to Dmitri’s objections.* Let me say, Dmitri, that once again you have offered a primitive and unyielding account of the law. You assume that just because SCR 1244 did not immediately demand the separation of Kosovo and its independence, no such result was foreseen. Indeed, you seem to consider the Resolution as the Albanian Kosovars’ remedy of last resort for the historic violations of universally accepted human rights norms committed against them by the terrorist régime in Serbia.³⁷³

My argument here is in three parts. First, I maintain that in 1999, after the Serbs’ genocidal campaign had been brought to an end, the Albanian Kosovars were entitled to independence.³⁷⁴ I think you come near to conceding as much, Dmitri, when you suggest that

369. *Jorgic v. Germany*, 2007 Eur. Ct. H.R. 583, ¶ 68.

370. *Id.* ¶¶ 6–45.

371. *Id.* ¶ 47.

372. *Id.* ¶¶ 103–108.

373. See Brilmayer, *supra* note 211, at 283 (suggesting that secession can be viewed as a remedy for human rights violations).

374. Cf. Rubin, *supra* note 225, at 269 (“In the immediate aftermath of atrocities, no resolution is feasible and the only moral course seems to be to allow people to separate themselves into communities that refuse to deal with those each considers evil.”).

the Security Council Resolution might have, but did not, approve Kosovo's independence at that point. The case for independence even then was based on a wrong of historic proportions, a murderous campaign last seen in Europe when the Nazi Third Reich attempted to exterminate the Jews. Is the case of the Kosovars really any different now from what it was in 1999?

A wrong begets the right to a remedy. Serbia's pattern of brutal atrocities against the Kosovar Albanian people entitled them, under prevailing international legal standards, to the remedy of self-determination. I will assume, as you do, Brothers, that the remedy of self-determination does not in *every* case equate with secession. Secession is perhaps the most drastic remedy available in a case such as this. But the test to be applied is whether that remedy is necessary and proportionate to the wrong endured. That test was satisfied in 1999 and is satisfied today as well. Only national independence for Kosovo could begin to repair the devastation Serbia inflicted. Only national independence could provide the Kosovars with true security against a repetition of Serbia's oppressions and atrocities. If the colonized peoples of Africa and Asia had the right to secede in the post-War period from the European empires that had held them down, so too Kosovo has the right to escape from Serbia's cage.³⁷⁵

Second, I maintain that the course of implementing SCR 1244 does not constitute a waiver either of the Kosovar people's right to the remedy of independence or of the *erga omnes* rights of other states to intervene in Kosovo on their behalf.³⁷⁶ I have called it an *erga omnes* "right"; I might well have called it instead their *duty* under the emerging "responsibility to protect."³⁷⁷ In interpreting the failure of SCR 1244 to provide for secession as the immediate remedy so as to bar secession at a later date, you ignore fundamental principles of the law of remedies.

Third, Serbia's actions in Kosovo in 1998–1999 must be seen as an impermissible and unlawful use of force against the people of

375. See Peter Radan, *The Definition of 'Secession,'* (Macquarie Law Working Paper Series, Paper No. 2007-3, 2007), available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1011833 (denying the tenability for legal analysis of the distinction between the creation of new state from an overseas colony formerly belonging to an empire and the creation of a new state through the secession of a territorial part of a pre-existing state).

376. *Barcelona Traction, Light and Power Co., Ltd. (Belg. v. Spain)*, 1970 I.C.J. 3, 32 (Feb. 5) (suggesting universal human rights obligation in respect to treatment of one's own nationals are *erga omnes* in character, that is to say, assertable by third parties on behalf of foreign nationals).

377. 2005 World Summit Outcome, G.A. Res. 60/1, ¶¶ 138–140, U.N. Doc. A/RES/60/1 (Sept. 16, 2005); see also INTERNATIONAL COMMISSION ON INTERVENTION AND STATE SOVEREIGNTY, *THE RESPONSIBILITY TO PROTECT* 11–19 (2001), available at <http://www.iciss.ca/report-en.asp> (articulating an emerging responsibility of governments to protect their citizens as a rationale for humanitarian intervention).

Kosovo. By analogy to Article 51, that people had an “inherent” right of self-defense that nothing in the Charter could impair.³⁷⁸ By further analogy, the West had a right to join them in collective self-defense. Declaring independence is but one more legitimate and proportional measure of lawful self-defense.

Alyosha:

When you speak of legal analogies, Ivan, I find it harder and harder to follow you. Surely it is sign of the weakness of your position that you have run out of better arguments. Perhaps this is one of your dreams and you are imagining international law rather than applying it.

Smerdyakov:

No, no, Alyosha. Give Ivan some rope here, because if I understand where he is going, we may all have the pleasure of seeing Ivan hang himself with it.

Ivan:

Thank you for that vote of confidence, Smerdyakov. But let me proceed. I rather think that, as usual, I am a chess move or two ahead of you.

Let me explain. If we are correct that the Kosovars were entitled to self-determination in 1999, then the initial U.S. proposal that the Resolution provides the Kosovars with right to a referendum on independence within three years makes perfect sense, because it would have given the Serbs three years then to make the necessary adjustments to give the Kosovar people confidence that the Serbs would not resume their genocidal campaign. Surely restoration of the Kosovar people's entitlement to confidence in their future expectations of Serbian human rights performance would have been a central part of any appropriate remedy for a human rights violation of this magnitude. But the inclusion of such a time-limited opportunity for the Kosovars would have given the Kosovars, I will concede, an incentive not to cooperate in any Serb efforts at restoring such confidence. Thus, the deletion of any time-certain referendum—or any right to a referendum at all, which would have invited the same debate during implementation as to an end-point for cooperation and thus created the same incentives for noncooperation

378. U.N. Charter art. 51.

for both sides³⁷⁹—makes perfect sense in the rational design of SCR 1244 as an attempt to facilitate a remedy for the wrong committed by the Serbs against the Kosovars.

Now, let me say I acknowledge that analogy to the law of self-defense, at first blush, seems improper. But it too provides a coherent and consistent account of SCR 1244 as a remedial measure. Consider that, if the Kosovar people had declared their independence in 1999, and had their new state been recognized at that time, then the Kosovar state would have been entitled to the right of individual and collective self-defense under customary international law—an “inherent” right, recognized as such by the Charter.³⁸⁰ This would have permitted other states to rise to Kosovo’s defense by “necessary and proportionate” means.³⁸¹ At that stage in the process, would it not have been permissible for the Kosovar state, and states rising to its defense, to be free to experiment with temporary modes of association with Serbia to test the good faith of Serbia’s assurance that it would not renew its use of force against the Kosovar people?

Thus, as you can see, both from the standpoint of a people’s entitlement under international human rights law, and from standpoint of a state or territorial unit’s freedom from a use of force, SCR 1244 can be understood as a provisional remedy, pending further elaboration of the facts.

Smerdyakov:

Now the trap is sprung, Brother Ivan, because, having conceded that the matter is governed by the Security Council, is it not now *the Council’s* responsibility to determine that a “more intrusive remedy,” as you prefer to call it—the dismemberment of Serbia, as Dmitri might claim—is now required?

Ivan:

I imagine you derive some kind of perverse joy in appearing to catch me in a contradiction, Smerdyakov, but sadly you will not have the pleasure for very long. It is precisely because Kosovo (which

379. See DOUGLAS G. BAIRD ET AL., *GAME THEORY AND THE LAW* 220 (1994) (noting the need for rules that give the parties proper incentives throughout their relationship).

380. U.N. Charter art. 51.

381. RESTATEMENT (THIRD) FOREIGN RELATIONS LAW OF THE UNITED STATES § 905 (1987) (stating that otherwise unlawful countermeasures including the use of force, if proportionate, may be taken to terminate, prevent, or remedy violations of international obligations). The principal of *erga omnes* also applies. *Id.* cmt. (a). Thus, these remedies are available to any state party against a state party violating the agreement, even if the violation did not affect nationals of the claimant state or any other particular interest of that state. *Id.* §§ 703(2), 703 cmt. (a).

could have claimed independence in 1999) and its supporters (which could have recognized that claim to independence) agreed to give the Security Council an opportunity to achieve a remedy through implementation of SCR 1244 that Kosovo and the West reserved all the rights they might have had under customary international law to seek their own remedies. The Resolution, properly construed, in fact acknowledges this by setting forth a set of principles to be implemented. Can anyone say that, through implementation of the Resolution, the status quo ante has been restored, and that Serbia's wrongs against Kosovo have been remedied?³⁸² The Resolution contemplated a remedy. Having failed to secure that remedy, the situation reverts to the state of affairs that existed prior to adoption of the Resolution.

Indeed, let me now get to what I regard as the dispositive point: any other interpretation of SCR 1244 so as to preclude independent action by Kosovo and supporting states once the terms of the Resolution are not fulfilled would discourage future entities like Kosovo and other states from cooperating in initial efforts through the Security Council to provide the least drastic remedies possible in such situations. Surely you would not have our interpretation of the Resolution—in light of the need to synthesize it with foundational human rights principles, the international law of remedies, and parallel principles of self-defense law—take a form that discourages, rather than promotes, international cooperation. Don't we want, as I suggested at the beginning of this part of our debate, a synthesis of the law of the Charter and the background principles upon which it sits, to serve humanity rather than be served by humanity?

Alyosha:

Brother Ivan, I am struck by your argument that SCR 1244 sought to remedy the injustice that the Albanian Kosovars had suffered at the hands of the Serbs and that the Resolution accordingly permits Kosovo unilaterally to choose secession as a necessary and proportionate remedy for that injustice if the consensual process that the Resolution contemplated should fail. But what I am unsure of is how you understand the kind of justice that the Resolution, on your interpretation, sought to provide.

382. Cf. *Chorzow Factory* (F.R.G. v. Pol.), 1928 P.C.I.J. (ser. A) No. 17, at 47 (Sept. 13) (“[R]eparation must, as far as possible, wipe out all the consequences of the illegal act and re-establish the situation which would, in all probability, have existed if that act had not been committed.”).

Are you saying that the Resolution sought to give the Kosovars *corrective* justice?³⁸³ In that case, it seems to me, you should maintain that the transfer of sovereignty over Kosovo from the Serbs' hands to the Kosovars' is a remedy to which the Kosovars are entitled, *regardless* of the Serbs' conduct in the years since 1999. In other words, since the Kosovars were entitled to the remedy of secession after the Serb onslaught in 1999, and the Resolution withheld that remedy from them temporarily, then it should not matter now whether or not Serbia had reformed itself in the meanwhile—all that should matter is whether in 2008 the Kosovars still wanted secession or not. The debtor's note had become due, as it were; the intervening conduct of the debtor, even if commendable, could not annul the debt. On the other hand, perhaps you see SCR 1244 as having *forward-looking* remedial functions, such as deterrence or preventing the Serbs from *repeating* their injustices. In that case, it would seem that your view should be that the Kosovars were *not* entitled in 1999 to *secession*, but only to *some* kind of self-determination—which might or might not be eventual independence. And in that case the subsequent behavior of the Serbs *would* seem relevant to deciding *now* whether the Kosovars' secession was a necessary and proportionate remedy, or whether some less drastic remedial measure would have been adequate.

Ivan:

Brother Alyosha, of course I think that the Resolution aimed to shape the future conduct of Serbia and thus was designed to deter or prevent injustice. I view the Council's work as designed, quite pragmatically, to influence the future conduct of states and so create a more rational world order, not to see that back debts (as you call them) are paid by one state to another. Thus, the Resolution was framed to give Serbia incentives to purge its leadership, democratize its politics, and reform. But I also believe that the Kosovars had the right to choose secession in 1999, because even then that was an appropriate remedy. The Resolution did not deny the legitimacy of the Kosovars' claim to secede; rather, it gave them, in effect, an *election* of remedies, while delaying for a while their ability to choose between them. After the negotiations contemplated by the Resolution had run their course, the Kosovars could *either* declare their independence (as they had a right to do in 1999) *or* choose some form of continuing association with Serbia that both sides found acceptable.

383. For a discussion of the centrality of claims of either corrective or restitutionary justice to arguments for the transfer of resources (including sovereignty) from one national group to another, see Brilmayer, *supra* note 296, at 12–14.

Alyosha:

Dear Ivan, I am grateful for your clarification. Whether or not we finally agree with you, I find you persuasive in arguing that statehood for the Kosovars would be a last-resort remedy to a grave international wrong. I cannot help but notice the similarity to the just war theory's effort to limit the international use of force to those cases in which no lesser remedy for evil can be found.³⁸⁴

Dmitri:

Brothers, I am only a plain, blunt soldier, and I cannot fathom Ivan's subtle profundities. Let me say only this.

First, if the Security Council had intended in 1999 to sever Kosovo from Serbia—or even to make Serbia's continued sovereignty over Kosovo contingent on Serbia's good behavior—the Council could have said so. SCR 1244 could easily, for instance, have provided for a referendum on independence in Kosovo within a fixed period, unless Serbia met certain benchmarks within that time. It did nothing of the kind. Ivan's interpretation of SCR 1244 as a provisional remedy for Kosovo's wrongs is creative; but it bears no resemblance to the text of that Resolution. Nor does it reflect the careful balance of interests that the Council struck: it overlooks the fact that the Council clearly recognized in 1999 that the *Serbians*, not only the Albanians, have equities in Kosovo—which, after all, explains why the government of Serbia has fought so long and so tenaciously to keep the province. The new "balance" struck by the unilateral actions of the Kosovar Albanians and their Western sponsors gives far too little weight to the important interests of Serbia and the Serbians—historical, religious, cultural, and demographic—in the future of Kosovo. Furthermore, even if SCR 1244 had been designed as a remedy for the Kosovar Albanians, the purported inadequacy of that remedy would not have justified their recourse to self-help. When it comes to the use of force—which Kosovo's secession plainly entails—the ICJ's *Corfu Channel* case, among others, teaches us that international law is most emphatically hostile to measures of self-help.³⁸⁵ Finally, why should we think of SCR 1244 as a kind of "remedy" for the Kosovars at all? Why is the Resolution not more analogous to a simple armistice between opposing military forces

384. For an explication of the so-called last resort criterion in Just War Theory, see, e.g., National Conference of Catholic Bishops (1983 and 1993), *The Challenge of Peace: God's Promise and Our Response*, reprinted in *THE ETHICS OF WAR* 669, 673 (Gregory Reichberg et al. eds., 2006) (collecting documents).

