

# Territorial Conflicts on the Territory of the Former Soviet Union. Stabilised *de facto* Regimes between Territorial Integrity, the Right of Self-determination, and the Interests of Third Parties

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## Introduction

Since the fall of the Soviet Union, nine non-State entities have appeared on its territory, each claiming independence, if not statehood: Abkhazia (Republic of Abkhazia or Apsny), Chechnya (Republic of Ichkheria), Crimea (Republic of Crimea), Donetsk People's Republic, Gagauzia (Republic of Gagauzia), Luhansk People's Republic, Nagorno-Karabakh (Republic of Artsakh), Transnistria (the Pridnestrovian Moldavian Republic), and South Ossetia (the Republic of South Ossetia - State of Alania). As Coppieters acknowledges, '[t]he flood of declarations of sovereignty and independence [...] posed a challenge to the Soviet authorities, as well as to the international community.'<sup>1</sup> Two of these entities have been incorporated back into their parent State (Chechnya and Gagauzia), three (Crimea, Donetsk People's Republic and Luhansk People's Republic) have been incorporated unlawfully<sup>2</sup> into another State whilst the others are perduring as non-State entities and can be classed as *de facto* stabilised regimes / States.

*De facto* States have been defined by Pegg as 'entities which feature long-term, effective, and popularly-supported organized political leadership that provide governmental services to a given population in a defined territorial area' and which 'seek international recognition and view themselves as capable of meeting the obligations of sovereign statehood.'<sup>3</sup> *De facto* States cause a significant headache for international law. Indeed, the concept of *de facto* States indicates that there are (at least) two sovereignty claims over a territory and a population, usually one by a group invoking the right of self-determination and another by a State ascertaining the principle of territorial integrity.<sup>4</sup> And, because they are deemed to have contravened one of the fundamental norms of international law, that of the territorial integrity of the State, and have been created without the permission of the State from which they have broken away, they are shunned, 'marginalised and treated with disapproval'<sup>5</sup> and 'exposed to [...] the threat of extinction'<sup>6</sup> or ignored.<sup>7</sup>

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<sup>1</sup> Bruno Coppieters, 'Four Positions on the Recognition of States in and after the Soviet Union, with Special Reference to Abkhazia' (2018) 70(6) *Eur-Asia Stud* 991, 991.

<sup>2</sup> For a contrary view regarding Crimea, see Alexei Moiseev, 'Concerning Certain Positions on the Ukrainian Issue in International Law' (2015) 53(2) *Russ Polit Law* 47-60 and the views of Russian academics presented in Erika Leonaitė and Dainius Žalimas, 'The Annexation of Crimea and Attempts to Justify it in the Context of International Law' (2015-2016) 14 *Lith Ann Strateg Rev* 11-63.

<sup>3</sup> Scott Pegg, *International Society and the De Facto State* (Routledge 1998) 4. See also Scott Pegg and Eiki Berg, 'Lost and Found: The WikiLeaks of *De Facto* State-Great Power Relations' (2016) 17 *Int Stud Perspect* 267, 268.

<sup>4</sup> Alexander Kurtskhaliya, 'The Application Process of International Law in Solution of Territorial Conflict of the Republic of Moldova and Georgia' (2019) 3(86) *Moldoscopie* 69, 75.

<sup>5</sup> James Ker-Lindsay, 'The Stigmatisation of *de facto* States: Disapproval and "Engagement without Recognition"' (2018) 17(4) *Ethnopolitics* 362, 362.

<sup>6</sup> Janis Grzybowski, 'The Paradox of State Identification: *de facto* States, Recognition, and the (Re-)Production of the International' (2019) 11 *Int Theory* 241, 241. Pegg/Berg (n 3) 268-269.

<sup>7</sup> Pegg/Berg (n 3) 268.

Their situation unmistakably puts in relief the definition of statehood and its criteria and the international community's unwillingness to consider them as States because they do not have the right of self-determination and were created in violation of core principles of international law such as territorial integrity and the prohibition of the use of force. As the topics of statehood and recognition are widely covered in international law literature,<sup>8</sup> this chapter does not aim to be another treatise on statehood (or recognition); rather, its goal is to discuss the concept of statehood in relation to the *de facto* entities in the post-Soviet space. Some academics have, of course, sought to examine statehood and recognition as applied to these entities too. However, their research usually centres on one specific entity,<sup>9</sup> overwhelmingly on Abkhazia and South Ossetia, less on Transnistria and rather rarely on Nagorno-Karabakh.<sup>10</sup> Further, the majority of such scholarly works are solidly grounded in politics and international relations, rather than in international law. In contrast, this chapter examines all four entities (Abkhazia, South Ossetia, Transnistria, and Nagorno-Karabakh) and espouses an international law approach.<sup>11</sup>

To shed a better light on the conundrum in which these entities find themselves, a socio-legal methodology seems most appropriate to understand how the law and reality interact and affect each other. Undoubtedly political, economic, social, and cultural factors are at play in any situation concerning statehood, secession and recognition. Combined with a doctrinal research method that uses secondary literature in the field of notably law, politics, anthropology, and sociology this chapter offers not only a discussion of the pertinent law but also a highly contextualised application of the law to the four entities.

The chapter demonstrates that contemporary law is so entrenched in defending the principle of territorial integrity that, as these four *de facto* States struggle to survive, they are not only likely to perdure as 'problem entities' but, as third parties are (increasingly) interested in supporting them, are in fact most likely to end up being run by and eventually incorporated in a patron State. Indeed, the lack of recognition has pushed them to seek assistance from a patron State to the extent that their claim to statehood is further weakened as they are unable to stand as independent States.

This chapter examines the criteria of statehood according to the Montevideo Convention and applies them to these entities with a view to evaluating their statehood. The chapter then turns its attention to identifying the legal factors that prevent these entities from being recognised as States such as the violation of the prohibition of the use of force and the principle of territorial integrity before examining the right of self-determination claim made by these entities. It eventually considers their relationship with 'interested third parties' that have become their patron State and concludes that, first, cast away from the

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<sup>8</sup> See the excellent works of e.g., James Crawford, *The Creation of States in International Law* (OUP 2006); John Dugard and David Raič, 'The Role of Recognition in the Law and Practice of Secession' in Marcelo Cohen (ed), *Secession, International Law Perspectives* (CUP 2006) 94; Jure Vidmar, *Democratic Statehood in International Law: The Emergence of New States in Post-Cold War Practice* (Hart 2013).

<sup>9</sup> See the chapters in Benedikt C Harzl and Roman Petrov (eds), *Unrecognized Entities. Perspectives in International, European and Constitutional Law* (Brill 2021); Heiko Krüger, *The Nagorno-Karabakh Conflict. A Legal Analysis* (Springer 2010). A notable exception is Charles Kings, 'The Benefits of Ethnic War: Understanding Eurasia's Unrecognized States (2001) 53(4) *World Polit* 524-552 which examines the four *de facto* States studied in this chapter.

<sup>10</sup> Such works are extensively referred to in this chapter.

<sup>11</sup> There are very few international law papers looking at the four entities. One of them is a chapter by Bowring (Bill Bowring, 'International Law and Non-Recognized Entities. Towards a Frozen Future?' in Harzl/Petrov (n 9) 9) that is rather descriptive, and another is a rather outdated journal article by Quénivet (Noëlle Quénivet, '15 Jahre nach dem Zerfall der Sowjetunion: Gibt es noch nicht anerkannte Staaten?' (2006) 44 *AVR* 481.

international community because they have failed to fulfil the requirements for recognition and, second, existing under the aegis of patron States, they are now even further away from statehood than they ever were.

## 1. Statehood under International Law

The most agreed upon definition of a State is enshrined in Article 1 of the Montevideo Convention:<sup>12</sup> 'The state as a person of international law should possess the following qualifications: a. a permanent population; b. a defined territory; c. government; and d. capacity to enter into relations with the other states'.<sup>13</sup> Whilst it is sometimes pointed out that the Convention is only applicable to the American continent, it is claimed that the definition is of customary nature<sup>14</sup> as it has been broadly accepted<sup>15</sup> and practised.<sup>16</sup> The 'criteria have become a touchstone for the definition of a state'<sup>17</sup> and so should form the basis of any assessment of an entity's claim to statehood as it is accepted that an entity that fulfils the requirements is a State.<sup>18</sup> They are 'the irreducible elements required for an entity to effectively function as a State'.<sup>19</sup> This section, therefore, examines each criterion and applies it to the State-like entities on the territory of the former Soviet Union.

### 1.1. Permanent Population

The criterion of a permanent population is probably one of the least contentious. A population is comprised of all inhabitants of the territory and is not limited to those who have a legal relationship with the State via the bond of nationality.<sup>20</sup> Culture, religion, language,

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<sup>12</sup> Crawford (n 8) 45.

<sup>13</sup> Convention on the Rights and Duties of States (Montevideo Convention), 26 December 1933, 165 LNTS 19.

<sup>14</sup> Irene R Lax, 'A State of Failure: The Sacrosanctity of Sovereignty and the Perpetuation of Conflict in Weak and Failing States' (2012) 26 *Temple Int'l & Comp LJ* 25, 40-41; Pamela Epstein, 'Behind Closed Doors: "Autonomous Colonization in Post United Nations Era – the Case for Western Sahara' (2009) XV(1) *Ann Surv Int'l & Comp L* 117, 119. Such an assumption is however disputed by Vidmar (Jure Vidmar, 'Territorial Integrity and the Law of Statehood' (2012) 44 *Geo Wash Int'l L Rev* 697, 745.

<sup>15</sup> Vidmar (n 14) 698.

<sup>16</sup> For example, the EU Declaration on the Guidelines on Recognition of New States in Eastern Europe and the Soviet Union referred to criteria additional to the 'normal standards of international practice' (Declaration on the Guidelines on Recognition of New States in Eastern Europe and the Soviet Union, 31 ILM 1485, 1486 (1992), 16 December 1991) that have been interpreted as the Montevideo criteria (See Steven Blockmans, 'EU Global Peace Diplomacy: Shaping the Law on Statehood' in Dimitry Kochenov and Fabian Amtenbrink (eds), *The European Union's Shaping of the International Legal Order* (CUP 2014) 130, 142); Peter Radan, 'Secession: A Word in Search of a Meaning' in Aleksandar Pavković and Peter Radan (eds), *On the Way to Statehood. Secession and Globalisation* (Ashgate 2008) 17, 19). For a contrary view, see Errol Mendes, *Statehood and Palestine for the Purposes of Article 12(3) of the IC Statute – A Contrary Perspective*, Submitted to ICC, 30 March 2010, 13-14.

<sup>17</sup> Epstein (n 14) 119.

<sup>18</sup> Kenn Chinemelu and Chibike Oraeto, 'Formation of State by Secession and the Import of Recognition in International Law' (2021) 2(1) *LASJURE* 25, 34; Radan (n 16) 19; Crawford (n 8) 45-46; Milena Sterio, 'A Grotian Moment: Changes in the Legal Theory of Statehood' (2011) 39 *Denv J Int'l L & Pol'y* 209, 215; ICC, *Situation in Palestine*, Summary of Submissions on Whether the Declaration Lodged by the Palestinian National Authority Meets Statutory Requirements, 3 May 2010, paras 34 and 39.

<sup>19</sup> Chike B Okosa, 'Statehood Theory: Current Scholarship on the Various Theories of Statehood in International Law' (2018) 1(1) *Nile Uni LJ* 107, 108 and 127.

<sup>20</sup> Crawford (n 8) 52; European Union, *Independent International Fact-Finding Mission on the Conflict in Georgia*, Volume II, September 2009, 131.

ethnicity or any other bond is irrelevant.<sup>21</sup> The size of the population does not matter either<sup>22</sup> as examples of micro-States such as Andorra, Monaco, etc prove.

The adjective 'permanent' that suggests a stable community leads to some more debate.<sup>23</sup> According to the *Western Sahara Advisory Opinion*, it includes nomads too.<sup>24</sup> Migration flows do not affect the permanent element of the population either even when such flows are forced.<sup>25</sup> The issue of population replacement or modification is not one that is examined as part of the criterion.<sup>26</sup>

All four entities have a permanent population and, as explained, the fact that there have been accusations of ethnic cleansing by the disintegrating State, such claims are irrelevant in relation to the definition of a permanent population under the Montevideo Convention.