385. *Corfu Channel* (U.K. v. Alb.), 1949 I.C.J. 4, 32–35 (Apr. 4).

than to a judicial remedy that one litigant has secured against another?

Second, I deny that the existence of an *erga omnes* right to prevent an ongoing genocide (if that is what an ethnic cleansing is) confers the right on third-party states to invade another state's political sovereignty or territorial integrity *without specific authorization from the Council in accordance with Chapter VII's use of force rules*. The Genocide Convention itself, as Smerdyakov has pointed out, makes that plain. And even if the practice of genocide violates *jus cogens*, so too does the use of force contrary to Charter rules. Indeed, the ICJ has said that the latter prohibition is a "conspicuous example" of *jus cogens*.³⁸⁶

Furthermore, I deny that that the *erga omnes* right entitles third-party states to dismember another state *because of the asserted fear that another genocide might otherwise take place*. If the right does not justify unauthorized intervention to prevent an *ongoing* genocide, it can hardly justify intervention to prevent an *anticipated* one. Moreover, there could be no Serbian genocide in Kosovo so long as the United Nations' mission—KFOR and UNMIK—remained in place. But who wants the UN presence removed? The West. Hence the West's claim that Kosovo's independence is the only realistic alternative to the recurrence of genocide is simply false.

Third, the idea that the Kosovar Albanians were acting in self-defense in declaring their independence is specious, and even more specious is the idea that the West is engaged in collective self-defense alongside them. Ivan, do us the courtesy of simply *reading* Article 51 of the Charter. It speaks of a right of self-defense "if an armed attack occurs *against a Member of the United Nations*."³⁸⁷ Kosovo was not, is not, and (until Serbia agrees) will not be a "Member of the United Nations." The Charter expressly sees the right of self-defense as a right of *states*, not of peoples. That makes perfect sense, if only for the reason that there is no agreed understanding as to what constitutes a people. The Supreme Court of Canada's decision on Quebec's secession ducked that issue, and understandably so.³⁸⁸ What we have, after all, is a Charter of the *United Nations*, not of the *United Peoples*. What is more, the ICJ's decision in the *Wall* case indicates that even a member state of the United Nations may not

386. Military and Paramilitary Activities (Nicar. v. U.S.), 1986 I.C.J. 14, ¶ 190 (June 27); see also U.N. Charter art. 2, ¶ 4 ("All Members shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any state, or in any other manner inconsistent with the Purposes of the United Nations.")

387. U.N. Charter art. 51 (emphasis added).

388. See Reference re: Secession of Quebec, [1998] S.C.R. 217, ¶¶ 126–139 (Can.).

have an Article 51 right of self-defense as against a non-state actor.³⁸⁹ Are you claiming nonetheless, Ivan, that a non-state actor has a right of self-defense as against a state? The paradox would be intolerable.

Finally, Ivan, let me question your idea that the oppression that the Kosovar Albanians have suffered under the Serbs entitles them to the remedy of secession. Do you think that that test would make for a wise and quieting rule of law in international affairs? How would you apply it? Was the secession of Bangladesh justified under your test, while that of Biafra was not? Or were secessions both justified? Or neither? Would your test apply to the Kurds of Iraq and Turkey? To southern Sudan? To Nagorno-Karabakh? To South Ossetia or Abkhazia?³⁹⁰ It is all very well for your Western friends to insist that Kosovo is a unique and unrepeatable case. But the justifications that are offered for Kosovo's secession are generalizable; and, if they are generalizable, as Smerdyakov quite rightly reminds us, other cases may fit under them, with no hope of legal stability.³⁹¹

Smerdyakov:

So, we face contradictory *jus cogens* principles—the right to suppress genocide as against the duty to respect the territorial integrity and political independence of states. Or to put it more generally, there is “a fundamental contradiction,” is there not, between “the legal principles of state sovereignty and human rights”?³⁹² We are also uncertain whether states have rights of self-defense against peoples and whether peoples have rights of self-defense against states. And we do not even know whether the international legal order derives ultimately from the nations that are the members of the United Nations or from the “peoples of the United Nations” who spoke in Article 1 of the Charter.³⁹³ Do nations create peoples, or do peoples decide what nations there are to be? A fine pickle!

389. See Legal Consequences of Construction of a Wall in Occupied Palestinian Territory, Advisory Opinion, 2004 I.C.J. 136, 194–95 (July 9).

390. See *supra* notes 22–23 and accompanying text (reporting Russian recognition of these secessions).

391. Compare Nikolas K. Gvosdev, *Kosovo and Its Discontents*, FOREIGN AFF., Jan.–Feb. 2006, at 169, 169 (arguing that the case for Kosovo's independence applies elsewhere), and Ignacio Ramonet, *Kosovo*, LE MONDE DIPLOMATIQUE (July 2007), available at <http://mondediplo.com/2007/07/01kosovo> (suggesting that Kosovo's declaration of independence could lead to similar action by similarly-situated territories), with Charles A. Kupchan, *Serbia's Final Frontier?*, FOREIGNAFFAIRS.ORG, Mar. 12, 2008, <http://www.foreignaffairs.org/20080312faupdate87276/charles-a-kupchan/serbia-s-final-frontier.html> (rejecting the “domino theory” of independence).

392. W. Michael Reisman, *Why Regime Change is (Almost Always) a Bad Idea*, 98 AM. J. INT'L L. 516, 517 (2004).

393. U.N. Charter art.1.

Alyosha:

Dear Brothers, please be patient and open your minds, for as we will soon see, “there are more things in heaven and earth . . . than are dreamt of in your philosophy.”³⁹⁴

394. WILLIAM SHAKESPEARE, *HAMLET* act 1, sc. 5.

Act IV: *The United Nations Charter as the "Constitution" of the World's Legal Order*

Alyosha:

Your discussions have glanced at metaphysical and theological questions, Brothers, but I still feel we have not properly discussed all the non-theological and non-metaphysical considerations that might be addressed before we confront these more fundamental grounds of disagreement. Let us keep the conversation going a bit longer, if possible, and in that spirit, let me begin to attempt to summarize your positions in as charitable a way as possible.

I believe I asked you each of you how you would decide the question if the Security Council Resolution were not controlling. You have done so fairly. But Smerdyakov asked you what can only be regarded as synthetic questions, requiring you to state your understanding of the relationship between Charter law and background principles of international law. Smerdyakov's questions ultimately posed for us the issue of how much of their traditional sovereignty the member states have granted to the international organs created by the Charter. For instance, should we assume that if a Security Council resolution is silent or ambiguous on the question of the secession of a province from a member state, then third-party member states retain their traditional power to recognize the independence of the breakaway province or not, as they see fit? Or should we instead assume that those states have delegated away much of that power to the Council, which must decide whether that secession is permissible, or to the General Assembly, which must decide whether to seat the new claimant, before they can legitimately recognize it? Or again: may we find that the practice of states can operate to revise the Charter—as the putatively emerging doctrine of humanitarian intervention is supposed to be revising the Charter's use of force rules—or must we hold that the Charter's written rules remain in effect until the Charter is formally amended? In both of these cases, we have problems concerning the true relationship between the United Nations and the states that compose it. Furthermore, I think that Smerdyakov is inviting us to reflect on the relationship between the human rights norms that have become increasingly prominent since the Charter was adopted, especially those that are now thought to embody peremptory norms, and the norms set forth in the Charter itself. For if the Charter is a kind of constitution of the world legal order, can it be that there are *higher* norms than those it incorporates, so that in the event of conflict the Charter is not supreme law? And what if those peremptory norms should conflict *with each other*?

Perhaps we cannot answer all of Smerdyakov's questions, but I think I can see, Brothers, how you might answer some of them. It appears to me that, in cases of doubt, Ivan thinks that the principle of self-determination trumps sovereignty when the UN is silent, but also empowers decision makers under the Charter to constitute a new state out of the territory of an existing member state. Dmitri, on the other hand, thinks that in those same cases sovereignty trumps self-determination, not only when the UN is silent, but even in the face of a UN decision favoring self-determination, because the Charter organs are merely creatures of the member states that created them and have no independent power to recognize a self-determination claim inconsistent with the sovereignty of a member state.

Dmitri:

Brother Alyosha, I see that they teach you some legal subtleties at your seminary! Perhaps you are not quite as unworldly as we, your brothers, have thought.

I will acknowledge that there is room for legal creativity in decisions of the Security Council, which fashioned a whole new theory of enforcement action when it delegated its enforcement powers under Chapter VII to a coalition of member states in the First Gulf War;³⁹⁵ conferred powers on an international organization arguably beyond the powers that organization had under its own statute;³⁹⁶ created international courts that have changed legal relations in civil,³⁹⁷ criminal,³⁹⁸ and terrorism-related matters arising between states and between states and sub-state entities;³⁹⁹ determined the boundary between Iraq and Kuwait;⁴⁰⁰ withheld collective recognition of Serbia's claim that it was the legal continuation of the former state of Yugoslavia for all relevant purposes following its dissolution;⁴⁰¹

395. See Oscar Schachter, *United Nations Law in the Gulf Conflict*, 85 AM. J. INT'L L. 452, 459 (1991) (concluding that such authorizations may well be consistent with both Articles 42 and 51).

396. See S.C. Res. 687, § C, U.N. Doc. S/RES/687 (Apr. 3, 1991) (creating UNSCOM and assignment responsibilities to IAEA to perform inspections beyond the scope of the IAEA Statute and its Inspections Agreement with Iraq).

397. See *id.* § E (establishing Iraq-Kuwait Compensation Fund).

398. See S.C. Res. 827, ¶ 2, U.N. Doc. S/RES/827 (May 29, 1993) (establishing International Criminal Tribunal for the former Yugoslavia).

399. See S.C. Res. 1373, ¶ 1, U.N. Doc. S/RES/1373 (Sept. 28, 2002) (requiring states to criminalize terrorist-financing).

400. See S.C. Res. 806, ¶¶ 1–2, U.N. Doc. S/RES/806 (Feb 5, 1993) (approving demarcation of Iraq-Kuwait boundary, as determined in report of U.N.'s Iraq-Kuwait Boundary Commission).

401. See S.C. Res. 777, ¶ 1, U.N. Doc. S/RES/777 (Sept. 19, 1992) (requiring the FRY to apply for admission to the United Nations); see also S.C. Res. 757, pmbl., U.N. Doc. S/RES/757 (Dec 6, 1992) (determining that the FRY's claim to succession of the SFRY's seat was not generally accepted); see also G.A. Res. 47/1, ¶ 1, U.N. Doc.

and partially granted at least Russia's claim to serve as the continuation of the Soviet Union by accepting the credentials of its representatives at the Security Council.⁴⁰²

But never has the Security Council, over the objection of a member state whose sovereignty was being fractured, created a new state.⁴⁰³ Nor has the General Assembly ever admitted a member—not even Bangladesh⁴⁰⁴—over the objection of the member state from which it had seceded. If the United Nations organs could exercise such a power, then could they not do the same in the Middle East, with cataclysmic consequences?

The Charter may have evolved, as some might argue, in accordance with an interpretation that is dynamic and flexible.⁴⁰⁵ But it is still the same Charter as it was in 1945.

Alyosha:

Thank you, Dmitri. Now, Ivan, can you clarify why you believe self-determination has become so important a principle of international law that it warrants an interpretation of SCR 1244 that permits the EU to recognize Kosovo?

Ivan:

Dmitri's views evidence a fundamental misconception about the role of international law, because he does not have the proper theory about the current meaning of the Charter and the relevance of that meaning to interpreting a Security Council resolution.

A/RES/47/1 (Sept. 22, 1992) (affirming the Badinter Commission's judgment that the SFRY was in the process of dissolution); Blum, *supra* note 33, at 800–03 (reviewing history of the FRY's claims to have succeeded the SFRY).

402. See generally Edwin D. Williamson & John E. Osborne, *A U.S. Perspective on Treaty Succession and Related Issues in the Wake of the Breakup of the U.S.S.R. and Yugoslavia*, 33 VA. J. INT'L L. 261, 273 (1993) (discussing the legal issues raised by the dissolution of these nation states).

403. See Rubin, *supra* note 225, at 259 (“To date, [the authority of the Security Council] has not been used to support any self-determination or secessionist movement . . .”).

404. Press Release, The Asian Human Rights Comm'n, Bangladesh: UN General Assembly Urged to Reject Bangladesh's Human Rights Council Bid (Apr. 21, 2006), available at <http://www.ahrchk.net/statements/mainfile.php/2006statements/492/>.

405. See Jose E. Alvarez, *The Once and Future Security Council*, WASH. Q., Spring 1995, at 5, 6 (noting that the Charter never worked as intended and that, contrary to popular wisdom, it is not working even in the aftermath of the Cold War as it was originally intended); cf. Edwin M. Smith, *Understanding Dynamic Obligations: Arms Control Agreements*, 64 S. CAL. L. REV. 1549, 1553–56 (1991) (relying on contract law scholarship, especially IAN R. MACNEIL, *THE NEW SOCIAL CONTRACT* (1980), to articulate a theory of changing meaning in treaties to accord with changing circumstances).

Alyosha:

Please explain this new theory of yours, for I fear you are taking us to yet another level of abstraction.