## 1.2. Defined Territory

The second element of a State is that of a defined territory: '[t]erritory would seem to be an absolute necessity to the modern state.'<sup>27</sup> Two reasons can be adduced for the need to have a territory. First, 'all forms of state are based on the territorialization of political power',<sup>28</sup> and as explained in the *Island of Palmas Case*, '[t]erritorial sovereignty [...] involves the exclusive right to display the activities of a State.'<sup>29</sup> It is on its territory that a State is able to exercise its power. Territory and population thus go hand in hand. Second, a territory ensures that a State is self-sufficient.<sup>30</sup> The territory must be some form of naturally formed land.<sup>31</sup> Its size is irrelevant<sup>32</sup> as the existence of micro-States showcases and it does not need to show contiguity.<sup>33</sup>

The question arises as to what is meant by the adjective 'defined'. It is agreed that it should not be interpreted so as to require a State to have defined borders. First, using the interpretation method specified in Article 33 of the Vienna Convention on the Law of Treaties on the use of all authenticated language versions of a treaty,<sup>34</sup> it should be noted that whilst the English version of the Montevideo Convention refers to a 'defined' territory, the French uses the adjective 'déterminé' (and a similar version is adopted in Spanish and Portuguese) which means a 'given territory' rather than a 'defined' one. Second, it is agreed that the State

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<sup>21</sup> In German- and French-speaking literature, this is however a requirement. See discussion in EU (n 20) 130-131 (fn 18).

<sup>22</sup> Crawford (n 8) 52.

<sup>23</sup> For example, Merezhko argues that the Holy See (sic) does not have a population as those present are 'resident functionaries, with the purpose to support it as a religious organization'. Oleksandr Merezhko, 'The Mystery of the State and Sovereignty in International Law' (2019) 64 *St Louis ULJ* 23, 34.

<sup>24</sup> ICJ, *Western Sahara*, Advisory Opinion, [1975] ICJ Rep 12, para 81.

<sup>25</sup> Wladyslaw Czapinski, 'La continuité, l'identité et la succession d'Etats – Evaluation de cas récents' (1993) 26 *RBDI* 374, 378.

<sup>26</sup> Interestingly, the Tagliavani report deems this an important factor to assess whether there is a stable group. EU (n 20) 131.

<sup>27</sup> Philip Marshall Brown, 'The Theory of the Independence and Equality of States' (1915) 9 *AJIL* 305, 317.

<sup>28</sup> Bob Jessop, 'The Future of the State in an Era of Globalization' (2003) 3 *IPG* 30, 30.

<sup>29</sup> *Island of Palmas Case* (1928) 1 RIAA 829, 839 (Arbitrator Huber).

<sup>30</sup> Marshall Brown (n 27) 318.

<sup>31</sup> Germany, Verwaltungsgericht Köln, *Fürstentum Sealand*, 3 May 1978, DVBl 1978, cited in Jeannine Hoffmann, Joerg Menzel and Tobias Pierlings, *Voelkerrechtsprechung. Ausgewahlte Entscheidungen zum Voelkerrecht in Perspektive* (Mohr Siebeck 2005) 175-179.

<sup>32</sup> Crawford (n 8) 46-47.

<sup>33</sup> Crawford (n 8) 47.

<sup>34</sup> Vienna Convention on the Law of Treaties, 23 May 1969, 1155 UNTS 331.

must have control of at least an uncontroversial core territory even if the exact delimitations of the border are debatable.<sup>35</sup> As was stated in the *Deutsche Continental Gas-Gesellschaft Case*, '[i]n order to say that a State exists [...] it is enough that this territory has a sufficient consistency, even though its boundaries have not yet been accurately delimited, and that the State actually exercises independent public authority over that territory.'<sup>36</sup> Such a position was confirmed by the International Court of Justice (ICJ) in the *North Sea Continental Shelf Cases*<sup>37</sup> and in practice.<sup>38</sup>

With regard to the four entities, the territory is defined, usually circumscribed by the administrative borders of the previous power/State.<sup>39</sup> What is more, the presence of military forces such as UNOMIG in Abkhazia,<sup>40</sup> peacekeeping troops in South Ossetia,<sup>41</sup> Russian troops in Transnistria,<sup>42</sup> and Russian peacekeeping troops in 2020 in Nagorno-Karabakh<sup>43</sup> seem to indicate that not only the territory is defined but the borders are delimited too. There has been a debate as to where the borders of South Ossetia are, notably because the 2008 six-point agreement did not specify the borders and, as a result of the presence of Russian guards installing a barbed-wire fence and 'border' signs, it appears that the line of the border has moved.<sup>44</sup> The other problematic case might be that of Nagorno-Karabakh as whilst the *de facto* State is in control of the territory of the former administrative entity, there were occupied territories from a previous armed conflict between Armenia and Azerbaijan in 1992 (that are undisputedly Azerbaijani territory).<sup>45</sup> However, as they have been 'reconquered' by Azerbaijan in the 2020 conflict, the question does not arise anymore.

### 1.3. Government

The third element of the Montevideo Convention is that of a government. Contrary to the two previous criteria, no adjective is appended to the noun. The form that this political organisation takes is irrelevant: '[n]o rule of international law [...] requires the structure of a State to follow any particular pattern, as is evident from the diversity of the forms of State found in the world today.'<sup>46</sup> Specifying the type of government would run counter several international law principles. First, as the ICJ explained in the *Nicaragua Case*, to oblige a State to adhere to a particular doctrine 'would make nonsense of the fundamental principle of State

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<sup>35</sup> Walter Kälin, Astrid Epiney, Martina Caroni, Jörg Künzli and Benedikt Pirker, *Völkerrecht. Eine Einführung* (5<sup>th</sup> edn Staempfli 2022) 147; EU (n 20) 130.

<sup>36</sup> German-Polish Mixed Arbitral Tribunal, *Deutsche Continental Gas-Gesellschaft v Polish State* (1929) 5 ILR 11, 14-15.

<sup>37</sup> ICJ, *North Sea Continental Shelf Cases (Federal Republic of Germany/Denmark and Federal Republic of Germany/Netherlands)*, Judgment, [1969] ICJ Rep 3, 32.

<sup>38</sup> See examples in Crawford (n 8) 50 and Malcolm Shaw, *International Law* (CUP 2017) 158.

<sup>39</sup> For South Ossetia and Abkhazia, see EU (n 20) 130.

<sup>40</sup> UNSC, Resolution 854 (1993), UN Doc S/RES/854 (1993), 6 August 1993.

<sup>41</sup> Friedrich W Kriesel, 'The CSCE Mission to Georgia/South Ossetia and its Cooperation with the Russian Peacekeeping Forces – Model or Individual Case?' in Hans-Georg Ehrhart, Anna Kreikemeyer and Andrei Zagorski (eds), *Crisis Management in the CIS: Wither Russia?* (Nomos 1995) 179.

<sup>42</sup> Marius Vahl and Michael Emerson, 'Moldova and the Transnistrian Conflict' (2004) 1 *JEMIE* 1, 8.

<sup>43</sup> See Freedom House, *Freedom in the World 2022 – Nagorno-Karabakh*, available at <https://freedomhouse.org/country/nagorno-karabakh/freedom-world/2022>.

<sup>44</sup> Tracey German, 'Russia and South-Ossetia: Conferring Statehood or Creeping Annexation?' (2016) 16(1) *SE Eur Black Sea Stu* 155, 162-163.

<sup>45</sup> Pål Kolstø and Helge Blakkisrud, 'Living with Non-Recognition: State- and Nation-Building in South Caucasian Quasi-States' (2008) 60(3) *Eur-Asia Stud* 483, 490.

<sup>46</sup> *Western Sahara Advisory Opinion* (n 24) para 94.

sovereignty on which the whole of international law rests, and the freedom of choice of the political, social, economic and cultural system of a State.<sup>47</sup> Second, the principle of non-intervention in internal affairs combined with the principle of equality prevents States from imposing on another State a certain type of political organisation.<sup>48</sup> Third, the right of self-determination that allows people to choose the type of political organisation that organises and runs them would be violated. It is sometimes contended that whilst this was the position adopted prior to 1990, it changed, at least on the European continent, following the fall of the Soviet Union and Yugoslavia as, to obtain recognition, the new entities had to attest that they constituted themselves on a democratic basis. Such an argument is incorrect because, as observed by Fikfak, the requirement of being a democracy 'should be regarded as a recognition requirement and not a statehood criterion.'<sup>49</sup>

Notwithstanding the lack of an adjective to qualify the government element, practice shows that the government must be 'central', i.e., that there is one unique source of power. The entity must set up a legal order and a central apparatus that is organised and able to exercise its authority over the territory and the people.<sup>50</sup> What matters is that there is a *central* legal order, usually derived from the constitution.<sup>51</sup> The reason is that a single authority should be able to assure the internal stability of the State as well as its ability to meet its obligations on the international level.<sup>52</sup>

Though the Montevideo Convention does not use the adjective 'effective' to qualify the government, the government must exhibit its effective control of the population and the territory<sup>53</sup> in the sense that it has the capacity to legislate (or give orders), apply, implement and enforce the law and establish basic institutions.<sup>54</sup> It also has the 'monopoly of force'.<sup>55</sup> Crawford clarifies that at a minimum it includes 'some degree of maintenance of law and order and the establishment of basic institutions'.<sup>56</sup> It is in this context that the structure of the entity is to be assessed, even if '[t]here is no bright line between effective and ineffective' and it is rather a matter of degree.<sup>57</sup>

Whilst the effectiveness of the government has been stressed multiple times, in practice, especially in relation to the decolonisation process, some entities were recognised although they had no control over territory and people.<sup>58</sup> More recent examples such as Bosnia Herzegovina, East Timor and Kosovo however attest that effectiveness is sometimes not that

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<sup>47</sup> ICJ, *Case Concerning Military and Paramilitary Activities in and Against Nicaragua (Nicaragua v United States of America)*, Merits, Judgment, [1986] ICJ Rep 14, para 263.

<sup>48</sup> Kälin *et al* (n 35) 151; *Nicaragua Case* (n 47) para 263.

<sup>49</sup> Veronika Fikfak, 'Democracy and Statehood' (2022) 23 *Chicago JIL* 103, 108.

<sup>50</sup> Dren Doli, *The International Element, Statehood and Democratic Nation-Building. Exploring the Role of the EU and International Community in Kosovo's State-Formation and State-Building* (Springer 2019) 109; André Jolicœur, 'De la reconnaissance en droit international' (1965) 6(2) *Cah de Droit* 85, 86.

<sup>51</sup> Jolicœur (n 50) 86.

<sup>52</sup> Varun Modasia, 'Creation of Statehood and its Legal Existence under International Law' (2021) 4(2) *IJLMH* 2190, 2197.

<sup>53</sup> Doli (n 50) 105; Kälin *et al* (n 35) 150.

<sup>54</sup> Crawford (n 8) 59.

<sup>55</sup> See Grzybowski (n 6) 255 who explains that Weber identified states with the 'human community that (successfully) claims the *monopoly of legitimate physical violence* within a particular territory'.

<sup>56</sup> Crawford (n 8) 59.

<sup>57</sup> Anne Peters, 'Statehood after 1989: "Effectivités" between Legality and Virtuality' Proceedings of the European Society of International Law 2010, 1, 3.

<sup>58</sup> Robert Jackson, *Quasi-States: Sovereignty, International Relations, and the Third World* (CUP 1990) 34; Crawford (n 8) 56-58; Okosa (n 19) 125.

decisive.<sup>59</sup> The point, it seems, is that the right to self-determination counterbalances the absence of an effective government.<sup>60</sup> That being the exception rather than the rule, effectiveness is a fundamental requirement for statehood. As Crawford insists, 'the requirement that a putative State have an effective government might be regarded as central to its claim for statehood'.<sup>61</sup>

In a modern world, one may question whether effectiveness should be limited to the application of force and the ability of the government to impose its power on the territory and population. A certain degree of governmental services ought to be provided as statehood cannot be reduced to a couple of attributes as it is meant to work as a comprehensive social order.<sup>62</sup> Kurtskhalia posits that '[t]he fullness of the territorial sovereignty of a state is expressed in the fact that each state on its own territory is able to determine the extent and nature of its competences, to regulate social relations in the most varied fields, to impose its authority on the entire social mechanism and to manage resources and national wealth.'<sup>63</sup> This means that in determining the effectiveness of a government, the ability to sustain an economy and provide welfare, health and social services for the population<sup>64</sup> should also be taken into account. After all, increasingly, security is understood not only as military security but also as human and environmental security.

Applying these criteria to the entities studied in this chapter is arduous because of the paucity of information relating to the effectiveness of the entities. Accordingly (and unfortunately), only a cursory application of the current situation is provided. The four *de facto* States are all (more or less) in effective control over the territory and population. Georgia does not exercise any of its sovereign prerogatives in Abkhazia and South Ossetia; the same holds true about Moldova and Transnistria and Azerbaijan and Nagorno-Karabakh. All four entities have promulgated a constitution establishing the powers of the institutions<sup>65</sup> as well as a number of local laws.<sup>66</sup> The law is enforced and applied by independent courts,<sup>67</sup> with a supreme court as the highest judicial authority<sup>68</sup> and sometimes a constitutional court verifying the constitutionality of legislation.<sup>69</sup> Many entities have a central bank<sup>70</sup> and state taxation

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<sup>59</sup> ICC (n 18) para 43. For a discussion on the recognition of Croatia and Bosnia-Herzegovina despite a lack of a central government exercising effective control, see Vidmar (n 14) 728-729.