Ivan:

It seems to me, as many have suggested, that we are living in a new legal world today: one in which the Charter's references to self-determination and human rights must be given greater weight than its references to the "domestic jurisdiction of states" and "sovereign equality." Some have suggested that a new "constitution" for international society has emerged in the aftermath of the Cold War;⁴⁰⁶ or that such a new constitution was at least proposed during that period;⁴⁰⁷ or that we are still in the midst of a process of constitutional change. Indeed, it has been argued that NATO's humanitarian intervention in Kosovo in 1999 was the beginning of this new global constitutional order.⁴⁰⁸ Now, this is not the time or the place to explore fully the arguments that would need to be made to establish that we are living in a fundamentally different

406. BOBBITT, *supra* note 33 at 636–39 (arguing that the Charter of Paris in 1990 constituted a treaty of peace closing the epochal war between parliamentary democracy and its fascist and communist competitors, in which the internal constitutional principles of what Bobbitt calls "market states" were confirmed as the new constitutional principles of the international system).

407. Antonio F. Perez, *On the Way to the Forum: The Reconstruction of Article 2(7) and the Rise of Federalism Under the United Nations Charter*, 31 TEX. INT'L L.J. 353, 402–04 (1996) (suggesting that the UN Security Council Declaration approving the Secretary-General's "Agenda for Peace"—describing self-determination and democracy as emerging central principles in the post-Cold War international legal system—operated as the proposal for a newly amended Charter).

408. See GERRY SIMPSON, *GREAT POWERS AND OUTLAW STATES* 194–223 (2004). Simpson raises the question of whether NATO's 1999 intervention in Kosovo was the "foundational moment" of a project of international "regime building" in which the West sought to overthrow the UN Charter as the "constitution" of the world legal order and to install a régime of regional hegemony instead. *Id.* at 194. Simpson sees the great European peace settlement at the Congress of Vienna in 1815 as establishing a kind of international constitution akin to the UN Charter of 1945. *Id.* at 177. He then compares NATO to the Holy Alliance of the early nineteenth century, led by Russia and joined by Prussia and Austria. *Id.* at 199–222. The Holy Alliance was committed to a policy of armed intervention (in Spain, for instance) to protect monarchist institutions from revolution. The Alliance's policy seemed to other nations (Britain and the U.S.) to threaten the foundation of the Congress of Vienna's international legal order, which rested on the idea of the equality of sovereign states and their freedom from outside interference. *Id.* at 91–131. NATO's intervention in Kosovo in 1999 likewise represented a revolution against the constitutional principles of the UN Charter, especially the requirement that non-self-defensive uses of force be sanctioned by the Security Council. *Id.* at 199–222. Fascinatingly, Simpson compares the "mystical" Prime Minister Tony Blair to the Russian Czar Alexander I, the founder of the Holy Alliance (and President Bill Clinton to Austria's Count Metternich, who joined the Holy Alliance for opportunistic reasons). *Id.* at 202–03.

international legal order from that of 1945. But with so many scholars and practitioners expressing the view that something important has changed, I am prepared to accept this new reality as the basis for a more purposive way of interpreting the work of the Security Council, so that it may accord more perfectly with the principles of human rights and self-determination.

Smerdyakov:

I can see, Ivan, why you do not wish to pursue that way of thinking in any detail: you come forward as a lawyer but you are in fact a revolutionary. If you say that NATO's armed intervention in Kosovo in 1999 in support of the human rights and self-determination of the Albanian Kosovars marked the beginning of a new, post-Charter constitutional epoch in international affairs, then the vigor of our debate today should have underscored that the international community as a whole has yet to accept that new world order. Let me tell you why the non-Western powers will resist your revolution.

Neither in 1999 nor in 2008 was the West's intervention in Kosovo truly humanitarian.⁴⁰⁹ Surely not even you, Ivan, would claim that the purported constitutional revolution in favor of human rights and self-determination is being driven by the West's love of suffering humanity. If the West had cared about the fate of the Albanian Kosovars in 1999, why did the EU nations not act on the French writer Jean Chesneaux's proposal to issue the Kosovar refugees with "European identity cards"?⁴¹⁰ Why did the Western powers choose war in Serbia, which meant taking innocent Serb and Kosovar lives through high-altitude bombing, rather than seeking to re-settle the Kosovar refugees in Paris, Vienna, or Chicago?⁴¹¹ And the intervention in favor of Kosovo in 2008 is truly more about protecting Europe from the Kosovars than protecting the Kosovars from the Serbs. Indeed, is not the new constitutional epoch of which you speak merely a matter of the West's lawless and destructive restlessness under the Charter régime, which accords more power to

409. See Mccgwire, *supra* note 62, at 12–18 (arguing that the 1999 War in Kosovo was not a "humanitarian" intervention but rather represented the NATO powers' attempt to forestall a war of "national liberation" between the KLA, which by late 1998 had grown significantly in power, and Serbia; other factors influencing NATO's decision for war included the desire to demonstrate the vitality of the alliance on the eve of its fiftieth birthday and the U.S. wish to use NATO as a means of bypassing the need for Security Council "use of force" authorizations).

410. ETIENNE BALIBAR, WE, THE PEOPLE OF EUROPE? REFLECTIONS ON TRANSNATIONAL CITIZENSHIP 4 (James Swenson trans., 2004).

411. The United States as well as its European allies failed to react to the mass deportation of Kosovars from their homeland "by concentrating on resettling them elsewhere and providing them with the means to start new lives for themselves," choosing military intervention instead—"a course of action that involved loss of life." FROMKIN, *supra* note 36, at 182.

Russia and China than the West would wish them to have? Far more than self-determination or human rights, the West cares about extending its regional hegemony throughout the whole of post-Communist Europe, and perhaps elsewhere. Kosovo is just a Western salient.

Alyosha:

Let me ask you, Ivan, to assume Dmitri and Smerdyakov are correct in rejecting your claim that the international political process has amended the international constitution, however that might be described. Do you concede?

Ivan:

Why, of course not. Dmitri's understanding of international law remains too primitive and fatalistic. He posits a theory in which the law is a given and accepts the world as it is. Law, in short, follows society. If I may offer an analogy, the Anglo-American common law in such areas as contract and tort has often been understood to reflect social custom and mores or morality, as the case may be. Some have called it order without law,⁴¹² although I prefer to call it bottom-up law. Under Dmitri's view, the task for the international legal theorist is to understand how the written law should conform to social reality, and his interpretation of the law is designed to accord with the social fact of Serb supremacy over the Kosovars. It is essentially a static, status quo vision of the role of law.

But there is something between the "ordinary" international law, reflected in treaties and custom, and "higher order" international law, reflected in the Charter or peremptory norms. There is space for discretion in adopting interpretive modes that, over time, will lead to a better and more rational world order. My approach is to recognize that our legal theory must be chosen to enable policy makers to make the right decisions about the future of the planet,⁴¹³ not to accommodate ourselves to an existing state of affairs, however unreasonable or unjust. Yes, the Charter remains the "constitution" of the world legal order; but our theory of Charter interpretation should be dynamic, adaptive, and flexible. It should enable decision

412. See ROBERT ELLICKSON, *ORDER WITHOUT LAW: HOW NEIGHBORS SETTLE DISPUTES* (1991) (showing how social norms can develop in ways that make law unnecessary or merely a ratification of the socially-accepted status quo).

413. See MYRES MCDUGAL & FLORENTINO FELICIANO, *LAW AND MINIMUM WORLD PUBLIC ORDER* vii–xiii (1961) (*locus classicus* for a policy-oriented, purposive conception of international law); see also PHILIP BOBBITT, *TERROR AND CONSENT* 16–17 (2007) (emphasizing the need for a coherent international "legal strategy" in the war against terror).

makers to incorporate policy-based considerations into the very constitution of the international order—namely, the identity, size, and borders of sovereign states; the reach and limits of their jurisdictions; their regional groups; and the ways in which sovereign entities interact in performing various functions.⁴¹⁴ So, to be explicit, if the relevant decision makers find that Kosovo is the right-sized unit of governance for the Kosovars, or that some governmental functions for Kosovars would be better performed at the EU level rather than at the nation-state level of Serbia, then interpretation of the Charter—and of Resolutions issued under it, such as SCR 1244—should not undercut that policy choice.

Smerdyakov:

I must admit Ivan's idea has a certain appeal—but only if I get to be a decision maker! And what guarantee is there of that? Perhaps there is a guarantee for the EU and U.S., since they currently monopolize the world's wealth. But aren't they contriving a constitutional theory, a legal strategy, if you will, that merely serves their own interests in promoting liberal capitalism and EU enlargement? Choose the decision makers and you have chosen the policy. Will Russia also be an equal member of this group? Will China? What about the emerging powers, Brazil, India, and Indonesia? The idea is a Pandora's box.

Dmitri:

Yes, dangerous. But, even worse, it is simply wrong. Ivan describes my approach to constitutional theory as static and bottom-up. But isn't that precisely what a constitutional theory is supposed to be? Do the few have the right to make law for the many? Let the states of the world amend the Charter if they feel it must be amended. Let us not delegitimize the only agreed global forum we have to resolve our differences in order to pursue short-term advantages of doubtful plausibility.

Alyosha:

I must admit that I, too, am troubled. What of our cultures as reflected in our current states? Aren't those cultures of value? And make no mistake about it; it is through states that cultures are preserved and that peoples live on. Just ask the Zionists, who judged that the survival of the Jewish people required a Jewish nation-

414. See ALBERTO ALESINA & ENRICO SPOLAORE, *THE SIZE OF NATIONS* 6–10 (2003) (discussing “right-sizing” of nations from economic point of view).

state.⁴¹⁵ If a constitutional theory does incorporate substantive values, such as Ivan's conception of efficiency in the allocation of governmental jurisdictions, is it not also important that it make room for cultural differences, or what some call global diversity or pluralism?⁴¹⁶ Isn't each culture a part of the world as we know it, a world in which we must discover the richness and diversity of life, one that allows us to pursue wisdom, finding the good in each form that has survived? I cannot imagine a world in which we have all the knowledge necessary to make and remake cultures in accordance with our limited knowledge about the future. This is the height of arrogance.

Ivan:

All fair objections, Brothers. But now that you have been properly prepared through my own humble efforts, let me now introduce a friend of mine, an astonishingly frank fellow, I will admit, but persuasive nonetheless. He will reveal to you the true nature of SCR 1244, the Charter, and the whole international legal order, if you are prepared to open your eyes.

Dmitri:

I will, of course, oblige; provided, of course, that you grant me the last word. For having endured your betrayal of Slavic heritage with your corrupted Western ideologies, I demand the right to invite my own champion to reveal the root of your error.

All the Brothers:

So be it.

415. See STEPHEN M. WYLEN, *SETTINGS OF SILVER: AN INTRODUCTION TO JUDAISM* 392 (2000) ("The political Zionists conceived of Zionism as the Jewish response to anti-Semitism. They believed that Jews must have an independent state as soon as possible, in order to have a place of refuge for endangered Jewish communities.").

416. See GEORGE KENNAN, *MEMOIRS 1925–1950*, at 449–69 (1967) (advancing a pluralist conception of international society).

Act V: *New and Old Believers' Eschatologies*

Part One: Speech of the Grand Inquisitor: European and Super-European

Honored hosts: I am deeply pleased to be a part of your company! I have made this long journey from Spain for the sake of my dear friend Ivan, my pupil—may I even say?—my son.

I know that Ivan has troubled your hearts in offering you his views as to the legal issues arising from Kosovo's secession. But let me help you through this difficulty, for it truly is hard to leave aside the childish obsessions that have prevented you from seeing the wisdom of Ivan's vision of the future, of a world free from the barriers of nationalism and any other primitive obsessions, such as religion, that impede humanity's material and psychological growth and development.⁴¹⁷ Let me first show you what is wrong with Dmitri's perspective, because his interpretation of the forms of the law throughout is premised on what he holds to be the practical necessity and moral worthiness of nationalism. Then I will show you why Ivan's contrary interpretation of the various legal forms is rightly motivated by the need to overcome Dmitri's childish fantasies and to reach a new understanding of what it means to be human. Only under Ivan's view, I shall argue, can humanity finally, at long last, reach freedom and maturity.

The New Europe. I am a man of some ninety years, born in the year the First Great War in Europe ended. I was a teenager when my own country was torn apart by its Civil War, and a young man of twenty-one when the Second Great War in Europe broke out. In my long life, I have seen war in all its horrors—the planes small as flies in the distant sky, dropping destruction and carnage on the cities below, the camps, the death trains, the anguished faces of children searching for their missing parents, old men and women sobbing for their dead daughters and sons. I appear before you as a witness to all the grief and misery that the peoples of Europe can inflict on themselves. So it is fitting that I start my discourse with a reflection

417. See SIGMUND FREUD, *THE FUTURE OF AN ILLUSION* (1927), reprinted in *THE STANDARD EDITION OF THE COMPLETE PSYCHOLOGICAL WORKS OF SIGMUND FREUD, 1927–1931*, at 5, 43 (James Strachey trans., 1961).

Religion would thus be the universal obsessional neurosis of humanity; like the obsessional neurosis of the children, it arose out of the Oedipus complex, out of the relation to the father. If this view is right, it is supposed that a turning-away from religion is bound to occur with the fatal inevitability of a process of growth

on the cause of those horrors, which during the Yugoslav Wars seemed to be descending on us Europeans again. I mean, of course, the nation state—what Nietzsche rightly called “the coldest of all cold monsters.”⁴¹⁸ What I offer you, in opposition to the idea of the nation state, is the idea of *Europe*.⁴¹⁹

You have puzzled over the relations between states and peoples. Those two ideas are fused together in the concept of the nation state. The nineteenth-century Italian nationalist Giuseppe Mazzini issued the slogan: “Every nation a state, only one state for the entire nation.”⁴²⁰ Like most nationalists, Mazzini assumed that the nation, the people, pre-existed the state that they were entitled to form.⁴²¹ Each nation or people was to have its own state; all the members of that people were to be gathered into that state; and only that people were to inhabit that state. Perhaps Portugal and Iceland—if even those—have been the only European states in modern times in which this perfect fusion of a people and their state has occurred. Even Mazzini’s Italy was itself a collection of disparate peoples, often barely intelligible to each other, whom the Italian state attempted to fashion into one. Nonetheless, Mazzini’s slogan announced what for many remains a compelling ideal.

We should distinguish between tribal states, which embody Mazzini’s conception of the nation state in its pure form, and pluralist states, which most states more or less are in fact.⁴²² The recent history of Yugoslavia, let us say from Marshal Tito’s death in 1980 to the present, has been a trajectory in which a pluralist state has broken down into tribalist ones. And the history of Serbia since 1989 has repeated, in miniature, the same trajectory—from a single state in which different peoples lived (Serbs, Albanians, Magyars, Croats) into two states, one for each of its main peoples.

Why should anyone want a tribal state, if he or she already lives in a pluralist one? Why did Yugoslavia disintegrate?⁴²³ We can, I

418. Friedrich Nietzsche, *Thus Spoke Zarathustra, On The New Idol*, reprinted in *THE PORTABLE NIETZSCHE*, 160, 160 (Walter Kaufman trans., 1976).

419. “Europe,” of course, is a polymorphous term. When the Inquisitor speaks of “Europe,” he usually means the lands and peoples of historic Latin Christianity, the Protestant Reformation, and the Enlightenment. But the “idea of Europe” refers to an emerging reality that includes the Orthodox-Muslim-formerly-Communist lands and peoples of the European continent as well.

420. JONATHAN GLOVER, *HUMANITY: A MORAL HISTORY OF THE TWENTIETH CENTURY* 143 (1999).

421. *See id.* (describing nationalists’ views).

422. STUART WOOLF, *NATIONALISM IN EUROPE 1815 TO PRESENT* 9–10 (1996) (classifying 19th century nations based on Mazzini’s conception of the nation state).

423. The Grand Inquisitor’s speech is indebted in part to the writing of the philosopher JONATHAN GLOVER, *supra* note 420, in part to that of the political scientist, JOHN HERZ, *POLITICAL REALISM AND POLITICAL IDEALISM* (1951), and in part to that of the historians Herbert Butterfield, *HERBERT BUTTERFIELD, HISTORY AND HUMAN RELATIONS* (1951), and his precursor, G. LOWES DICKINSON, *THE EUROPEAN ANARCHY*

think, identify two reasons—one having to do with *security*, the other with *self-expression*. Or, if I may put it so, one having to do with the ideas of Thomas Hobbes,⁴²⁴ the other having to do with those of Johann Herder.⁴²⁵ Let me start with *security*.

When a tribe (or, if you will, an ethnic group or a people) suddenly and unexpectedly finds itself, like the Serbs in Croatia, in the midst of a state dominated by another tribe, and there has been a history of rivalry or hatred between the two tribes, then the members of the smaller tribe will begin to fear for their own safety. What is to stop the larger group from persecuting and plundering them, or from treating them with dishonor and disrespect? So they seek to form their own state, dominated by their own tribe. What the political theorists and historians, following Hobbes, call the “security dilemma” of states⁴²⁶ finds itself reproduced on the level of peoples.

(1916). Each of these four very different thinkers is in turn deeply indebted to the seventeenth-century English philosopher Thomas Hobbes, who is discussed at greater length *infra*.

The Grand Inquisitor’s speech attempts to answer the question posed in the text at a very high level of generality. But at least three more specific kinds of explanation have been offered by politicians, social scientists, journalists, and others: first, that the ethnic wars in the former Yugoslavia stemmed from ancient and immutable hatreds; second, that they were the effect of nationalist politicians using modern media to exploit popular antagonisms and fears; and third, that they were waged by small groups of armed thugs. For a survey of these approaches and a defense of the last, see John Mueller, *The Banality of “Ethnic War,”* INT’L SECURITY, Summer 2000, at 42, 42 (2000). For a sophisticated critique of these three theories, including Mueller’s, see MANN, *supra* note 48, at 358–61.

424. See THOMAS HOBBS, *THE LEVIATHAN* (1651), reprinted in HOBBS’S *LEVIATHAN* (1909).

425. English translations of Herder’s works are unfortunately few, but see JOHANN GOTTFRIED HERDER, *ANOTHER PHILOSOPHY OF HISTORY AND SELECTED POLITICAL WRITINGS* (Ioannis D. Evrigenis & Daniel Pellerin trans., 2004). A sympathetic recent study of Herder and the contemporary influence of his ideas is found in Richard White, *Herder: On the Ethics of Nationalism*, 18 HUMANITAS 166 (2005). For a balanced appreciation of Herder’s “cultural nationalism” that emphasizes his debts to the Enlightenment and reviews earlier scholarship. See Royal J. Schmidt, *Cultural Nationalism in Herder*, 17 J. HIST. IDEAS 407 (1956). Probably the leading English-language study remains, SIR ISALAH BERLIN, *THREE CRITICS OF THE ENLIGHTENMENT: VICO, HAMANN, HERDER* (2000); see also William A. Wilson, *Herder, Folklore and Romantic Nationalism*, 6 J. POPULAR CULTURE 819 (1973).

426. See HERZ, *supra* note 423, at 203 (stating that “international affairs are the field in which the “law of nature” (in the Hobbesian sense) rules supreme”); see also BUTTERFIELD, *supra* note 423, at 21 (describing Hobbesian fear). Herz’s insight, which lies at the foundation of “realist” analyses on international relations, see JOHN J. MEARSHEIMER, *THE TRAGEDY OF GREAT POWER POLITICS* 35–36 (2001), has been applied to intra-state conflicts, including those in the former Yugoslavia, as well as to inter-state conflicts. See Barry R. Posen, *The Security Dilemma and Ethnic Conflict*, 35 SURVIVAL 27, 35–38 (1993) (applying concept of “security dilemma” to intra-state ethnic conflict in Yugoslavia and elsewhere); see also Paul Roe, *The Intrastate Security Dilemma: Ethnic Conflict as a “Tragedy”?*, J. PEACE RES., Mar. 1999, at 183, 188–92 (1999) (review of literature and critique of Posen); Paul Roe, *Former Yugoslavia: The Security Dilemma That Never Was?*, 6 EUR. J. INT’L REL. 373 (2000) (articulating a narrow conception of “security dilemma” in which intentionality is critical).

But there is another reason to want a tribal state, a more affirmative or positive reason, having to do with joy rather than with fear. Herder taught that each people had its own distinctive genius, its own unique and invaluable way of expressing "the human essence."⁴²⁷ Travel within Spain, and you will see it. One region speaks Castilian, another Basque, a third Catalan. There are recognizable styles of architecture, of dancing, of food, of dress. You will hear bagpipes played on the streets of Galicia⁴²⁸ but not on those of Andalucía. Often there are different stories and songs, poems and myths, collective memories or imaginations. And these different ways of a people are, or may be, constitutive of its identity, its sense of itself. Indeed, they are, or may be, constitutive of the identity of each *individual*, for our sense of our personal identity may draw on our sense of belonging to a particular people or group. And so the public expression of the ways of a people may be an important, even essential, element of *individual* flourishing and richness of life.⁴²⁹

So one may want a tribal state in order to be able to live as a person of a certain kind. A Croatian Serb may want a Serb Republic of the Krajina, not only to guard against the insecurity of living in a Croat-dominated state, but also to be able to live fully *as a Serb*—to worship in an Orthodox church, not a Catholic one; to read street signs written in Cyrillic characters, not in Roman ones; to mark the great events of Serbian history with public holidays; and to see statues of Serbian saints and heroes, not Croat ones, in the village square. But perhaps, you may say, to be a Serb is not so very different in reality from being a Croat. Are Serbs and Croats not both Slavic people, speaking the same Serbo-Croat language? To this the nationalist has a ready reply: "It does not matter; here, what is imagined is also real."⁴³⁰

Such is the dream of the tribal state: a political form that provides both security and self-expression. But, you will say, the pluralist state can also provide both of those goods. And that is true; but it is not so simple. Where there has been conflict between two groups or tribes, they may need, as Hobbes contended, a "Leviathan"

427. Herder affirms the ontological priority of the different peoples or nations of the world. "It is nature which educates families: the most natural state is, therefore, *one nation, an extended family with one national character.*" He argues that each nation is the embodiment of a unique culture and a particular way of life, and in this way each culture may be viewed as a unique expression of *humanität* (or the human essence). White, *supra* note 425, at 171.

428. See James R. Oestreich, *Revealing the Soul in Soldierly Bagpipes*, N.Y. TIMES, Sept. 16, 2006, at B9 (discussing a Galician bagpipe player).

429. See White, *supra* note 425, at 167 (explaining that Herder believed the identity of an individual is dependent on his or her culture).

430. See BENEDICT ANDERSON, *IMAGINED COMMUNITIES: REFLECTIONS ON THE ORIGIN AND SPREAD OF NATIONALISM* 5–7 (2006) (defining a nation as "an imagined political community . . . imagined as both inherently limited and sovereign").

to provide them with security from each other.⁴³¹ Often that Leviathan takes the form of an empire.⁴³² In the Balkans, that Leviathan was for many centuries the Ottoman Empire. Then, over much of what became Yugoslavia, it was the Austrian one. In post-World War II Yugoslavia, the Leviathan was Tito's régime; of late, it has been the United Nations, or NATO—or no one. Leviathan answers the security problem, if Leviathan is prepared to use overmastering protective force on behalf of *any* of its subject tribes against *any* of its others. But the problem with this solution is that, although Leviathan may inspire fear, it often inspires little loyalty or love. So too, although the Habsburg dynasty served the peoples of its dual monarchy, Austria-Hungary, faithfully and well, it came to feel their detestation.⁴³³

The pluralist state can also provide its peoples with the satisfactions of self-expression. For one thing, it can encourage a vigorous, if also peaceable, measure of self-expression for different cultures (what we now call multiculturalism). For another, it can grant a substantial degree of regional or local autonomy, as in Spain or Canada.⁴³⁴ For a third, it can offer significant legal and constitutional guarantees for its minority populations—not merely protections against persecution or oppression, but also affirmative rights, such as the right to education in the minority's own language.

The liberal-capitalist European order of the nineteenth century at least adumbrated a system of pluralist states of this kind. That Europe was born in one great revolutionary war—the French Revolution, including the Napoleonic wars—and came to an end a century later in the First Great War.⁴³⁵ Now, after the “short”

431. See Peter J. Ahrens Dorf, *The Fear of Death and the Longing for Immortality: Hobbes and Thucydides on Human Nature and the Problem of Anarchy*, 94 AM. POL. SCI. REV. 579, 581 (2000) (explaining how Hobbes envisaged “Leviathan” as an answer to the problem of civil war).

432. See MICHAEL W. DOYLE, *EMPIRES* 19–138 (1986) (discussing the characteristics and attributes of empire); see also HERFRIED MÜNKLER, *EMPIRES: THE LOGIC OF WORLD DOMINATION FROM ANCIENT ROME TO THE UNITED STATES* 4–9 (Patrick Camiller trans., 2007) (describing the characteristics of an empire).

433. As Ernest Gellner noted, they took their ruler's two titles, *Kaiser* (Emperor) and *König* (King), and called their country *Kakania* (Land of Shit). ERNEST GELLNER, *LANGUAGE AND SOLITUDE: WITTGENSTEIN, MALINOWSKI, AND THE HAPSBURG DILEMMA* (1998).

434. See Pablo Lucas Murillo de la Cueva, *Rights in a Pluralist State: The Case of Spain*, in *CITIZENSHIP AND RIGHTS IN MULTICULTURAL SOCIETIES* 153, 153–68 (Michael Dunne & Tiziano Bonazzi eds., 1995) (describing pluralism in Spain); see also Patricia K. Wood & Liette Gilbert, *Multiculturalism in Canada: Accidental Discourse, Alternative Vision, Urban Practice*, 29 INT'L J. URB. & REGIONAL RES. 679, 679 (2005) (describing multiculturalism in Canada).

435. See W.G. Runciman, *Has British Capitalism Changed Since the First World War?*, 44 BRIT. J. SOC. 53, 53 (1993) (discussing the change in capitalism since the First World War); see also Imanuel Wallerstein, *The French Revolution and Capitalism: An*

twentieth century of seventy years (1914–1989),⁴³⁶ we are seeing the return of a higher, more durable form of that liberal continental order. But before we turn to that, let us briefly examine the intervening period of the short century—for that story is the key to what comes later.

The older liberal-capitalist order collapsed in two stages: first in the political crisis caused by the First Great War, then in the economic crisis of the Great Depression. These two crises combined to produce a new form of political and economic organization in the heart of Europe, in Germany: the “national-socialist” state. As its very name signifies, this form of organization consciously rejected both liberalism and capitalism as they had existed in places such as the pluralist empire of Austria-Hungary.⁴³⁷ The new form of organization drew much of its inspiration—and, for many, much of its attractiveness—from the romantic nationalism of the nineteenth century.⁴³⁸ It was, in other words, an attempt to return to, or perhaps create, a tribal state.

Hitler’s program of creating a tribal German state seemed at first to have the sanction of Woodrow Wilson. As you have observed in your conversation, Wilson had announced self-determination in this form as a war aim.⁴³⁹ It is true that Wilson’s Secretary of State Robert Lansing was bitingly critical of the idea, that Wilson himself soon came to abandon it, and that it was not inscribed in the Versailles Treaty.⁴⁴⁰ Nonetheless, the principle served the Peace Conference as the basis for recognizing or creating some new states—Poland, Czechoslovakia, a much-reduced Hungary—and fueled others’ demand for independence, such as Ireland.⁴⁴¹ But the principle was applied with indefensible inconsistency. Why could

Explanatory Schema, 1 PRAXIS INT’L 1, 5 (1985) (describing the relationship between the French Revolution and capitalism).