<sup>60</sup> ICC (n 18) paras 43 and 45.

<sup>61</sup> Crawford (n 8) 55.

<sup>62</sup> Grzybowski (n 6) 257.

<sup>63</sup> Kurtskhalia (n 4) 70.

<sup>64</sup> See Christopher Clapham, 'Degrees of Statehood' (1998) 24 *RIS* 143, 156; Thomas Risse, 'Governance in Räumen begrenzter Staatlichkeit' 2005 1 *IP* 6, 8.

<sup>65</sup> Abkhazia: available at <https://abkhazworld.com/aw/reports-and-key-texts/607-constitution-of-the-republic-of-abkhazia-apsny>); South Ossetia: available at <https://rsogov.org/republic/constitution>; Transnistria: available at <https://mid.gospmr.org/en/bht>; Nagorno-Karabakh: available at <http://www.nkr.am/en/constitution-of-Artsakh>

<sup>66</sup> Abkhazia: Constitution, Chapter 3; South Ossetia: Constitution, Chapter IV; Transnistria: Constitution, Section III, Chapter 2; Nagorno-Karabakh: Constitution, Chapter 5

<sup>67</sup> Abkhazia: Constitution, Chapter 5 ; South-Ossetia: Constitution, Chapter VI; Transnistria: Constitution, Section III, Chapter 5; Nagorno-Karabakh: Constitution, Chapter 6.

<sup>68</sup> Abkhazia: Constitution, Art 68; South-Ossetia: Constitution, Art 84; Transnistria: Constitution, Art 89; Nagorno-Karabakh: Constitution, Art 140.

<sup>69</sup> South Ossetia: Constitution, Arts 82-83; Transnistria: Constitution, Arts 86-88.

<sup>70</sup> Abkhazia: referred to in Constitution, Art 47; South Ossetia does not seem to have a central bank; Transnistria: Constitution, Art 89; Nagorno-Karabakh does not seem to have a central bank.

system.<sup>71</sup> Sometimes they have their own currency<sup>72</sup> or have adopted a foreign currency, such as the Russian ruble (either officially<sup>73</sup> or informally<sup>74</sup>) or the Armenian dram.<sup>75</sup> Each entity grants nationality<sup>76</sup> though many inhabitants chose to adopt the Russian<sup>77</sup> or Armenian<sup>78</sup> nationality. The defence of the entity is in the hands of the local military forces and the President is the Commander-in-Chief,<sup>79</sup> at least on paper since in reality, the presence of Russian and Armenian armed forces ensures the security of the entities. These *de facto* States have also established legislation and systems in the field of health care, education, cultural, social welfare and environmental protection<sup>80</sup> all the more as the constitutions link the delivery of such social goods to human rights guarantees.<sup>81</sup> The effectiveness of such legislation is nonetheless limited by a lack of financial resources, a poor economy and thus great reliance on Russia and Armenia to provide the funds to support the local economy. Undoubtedly, such entities have been able to set up a classic State apparatus that is effective, though it remains rather limited in the sense that whilst they are able to perform the Weberian definition of a State and some basic State functions, they struggle at the economic and social level. Moreover, the independence of these entities might be rightly questioned.

#### 1.4. Capacity to Enter into Relations with other States

The fourth criterion, that of the capacity to enter into relations with other States, is probably the most strenuous to describe. Some authors maintain that it should not be an element of statehood because it is a consequence of an entity's ability to fulfil the three previous requirements,<sup>82</sup> the argument being that this capacity is not limited to States and thus not a sign that an entity is a State. Accordingly, '[e]ven if capacity were unique to states, the better view seems to be that, though capacity results from statehood, it is not an element in a state's creation.'<sup>83</sup>

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<sup>71</sup> Abkhazia: referred to in Constitution, Arts 29 and 53; South-Ossetia: referred to in Constitution, Art 45; Transnistria: Constitution, Arts 96-99; Nagorno-Karabakh: Constitution, Art 60.

<sup>72</sup> In Abkhazia, the *apsar* exists since 2008; Transnistria: Constitution, Art 96; Nagorno-Karabakh: Artsakh dram.

<sup>73</sup> See Tracey C German, 'Le conflit en Ossétie-du-Sud: La Géorgie contre la Russie' (2006) 1 *Politique Etrangère* 51, 52; Kolstø/Blakkisrud (n 45) 504.

<sup>74</sup> In Abkhazia the local currency is of limited usage as the Russian ruble is widely used.

<sup>75</sup> In Nagorno-Karabakh, the Armenian dram is much more widely used than the Artsakh dram. Kolstø/Blakkisrud (n 45) 501.

<sup>76</sup> Abkhazia: Constitution, Art 49; South Ossetia: Constitution, Art 16; Transnistria: Constitution, Art 3; Nagorno-Karabakh: Constitution, Art 47.

<sup>77</sup> For Abkhazia and South Ossetia, see Roman Petrov, 'The Legal Systems of the Donetsk/Lugansk People's Republics. International and European Considerations' in Harzl/Petrov (n 9) 209, 214 and EU (n 20) 132-133. South Ossetian President claimed that 95% of the inhabitants had opted for the Russian nationality (German (n 73) 52). For Transnistria, see ECtHR, *Catan and Others v Moldova and Russia*, Applications Nos 43370/04, 8252/05 and 18454/06, 19 October 2012, para 42; ECtHR, *Mozer v Moldova and Russia*, Application No 11138/10, 23 February 2016, para 107.

<sup>78</sup> ECtHR, *Chiragov and Others v Armenia*, Application No 1316/05, 16 June 2015, para 83.

<sup>79</sup> Abkhazia: Constitution, Art 53; South Ossetia: Constitution, Art 50; Transnistria: Constitution, Art 71; Nagorno-Karabakh: Constitution, Art 94.

<sup>80</sup> Abkhazia: Constitution, Arts 19 and 53; South Ossetia: Constitution, Arts 25, 26 and 28; Transnistria: Constitution, Arts 38, 39, 41, 42, 56, and 62; Nagorno-Karabakh: Constitution, Arts 11, 12, 15 and Chapter 3.

<sup>81</sup> Abkhazia: Constitution, Arts 19 and 32; South Ossetia: Constitution, Arts 25, 26, 27 and 28; Transnistria: Constitution, Arts 38, 39, 40, and 41; Nagorno-Karabakh: Constitution, Arts 38 and 57.

<sup>82</sup> Modasia (n 52) 2196.

<sup>83</sup> Thomas Grant, 'Defining Statehood: The Montevideo Convention and its Discontents' (1998-1999) 37 *Columbia J Transnt'l Law* 403, 435.



Scholars who accept that it is a requirement struggle with its practical application. First, the word 'capacity' can be understood as taking measures enabling an entity to act. A hypothetical example is an entity that sets up a Ministry of Foreign Affairs willing to engage with States and other international legal entities. It can be understood as the ability 'to effectively govern the concerned territory to the extent that it can undertake and apply international obligations internally.'<sup>84</sup> The constitution of Abkhazia specifies that it is a subject of international law<sup>85</sup> and that of South Ossetia that the entity can enter into relations with other States.<sup>86</sup> Foreign Affairs are often conducted by the President<sup>87</sup> though in Transnistria, the main lines of the foreign policy, including the military doctrine, are determined by the legislative power<sup>88</sup> and implemented by executive power.<sup>89</sup> In practice, it is interesting to note that in November 2000, the ministers of foreign affairs of Transnistria, Abkhazia, South Ossetia and Nagorno-Karabakh met in Tiraspol.<sup>90</sup> Should this meeting be considered as a piece of evidence that these four entities have the capacity to enter into relations with other States?<sup>91</sup> In September 2005, Russia organised a conference with South Ossetia, Abkhazia and Transnistria.<sup>92</sup> In 2015, the South Ossetian President was seeking closer ties not only with Abkhazia and Transnistria but also with Luhansk and Donetsk.<sup>93</sup> After all, if they can interact with each other why should they not have this capacity in relation to States?

Second, the quality of the interaction needs to be investigated. Besides the classic capacity to sign and ratify treaties, it might be tricky to pinpoint how the requirement of capacity is fulfilled. Would the establishment of an embassy satisfy the requirement, the accreditation of a commercial representation benefiting from some privileges,<sup>94</sup> or would lower-key events such as meetings between officials suffice? Ker-Lindsay brilliantly highlights the myriad of ways States officially interact with *de facto* States without still recognising them:<sup>95</sup> missions (usually called liaison offices) rather than embassies are established,<sup>96</sup> official documents and passports are recognised, there are direct or indirect economic interactions,<sup>97</sup> or sporting, cultural and educational interactions.<sup>98</sup>

Appraising the interaction of the four entities studied in this chapter is rather challenging owing to the paucity of information and the impossibility of scrutinising the interaction of all States towards these entities. The assessment can therefore (again!) only rely on work by

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<sup>84</sup> Doli (n 50) 108.

<sup>85</sup> Constitution of Abkhazia, Art 3.

<sup>86</sup> Constitution of South Ossetia, Art 10.

<sup>87</sup> Abkhazia: Constitution, Art 53; South Ossetia: Constitution, Art 47.

<sup>88</sup> Constitution, Art 62.

<sup>89</sup> Constitution, Arts 71 and 73.

<sup>90</sup> Dov Lynch, 'Separatist States and Post-Soviet Conflicts' (2002) 78 *Int'l Aff.(UK)* 831.

<sup>91</sup> Other *de facto* States have relationships too. For example, in 2020, Somaliland and Taiwan signed a bilateral accord to open representative offices in each entity. See Scott Pegg, 'The Somaliland-Taiwan Partnership: A New Frontier in De Facto State Diplomacy?' *De Facto States Research*, 14 August 2020, available at <https://defactostates.ut.ee/blog/somaliland-taiwan-partnership-new-frontier-de-facto-state-diplomacy>

<sup>92</sup> German (n 73) 60.

<sup>93</sup> German (n 44) 159.

<sup>94</sup> See France, Cour de Cassation Chambre civile 1, *Dame Clerget c Représentation commerciale de la République démocratique du Viet-Nam et autres*, 2 November 1971, JDI 1972, 267.

<sup>95</sup> Ker-Lindsay (n 5) 364.

<sup>96</sup> Geoff Berridge, *Diplomacy. Theory and Practice* (Palgrave 2015) 238.

<sup>97</sup> In his article, Kontorovich explains how States have interacted with *inter alia* the Turkish Republic of Northern Cyprus, Abkhazia, South Ossetia, Nagorno-Karabakh and Crimea. Eugene Kontorovich, 'Economic Dealings with Occupied Territories' (2015) 53 *Colum J Transnat'l L* 584.

<sup>98</sup> See also Pegg/Berg (n 3) 267-286.

other experts and focus on available information. For example, Nagorno-Karabakh has very little foreign trade except towards Armenia.<sup>99</sup> The USA provides foreign (humanitarian) aid to Nagorno-Karabakh<sup>100</sup> and has had from 1998 to 2019 funds earmarked to that effect<sup>101</sup> though it does not regard this direct aid as recognition.<sup>102</sup> Be that as it may, it never directly engaged with Nagorno-Karabakh.<sup>103</sup> Likewise, the US has rarely engaged directly with Abkhazia and when it has, it was usually with mid-level *de facto* officials, mayors, commerce and trade representatives, etc.<sup>104</sup> As Pegg and Berg demonstrate in relation to Abkhazia and South Ossetia, ‘the commonly held belief that international society ignores *de facto* states is incorrect’.<sup>105</sup>

Third, and more fundamentally, scholars observe that without recognition there is no real possibility to enter into relations with other States. ‘Without recognition, a state’s capability to enter relations with another state is greatly limited due to its isolation from the international community.’<sup>106</sup> Even though it is broadly agreed that recognition is declaratory<sup>107</sup> and not constitutive,<sup>108</sup> without recognition new entities struggle to function as States.<sup>109</sup> The reality is that they are not able to work if they are not recognised by a certain number of States.<sup>110</sup> They need to be recognised by their peers, i.e., States, as being one of them.<sup>111</sup> Such a position lays bare the fact that recognition is evidentiary: ‘non-recognition by the vast majority of States in the international community suggests that the factual criteria for statehood are not considered to have been fulfilled’.<sup>112</sup> In this vein, it is suggested that the fourth ‘criterion’ is a consequence rather than an element of statehood.<sup>113</sup> Alternatively, it could be defended that recognition is, in practice, a requirement of statehood<sup>114</sup> or that ‘in the context of secession at least, recognition of the seceded state by other states has at least

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<sup>99</sup> Kontorovich (n 97) 624. Nina Caspersen, *Unrecognized States. The Struggle for Sovereignty in the Modern International System* (Polity Press 2012) 56.