436. LUKACS, *supra* note 28, at 1–3. See generally ERIC HOBSBAWM, *THE AGE OF EXTREMES: THE SHORT TWENTIETH CENTURY, 1914–1991* (1994).

437. FRITZ STERN, *THE FAILURE OF ILLIBERALISM: ESSAYS ON THE POLITICAL CULTURE OF MODERN GERMANY 199–200* (1972).

438. *Id.*

439. Allen Lynch, *Woodrow Wilson and the Principle of ‘National Self-Determination’: A Reconsideration*, 28 REV. INT’L STUDIES 419, 419 (2002).

440. See FROMKIN, *supra* 36, at 126–28 (describing Wilson’s use of the phrase “self-determination”).

441. FROMKIN, *supra* 36, at 130.

According to [Wilson’s close adviser] Colonel House, Wilson’s pledge of self-determination brought to Paris many and diverse delegations from Europe, Asia, and Africa. They were the most picturesque as well as the most ill informed and unreasoning of all those who gathered around the historic center where the peace was made.

Id. Wilson responded to these demands by limiting the scope of the principle of self-determination to the territory of the powers defeated in the war. *Id.* at 131.

Austria and the other ethnically German parts of the Austro-Hungarian Empire not now merge into Germany, if their peoples so wished? The inability of the victors to provide a coherent answer seemed to underscore their vengefulness and their opportunism.

So Hitler rode to power by his appeals to German nationalism and German resentment of Versailles. And once in power, he showed what the creation of a tribal state in the heart of Europe would entail. Think of the situation, my Russian friends, as if Central Europe were like one of your Russian dolls, the *matryoshkas*.⁴⁴² Within the Polish or Czech doll, there was a smaller German doll. But perhaps within that German doll there was a still smaller Polish or Czech doll. You could not take the small German doll and put it inside the larger German doll unless you also put an even smaller Polish or Czech doll inside the big German doll too. And so the claim to be curing an injustice to Germans entailed doing the very same injustice to non-Germans.

And anyway, Hitler was not interested in doing Wilsonian justice—few, if any, nationalists really are.⁴⁴³ He was interested, as are they, in domination.⁴⁴⁴ Hitler's tribal German state would not include mere traces of non-German elements. Rather, it would include untold numbers of non-Germanic peoples and vast stretches of their lands. What starts as a tribe's self-defense (the Croatian Serbs' attempt to protect their own security) or as its demand for equal justice (Germany's annexation of the Sudetenland) swiftly turns into the desire to subjugate, oppress, or destroy other tribes. Herder, that son of the Enlightenment, believed as ardently in pacifism as he did in nationalism. But Herder's values proved hard to combine,⁴⁴⁵ and his "bad aestheticism"—his desire "that the world

442. The *matryoshka* doll, which has become a fixture of popular Russian culture since the 1890s, was created by two Russian craftsmen who were fascinated by a nesting doll that had been imported from Japan. They substituted the figure of a Russian peasant woman for the bald old man of the Japanese original. It contained eight different wooden dolls, one within another, and represented a united and happy family. BILLINGTON, *supra* note 3, at 148–49.

443. For possible explanations of this tendency in nationalism, see ERNEST GELLNER, *NATIONS AND NATIONALISM* 1–2 (1983); see also Roe, *supra* note 426, at 194–95.

444. This is not a merely Germanic impulse. In seeking to promote Italian nationalism, Machiavelli reminded his readers that the Romans also understood the need to find ways to channel "the ambitions of the populace" into foreign conquest and glory. See NICOLÒ MACHIAVELLI, *THE DISCOURSES* 113–15 (Bernard Crick ed., Leslie J. Walker trans., 1970) ("[E]very city should provide ways and means whereby the ambitions of the populace may find an outlet, especially a city which proposes to avail itself of the populace in important undertakings.").

445. For possible explanations, see Jamie Mayerfeld, *The Myth of Benign Group Identity: A Critique of Liberal Nationalism*, 30 *POLITY* 555, 557 (1998) (arguing that "nationalism in any form tends to encourage aggression against foreigners and violent conflict between nations"). For an opposing view, see generally Yael Tamir, *LIBERAL NATIONALISM* (1993).

be made up of manifestly different groups”—can easily “serve as a preparation of the sentiments for armed tribalism.”⁴⁴⁶ So in our Europe, wherever the sense of national identity is strong, the peace between different peoples is fragile, as you well know: your Latvian and Estonian neighbors can hardly bear to share their lands with their Russian minorities. Indeed, groups of *any* kind soon show themselves willing, once they have the power, to wreak injustices on other groups.⁴⁴⁷ And this tendency to inflict oppression and harm may be especially true of groups that have a keen and anguished sense of the injustices done to them.⁴⁴⁸ As the poet W.H. Auden said of Hitler’s Germans: “I and the public know / What all schoolchildren learn, / Those to whom evil is done / Do evil in return.”⁴⁴⁹

And so a Second Great War in Europe came. Although we have all seen it, either with our own eyes or in the horrifying images from the period, we can still hardly imagine its fury, its devastation, its destructive power. Europe emerged from it shattered and barely alive. Europe’s people and statesmen resolved that a war such as that must never, *never* come again. And Europe correctly understood that the cause of the horrors was, somehow, the idea of the tribal state.

From that deep and lasting insight, the post-War idea of Europe was born. Although the Cold War may have obscured the fact, you will immediately agree, my Russian friends, that the Communist bloc, no less than Western Europe, rejected the idea of the tribal state

446. George Kateb, *Notes on Pluralism—Liberalism*, 61 SOC. RES. 511 (1994) (pointing out that human beings find not only psychological relief in group membership, but also the pleasures of animosity and feelings of superiority, and that identification with a national group is typically also identification with an *armed* group).

447. See PHILIP ZIMBARDO, *THE LUCIFER EFFECT: UNDERSTANDING HOW GOOD PEOPLE TURN EVIL* 1–257 (2007) (describing famous psychological experiment with Stanford undergraduates who were asked to assume roles of prisoners and their guards; within days group identities had solidified and “guards” began persecuting “prisoners,” so that the experiment had to be cut short). Zimbardo’s experimental results have been taken to suggest that *any* group, however transparently fictive or flimsy its identity, will tend to persecute or demean any other group over which it is given unlimited power.

448. See Mayerfeld, *supra* note 445, at 569.

Journalists covering the war in Yugoslavia tell the same story over and over again: each side is driven by the furious certainty that it is the aggrieved party. This is true not least of the Serbs, who suffer the added injury that the whole world has turned against them . . . The Nazis built much of their support by appealing to the German sense of victimhood, by promising to stand up for the nation that had been “stabbed in the back” in 1918, humiliated at Versailles, and historically snubbed by the great powers.

Id.

449. W.H. Auden, *September 1, 1939*, available at <http://www.poemdujour.com/Sept1.1939.html>.

and sought in its own way to transcend ethnic differences. Indeed, the Communist state of Yugoslavia and the USSR itself stood as models for that rejection: the repression of ethnic violence for forty years in both nations was “probably the greatest achievement of Communism, unmatched by later democratizing countries.”⁴⁵⁰ But for now, I am more concerned with what happened in the post-Cold War West.

The post-War European project, undertaken slowly at first, has acquired a growing boldness and even a sense of inevitability. Undoubtedly, it has had important economic ends: to promote intra-European trade, enhance competitiveness, and promote efficiency. Undoubtedly too, it was originally (and largely remains) an alliance between France and Germany. But at its core, the European project is *political*: it is an attempt to prevent the recurrence of wars of tribal nationalism. Nationalism, not Communism, was “[t]he main political force in the twentieth century.”⁴⁵¹ And so destructive did European nationalism prove to be that the peoples of Europe finally determined to break it. So, as a former judge on the European Court of Justice has explained, the guiding purpose of Europe’s post-War integration has been “to prevent the evils of nationalism.”⁴⁵² Or, as an U.S. philosopher more starkly put it, “[t]o want nationhood . . . is to want war and death.”⁴⁵³

Now traditional European national identities cannot be wholly eradicated; our sense of nationality is far too entrenched for that. It may indeed be true that “[n]ations are fiction: [t]heir bonds tend to degenerate into kitsch, which favors crime and aggression.”⁴⁵⁴ But it would be hard indeed to persuade ordinary English or French or Danish people, the heirs to sturdy traditions of nationhood, that their national identities are utterly spurious. Nonetheless, those identities can be softened or diluted, and their hard edges blunted. In particular, the “sovereignty” of the German or French or Italian states can be encased within a more encompassing European sovereignty: national dolls within a bigger, supranational doll.⁴⁵⁵ As I say, the Communists tried to do something like this in their own way in the East. In the West, the project appealed, for different

450. MANN, *supra* note 48, at 354.

451. LUKACS, *supra* note 28, at 4.

452. Robert J. Delahunty, *The Battle of Mars and Venus: Why Do American and European Attitudes Toward International Law Differ?*, 4 LOY. U. CHI. INT’L L. REV. 27–28 (2006).

453. George Kateb, *Hobbes and the Irrationality of Politics*, 17 POL. THEORY 355, 382 (1989).

454. *Id.* at 381.

455. The EU is widely, and rightly, thought to exemplify “a new type of sovereign statehood . . . which is qualitatively different from the modern state.” GEORGE SØRENSEN, *CHANGES IN STATEHOOD: THE TRANSFORMATION OF INTERNATIONAL RELATIONS* 87 (2001).

reasons, to both Liberals and Catholics, secularists and believers. It had roots in the Enlightenment, in Kant's idea of a perpetual peace brought about by a league or confederation of republics.⁴⁵⁶ But it also had roots in pre-Enlightenment ideas about natural law and the *jus gentium*.⁴⁵⁷ So it was, truly, not only an idea for Europe, but the idea of the European peoples.

We know that the identity of a people or tribe only sometimes, perhaps rarely, exists prior to that of their state. I mentioned Mazzini before; the historian Eric Hobsbawn mentions another nineteenth century Italian, a member of the first parliament of the new kingdom of Italy. He said: "We have made Italy, now we have to make Italians."⁴⁵⁸ Who made the Italian people, then? The Italian state. Serbian nationalism likewise can be seen as the artifact of a doctored version of history instilled by the Serb state.⁴⁵⁹ "We got the children," a Serb schoolmaster once said, "[and] made them realize they were Serbs. We taught them their history."⁴⁶⁰ I am arguing, in other words, that nationalism can often be seen as "a political program which has as its goal not merely to praise, or defend, or strengthen a nation, but actively to construct one, casting its human raw material into a fundamentally new form."⁴⁶¹ But if the Italian and Serb states can construct the Italian and Serb peoples, can the European supra-state construct a European people? The task may be harder, but I am confident that the answer will be "yes." There will be new styles of architecture, new cuisines, new songs, new myths, revised memories, a new people. Even if the history of "something called 'Europe'" has not been written yet,⁴⁶² it will be.

456. See IMMANUEL KANT ET AL., TOWARD PERPETUAL PEACE AND OTHER WRITINGS ON POLITICS, PEACE, AND HISTORY 69–109 (David L. Colclasure trans., 2006) (setting forth Kant' notion of "perpetual peace"). Kant's core idea was that humanity (or at least European humanity) could make measurable progress toward solving the problem of inter-state violence by forming a federation of allied, liberal régimes. *Id.* at 79–81. Later scholarship has revived Kant's idea, based in part on empirical evidence that democratic states are unlikely to go to war with other democratic states (the "democratic peace" thesis). See DEBATING THE DEMOCRATIC PEACE (Michael E. Brown, Sean M. Lynn-Jones & Steven E. Miller eds., 2001) (including essays by Michael Doyle, the leading exponent of the thesis, and others); see also PERPETUAL PEACE: ESSAYS ON KANT'S COSMOPOLITAN IDEAL (James Bohman & Matthias Lutz-Bachmann eds., 1997) (discussing Kant's idea of perpetual peace).

457. See Delahunty, *supra* note 452, at 26, 30 (describing the effect of natural law and *jus cogens* on European countries and the United States).

458. E.J. HOBSBAWM, NATIONS AND NATIONALISM SINCE 1780: PROGRAMME, MYTH, REALITY 44 (1992).

459. See MANN, *supra* note 48, at 360 (discussing genocide as being a result of planned, conscious policy decisions made by the Serb establishment).

460. MACMILLAN, *supra* note 36, at 112.

461. DAVID A. BELL, THE CULT OF THE NATION IN FRANCE: INVENTING NATIONALISM, 1680-1800, at 3 (2001).

462. J.G.A. Pocock, *Some Europes in Their History, in THE IDEA OF EUROPE FROM ANTIQUITY TO THE EUROPEAN UNION* 55, 69 (Anthony Pagden ed., 2002).

Now in the course of this birth of a new Europe and a new people of Europe, much that is old will have to die. And it is likely that the death of the old will be accompanied by violence—which brings me back to Kosovo. One thing that must die is Serb nationalism. It is tribal, and therefore deadly. That kind of tribalism has no place in contemporary Europe except among soccer hooligans—and even then, not always.⁴⁶³ If the Serbs insist on remaining the soccer hooligans of Europe, as they were throughout the 1990s, then Europe will punish them mercilessly. When armed groups persist in being “teams that cannot bear to think that they are playing,”⁴⁶⁴ then they must be suppressed by force or ridicule or indignation, as the case may be.

What the Serbs did, or attempted to do, in Kosovo in 1998–1999 left Europe no choice but to intervene. The entire basis of the post-War European project, as I have explained, is the rejection of national tribalism, with its glorification of race and history, its negation of “otherness,” its genocidal violence, its ineradicable tendency to atrocity and mass murder. Europe watched, stunned but helpless, as this deadly Serb fury worked its will on Bosnia. But it could no longer stand by and watch with Kosovo. The parallels with the Nazi period were too palpable and too close. To have let the genocide continue would have dishonored, indeed defeated, the entire European idea.

I admit that Europe (or Latin-Protestant-Enlightenment Europe) hardly recognizes Kosovo or even Serbia as European.⁴⁶⁵ But even if Europe wished to let Kosovo and Serbia go their own way, at this point it cannot do so. The Serbs and the Albanian Kosovars have demonstrated that they cannot resolve their differences. Serbia, whether it will admit it or not, cannot hope to reconquer Kosovo. But Kosovo cannot stand on its own—it would swiftly become either a failed state or a criminal enterprise. If only for its own sake, then, Europe cannot permit the future of the western Balkans to fall into the hands of Kosovo’s gangsters and Serbia’s soccer hooligans, Islamic radicals and Christian thugs. There can be neither a Greater Serbia

463. See FRANKLIN FOER, AN UNLIKELY THEORY OF GLOBALIZATION: HOW SOCCER EXPLAINS THE WORLD 7–34 (2004) (discussing links between soccer hooliganism and ethnic hatred in Serbia).

464. Kateb, *supra* note 453, at 382.

465. See Pocock, *supra* note 462, at 60.

The lands to which the term “Europe” was originally applied—Thrace, Macedonia, Illyria, the more modern Bulgaria, Albania, and Serbia—those which the Byzantine emperors considered their European “themes” or provinces—are in our minds only marginally European, inhabited by uncouth warring tribes whose history is not ours and whose problems are none of our business.

nor a Greater Albania. Both Kosovo and Serbia must be inducted into the Greater Europe.⁴⁶⁶

You will remind me that I have said that empires collapse because they cannot summon up the love and loyalty of those they govern. Is not the EU a type of empire? And is it therefore not subject to the same infirmities? Do we not already see the signs of that in the common complaints about the EU's "democratic deficit"?⁴⁶⁷ I admit that the problem is very serious, perhaps more difficult than Ivan would have you believe. Yet I am also confident that the future will be different this time.

The New Humanity. Now, I have spoken of constructing a new European identity. Yet, the European project cannot finally succeed unless it finds a solution to the problem of war and peace, a problem that is rooted not in nationalism alone but also in the biological and psychological characteristics of our species. And if the tendency to war is inscribed in what, for lack of a better word, I will call human nature—as it may well be—the project must require an alteration in the very nature of human beings. To prevent war, therefore, we must change human nature so that it no longer seeks glory or fame after death. We must create a humanity that longs for lives that are *comfortable* rather than lives that are saintly, heroic, or virtuous.⁴⁶⁸ Humanity must be reformed to become timid, concupiscent and risk-averse. It must cease to be troubled by questions of meaning that it cannot answer—or as you once wonderfully said, Ivan, our minds must become "Euclidean" and "three-dimensional."⁴⁶⁹ And let me be

466. See Ismail Kadare, *Il faut européaniser les Balkans*, LE MONDE, Apr. 10, 1999 (arguing that the question whether the Balkans "can be civilized, that is, europeanized," [*si les Balkans peuvent être civilisés, autrement dit européanisés*]) had become "fundamental and urgent").

467. See Andreas Follesdal & Simon Hix, *Why There is a Democratic Deficit in the EU: A Response to Majone and Moravcsik*, European Governance Papers No. C-05-02 (2005), available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=924666 (surveying democratic deficit literature and offering a partial defense of the EU); see also Jürgen Habermas, *After the Wheels Stopped Turning*, SPIEGEL ONLINE INT'L, June 18, 2008 (analyzing causes of voters' rejection of proposed Lisbon Treaty, namely that "[t]he divide between the political decision-making authority granted to the EU in Brussels and Strasbourg on the one hand, and the nation state-bound opportunities provided by participatory democracy on the other, has become too large.").

468. Thus it is that "the price of peace may seem [to be] the nearly complete sacrifice of the distinctively or eminently human." Kateb, *supra* note 453, at 375.

469. The Inquisitor is alluding to a colloquy in *The Brothers Karamazov* between Ivan and Alyosha, in which Ivan speaks of the discovery of a non-Euclidean geometry in which two parallel lines meet in infinity. Ivan tells Alyosha that he cannot understand that concept, and that:

I have come to the conclusion that, since I can't understand even that, I can't expect to understand about God. . . . I have a Euclidean earthly mind, and how could I solve problems that are not of this world? And I advise you never to think about it either, my dear Alyosha, especially about God, whether He exists

candid: if someday we find that this shall require biochemical or cybernetic interventions, then so be it.⁴⁷⁰ If we take humanity in that direction, then the great problem of war and peace can be solved. Humanity must become post-human.⁴⁷¹

So I must speak now of something even harder and more ambitious than the construction of a new Europe: the construction, for now without biological or cybernetic engineering, of a new *humanity*. Nietzsche seems to have envisaged exactly the change I have in mind when he wrote, despairingly, of the emergence of the "Last Men."⁴⁷² What Nietzsche himself may have wanted was the formation of a self-consciously archaizing aristocracy in Europe, the renewed ascendancy of the noble, masterful human type such as he had found in the epics of Homer and the histories of the Italian Renaissance. But such an aristocracy will not be born again. Instead, if we are exceptionally fortunate, we will live to see the triumph of the very Last Men whom Nietzsche viewed with such disgust and despair. For those post-human human beings—fearful, ignoble, and herd-like animals as they are—will also be the bearers of universal peace.

The effort at constructing such a post-humanity has been underway now for several centuries. Perhaps we can say that the project began with Hobbes, who boldly declared that "the first, and Fundamentall Law of Nature . . . is, to seeke Peace and follow it."⁴⁷³ Perhaps we can say that it is intrinsic to the liberal idea, as Hobbes' great successors Locke, Rousseau, Kant, Constant, Bentham, and Mill developed it. Indeed, we might even venture to say that the desire to create a new humanity is something that liberalism shares with both Nazism and communism—but liberalism has been quieter, stealthier, and more successful. In any case, Hobbes' programmatic aim was to discover the conditions in which peace, not war, becomes entrenched—to show how the seemingly inevitable cycle of war and

or not. All such questions are utterly inappropriate for a mind created with an idea of only three dimensions.

DOSTOEVSKY, *supra* note 210, at 216.

470. For a discussion of the issues arising from efforts in this direction see FRANCIS FUKUYAMA, *OUR POSTHUMAN FUTURE: CONSEQUENCES OF THE BIOTECHNOLOGY REVOLUTION* (2002).

471. See Ahrens Dorf, *supra* note 431, at 586.

The goal of the modern, Hobbesian state, the goal of peace and security, ultimately requires us to suppress not only our religious hopes and longings but also, to some extent, our very reason. The state that is based on our fear of violent death is based on a forgetting, not only of eternity but also of mortality.

Id.

472. NIETZSCHE, *supra* note 418, Prologue, § 5.

473. HOBBS, *supra* note 424, at 190.

peace can be broken.⁴⁷⁴ Part of his answer was that human nature must be reconstructed so that we are irresistibly drawn to peace, not war. What draws us to war? Not only the fear of others, but also, Hobbes observed, the desire for glory and esteem—most especially for a fame that will outlast our lives and thus confer on us a kind of immortality. And fame of that kind is chiefly won in war. So, he reasoned, we must find a means to control, even extinguish, that desire.⁴⁷⁵ But desires are not extinguished merely by being suppressed; no, they must be *supplanted* by (or transformed into) stronger, better desires.⁴⁷⁶ What can supplant or transform the desire for glory and fame? The desire for wealth, ease, amenity, comfort.⁴⁷⁷ “The Passions that incline men to Peace,” Hobbes wrote, include the “desire of such things as are necessary for commodious living” and “a Hope that by their industry to obtain them.”⁴⁷⁸

We must, and can, defeat the furies of our existence. The antidote to those destructive passions is the rule of “interest”: the love of wealth, amenity, and ease rather than the more primitive emotions. There is no reason why through reason war cannot become

474. Hobbes himself was more concerned with identifying the causes of *civil* war, and then eliminating them, than he was with those of *foreign* wars. Indeed, he appears to have been something of an English nationalist, and may have sought to suppress civil war precisely so that an internally unified England under a powerful monarch or executive would have been able to wage foreign wars effectively. See Kateb, *supra* note 453, at 376–81 (discussing Hobbes’s view that the main goals of a ruler should be to maintain civil peace and defend his people against foreign enemies). If that is so, it is a deep flaw in Hobbes’ “clement rationalism,” for it would be a “supreme irony” for Hobbes to have “encourage[d] nations to be what he warns individuals not to be: activist, uncontented, and ambitious.” *Id.* at 380–82. Nonetheless, as Kateb argues, Hobbes’ prescriptions for avoiding civil war can be applied to all wars, civil or foreign. *Id.*

475. See Ahrens Dorf, *supra* note 431, at 581.

There, are, then, two sides of human nature [for Hobbes]: the anxious, death-fearing side and the spirited or vain, honor-seeking side Both sides lead to a state of war. Just as the proud desire for honor—namely, that others honor you more than they honor themselves—leads humans to attempt “to extort” honor from others by force, so the anxious desire for security leads humans to subdue or kill preemptively anyone who might possibly threaten their life In order to induce humans to quit the state of war, the natural desire to preserve oneself, or the fear of death, must be inflamed and instructed, while the natural desire for honor must be weakened and controlled.

Id.

476. See SIGMUND FREUD, THREE ESSAYS ON THE THEORY OF SEXUALITY (1905), reprinted in THE STANDARD EDITION OF THE COMPLETE PSYCHOLOGICAL WORKS OF SIGMUND FREUD, vol. xx (James Strachey trans., 1968) (articulating the theory of “sublimation,” under which, at the risk of oversimplification, libido, or psycho-sexual energy, is redirected towards higher-order endeavors).

477. To be more faithful to Hobbes, *both* the fear of death *and* the love of comfort are means to overcoming the destructive passions for fame and glory. Ahrens Dorf, *supra* note 431, at 582.

478. HOBBS, *supra* note 424, at 188.

obsolete, exactly as dueling has done. Why did men once duel? Because their honor had been offended. But what if any sense of honor is extinguished? Then it becomes impossible to offend another's honor. And if it is impossible to offend another's honor, then honor cannot be vindicated in a duel. The institution of dueling loses its reason for being—it become pointless, ridiculous. As dueling has been abolished by extinguishing the passion for honor, so might war be abolished by redirecting the passions for glory and domination.⁴⁷⁹

But just as society and law turned their faces away from the duel, to eliminate war and allow space for “interest” to prevail, we must organize international society in accordance with specific political and legal forms.

The New International Law. Historically, empires have established the conditions in which great wealth can be accumulated and the beneficent habits of acquisitiveness and consumption instilled.⁴⁸⁰ In the nineteenth and twentieth centuries, the state had similar purposes and effects, but in contemporary conditions, a form of political organization closer to the empires of the past serves better. The EU is such a latter-day empire. Empires offer peace, not merely within a limited territory, but on a continental, perhaps eventually global, scale. They bring the law and order, the stability and predictability, the freedom from predation, that capital formation requires. They build roads, post offices, courthouses, markets, and useful infrastructure of all kinds; they eliminate borders, customs, and barriers to trade. Goods, investment capital, even what we have now come to call “human resources” can be moved rapidly to the places where they can be used most efficiently.

We must understand international law in the light of the grand aims of Europe's transformative, revolutionizing project. International law must be made subordinate to the purpose of creating a continental island of order, stability, and wealth—and hence of *peace*. Once that object is achieved on the European continent, it can be replicated elsewhere. Europe must become the model of governance for the other regions of the world: in that, indeed, lies our true *mission civilatrice*. Europe, which is itself already moving “towards the Kantian world of perpetual peace,” now has the essential task “to *show* the way from the Hobbesian planet to

479. See JOHN MUELLER, *THE REMNANTS OF WAR* 162 (2004) (arguing that war, like dueling, is an institution that is grounded in custom rather than in nature and thus can be, and is being, abolished).

480. M.C. Howard & J.E. King, *Whatever Happened to Imperialism?*, in *THE POLITICAL ECONOMY OF IMPERIALISM: CRITICAL APPRAISALS* 19, 19–40 (Ronald H. Chilcote ed., 2000).

the Kantian ‘universal unification of the human species.’”⁴⁸¹ The decisions of the United Nations, including the Resolution we have been discussing, must be read and applied so as to serve that overriding *telos*. Legal primitivism must yield to legal pragmatism.

Europe is offering Kosovo and Serbia the chance to join in its project of creating peace and wealth. It wants to awaken them from the nightmare of history, to free them from the unending cycle of violence, remembrance, and retaliation. It urges them to forget the faiths that divide, the myths that kill. Ivan’s interpretation of the legal forms has shown you the vehicle through which these new dreams can be realized. How can the Kosovars and Serbia refuse this gift?

Part Two: Speech of Father Zossima: A Pilgrimage to Pristina

Good Friends and Brothers, Alyosha my dearest, honored guest from Seville: I have listened to the speech of the Grand Inquisitor with attention and even reverence. For I hear in his words a deep and aching pity for the world. He has looked at human history and seen in it “the record of people throwing their lives away.”⁴⁸² His soft heart is wounded by the sight of human suffering, and he has searched for many years to find some cure for mankind’s desperation, destructiveness and folly. Even in counseling us to turn away from the noble to the ignoble, he is seeking our good. He comes to us as one who longs for peace, and who thinks he has found the way to it. For this, indeed, I would give him a soft kiss “on his bloodless aged lips,” in imitation of my Master.⁴⁸³

Yet, the great difference between the Inquisitor and myself is summed up precisely in that word, “peace.” The peace the Inquisitor holds up to you is a negative and empty peace: it is the *absence* of war, of violence, of disorder. That indeed is peace, but of a poor kind. The peace that I will urge you to seek, on the other hand, is not the absence of war, but its overcoming; not the cessation of violence, but its transformation; not the end of disorder, but the coming of a higher and richer order. Both he and I wish to see mankind escape from the cycle of violence and retaliation in which it seems forever to be

481. ZYGMUNT BAUMAN, *EUROPE: AN UNFINISHED ADVENTURE* 40 (2004).

482. Kateb, *supra* note 453, at 374.

483. See DOSTOIEVSKY, *supra* note 210, at 243 (in which, in Ivan’s telling, the legend of the Grand Inquisitor ends with Christ imparting on the Grand Inquisitor a soft kiss “on his bloodless aged lips”).