<sup>100</sup> Kontorovich (n 97) 624; Jim Nichol, ‘Armenia, Azerbaijan, and Georgia: Political Developments and Implications for U.S. Interests’, *Congressional Research Service*, 2 April 2014, 65.

<sup>101</sup> Cory Welt and Andrew Bowen, *Azerbaijan and Armenia: The Nagorno-Karabakh Conflict*, Congressional Research Service, 7 January 2021, R4665, 20.

<sup>102</sup> Kontorovich (n 97) 584.

<sup>103</sup> Pegg/Berg (n 3) 276-277.

<sup>104</sup> Pegg/Berg (n 3) 276-277.

<sup>105</sup> Pegg/Berg (n 3) 280.

<sup>106</sup> Anthony Murphy and Vlad Stancescu, ‘State Formation and Recognition in International Law’ (2017) 7(1) *Juridical Tribune* 6, 7; Doli (n 50) 108; Alan James, ‘The Practice of Sovereign Statehood in Contemporary International Society’ (1999) *XLVII Pol Stud* 457, 466.

<sup>107</sup> See Opinion 1, Annex to Alain Pellet, ‘The Opinions of the Badinter Arbitration Committee. A Second Breath for the Self-Determination of Peoples’ (1992) 63 *EJIL* 178, 182; Montevideo Convention (n 13) Art 3.

<sup>108</sup> The debate declaratory v constitutive theory is reproduced in a variety of academic papers. See, e.g., Fikfak (n 49) 108-109; Mehdi Belkahlia, ‘La qualité étatique accordée par le juge interne: Une reconnaissance procédurale de l’Etat?’ in Hélène Ruiz Fabri (ed), *International Law and Litigation: A Look into Procedure* (Nomos 2019) 233, 240-242.

<sup>109</sup> Armen Tamzarian, ‘Nagorno-Karabagh’s Right to Political Independence under International Law: An Application of the Principle of Self-Determination’ (1994) 24 *Southwest Univ Law Rev* 183, 201. See also Sterio (n 18) 216.

<sup>110</sup> Kälin *et al* (n 35) 154.

<sup>111</sup> Jolicoeur (n 50) 86.

<sup>112</sup> The Netherlands, District Court The Hague, *Democratic Republic of East Timor et al v State of the Netherlands* (1980) ILR 87 (1992) 74 as cited in Kälin *et al* (n 35) 154. See also EU (n 20) 129.

<sup>113</sup> See Doli (n 50) 108.

<sup>114</sup> Kälin *et al* (n 35) 154; Sterio (n 18) 230.

some part to play in its creation.<sup>115</sup> Abkhazia and South Ossetia have been recognised by Russia, Nicaragua, Venezuela, Tuvalu and Nauru,<sup>116</sup> and Syria.<sup>117</sup> Abkhazia was also recognised by Vanuatu in 2011.<sup>118</sup> Neither Nagorno-Karabakh nor Transnistria have been recognised though.<sup>119</sup>

These *de facto* States have thus the capacity to enter into relations with States; yet, the question is whether their level and intensity of engagement is deemed sufficient to consider them as States. In the case of the four entities, whilst they certainly show a willingness to engage with other States, their lack of recognition hampers them from reaching the required level and intensity.

As Okosa summarises, '[d]e facto states are entities that satisfy the four criteria of statehood enumerated in the Montevideo Convention.'<sup>120</sup> Abkhazia, South Ossetia, Transnistria and Nagorno-Karabakh prove the point, though for some their claims are less well grounded. Yet, they are not viewed as States and this is because, despite all claims to the contrary, a State does not exist in international law as soon as it exists, i.e., as soon as it meets the Montevideo criteria.<sup>121</sup>

## 2. Violations of the Prohibition of the Use of Force and of the Principle of Territorial Integrity

It is largely agreed that the fulfilment of the Montevideo Convention requirements is not sufficient.<sup>122</sup> It should be because, under the declarative theory of recognition that prevails under contemporary international law, an entity does not need to be recognised as a State to be one. Recognition only confirms the existence of the State.<sup>123</sup> The reality is that '[a] state does not simply exist as a matter of fact: the existence of a state is determined by *meeting international legal standards* and failure to do so implies denial of statehood in international law.'<sup>124</sup> Despite claims to the contrary, recognition plays a significant role<sup>125</sup> and even more so for seceding entities. For them, recognition becomes central; it is what matters in the end: 'The defining characteristic of unrecognized states, the factor that determines their position in the international system and predominates in internal debates, is their lack of recognition'.<sup>126</sup> Recognition comes at a price fixed by the international community of States that introduced normative, additional, elements to determine whether an entity ought to be recognised as a State.<sup>127</sup>

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<sup>115</sup> Radan (n 16) 20.

<sup>116</sup> Kälin *et al* (n 35) 154.

<sup>117</sup> 'Countries that Recognized South Ossetia's and Abkhazia's Independence', *TASS*, 29 May 2018.

<sup>118</sup> Lauri Mälksoo, 'Post-Soviet Eurasia, *Uti Possidetis* and the Clash between Universal and Russian-Led Regional Understandings of International Law' (2021) 53 *N Y U J Int'l L & Pol* 787, 816 (fn93).

<sup>119</sup> Mälksoo (n 118) 815 (fn 86).

<sup>120</sup> Okosa (n 19) 115.

<sup>121</sup> See Vidmar (n 14) 702-704.

<sup>122</sup> See Doli (n 50) 100.

<sup>123</sup> Montevideo Convention (n 13) Art 6.

<sup>124</sup> Roland Portmann, *Legal Personality in International Law* (CUP 2010) 253 (emphasis added).

<sup>125</sup> Okosa (n 19) 116.

<sup>126</sup> Caspersen (n 99) 16.

<sup>127</sup> Antoine Buyse and Rick Lawson, 'State Recognition: Admission (Im)Possible' (2007) 20 *LJIL* 785, 785.

## 2.1. Element of Statehood or Recognition

It is in the 1970s that the international community started to deny recognition to entities that were unlawfully created; such entities are 'illegitimate no matter how effective'.<sup>128</sup> The Tagliavini report made the point that '[i]n current international law, the observation of legal principles which are themselves enshrined in international law (notably the principles of self-determination and the prohibition of the use of force), are accepted as an *additional* standard for the qualification of an entity as a state'.<sup>129</sup>

Whilst legal literature is unclear whether such elements relate to recognition, becoming a member of an international organisation or are now deemed to be more generally related to statehood,<sup>130</sup> it is argued that these elements are essential for recognition but not for statehood purposes. First, such requirements exist because once an entity is a State it acquires all the rights and, of course, obligations related to this status; it is, therefore, important to ensure that from the outset a new State complies with international law.<sup>131</sup> As Hillgruber explains, '[t]he reliability of the new entity as a partner in international relations is the decisive criterion of statehood in the sense of international law'.<sup>132</sup> In other words, it is the relationship between the new entity and the 'established' States that is at stake. It is a question of recognition<sup>133</sup> and not statehood. Second, these requirements relate to values deemed to be shared by this community; the additional criteria are considered to be of *jus cogens* nature and, so, creating States in violation of such criteria means that they are illegal *per se*<sup>134</sup> or legal nullities<sup>135</sup> as the international community asserts that they cannot derive a right from a wrong (*ex injuria jus non oritur*).<sup>136</sup> Again, this to some extent concerns the relationship between the entity and 'established' States. Third, Gazzini reminds us that 'The question of the existence of the subject must be kept separate from that of the responsibility for and consequences of violations of international law.'<sup>137</sup> Otherwise, the purpose of international law, that to regulate the relationship between independent entities, is jeopardised. Fourth, although one might agree that it is imperative for such values to be taken into account, no agreement can be discerned on what these values or elements are.<sup>138</sup> The ones most commonly referred to in academic literature and found in the practice of States are that an entity cannot become a State if 1) it has been created in violation of the right of self-determination, 2) has violated the territorial integrity of the State from which it claims secession, or 3) it has been created by the use of force.<sup>139</sup> Fifth, unlike the Montevideo

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<sup>128</sup> Pegg (n 3) 5. See Marc Weller, 'Modesty Can Be a Virtue: Judicial Economy in the ICJ Kosovo Opinion' (2011) 24 *LJIL* 127, 135.

<sup>129</sup> EU (n 20) 128 (emphasis added).

<sup>130</sup> See Colin Warbrick, 'Recognition of States: European Practice' in Malcolm Evans (ed), *Aspects of Statehood and Institutionalism in Contemporary Europe* (Dartmouth 1997) 9, 17; Charpentier, 'Les déclarations des douze sur la reconnaissance des nouveaux Etats' (1992) 96 *RGDIP* 343, 352; Vidmar (n 14) 704.

<sup>131</sup> United Nations, *A More Secure World: Our Share Responsibility, Report of the Secretary-General's High-Level Panel on Threats, Challenges and Change*, 2004, para 29 (emphasis added).

<sup>132</sup> Christian Hillgruber, 'The Admission of New States to the International Community' (1998) 9 *EJIL* 449, 499.

<sup>133</sup> To some extent, it is possible to argue that an element of good faith must be present for a State to recognise another entity as a State.

<sup>134</sup> Okosa (n 19) 116; Vidmar (n 14) 704.

<sup>135</sup> Weller (n 128) 136.

<sup>136</sup> See discussion in Okosa (n 19) 122; Leonaitė and Žalimas (n 3) 27.

<sup>137</sup> Tarcisio Gazzini, 'Criteria for Statehood as Applied by the EU's Independent Fact-Finding Mission on the Conflict in Georgia' *EJIL:Talk!*, 8 December 2009.

<sup>138</sup> Quéniwet (n 11) 489.

<sup>139</sup> See e.g., Grzybowski (n 6) 254.

requirements that need to be fulfilled, these elements in fact prevent an entity from being considered a State: '[t]he underlying idea behind the concept is that an illegally created entity cannot become a State'.<sup>140</sup> Again, this deals with recognition and not statehood.

Sterio propounds an alternative view: '[t]hese additional criteria are in reality subparts of the fourth pillar of statehood, the capacity to enter into relations'.<sup>141</sup> Her criteria are slightly different from the ones usually enunciated by scholars. She refers to 'the need for recognition by both regional partners, as well as the most powerful states [...]; a demonstrated respect for human/minority rights; and a commitment to participate in international organizations, and to abide by a set world order'.<sup>142</sup>

Overall, whilst these elements are not imperative for statehood purposes, they are for recognition purposes and thus crucial for entities seceding from their parent State.

In relation to Abkhazia, South Ossetia, Transnistria, and Nagorno-Karabakh the principles they have transgressed include the prohibition on the use of force and the principle of territorial integrity. Their right to self-determination is scrutinised in depth in Section 3.

## 2.2. Unlawful Use of Force

One of the main international law principles is the prohibition of the use of force. This principle, enshrined in Article 2(4) UN Charter, covers not only the actual use of force but also the threat of the use of force aimed at the territorial integrity of the State. Whilst the prohibition of the use of force is often deemed to be of *jus cogens* nature,<sup>143</sup> some scholars such as Green disagree, offering a more nuanced <sup>144</sup> Moreover, the latest work of the International Law Commission only refers to 'the prohibition of aggression' which is of a higher threshold than the prohibition of the use of force as an example of a peremptory norm.<sup>145</sup>

An entity created by the unlawful use of force cannot be recognised because it violates the prohibition.<sup>146</sup> The first application of this principle in relation to the non-recognition of a *de facto* State was the adoption of Resolution 541 in 1983 by the United Nations Security Council following the creation of the Turkish Republic of Northern Cyprus.<sup>147</sup> States are thus bound to withhold recognition, whether formal or implied, of that entity because of a breach of a *jus cogens* norm. This is backed by Article 41(2) of the Articles on the Responsibility of States for Internationally Wrongful Acts which obliges States not to recognise as lawful a situation created by a breach of a peremptory norm<sup>148</sup> and Conclusion 19(2) of the Draft conclusions on identification and legal consequences of peremptory norms of general international law (*jus cogens*).<sup>149</sup> Consequently, the entity is denied the rights, competences and privileges

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<sup>140</sup> Vidmar (n 14) 704.

<sup>141</sup> Sterio (n 18) 210.

<sup>142</sup> Sterio (n 18) 210.

<sup>143</sup> ILC, *Draft Articles on the Responsibility of States for Internationally Wrongful Acts (ARSIWA)*, Commentary to Art 40 p 112 fn 641 and fn 644. For an excellent examination of the views of the majority of scholars on the subject, see James Green, 'Questioning the Peremptory Status of the Prohibition of the Use of Force' (2011) 32 *Mich L J* 215, 220-225.

<sup>144</sup> Green (n 143).

<sup>145</sup> ILC, *Draft Conclusions on Identification and Legal Consequences of Peremptory Norms of General International Law (jus cogens)*, 2022, Conclusion 23 (Annex)

<sup>146</sup> Okosa (n 19) 118. See Leonaitė and Žalimas (n 3) 25.

<sup>147</sup> UNSC, Resolution 541 (1983), UN Doc S/RES/541, 18 November 1983.

<sup>148</sup> ARSIWA (n 143) Art 41(2) and Commentary paras 5 and 6.

<sup>149</sup> Draft Conclusions on *Jus Cogens* Norms (n 145).

associated with statehood.<sup>150</sup> Whilst it may be suggested that such an enunciation relates to recognition and not to statehood as such, it should be stressed that a wider approach has been taken in recent years. For example, in 2005, the Parliamentary Assembly of the Council of Europe 'reaffirm[ed] that independence and secession of a regional territory from a state may only be achieved through a *lawful* and *peaceful* process based on the democratic support of the inhabitants of such territory and *not in the wake of an armed conflict* leading to ethnic expulsion and the de facto annexation of such territory to another state',<sup>151</sup> thereby dropping any express reference to recognition and seemingly linking it to independence and secession. Whilst the principle undoubtedly makes sense, its strict application within the context of the creation of new States unable to secede from their parent State might be questionable. First, often, they emerge from armed conflicts, having defeated the armed forces of their parent State, unwilling to let the entity become independent. Second, as Peters points out, it is unclear '*whose* use of force' makes an independence declaration violative of international law.<sup>152</sup> Third, it might be contended that the prohibition on the use of force only applies to States and not to non-State actors since it is enshrined in legal instruments that govern relations between States. Fourth, since the UN Security Council Resolution was passed in the context of a *de facto* State being created by the use of force by a State (Turkey) it could be maintained, that the rule only applies when another State is involved (which would tally up with the previous proposition). Accordingly, it is debatable whether the principle applies more generally. To some extent, the aforementioned 2005 Resolution of the Parliamentary Assembly could confirm this interpretation as it refers to 'an armed conflict leading to [...] the de facto annexation of such territory to another state' and not to any armed conflict; yet, it also stresses that the independence must be 'achieved through a [...] peaceful process', thereby covering all uses of force.

In relation to the four *de facto* States in the post-Soviet space, one declared its independence after an armed conflict (Nagorno-Karabakh) whilst, for the others, the conflict followed the declaration of independence. When scrutinising the timeline, one needs to bear in mind that the Soviet Union was, as a matter of law, dissolved on 31 December 1991 and that the home States involved in this study, i.e., Georgia, Moldova and Azerbaijan, all declared their own independence before the formal collapse of the Soviet Union, thereby further complicating legal matters. On 25 August 1990, i.e., before the collapse of the Soviet Union, the Supreme Council of Abkhazia adopted a 'Declaration of State Sovereignty'. Then, a month after Abkhazia declared its independence on 23 July 1992, Georgia sent troops to restore order, an operation that led to an armed conflict and the withdrawal of Georgian troops and most Georgians were forced to flee.<sup>153</sup> During that conflict, Russia supported the Abkhaz forces by, e.g., providing them with weapons, attacking targets in Georgian-controlled territory, etc.<sup>154</sup> A spanner is however thrown into this timeline by Abkhazia itself as it declares in the 12

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<sup>150</sup> See Stefan Talmon, 'The Duty Not to 'Recognize as Lawful' a Situation Created by the Illegal Use of Force or Other Serious Breaches of a *Jus Cogens* Obligation: An Obligation without Real Substance?' in Christian Tomuschat and Jean-Marc Thouvenin (eds), *The Fundamental Rules of the International Legal Order: Jus Cogens and Obligations Erga Omnes* (Brill 2006) 99, 115-117.

<sup>151</sup> Parliamentary Assembly of the Council of Europe, Resolution 1416 (2005), 25 January 2005 (emphasis added). The resolution, albeit focused on the conflict over the Nagorno-Karabakh, can be used more widely.

<sup>152</sup> Anne Peters, 'Populist International Law? The Suspended Independence and the Normative Value of the Referendum on Catalonia' *EJIL:Talk!*, 12 October 2017.

<sup>153</sup> Cory Welt, 'Georgia: Background and U.S. Policy', *Congressional Research Service*, 10 June 2021, R45307, 12.

<sup>154</sup> Human Rights Watch, *Georgia/Abkhazia: Violations of the Laws of War and Russia's Role in the Conflict*, Vol 7, No 7, March 1995.

October 1999 Act of State Independence of the Republic of Abkhazia that ‘the subsequent Abkhazo-Georgian war of 1992-1993 resulted in the independence of Abkhazia both de facto and de jure’, thereby claiming that independence was the product of an armed conflict whilst at the same time stating that its people ‘have reaffirmed their determination to proceed with building a sovereign, democratic State.’<sup>155</sup>

Transnistria claimed its independence before any use of force. Following a referendum that lasted between December 1989 and November 1990 with 90% of the voters in favour of independence, the Congress of Deputies in Tiraspol declared independence on 2 September 1990 whilst Moldova was still part of the Soviet Union. The Supreme Council of Transnistria voted to join the Union of Soviet Socialist Republics (USSR) on 2 September 1991, after Moldova declared its independence but eventually, after a referendum carried out on 1 December 1991, declared its independence outside the Soviet Union. Clashes between the police and separatists and eventually paramilitary formations and professional guards ended in an armed conflict in June 1992. The Russian 14<sup>th</sup> Army that was present in Transnistria directly or indirectly helped secessionists,<sup>156</sup> providing military, economic, financial, and political support.<sup>157</sup>

In November 1989, the South Ossetian Council asked Georgia to upgrade its status to that of an autonomous republic.<sup>158</sup> Georgia refused to do so. Then on 20 September 1990, it declared itself an independent Republic, part of the USSR.<sup>159</sup> Following clashes between Georgians and South Ossetians and a declaration of emergency Georgian troops were deployed in December 1990.<sup>160</sup> South Ossetia declared its formal independence in December 1991. Then the population approved secession from Georgia and integration with Russia by way of a referendum in January 1992 which led to the Supreme Council of the Republic of South Ossetia proclaiming its independence in May 1992.<sup>161</sup> This all took place in the midst of hostilities which lasted until the Dagomys peace agreement on 24 June 1992.

Nagorno-Karabakh had been embroiled in an (armed) conflict since 1988 under the Soviet Union when it declared its independence by way of a referendum on 10 December 1991. The conflict escalated when Armenia and Azerbaijan became independent, and the Soviet Union collapsed leading to a full armed conflict that ended in a cease-fire brokered by Russia in May 1994. What must be stressed in this situation is the important role played by Armenia in the conflict as it sent troops onto Azerbaijani territory in January 1992 and by mid-1992 its forces controlled the Nagorno-Karabakh and the Lachin corridor.<sup>162</sup> The European Court of Human Rights admitted that it was hardly conceivable that the entity would have been able to fight Azerbaijani armed forces without the support of Armenia.<sup>163</sup> Resultantly, as Krüger explains, ‘Armenia thus has not only violated the prohibition on the use of force and the prohibition on

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<sup>155</sup> Act of State Independence of the Republic of Abkhazia, 12 October 1999.

<sup>156</sup> Parliamentary Assembly of the Council of Europe, *Report on the Application by Moldova for Membership of the Council of Europe*, Rapporteur Lord Finsberg, Doc 7278 Revised, 22 May 1995, paras 30 and 73; Vahl and Emerson (n 42) 7.

<sup>157</sup> ECtHR, *Ilaşcu and Others v Moldova and Russia*, Application No 48787/99, 8 July 2004, para 392; *Catan* (n 77) para 105.

<sup>158</sup> *Bowring* (n 11) 17-18.

<sup>159</sup> *German* (n 44) 157.

<sup>160</sup> *German* (n 44) 157.

<sup>161</sup> *Kurtskhalia* (n 4) 76; *Kolstø and Blakkisrud* (n 45) 488.

<sup>162</sup> Philip G Roeder, *Where Nation-States Come From. Institutional Change in the Age of Nationalism* (PUP 2007) 313.

<sup>163</sup> *Chiragov* (n 78) para 174.

intervention under international law in the past, but continues to do so in an unjustified form'.<sup>164</sup> Parallels can thus be drawn with the Turkish Republic of Northern Cyprus. In fact, '[f]ull independence of Nagorno-Karabakh recognized by the world community is now unthinkable as is unthinkable a recognized independent Cyprus Turkish Republic.'<sup>165</sup> To conclude, in South Ossetia and Transnistria, it was the declaration of independence that led to an armed conflict and thus no violation of the prohibition of the use of force can be attached to these *de facto* States. In Abkhazia, the timeline seems to indicate the same, but the official position of Abkhazia is somehow more muddled. As for Nagorno-Karabakh, there is no doubt that independence was reached by using force.

### 2.3. Violation of the Principle of Territorial Integrity

Whereas in the past, entities only had to prove that they fulfilled the objective criteria of statehood, this changed in the second half of the twentieth century which 'witnessed the rejection of unilateral secession and a widespread refusal to accept the legalisation of *de facto* statehood'.<sup>166</sup>

Such a change is linked to the principle of territorial integrity. As *Hanna* explains, '[c]ontemporary secession claims violate territorial integrity, the central characteristic of international law'.<sup>167</sup> This principle, which ensures that a State 'is the paramount authority within its own borders',<sup>168</sup> is found in Article 2(4) of the UN Charter (and is thus closely linked to the principle of the prohibition of the use of force<sup>169</sup>), repeated in the Friendly Relations Declaration which asserts that 'the territorial integrity and political independence of the State are inviolable',<sup>170</sup> and reaffirmed in a far-reaching range of cases before the ICJ.<sup>171</sup> It is also viewed of customary nature<sup>172</sup> though not necessarily deemed to be of *jus cogens* nature.<sup>173</sup> The principle is even more important as a territory 'is the essence of their statehood'.<sup>174</sup>

A fundamental question is whether the principle applies within a State. Article 2(4) UN Charter and the Friendly Relations Declaration confine the application of the principle to relations between States.<sup>175</sup> In the *Advisory Opinion on Kosovo*, the ICJ stated that 'the scope of the principle of territorial integrity is confined to the sphere of relations between States',<sup>176</sup> thus

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<sup>164</sup> Krüger (n 9) 112.

<sup>165</sup> Dimitry Furman, 'The Dynamic of the Karabakh Conflict' in Ehrhart, Kreikemayer and Zagorski (n 41) 40.

<sup>166</sup> Ker-Lindsay (n 5) 364.

<sup>167</sup> Roya M Hanna, 'Right to Self-Determination in *Re Secession of Quebec*' (1999) 23 *Md J Int'l L* 213, 230.

<sup>168</sup> Lax (n 14) 58.

<sup>169</sup> *Nicaragua Case* (n 47) para 212.

<sup>170</sup> UNGA, *Declaration on the Principles of International Law concerning Friendly Relations and Co-operation among States in Accordance with the Charter of the United Nations*, UN Doc A/RES/2625 (XXV), 24 October 1970.

<sup>171</sup> ICJ, *Territorial Dispute (Libyan Arab J'amahiriya/Chad)*, Judgment, [1994] ICJ Rep 6, para 72; ICJ, *The Corfu Channel Case (United Kingdom v Albania)*, Judgment, [1949] ICJ Rep 4, 35; *Nicaragua Case* (n 47) para 263; ICJ, *Case Concerning the Temple of Preah Vihear (Cambodia v Thailand)*, Judgment, [1962] ICJ Rep 6, 34.

<sup>172</sup> Sterio (n 18) 223.

<sup>173</sup> Draft Conclusions on *Jus Cogens* Norms (n 145) Conclusion 23 (Annex).

<sup>174</sup> Somto David Ojukwu and Osita Dominic Okoli, 'A Critical Appraisal of the Right to Self-Determination under International Law' (2021) 12(1) *Nnamdi Azikiwe Uni J Int'l L Jurisprudence* 127, 127; Sterio (n 18) 223.

<sup>175</sup> Vidmar (n 14) 707. On Art 2(4) UN Charter and its application between States, see Olivier Corten, 'Territorial Integrity Narrowly Interpreted: Reasserting the Classical Inter-State Paradigm of International Law' (2011) 24 *LJIL* 87, 90-91.

<sup>176</sup> ICJ, *Accordance with International Law of the Unilateral Declaration of Independence in Respect of Kosovo*, Advisory Opinion, [2010] ICJ Rep 141, para 80.



applying the principle 'only, horizontally, but not vertically within a State'.<sup>177</sup> Accordingly, a non-State entity cannot violate the principle of territorial integrity since the principle only applies between States,<sup>178</sup> a position that Vidmar and Corten apprise as incorrect.<sup>179</sup> As Vidmar argues, the Friendly Relations Declaration mentions the principle of territorial integrity in the context of the right of self-determination that applies to peoples.<sup>180</sup> In other words, the principle of territorial integrity constrains the peoples' right of self-determination and so, the principle of territorial sovereignty cannot be solely applied between States, a position also adopted in the Tagliavini report.<sup>181</sup> Moreover, the principle has been extensively referred to in the context of terrorism (usually deployed by non-State actors),<sup>182</sup> indigenous peoples,<sup>183</sup> minorities,<sup>184</sup> etc.