Nicolas Berdyaev observes that Dostoevski “thought that rebellion against God . . . might arise from [man’s] feeling for righteousness and pity.” BERDYAEV, *supra* note 28, at 204. At the same time, Berdyaev notes, Dostoevski regarded the “spirit of antichrist” represented in the Grand Inquisitor as “above all hostile to freedom and contemptuous of man.” *Id.* at 207. In the speech given to him in the text above, Father Zossima understands the Grand Inquisitor in light of these two Dostoevskian beliefs.

trapped. He thinks that by the skillful and far-seeing use of human reason, we can escape, in a decisive leap, from that trap. I believe that we can never escape from it, at least not by our own efforts. But I also think that our tragic predicament can be, and sometimes is, made better through the stirring of grace within our souls. He would save humanity by debasing it, making it into something lower than it is. I would remind you that the angels, although they will always be wiser and more beautiful than we are, envy us because, unlike them, we can repent and forgive.

Friends, Brothers, you are masters of international law, and so I will express my teaching in the medium that you understand so well. We have gathered here to seek a solution, in the realm of law or perhaps even of justice, to a crisis in international affairs. That crisis has already led to one war; without God's help, it may yet lead to another. Much, therefore, is at stake. You have earnestly peeled off the layers of the onion, as lawyers seem so inclined to do, seeking to reveal ever deeper levels of truth. But I fear that your method may leave you with nothing in your hands—for onions have no core!⁴⁸⁴

Instead, let me invert the order you have followed in your conversations. I will begin with the most general and proceed downward to the particular—to the case of Kosovo. I shall attempt to explain to you first why the Inquisitor is wrong in his understanding of the *telos* of our continent and thus of international law; then I shall try to give you a truer and better understanding of both. In my discourse, I shall draw on three themes: the theme of *history*, the theme of *sacrifice*, and the theme of *forgiveness*. Reflection on history and sacrifice will show us why the Inquisitor is wrong in his view of what he calls the European project: for that project fails to satisfy the need for ties to the past through history and to the future through sacrifice. But it is not enough, of course, merely to convince you that his project's inability to face these difficult challenges condemns it to failure; I must try to offer you something better—a foundation on which to build a legal order for states and peoples. To achieve that, I must ask you to consider an even more difficult task, forgiveness.

History. The Grand Inquisitor is in a cruel dilemma. He can find “nothing that grounds human meanings,” but at the same time he cannot help but feel an “agonized pity” for human suffering that he

484. Grushenka—Dmitri's bane and beloved—tells Alyosha the tale of the onion, speaking metaphorically of herself. In the tale, a wicked old woman dies “and did not leave a single good deed behind,” sending her into the fiery lake of hell. DOSTOEVSKY, *supra* note 210, at 330. When her Guardian Angel reminds God that she did once pull an onion out of a garden and give it to a peasant woman, God responds: “You take that onion then, hold it out to her in the lake, and let her take hold and be pulled out.” *Id.* But the onion broke as the old woman, kicking and screaming, pushed off the other sinners in the lake who tried to hold on to her also to be pulled out. *Id.*

thinks “can only be dealt with by a systematic policy of minimizing [it], denying it and educating human beings to look for swift and unambiguous solutions where it appears.”⁴⁸⁵ Thus, the theory of international law that the Grand Inquisitor has given us is, perhaps, not so very grand at all; indeed, in all charity, I must say that it is quite impoverished. For his theory of law derives from a view of history that makes room only for material and economic forces. It thus sweeps aside the spiritual and cultural riches that have played so important a part in forming the Slavic vision of history, which I would also describe as a Christian vision.⁴⁸⁶ After surviving for seven decades under a system that recognized the reality of nothing but economic and material forces, we Russians may be permitted to return, and we should return, to our Slavic Christian roots. But before discussing that, let me first try to explain why the Grand Inquisitor’s theory must fail on its own terms.

What, after all, Grand Inquisitor, is your avowedly post-human idea of Europe? As the historian J.G.A. Pocock put it, it demands “the subjugation [to the global market] of the political community and perhaps of the ethnic and cultural community also; we are to give up being citizens and behave exclusively as consumers.”⁴⁸⁷ But how can a political community survive without citizens, except as a régime of masters and slaves? Do we want the Europe of the future to be a despotism, even if it is a benign one? Furthermore, as Pocock asks, is not the attempt to create a sovereign that is not a sovereign bound to be self-defeating? “An organization designed to break the will of the state to govern itself necessarily reduces its own will to use military power to police its own frontiers, notably when these lie in parts of the world where only will can establish where those frontiers lie.”⁴⁸⁸ So even when it came to the genocide in Kosovo—where, as you have said, the very future of the European project was at stake—Europe could defend neither the Kosovars nor itself without the aid of its U.S. Praetorian Guard.

And what if your materialism is doomed to failure because it holds up a false conception of the individual’s good that makes it antagonistic to the good of the whole? Is it not true that the demographic crisis now suffered by Russia is a direct result of decades of Marxist-Leninist materialism and the spiritual impoverishment of our people? Is it not also true, as has been widely reported, that the established members of the EU are suffering a

485. WILLIAMS, *supra* note 30, at 78.

486. See GEORGE WEIGEL, *THE CUBE AND THE CATHEDRAL: EUROPE, AMERICA, AND POLITICS WITHOUT GOD* 29–32 (2005) (attributing this approach to Vaclav Havel and Karol Wojtyła, later known as Pope John Paul II).

487. Pocock, *supra* note 462, at 70.

488. *Id.*

demographic catastrophe of historical proportions?⁴⁸⁹ If, in fact, all that the EU can see is the material dimension of life, and its populations are unable even to reproduce themselves, then perhaps this explains why the EU must expand or die, for only then can its way of life survive. Could it be that the “demographic suicide” of Europe is rooted in the absence of any spiritual or cultural reason for re-creating European peoples that will carry their ways of life into the future?⁴⁹⁰ Could it be that the need to extend a culture into the future must be predicated on a shared understanding of that culture’s past, one rooted in a common history and a set of beliefs about that culture? And what if it is precisely the need for an understanding of a culture’s past that provides the resources necessary to guarantee its future?

In reflecting on these questions, I would draw your attention to the seminal work of the writer George Weigel⁴⁹¹ and the international law scholar J.H.H. Weiler.⁴⁹² Weigel and Weiler share the belief that the decision not to include a reference to the Christian sources of European intellectual and cultural history in the preamble of the proposed Lisbon Treaty (amending the Treaty of European Union) left that Treaty radically incomplete.⁴⁹³ Inquisitor, you would surely approve the Lisbon Treaty’s historic amnesia; I would call it Orwellian.

Now, do not misunderstand me. I am a Russian Orthodox monk, Weigel is a Roman Catholic, and Weiler is an Orthodox Jew. But while I have always believed that it is through Russian Orthodoxy that the soul of Russia must be saved,⁴⁹⁴ I will acknowledge that in Europe today, we believers have more in common with each other than each of us has with the non-believers. Yes, there was a time when some Slavophile thinkers, Dostoevski himself among them, saw Roman Catholicism as a form of Western “rationalism.”⁴⁹⁵ But given modern Catholicism’s commitment to the union of reason and

489. See generally PHILLIP LONGMAN, *THE EMPTY CRADLE: HOW FALLING BIRTHRATES THREATEN WORLD PROSPERITY AND WHAT TO DO ABOUT IT* 151–96 (2004) (arguing that the world population may be shrinking, due to modern medicine, reduced fertility, and the threatened collapse of the free market system).

490. WEIGEL, *supra* note 486, at 20–21.

491. See *id.* at 56–71 (relying extensively on J.H.H. WEILER, *UN’EUROPA CRISTIANA: UN SAGGIO ESPLORATIVO* (2003)).

492. See WEILER, *supra* note 491, at 177–84 (asserting that Europe must not ignore its Christian past as it looks to the future).

493. See *id.* (proposing that the inclusion of a reference to Diety, Christianity or religion is indispensable); WEIGEL, *supra* note 486.

494. See BILLINGTON, *supra* note 3, at 107–08 (describing the role Russian Orthodoxy has played in defining Russian identity).

495. See BERDYAEV, *supra* note 28, at 42–43 (describing the belief of many Slavophiles that Western rationalism, traced back to Catholic scholasticism, was “the source of all evils”).

faith,⁴⁹⁶ Orthodoxy and Catholicism are today no longer in radical opposition, even if they are often quarreling brothers suffering from ancient resentments and natural competition.⁴⁹⁷ What we believers have in common now is our rejection of the idea that secular rationalism is an adequate basis upon which to build a society, be it domestic or international. More to the point, it has never been, and never will be, the basis for Europe. Rather, it is an idea that, as Dostoevski saw, is both deeply sinful and deeply false, and that will lead to the destruction, not the renewal, of European culture.⁴⁹⁸

How much of the shame about Europe's past reflects an ideological agenda or simple ignorance of the truth of that past is not a matter I wish to explore here. My central point is that an accurate understanding of the role the Christian sources of European culture played in the emergence of democracy and human rights would make it a source of pride, not something that needed to be repressed.⁴⁹⁹

496. John Paul II, writing in the preamble to his encyclical on the relationship between faith and reason, affirmed that "[f]aith and reason are like two wings on which the human spirit rises to the contemplation of truth; and God has placed in the human heart a desire to know the truth." Letter from John Paul II, Encyclical Letter *Fides et Ratio* of the Supreme Pontiff John Paul II to the Bishops of the Catholic Church on the Relationship Between Faith and Reason (Sept. 14, 1998) available at http://www.vatican.va/holy_father/john_paul_ii/encyclicals/documents/hf_jp-ii_enc_151_01998_fides-et-ratio_en.html; see also GEORGE WEIGEL, WITNESS TO HOPE: THE BIOGRAPHY OF POPE JOHN PAUL II 841–42 (1999) (discussing this encyclical).

497. See BILLINGTON, *supra* note 3, at 53, 73 (suggesting the Orthodox Church is seeking to limit the influence of other faiths from the new Russia).

498. According to noted English theorist of international relations (and biographer of Dostoevski) E.H. Carr:

[T]here had appeared a work whose historical significance far exceeds its small literary merit, a novel by the radical publicist Chernyshevsky entitled *What is to be Done?* It is the picture of a Utopian state of society in which perfect happiness is attained by everyone pursuing untrammelled the satisfaction of his own rational desires. In the eyes of Chernyshevsky, a pupil of J.S. Mill, reason and self-interest are the sole sanctions of morality; man commits evil actions only through misapprehension of the true nature of his interests; and intellectual enlightenment is the infallible road to right conduct. The *Memoirs from Underground* are an answer to the philosophy of Chernyshevsky.

E.H. CARR, DOSTOEVSKY 119–20 (Henderson & Spalding eds., 1949) (1931). In these *Memoirs from Underground*, which "mark then a stage in the growth of Dostoevsky's thought," Dostoevski argues that "[m]an may love to build, like the ant in his ant-hill; but he also loves to destroy. He loves to indulge his caprice, to sin deliberately against his own interests merely in order to free himself from the tyranny of reason." *Id.* at 120–21.

499. As Weigel observes:

The recovery of a mature cultural confidence in the West requires that we be able to defend western commitments to civil society and democracy philosophically; it also requires us to be able to defend those commitments historically. That is, we must reclaim the history of the West, including its modern democratic politics, as an outgrowth of the distinctive culture that was formed from the fruitful interaction of Jerusalem, Athens, and Rome: biblical

Such pride about Europe's past would serve as the basis for faith in its future. So do not think I am an enemy of Europe—not at all! Like Dostoevski himself, I hold it “sacred.”⁵⁰⁰

At the root of the matter is the question of how we view the wellsprings of salvation. For it is in the workings of history that “the one true God made himself known to his people and empowered them to lead lives of dignity, through intelligence and free will with which he has endowed them in creation.”⁵⁰¹ Weigel suggests that it was in the Trinitarian conception of God that the West was able to develop the notion of pluralism.⁵⁰² Likewise, he argues, the “ideas and institutions for self-government were laid before in the European universities” (which were “entirely Christian in their origins”), in the “direct, democratic election of superiors in Benedictine monasteries,” and in the “pilgrimage tradition by which the men and women of an emerging Europe met and came to understand themselves as members in a common civilizational project.”⁵⁰³ The separation of church and state in the West originated, Weigel says, in the investiture controversy; while the traditions of caesaropapism in the Orthodox lands, Weigel believes, may help explain the difficulties those societies have experienced in their transition from communism to democracy.⁵⁰⁴ It may or may not be that all the rich traditions of the Orthodox Church—which have always formed in one way or another a recurring theme in the spiritual and cultural history of the Slavic peoples⁵⁰⁵—should be preserved without adaptation. But it is

religion, philosophical rationality, and law. The Whig theory of history—which tells the story of the West as if the freedom project in contemporary western public life only began with the Enlightenment—is mistaken, as a matter of the history of ideas. It also plays into the hands of jihadist ideologues, who are all too eager to claim that democracy, civil society and the rule of law as we understand those terms are the by-products of decadent, godless cultures.