The application of the principle to non-State entities seems to lead to accepting an absolute prohibition of unilateral secession.<sup>185</sup> There is indeed no principle of or right to secession.<sup>186</sup> As Borgen bluntly states, secession 'is treated as a fact: a secession either was successful, it was not, or it is still being contested.'<sup>187</sup>

According to some scholars, secession is permitted, on the condition that the parent State allows it and so the principle of territorial sovereignty is not breached.<sup>188</sup> This means that '[s]tatehood [is] secure only when the prior claimant to those territorial units relinquish[es] its claim'<sup>189</sup> and if 'achieved through a lawful and peaceful process'.<sup>190</sup> Acceptance of secession occurs through some formal official act of recognition. Still, 'the metropolitan capitals are reluctant to abandon one of their strongest weapons with regard to their separatist regions: that is, withholding formal recognition of their existence. Non-recognition relegates the self-declared states to continued pariah status in international relations.'<sup>191</sup>

In the case of Abkhazia and South Ossetia, Georgia did not accept the secession of these two entities. Its original silence cannot be deemed as acquiescence as, quickly after Georgia settled its political system, it clearly indicated that the territory of Abkhazia and South Ossetia

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<sup>177</sup> Volker Röben, 'The ICJ Advisory Opinion on the Unilateral Declaration of Independence in Respect of Kosovo: Rules or Principles?' (2010) 2(3) *GoJIL* 1065, 1068.

<sup>178</sup> Georges Abi-Saab, 'Conclusions' in Marcelo G Kohen (ed), *Secession – International Law Perspectives* (CUP 2006) 470, 474.

<sup>179</sup> Vidmar (n 14) 368-369. Corten (n 175) 91.

<sup>180</sup> Vidmar (n 14) 708.

<sup>181</sup> EU (n 20) 137.

<sup>182</sup> See e.g., United Nations Human Rights Council, *Enhancement of International Cooperation in the Field of Human Rights*, UN Doc A/HRC/RES/47/9, 16 July 2021, para 14.

<sup>183</sup> UNGA, *United Nations Declaration on the Rights of Indigenous Peoples*, UN Doc A/RES/61/295, 13 September 2007, Art 46(1).

<sup>184</sup> Framework Convention for the Protection of National Minorities, ETS No 157, 1 February 1995, Art 21; European Charter on Regional or Minority Languages, ETS No 148, 5 November 1992, Art 5.

<sup>185</sup> See United Nations Office of Public Information, 'Statement of Secretary General Thant', *UN Monthly Chronicle* 1970, 36.

<sup>186</sup> Adam Twardowski, 'The Return of *Novorossiya*: Why Russia's Intervention in Ukraine Exposes the Weakness of International Law' (2015) 24 *Minn J Int'l L* 351, 368.

<sup>187</sup> Chris Borgen, 'Can Crimea Secede by Referendum?' *Opinio Juris*, 6 March 2014.

<sup>188</sup> Alexander Orakhelashvili, 'Statehood, Recognition and the United Nations System: A Unilateral Declaration of Independence of Kosovo' (2008) 12 *Max Planck Yrbk UN L* 1, 13.

<sup>189</sup> Grant (n 83) 439-440.

<sup>190</sup> PACE Resolution 1416 (2005) (n 151).

<sup>191</sup> Lynch (n 90) 833.

belonged to Georgia.<sup>192</sup> Such territorial sovereignty was also favoured by the UN Security Council with regard to Abkhazia<sup>193</sup> until the 2008 armed conflict opposing Georgia to Russia in South Ossetia. Nothing similar was however undertaken in relation to South Ossetia though the phrasing of many resolutions regarding Abkhazia invokes the territorial sovereignty of Georgia more generally.<sup>194</sup> Moldova did not approve of the secession of Transnistria either.<sup>195</sup> Likewise, Azerbaijan, from the outset, rejected the secession of Nagorno-Karabakh as it fought to keep control of it. Such a position has been widely accepted at the international level, with a plethora of UN Security Council resolutions referring to the territorial integrity of all States in the region<sup>196</sup> and/or specifically mentioning that of Azerbaijan.

That being said, as Vidmar stresses, there is no legal basis in international law that prohibits unilateral secession.<sup>197</sup> A better position is that international law is neutral<sup>198</sup> towards secession: 'an entity is neither prohibited from, nor entitled to, secession when the parent State continues to make a counterclaim to territorial integrity.'<sup>199</sup> For as long as a counterclaim to territorial integrity exists and is not disregarded by the international community, the seceding entity is not a State.<sup>200</sup> Fikfak's interpretation of the *Re Secession of Quebec* supports this view as she notes that '(1) the success of a unilateral secession depends on international recognition, and (2) the conduct of the parent state towards the independence-seeking entity will be considered very important when states decide on granting recognition.'<sup>201</sup> Moreover, a wide range of international legal instruments preclude secession without the consent of the parent State.<sup>202</sup> However, the principle of territorial integrity is no guarantee against the application of the right of self-determination, notably because of the safeguard clause included in the Friendly Relations Declaration that alludes to what is called 'remedial secession'.<sup>203</sup>

If secession is permitted, it must comply with the *uti possidetis juris* rule, which is understood as the principle of respect for the territorial *status quo*.<sup>204</sup> The rule is widely acknowledged, its 'periodic restatement [...] perpetuat[ing] its salience in the international law governing

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<sup>192</sup> See e.g., UNGA, *Right of Peoples to Self-Determination*, Report of the Secretary-General, UN Doc A/58/180, 24 July 2003, para 4.

<sup>193</sup> See e.g., the first one UN Security Council, Resolution 876 (1993) of 19 October 1993, para 1 and the last one is United Nations Security Council, Resolution 1808 (2008), UN Doc S/RES/1808 (2008), 15 April 2008, para 1.

<sup>194</sup> See the list of resolutions mentioned in the Tagliavani report that refers to the territorial integrity of Georgia. EU (n 20) 145 (fn81).

<sup>195</sup> *Ilaşcu* (n 157) para 341.

<sup>196</sup> UNSC, Resolution 822, 30 April 1993, Preamble; UNSC, Resolution 853, 29 July 1993, Preamble; UNSC, Resolution 874, 14 October 1993, Preamble; UNSC, Resolution 884, 13 November 1993, Preamble.

<sup>197</sup> Vidmar (n 14) 708.

<sup>198</sup> For a discussion on the concept of neutral legality, see Ka Lok Yip, *The Use of Force against Individuals in War under International Law* (OUP 2022) 75-79.

<sup>199</sup> Vidmar (n 14) 709. See also Jean-Baptiste Jeangène Vilmer, 'Crimée: les contradictions du discours russe' (2015) 1 *Politique Étrangère* 159, 167; Corten (n 175) 88; Weller (n 128) 135-136; Gary Wilson, 'Secession and Intervention in the former Soviet Space: The Crimean Incident and Russian Interference in its "Near Abroad"' (2016) 37 *Liverpool LR* 153, 159.

<sup>200</sup> Vidmar (n 14) 709.

<sup>201</sup> Fikfak (n 49) 111. See also Wilson (n 199) 159.

<sup>202</sup> See Mikulas Fabry, 'The Contemporary Practice of State Recognition: Kosovo, South Ossetia, Abkhazia, and their Aftermath' (2012) 40(5) *Natl Pap* 661, 664.

<sup>203</sup> See Radan (n 16) 28 and Wilson (n 199) 161. For a contrary view, see EU (n 20) 138.

<sup>204</sup> Opinion 3 (n 107) 184.

territory'.<sup>205</sup> Its latest iteration is found in Opinion 3 of the Badinter Committee which, based on the *Frontier Dispute Case*,<sup>206</sup> determined that it 'is today recognized as a general principle'.<sup>207</sup> Notwithstanding, as Mälksoo expounds, the principle is neither codified in a treaty nor 'is it obvious that it is a universally binding customary rule.'<sup>208</sup> The ICJ stressed that the principle 'is logically connected with the phenomenon of the obtaining of independence'.<sup>209</sup> Originally applied in the context of the decolonisation of Spanish South America and Africa,<sup>210</sup> the rule specifies that new entities must keep the borders inherited from the colonisation or from the administrative divisions of the State.<sup>211</sup> This means that, 'except where otherwise agreed, the former boundaries become frontiers protected by international law'.<sup>212</sup>

Whilst the national borders become the new international borders, autonomous regions within that State do not have this opportunity. Sadly, this is one of the sources of the current intractable plight faced by the *de facto* States in the post-Soviet space. They were autonomous republics or regions (oblasts) within Soviet States and were thus prevented from declaring their independence.<sup>213</sup> Bowring indicates that Abkhazia, South Ossetia, and Transnistria never seceded from what is now their parent State.<sup>214</sup> This is however partially incorrect though it is true that all three entities expressed their desire to become independent *prior* to the collapse of the Soviet Union.

South Ossetia had been an autonomous region as part of Georgia and requested an upgrade of status to that of an autonomous republic in November 1989, before the fall of the Soviet Union. It was not a republic; but, it was not part of a republic either and thus an administrative entity within an administrative entity. On 20 September 1990, it self-proclaimed itself as an independent republic, a constituent part of the USSR and thus seceded from Georgia which was a Soviet Republic.<sup>215</sup> The plot thickens even more as Georgia dissolved the region on 11 December 1990.<sup>216</sup> South Ossetia declared its independence on 29 May 1992, after the collapse of the Soviet Union and the creation of Georgia. It thus seceded from Georgia as an independent State though as a non-territory (according to Georgia) which means that it violated the *uti possidetis* rule that requires administrative borders to be kept.

On 25 August 1990, the Supreme Council of Abkhazia adopted a 'Declaration of State Sovereignty', and on 23 July 1992 after the creation of Georgia and the collapse of the Soviet Union reiterated its independence. If one considers the declaration of State sovereignty as a declaration of independence, Abkhazia did not violate the principle of territorial integrity of Georgia but, as explained earlier, given that the 1999 Act of Independence indicates that independence was declared after the conflict with Georgia, the logical conclusion is that

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<sup>205</sup> Joshua Castellino, 'Territorial Integrity and the "Right" to Self-Determination: An Examination of the Conceptual Tools' (2008) 33(2) *Brook J Int'l L* 503, 507.

<sup>206</sup> ICJ, *Case Concerning the Frontier Dispute (Burkina Faso v Mali)*, Judgment, [1986] ICJ Rep 554, para 20.

<sup>207</sup> Opinion 3 (n 107) 184.

<sup>208</sup> Mälksoo (n 118) 813.

<sup>209</sup> *Frontier Dispute Case* (n 206) para 20.

<sup>210</sup> Opinion 3 (n 107) 184; *Frontier Dispute Case* (n 206) para 20.

<sup>211</sup> Malcolm N Shaw, 'The Heritage of States: The Principle of Uti Possidetis Juris Today' (1996) 67 *BYIL* 75, 97.

<sup>212</sup> Opinion 3 (n 107) 184. See also Opinion 2, Annex to *Pellet*, Opinions (n 107) 183.

<sup>213</sup> Coppieters (n 1) 992.

<sup>214</sup> Bowring (n 11) 16-18.

<sup>215</sup> German (n 44) 157.

<sup>216</sup> Roeder (n 162) 51.

Abkhazia was in breach of the principle. It would however not have violated the *uti possidetis* rule.<sup>217</sup>

Transnistria declared its independence on 2 September 1990 when Moldova was still part of the Soviet Union and expressed its wish to join the USSR as an independent Republic on 2 September 1991 after Moldova declared its independence. On 1 December 1991, a further referendum enabled Transnistria to declare its independence outside the Soviet Union. Taking into account the 1990 declaration of independence, the conclusion is that Transnistria did not secede from Moldova as an independent State. These three entities also kept their administrative borders as a republic/region.

In relation to Nagorno-Karabakh, it can be contended that it was an original component of the Republic of Azerbaijan and thus seceded from that independent State.<sup>218</sup> Azerbaijan declared its independence on 30 August 1991, Nagorno-Karabakh declared its independence four days later,<sup>219</sup> Azerbaijan then abolished the legal status of Nagorno-Karabakh as an autonomous region on 26 November 1991<sup>220</sup> and brought it under its direct rule and then on 10 December 1991 Nagorno-Karabakh declared its independence<sup>221</sup> following a referendum.

Owing to the complicated situation that developed as the Soviet Union was collapsing, it is difficult to assess in clear terms whether the *de facto* States violated the principle of territorial sovereignty as it is often unclear when they seceded and resultantly whether they seceded from their so-called parent-State (i.e., Georgia, Moldova, and Azerbaijan) or from the Soviet Union. The international community nevertheless has taken the view that these entities seceded from their parent-State<sup>222</sup> and, as Vidmar points out, '[u]ltimately, the hurdle that the independence-seeking entity needs to overcome is the territorial integrity of its parent State'.<sup>223</sup> Such impediment can only be removed in the case of remedial secession, as a last resort. It is by invoking the right of self-determination that the peoples of these *de facto* States might be able to claim that they can secede.

### 3. Remedial Secession and the Right of Self-Determination

The right of self-determination, if denied internally, allows for a lawful violation of the principle of territorial integrity leading to the exercise of the right of self-determination externally and the creation of a new State.<sup>224</sup> In other words, albeit sacrosanct, the principle of territorial integrity can be breached by peoples, provided some specific circumstances are present. All three Caucasian *de facto* States claim in their constitutions that they are based on the right of self-determination,<sup>225</sup> whilst the constitution of Transnistria makes no such claim. After offering a critical presentation of the right of self-determination this section examines the circumstances under which peoples can exercise their right to external self-determination and create a State whilst applying the requirements to the four *de facto* States.

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<sup>217</sup> See EU (n 20) 146.

<sup>218</sup> Krüger (n 9) 42-49.

<sup>219</sup> Parliamentary Assembly of the Council of Europe, *Armenia's Application for Membership of the Council of Europe*, Rapporteur Volcic, Doc 8747, 23 May 2000, para 49.

<sup>220</sup> Roeder (n 162) 51.

<sup>221</sup> ECtHR, *Sargsyan v Azerbaijan*, Application No 40167/06, 16 June 2015, para 19.

<sup>222</sup> Coppieters (n 1) 996.

<sup>223</sup> Vidmar (n 14) 746

<sup>224</sup> Fikfak (n 49) 111; Supreme Court of Canada, *Re Secession of Quebec*, [1998] 2 SCR 217 (Can), para 126.

<sup>225</sup> Constitution of Abkhazia, Art I; Constitution of South Ossetia, Art 1. See also EU (n 20) 135; Constitution of Nagorno-Karabakh, Preamble.

### 3.1. The Right of Self-Determination

The right of self-determination is undeniably one of the most controversial principles of international law.<sup>226</sup> ‘Controversial to all, inconveniencing to many, and passionately vexing to a few, it has remained central to political changes and scholarly discourse’.<sup>227</sup> Its interpretation is manifold and increasingly diverging, especially since the declaration of independence of Kosovo which has led to a flurry of heated debates.<sup>228</sup>

The right of self-determination is enshrined in a variety of legally and non-legally binding instruments. Articles 1(2) and 55 of the United Nations Charter expressly refer to the principle of self-determination of peoples. It also appears in Article 1 of the International Covenant on Civil and Political Rights<sup>229</sup> and the International Covenant on Economic Social and Cultural Rights.<sup>230</sup> Moreover, it is found in two important declarations of the United Nations General Assembly, the 1960 Declaration on the Granting of Independence to Colonial Countries and Peoples<sup>231</sup> and the 1970 Declaration on Principles of International Law Concerning Friendly Relations and Co-operation Among States in Accordance with the Charter of the United Nations.<sup>232</sup> More generally, the principle of self-determination is viewed to be of customary nature<sup>233</sup> and, according to the latest work of the International Law Commission, is of *jus cogens* nature.<sup>234</sup> The ICJ has recognised it as ‘one of the essential principles of contemporary international law’.<sup>235</sup> At the European level, the Helsinki Final Act<sup>236</sup> and the Charter of Paris,<sup>237</sup> two instruments referred to in the Declaration on the Guidelines on Recognition of New States in Eastern Europe and the Soviet Union, safeguard the right to self-determination too.

None of these instruments though define the right of self-determination. First, it is often essentially linked to the decolonisation process.<sup>238</sup> One can point out that the Declaration on the Granting of Independence to Colonial Countries and Peoples refers to ‘colonised peoples’ and not to ‘peoples’.<sup>239</sup> Such an interpretation would however be flawed because the right of self-determination (albeit phrased as autonomy) was originally mentioned in relation to minorities in Europe after the First World War, as one of US President Wilson’s 14 points, and

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<sup>226</sup> As Castellino avows, ‘despite the volumes written from various disciplinary perspectives, the right to self-determination remains an essentially contested right with several meanings attributable to it.’ Castellino (n 205) 513.

<sup>227</sup> Chinedu R Ezetah, ‘Legitimate Governance and Statehood in Africa: Beyond the Failed State and Colonial Self-Determination’ in Edward K Quashigah and Obiora C Okafor (eds), *Legitimate Governance in Africa* (Kluwer 1999) 421, 448.

<sup>228</sup> EU (n 20) 26.

<sup>229</sup> International Covenant on Civil and Political Rights, 999 UNTS 171, 16 December 1966.

<sup>230</sup> International Covenant on Economic, Social and Cultural Rights, 993 UNTS 3, 16 December 1966.

<sup>231</sup> UNGA, *Declaration on the Granting of Independence to Colonial Countries and Peoples*, UN Doc A/RES/1514(XV), 14 December 1960.

<sup>232</sup> Friendly Relations Declaration (n 170).

<sup>233</sup> *Western Sahara Advisory Opinion* (n 24); *Frontier Dispute Case* (n 206); ICJ, *Case Concerning East Timor (Portugal v Australia)*, Judgment, [1995] ICJ Rep 90, para 29; ICJ, *Legal Consequences of the Separation of the Chagos Archipelago from Mauritius in 1965*, Advisory Opinion, [2019] ICJ Rep 95, para 152.

<sup>234</sup> Draft Conclusions on *Jus Cogens* Norms (n 145) Conclusion 23 (Annex). See also Twardowski (n 186) 368.

<sup>235</sup> *Case Concerning East Timor* (n 233) para 29.

<sup>236</sup> Helsinki Final Act 1975, the Declaration on Principles Guiding Relations between the Participating States.

<sup>237</sup> Charter of Paris for a New Europe, Paris 1990.

<sup>238</sup> See e.g., Written Statement of the People’s Republic of China to the International Court of Justice on the Issue of Kosovo, 16 April 2009; See *Chagos Advisory Opinion* (n 233).

<sup>239</sup> See Wilson (n 199) 160; Ojukwu and Okoli (n 174) 129.

more specifically the collapse of the Austrian-Hungarian and Ottoman empires.<sup>240</sup> Moreover, as Sterio demonstrates, a wide range of legal instruments offer a wider approach to the right of self-determination.<sup>241</sup> Second, the right of self-determination tends to be associated with secession when the reality is that the right of self-determination can take an internal and external form<sup>242</sup> as clearly spelled out in the Declaration on Principles Guiding Relations between the Participating States of the Helsinki Final Act 1975.<sup>243</sup> Furthermore, Ezetah observes that 'the breadth of the right of self-determination is not coterminous with secession alone, it has provided for imaginative construction of legal relations that will enhance peaceful coexistence between minorities and majority cultures. Its legitimate exercise could range from a democratic framework, degrees of autonomy with an existing state, to outright separation.'<sup>244</sup>

### 3.2. Conditions to Exercise the Right to External Self-Determination

The right to self-determination can only be exercised by 'peoples' and provided a certain set of circumstances is present.

#### 3.2.1. The Definition of Peoples

The first point to examine is who the right holders are. They are defined and interpreted narrowly so as to temper the potentially destructive and destabilising effect of the principle of self-determination.<sup>245</sup> As a result, the right of self-determination is limited to people and does not include minorities.<sup>246</sup> This post-WWII interpretation is a product of decolonisation times that has little place in a more contemporary context and thus ought to be revised.<sup>247</sup> For example, Moore asserts that there are two conceptions of 'peoples', a stance that can be justified by remembering that '[t]he underlying purpose of the Montevideo Convention was to promote the self-determination for colonial or national ethnic minority populations and assist them join the world community as a nation-state, with all the protections offered by that new status.'<sup>248</sup> The first approach views 'peoples' as a political entity that wishes to exercise its right of self-determination within a defined territory. The term is closely related to territory: the 'peoples' are all inhabitants of a non-self-governing territory or the entire population of a State.<sup>249</sup> The second approach considers that a people is based on ethnic,

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<sup>240</sup> President Woodrow Wilson's 14 Points (1918). In fact, the concept of self-determination 'developed as a natural corollary of developing nationalism in the eighteenth and nineteenth centuries'. Hurst Hannum, *Autonomy, Sovereignty, and Self-Determination: The Accommodation of Conflicting Rights* (UPP 1996) 27.

<sup>241</sup> Milena Sterio, *The Right of Self-Determination under International Law* (Routledge 2013) 12-13.

<sup>242</sup> Ojukwu and Okoli (n 174) 134; Leonaitė and Žalimas (n 3) 24; Wilson (n 199) 160; Sterio (n 241) 18-21.

<sup>243</sup> Helsinki Final Act 1975 (n 236) Art VIII.

<sup>244</sup> Ezetah (n 227) 453.

<sup>245</sup> Margaret Moore, 'Sub-State Nationalism and International Law' (2004) 25 *Mich J Int'l L* 1319, 1323; Ojukwu and Okoli (n 174) 128; Fabry (n 202) 664; Jan Klabbers, 'Shrinking Self-Determination: The *Chagos* Opinion of the International Court of Justice' *ESIL Reflections*, 27 March 2019; See e.g., declaration by the Minister of State from the UK Foreign and Commonwealth Office in 1983 (HL, Deb, vol 446, cc94WA).

<sup>246</sup> Sub-Commission on Prevention of Discrimination and Protection of Minorities, *The Right to Self-Determination: Implementation of United Nations Resolutions*, Study Prepared by Hector Gros Espiell, Special Rapporteur, UN Doc E/CN.4/Sub.2/405/Rev.1 (1980), para 56.

<sup>247</sup> Quénivet (n 11) 491.

<sup>248</sup> ICC, *Situation in the State of Palestine in the Case of the Prosecutor v*, Corrected Version of: Court's Territorial Jurisdiction in Palestine Registration no: ICC-01/18-115, ICC-01/18 (Dr Frank Romano), 16 March 2020, 15.

<sup>249</sup> Leonaitė and Žalimas (n 3) 23 and 36.

religious and/or linguistic lines,<sup>250</sup> an approach that follows the lines of Resolution 2625 which refers to 'race, creed, or colour'<sup>251</sup> and the UNESCO definition that mentions seven shared characteristics.<sup>252</sup> Further, it is suggested that the group must fulfil objective and subjective criteria, the former being a common ethnic origin, a language, an attachment to a particular territory and the latter being the perception of the group as belonging together and being different from others.<sup>253</sup> Interestingly, the Badinter Committee, when asked about the right of self-determination, did not invoke the concept of 'peoples' but preferred that of 'communities' and specifically recognised that these communities had the right to see their identities recognised.<sup>254</sup>

Using a broad interpretation of the term 'people' outside the decolonisation context, some of the population of the *de facto* States in the post-Soviet space could be defined as peoples as they wish to exercise their right of self-determination by establishing a functioning entity within a defined territory. In addition, some of them also share ethnic, religious, and language backgrounds whilst being different from the population of the State from which they wish to secede. Abkhazian people are undoubtedly different from Georgians (and Russians), enjoying a different culture and language.<sup>255</sup> South Ossetians are of Iranian origin (and call themselves 'Alans' after an Iranian tribe),<sup>256</sup> have a kin-State in the neighbouring Republic of North Ossetia that is part of Russia<sup>257</sup> and 'enjoy a distinctive culture, language, and history of self-rule'.<sup>258</sup> The population of Nagorno-Karabakh is almost exclusively Armenian which is that of their kin-State.<sup>259</sup> In contrast, the population of Transnistria is mainly Russian and Ukrainian but there is no (real or claimed) Transnistrian people<sup>260</sup> though there is 'a separate history, and a certain Soviet nostalgia.'<sup>261</sup>

### 3.2.2. Circumstances under which the Right of Self-Determination Can Be Exercised

The second point is that even if the peoples have the right to self-determination a certain set of circumstances must be present. In 1998, the Supreme Court of Canada, when examining the right of self-determination in the context of a secession claim made by Quebec, stated that there were only three situations allowing the right of self-determination to lead to secession. Either 1) the peoples are from a former colony 'breaking from the "imperial" power',<sup>262</sup> 2) the claim does not stem from colonial territories but 'where a people is subject to alien subjugation, domination or exploitation'<sup>263</sup> or 3) 'when a people is blocked from the meaningful exercise of its right to self-determination internally, it is entitled, as a last resort,

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<sup>250</sup> Moore (n 345) 1326.

<sup>251</sup> Friendly Relations Declaration (n 170).

<sup>252</sup> UNESCO, *International Meeting of Experts on Further Study of the Concept of the Rights of Peoples*, 27-30 September 1989, UN Doc SHS 89/CONF.602/7, para 22.