GEORGE WEIGEL, FAITH, REASON, AND THE WAR AGAINST JIHADISM: A CALL TO ACTION 112 (2007).

500. In *The Diary of a Writer*, Dostoevski wrote:

Europe—is not this a terrible and a sacred thing—Europe? Do you know, gentlemen, how dear to us it is, to us dreamers, to us Slavophiles, to us who in your opinion are haters of Europe? That same Europe, that country of ‘holy wonders’—you know how dear to us are those wonders and how we love and revere them with more than brotherly love.

BERDYAEV, *supra* note 28, at 70.

501. WEIGEL, *supra* note 486, at 46–47.

502. *Id.* at 141.

503. *Id.* at 106.

504. *Id.* at 100–02. The Orthodox Christian Berdyaev also criticizes aspects of the Russian tradition of caesaropapism, saying that, under it, “God’s things were rendered to Caesar.” BERDYAEV, *supra* note 28, at 10.

505. See BILLINGTON, *supra* note 3, at 107–08 (arguing that Orthodox Church traditions have played a large part throughout history in the lives and culture of Slavic peoples).

only through reaching into the spiritual and cultural history of the Slavic peoples that true freedom and salvation are possible for us, certainly not as subject races of a faceless and heartless “European” future.

What has this to do with international law, Inquisitor? Everything! I hope it is becoming clear that your foundational premises lead to a distorted view of law that rejects both our Slavic culture and history and the Christian culture and history of Europe. Your premises drive you to a relentless expansion of the EU that is intended to break down, absorb, and finally destroy the distinctive features of our Slavic culture, along with the cultures of all other peoples of Europe.⁵⁰⁶ For you, the self-determination of the Kosovar people is a mockery—it is merely the freedom to be swallowed up by the EU, for outside the EU there is no salvation. And soon thereafter, only within the EU will there be salvation for the Serb people. Is this because you wish the EU to expand into the Russian sphere of influence to weaken Russia and ultimately to absorb her? Is not your “humanitarian intervention” in Kosovo a form of bad faith, a lie you tell yourselves to conceal and repress the darker motives that truly do explain your expansionist policies?

Sacrifice. Friends and Brothers, let me offer you a different way to think of the world’s legal order, a way that unites history and futurity, entwining memory with purpose, through the possibility of sacrifice. Where there is no sacrifice, there is no futurity; where there is no futurity, there is no life, but only the semblance of it. For truly it has been said: “[U]nless a grain of wheat falls into the earth and dies, it remains alone; but if it dies, it bears much fruit.”⁵⁰⁷

Let me ask you, Ivan, whether you would not agree that the meaning of your life is the thing for which you are prepared to sacrifice it? In helping Ivan to consider his answer, Grand Inquisitor, you assist me by drawing our attention to the practice of dueling. For

506. See LUKACS, *supra* note 28, at 180–81.

For Europe the true alternative to nationalism is not some kind of bureaucratic, materialist and abstract internationalism, but the kind of internationalism that develops from an increasing understanding [and, consequently, from an increasing cultural symbiosis] of its different nations A key ingredient of nationalism is xenophobia, the dislike and fear of foreigners. But the proper and desirable opposite of xenophobia is not an indiscriminating xenophilia, a thoughtless and abstract kind of broadmindedness. It is, rather, a discriminating *xenologia*, a comprehensive and compassionate understanding of others, of foreigners.

Id.

507. *John* 12:24. This is, in fact, the opening quotation of *The Brothers Karamazov*, prefiguring its central theme of salvation through sacrifice. DOSTOEVSKY, *supra* note 210, at xii.

in my dissolute younger years it was in a duel that I discovered the meaning of my life. It was a foolish venture, a challenge I made out of resentment that another man had won the affection of a lady—an offense, as I conceived it, to my honor. And shortly before the duel, I repented of the wrongfulness of my conduct. But I also saw that the only way for me to show why my path had been wrong was to allow my adversary to fire the first shot and only if I survived to reveal my reformation; for, if I had withdrawn from the duel before permitting my adversary to take the first shot, my action would have been seen as cowardice rather than wisdom. I needed to be prepared to sacrifice in order to gain the moral authority necessary to persuade others that they, too, needed to reform their lives.⁵⁰⁸ The memory of that deed has shaped my life. And perhaps a great sacrifice will also change your life, Dmitri. For you have taken the right path in our discussion, although for reasons that you at most dimly understood.⁵⁰⁹

As it is for individuals, so it must be for communities.⁵¹⁰ Great and selfless acts define the moral purpose, the *telos*, for which a community exists. The memory of such acts and the willingness to repeat them forge a community in which a people pursue the common good and, as much as can be in the City of Man, prepare them for salvation in the City of God.⁵¹¹ But for what is the EU prepared to risk its existence? The answer would reveal its *telos*.⁵¹² The EU had

508. DOSTOEVSKY, *supra* note 210, at 274–80.

509. Zossima's recounting of his youthful dissoluteness and moral transformation foreshadows Dmitri's sacrifice—his submission to wrongful prosecution and punishment for a murder committed by Smerdyakov. *Id.* at 623–716.

510. THE BROTHERS KARAMAZOV, in fact, closes with a scene relating to this theme. Young Ilusha has died, and after his funeral Alyosha speaks to Ilusha's classmates:

Let us make a compact, here, at Ilyusha's stone that we will never forget first, Ilyushechka, and second, one another. And whatever happens to us later in life, if we don't meet for twenty years afterwards, let us always remember how we buried the poor boy at whom we once threw stones And so in the first place, we will remember him, boys, all our lives. And even if we are occupied with most important things, if we attain to honor or fall into great misfortune—still let us always remember how good it was once here, when we were all together, united by a good and kind feeling which made us, for the time we were loving that poor boy, better perhaps than what we are What's more, perhaps that one memory may keep him from great evil and he will reflect and say, "Yes, I was good and brave and honest then!"

Id. at 733–34.

511. See ST. AUGUSTINE, THE CITY OF GOD 5–6 (Henry Bettensen trans., 1972) (formulation of a distinction that may have paved the road for the emergence of separation between the spiritual and temporal realms, between church and state, in Western culture).

512. Cf. WEIGEL, *supra* note 486, at 65 (citing WEILER, *supra* note 491, for the idea that a constitution prescribes "the *ethos* and *telos*, the cultural foundations and aspirations, of a given political community").

neither the strength nor will to fight for Kosovo. But if an individual, a group, a state, community of states, cannot sacrifice itself, it cannot live.

In saying this, I am of course rejecting the fallacy that one *invents* one's values—instead, one *discovers* them. Values that are transparently nothing but the artifacts of human desire are empty and meaningless; they fail to explain why we *should* desire what we do. Rather, the meaning and *telos* of our lives is chosen for us. And that mystery is as true for states and peoples as it is for individuals. So I cannot agree that the EU's choice of bread and water is as wise or valid as its choice of bread and wine would be. The states and the peoples must choose bread and wine, not bread and water, to find their true *telos*.

Yes, it is very, very difficult to ask statesmen and rulers to sacrifice the interests of the states and peoples they govern for the sake of bread and wine. In any decision involving responsibility for others, are we free to choose a course that requires sacrifices from them, risking the very existence of the state in which they find a home, in order to pursue moral purposes of a transcendent character?⁵¹³ Surely the kingdom of Heaven cannot be built by human statecraft! Do we not live under the "order of necessity," in which there can be no escape by purely human means from the unending cycle of violence and retaliation?⁵¹⁴

Indeed, the Kingdom cannot be built by human hands. We have been taught to pray, "Thy Kingdom *come*."⁵¹⁵ And by that teaching we are instructed that it is not in *our* power to make the kingdom come. We must wait; all in God's time. But we have also been taught to pray: "Forgive us as we forgive those who have sinned against us."⁵¹⁶ And to seek and grant forgiveness *do* lie within our power. In a certain understanding of forgiveness, I think we may at last see the true answer to our problem of law.

Forgiveness. In the 1860s, during Dostoevski's lifetime, the jury system was introduced from the West into Russia. Dostoevski observed that Russian juries were irresistibly drawn to acquit any accused criminal, no matter how grave the offense or how clear the evidence of guilt.⁵¹⁷ In a passage in *The Diary of a Writer*, Dostoevski tried to explain the Russian jurors' state of mind:

513. See generally REINHOLD NIEBUHR, *MORAL MAN AND IMMORAL SOCIETY: A STUDY IN ETHICS AND POLITICS* 23–50 (1932) (arguing that reason enables man to rationalize selfishness in order to pursue greater goals of power and control).

514. JACQUES ELLUL, *VIOLENCE: REFLECTIONS FROM A CHRISTIAN PERSPECTIVE* 91 (1969).

515. *Matthew* 6:10.

516. *Matthew* 6:12.

517. Berdyaev noted the same phenomenon:

We sit in the jurors' box and perhaps we think: "Are we ourselves better than the defendant? Here we are, rich and secure; but if we were to find ourselves in the same position as he, perhaps we should do even worse than he—so we will acquit."⁵¹⁸

And Dostoevski added:

Perhaps even it is good that we should feel thus; it is sincere mercifulness. It is perhaps the pledge for some sort of higher Christianity which the world has not yet known.⁵¹⁹

Think of the international community, most of all the great powers that are the permanent members of the Security Council, as if they were such a Russian jury.⁵²⁰ And think of Serbia as if it were an accused criminal, and Kosovo its victim. What should the jury do? The crime is grave, and Serbia's guilt is incontestable. So, no doubt, the jury should not simply acquit Serbia—although what great power does not have bloodstained hands? But the world is surely not ready yet for that old Russian form of Christianity. Then should the jurors simply find Serbia guilty, and punish it? But punishment may serve only to deepen Serbia's sense of grievance and to strengthen its desire for vindication and revenge. Consider the effects of Germany's "punishment" after the First World War. Would it not be best, then, if the jurors gave Serbia the chance to grasp in all its fullness the very great wrong it had done and, in time, humbly to seek the Kosovars' forgiveness? Mindful of their own deep wrongs, should not the great powers counsel Serbia to reflect on its need to repent and to consider the ways in which it might secure forgiveness from those whom it had injured? Should not Russia, as Serbia's friend, take the lead in offering such counsel? You will remember, my Brothers, that our common Serbian and Russian Orthodox faith, unlike Latin Christianity, calls for public, rather than private, confession.⁵²¹ How can we fail to draw on that heritage to transcend the current political and legal impasse? May we not read the Security Council's Resolution in a way that permits and encourages the ripening of Serbia's reflections? And because such reflections will be painful,

Among the Russians and it may be among the Russians only, there exists a doubt about the righteousness of punishment. This is in all probability connected with the fact that the Russians are people with a community spirit, though they are not socialized in the Western sense, that is to say they do not recognize the supremacy of society over man.

BERDYAEV, *supra* note 28, at 52–53.

518. CARR, *supra* note 498, at 296.

519. *Id.*

520. Father Zossima is speaking here of the Security Council as a "jury" that can express the moral conscience of the international community. In a distinct sense not relevant here, the Council may also resemble a "jury" in serving as an impartial finder of facts as suggested in HANS BLIX, *DISARMING IRAQ* 218 (2004).

521. BILLINGTON, *supra* note 3, at 107.

much patience and time may be needed. But should not the president of Serbia—when the time has come—visit an Albanian village in Kosovo that the Serbs had destroyed, and kneel on the ground before its inhabitants, and beg their forgiveness for himself and for his people? And he must do this, realizing all the time that 200,000 Serbs have had to flee their homes in Kosovo.⁵²²

Friends, Brothers: my elder brother died as a very young man, scarcely more than a boy. As his illness grew worse, his joy in the world became ever more intense, even ecstatic. And as death drew nearer, he said to my mother, “[M]other, every one of us has sinned against all men, and I more than any.”⁵²³ And she smiled and wept and said to her dying boy, “Why, how could you have sinned against all men, more than all? Robbers and murderers have done that, but what sin have you committed, that you hold yourself more guilty than all?”⁵²⁴ And he replied to her tenderly, “[L]ittle heart of mine, my joy, believe me, everyone is really responsible to all men for all men and for everything.”⁵²⁵

International law can guide the states and peoples of the world on the path to peace only if it awakens in them the realization that each of them is guilty before each of the others. Yes, there are nations that are like murderers and robbers, and perhaps there might even be some that are more like innocent, dying boys. But all nations are guilty before all, all stand in need of repentance and forgiveness, all must acknowledge and confess their brokenness. I do not say that the international law alone can bring them to that realization, for the action of grace in the soul of a nation is as needful as it is in the soul of each individual. So, indeed, it may be that international law can perform its highest service for us only after we have reached the point at which we no longer need it. But it is only through seeking and granting forgiveness that states and peoples can have any hope of breaking the cycle of violence and retaliation.

522. Carr writes that Dostoevski believed that

the sense of sin, an awareness of the lower instincts of one's own nature, was the key to salvation, and that it was through the antithesis of good and evil within him that man arrived at the divine synthesis. In *The Brothers Karamazov*, he works out this doctrine in the person of Dmitri, who seeks salvation through sin and through suffering accepted in order to expiate it.

CARR, *supra* note 498, at 295. In that spirit, Father Zossima argues that peace can come to Kosovo only if Serbia is prepared both to atone for its sins against the Kosovars and at the same time to forgive the Kosovars' sins against the Serbs. Whether the Kosovars respond by insisting on independence or agreeing to reunification would then be for them to say.

523. DOSTOEVSKY, *supra* note 210, at 268.

524. *Id.*

525. *Id.* The theme repeats itself in many voices, including that of Zossima himself and an older “mysterious visitor.” *Id.* at 280–91. It is without doubt the most challenging concept in Zossima's teaching and Dostoevsky's novel.

These are, of course, not the ways in which the world has been ruled or the affairs of the nations governed. But perhaps it is time. And if it is time, then international law should be applied, not to accuse and to punish, but to heal and to bind.