<sup>253</sup> See Leonaitė and Žalimas (n 3) 23; Wilson (n 199) 162; Sterio (n 241) 16-18.

<sup>254</sup> See also Opinion 2 (n 107) 184.

<sup>255</sup> Wilson (n 199) 156; Kolstø and Blakkisrud (n 45) 485-486.

<sup>256</sup> Thomas De Waal, 'South Ossetia Today', 3 June 2019, available at <https://3dcftas.eu/publications/south-ossetia-today>, 2.

<sup>257</sup> Bowring (n 11) 12.

<sup>258</sup> Wilson (n 199) 155; Kolstø and Blakkisrud (n 45) 487.

<sup>259</sup> Bowring (n 11) 12.

<sup>260</sup> Bowring (n 11) 12; Report on the Application by Moldova (n 156) para 71.

<sup>261</sup> Pål Kolstø, 'The Sustainability and Future of Unrecognized Quasi-States' (2006) 43(6) *J Peace Res* 723, 731.

<sup>262</sup> *Re Secession of Quebec* (n 224) para 132.

<sup>263</sup> *Re Secession of Quebec* (n 224) para 133.

to exercise it by secession'.<sup>264</sup> A fourth situation mentioned in the literature is that racial groups that are denied access to government can exercise their right of self-determination.<sup>265</sup> Racial groups are automatically viewed as 'peoples' having such a right. It is however unclear how 'racial groups' are defined and how they are different from 'ethnic groups' that do not have the automatic right of self-determination. Accordingly, this fourth proposition is not covered in this chapter.

The third circumstance mentioned in the case dealt with by the Supreme Court of Canada is controversial. In fact, it avowed that it was unclear whether the third possibility reflected the then state of international law.<sup>266</sup> In the years following the pronouncement of the Supreme Court of Canada, UN documents such as the Millennium Declaration<sup>267</sup> or the World Summit Outcome<sup>268</sup> only referred to the first two circumstances. Some scholars even brush away this third possibility and, instead, focus on the right of self-determination as entrenched in three areas, 'an anti-colonial standard', 'a ban on foreign military occupation' and 'as a requirement that all racial groups be given full access to government.'<sup>269</sup> position of the ICJ in the *Advisory Opinion on Kosovo* is more nuanced as it acknowledges this contested right, indicating that 'the practice of States [in instances of declarations of independence outside this context] does not point to the emergence in international law of a new rule prohibiting the making of a declaration of independence in such cases.'<sup>270</sup> Likewise, the 2009 Tagliavini report<sup>271</sup> and an Opinion of the Venice Commission in 2014<sup>272</sup> maintain that the existence of this right remained controversial under international law.

It might nevertheless be contended that the third situation is somehow recognised in law. The Friendly Relations Declaration contains a safeguarding clause, overriding the principle of territorial integrity when the right of self-determination is invoked: '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 above and thus possessed of a government representing the whole people belonging to the territory without distinction as to race, creed or colour.' Put simply, if the State cannot secure the internal right of self-determination, people have the right to external self-determination though secession is

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<sup>264</sup> *Re Secession of Quebec* (n 224) para 134. These three situations were reiterated recently by the Supreme Court of the United Kingdom (Judgment, *Reference by the Lord Advocate of Devolution Issue under Paragraph 34 of Schedule 6 to the Scotland Act 1998*, [2022] UKSC 31, 23 November 2022, paras 88-89). See Kushtrim Istrefi, 'The UK Supreme Court in the Scottish Case: Revitalising the Doctrine of Remedial Secession' *EJIL:Talk!*, 14 December 2022.

<sup>265</sup> Ojukwu and Okoli (n 174) 136-137.

<sup>266</sup> *Re Secession of Quebec* (n 224) para 135.

<sup>267</sup> UNGA, Resolution A/RES/55/2, sec 1, 8 September 2000, para 4.

<sup>268</sup> UNGA, Resolution A/RES/60/1, sec 1, 24 October 2005, para 5.

<sup>269</sup> Ojukwu and Okoli (n 174) 135-137.

<sup>270</sup> *Kosovo Advisory Opinion* (n 176) para 79. See Weller (n 128) 137.

<sup>271</sup> EU (n 20) 141.

<sup>272</sup> European Commission for Democracy through Law (Venice Commission), *Opinion on "Whether Draft Federal Constitutional Law No 462741-6 on Amending the Federal Constitutional Law of the Russian Federation on the Procedure of Admission to the Russian Federation and Creation of a New Subject within the Russian Federation Is Compatible with International Law"*, Opinion No 763/2014, CDL-AD(2014)004, 21 March 2014, para 26. See also EU (n 20) 141.



viewed as an *ultimum remedium*.<sup>273</sup> Such a right was also mentioned in the 1921 report on the Aaland Island outside the decolonisation context: ‘The separation of a minority from the State of which it forms part and its incorporation in another State can only be considered as an altogether exceptional solution, a last resort when the State lacks either the will or the power to enact and apply just and effective guaranteed (religious, linguistic and social freedom).’<sup>274</sup> More recently, the ICJ in the *Chagos Advisory Opinion* tentatively declared that ‘the right of self-determination, as a fundamental human right, has a broad scope of application’,<sup>275</sup> leading some academics such as Klabbers to suggest that the Court might be hinting at ‘external self-determination (i.e. secession) as *ultimum remedium* in the face of gross oppression, useful in those circumstances where all else fails, and perhaps conditional on much blood already having been shed’.<sup>276</sup>

It might come as a surprise, but the people of Abkhazia have made claims of colonisation.<sup>277</sup> To the author’s knowledge, the people of the other three *de facto* States have however not made such claims. Their claim does not hold much ground because the UN Resolution ‘Principles which Should Guide Members in Determining whether or not an Obligation Exists to Transmit the Information Called in Article 73e of the Charter of the United Nations’<sup>278</sup> specifies that colonies must be physically separated from the colonial power and must be ethnically and culturally different. The ‘saltwater colonialism’ approach means that oppression within the metropolitan territory is not viewed as colonialism and so does not fall within that exception.<sup>279</sup> Accordingly, the first way to claim the external right of self-determination is of no avail to Abkhazia or any other *de facto* States in the post-Soviet space.<sup>280</sup>

The second situation is to claim alien subjugation. Indeed, ‘self-determination’s commitment to ending alien, imposed rule seems logically consistent with giving full expression to the population’s will in organizing the state.’<sup>281</sup> The question inevitably centres on defining ‘alien’ and ‘subjugation, domination or exploitation’. Quite often the phrase ‘foreign rule’ also appears in literature. Alien or foreign seems to indicate that people are subdued by a group different from theirs; nonetheless, there is little discussion in academia on the definition of ‘alien’ or ‘foreign’. Most of the discussion centres on the use of force against people and its

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<sup>273</sup> Allen Buchanan, *Justice, Legitimacy, and Self-Determination. Moral Foundations for International Law* (OUP 2003) 335; Kurtshkhali (n 4) 75.

<sup>274</sup> *The Question of the Aaland Islands: Report of the Commission of Jurists*, (1920) League of Nations Official Journal Spec Supp 3 [27].

<sup>275</sup> *Chagos Advisory Opinion* (n 233) para 144.

<sup>276</sup> Klabbers (n 245).

<sup>277</sup> European Commission for Democracy through Law, *Seminar on ‘State-Legal Aspects of on the Settlement of the (Abkhaz) Conflict, Pitsunda, Georgia, 12-13 February 2001*, para 3: ‘Their presentation was mainly historical, starting in the eighth century and complaining about Georgian colonisation of their land.’ For those familiar with the history of Russia and the Soviet Union, this might however not come as a surprise. In 1879 the Russian legal scholar Martens drew parallels between England’s and Russia’s activities on the Indian subcontinent and Central Asia respectively. Fyodor Martens, ‘La Russie et l’Angleterre dans l’Asie Centrale’ (1879) *Revue de Droit International et de Législation Comparée* 227. See Lauri Mälksoo, ‘The Legacy of F.F. Martens and the Shadow of Colonialism’ (2022) 21(2) *Chinese JIL* 55-77.

<sup>278</sup> UNGA, *Principles which Should Guide Members in Determining whether or not an Obligation Exists to Transmit the Information Called in Article 73e of the Charter of the United Nations*, UN Doc A/RES/1541(XV), 15 December 1960, Principle IV.

<sup>279</sup> Buchanan (n 273) 339-340.

<sup>280</sup> It is also dismissed in the Tagliavani report. EU (n 20) 136.

<sup>281</sup> Timothy W Waters, ‘Contemplating Failure and Creating Alternatives in the Balkans: Bosnia’s Peoples, Democracy, and the Shape of Self-Determination’ (2004) 29 *Yale J Int’l L* 423, 435.

prohibition under international law.<sup>282</sup> Could nonetheless the concept of ‘alien rule’ cover not only the military but also the economic and cultural imposition of norms? It might be possible to draw this conclusion because the Friendly Relations Declaration spells out that ‘[e]very State has an inalienable right to choose its political, economic, social, and cultural systems’.<sup>283</sup> ‘All of the separatist authorities insist on an inherent moral entitlement to self-determination in the face of “alien” and “imposed” rule.’<sup>284</sup> Most of these entities were either independent at some time in history or belonged for a short(er) time to (an)other State and then were incorporated into the State from which they are seceding. Abkhazia states in its 1999 Act of independence that ‘Abkhazian Statehood stretches over 12 centuries of history. For centuries the people of Abkhazia have had to struggle to preserve their independence.’<sup>285</sup> Abkhazia had been an independent Soviet Republic recognised on 31 March 1921, but it was quickly forced to conclude a confederative union treaty with Georgia. In 1931, it was incorporated without its express consent into the Soviet Republic of Georgia which granted it autonomous status. South Ossetia, much like Abkhazia, has had a long history of self-rule. However, unlike most Caucasian people, it sided with the Bolsheviks against Georgia in the early 1920s and was thus given autonomous status by Moscow in 1922.<sup>286</sup> Indeed, following the creation in 1921 of the Georgian Socialist Soviet Republic and its subsequent incorporation in the Soviet Union, the South Ossetian Autonomous region became part of Georgia.

The history of Transnistria is not an easy one either. Between 1924 and 1940, the Moldavian Autonomous Soviet Socialist Republic was an autonomous republic of the Ukrainian Soviet Socialist Republic which included Transnistria. After WWII, the ‘Moldavian Soviet Socialist Republic’ with most of Bessarabia and what is now Transnistria was created.<sup>287</sup> Accordingly, Transnistria claimed that although it was part of the Moldavian Soviet Republic it had not been part of Romania before the Second World War.<sup>288</sup>

Nagorno-Karabakh’s history is even more complicated. It was originally part of the Transcaucasian Democratic Federative Republic which dissolved into Armenia, Azerbaijan, and Georgia. Several wars pitted Armenia against Azerbaijan over Nagorno-Karabakh between 1918 and 1920 until, following the defeat of the Ottoman Empire, the British provisionally gave Nagorno-Karabakh to Azerbaijan,<sup>289</sup> a decision entrenched by the Bolsheviks in 1921 following which Nagorno-Karabakh became a region in the Azerbaijan Soviet Socialist Republic in 1923.<sup>290</sup> As soon as the Soviet Union unveiled its weaknesses in the late 1980s the population of Nagorno-Karabakh demanded to be transferred to the Armenian Soviet Socialist Republic.

To some extent, they could claim that they have been under foreign occupation, but the problem ineluctably is the timeframe. As Mälksoo rightly questions in relation to Transnistria, ‘when borders are drawn in post-imperial spaces, should the baseline be 1991 or, for instance, 1939?’<sup>291</sup> For some of these entities, one would need to go as far back as imperial Russia. Where do we start the clock? That being said, when allowing colonised peoples to exercise

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<sup>282</sup> See e.g., Ojukwu and Okoli (n 174) 136.

<sup>283</sup> Friendly Relations Declaration (n 170).

<sup>284</sup> Lynch (n 90) 837.

<sup>285</sup> Act of State Independence of the Republic of Abkhazia, 12 October 1999.

<sup>286</sup> De Waal (n 256) 2.

<sup>287</sup> Report on the Application by Moldova (n 156) paras 12-13.

<sup>288</sup> See Mälksoo (n 118) 817.

<sup>289</sup> Krüger (n 9) 13.

<sup>290</sup> See Kolstø and Blakkisrud (n 45) 486.

<sup>291</sup> Mälksoo (n 118) 817.

their right of self-determination no date is set either but the situation of such peoples has always been deemed different from other groups.<sup>292</sup> Given the legal uncertainty as to the definition of 'alien' or 'foreign' rule concept, it could be contended that the *de facto* States have such a claim, albeit against Russia and the Soviet Union but not against their parent State (i.e., Georgia, Moldova and Azerbaijan).

The third situation mentioned in the *Re Secession of Quebec Case* also requires investigation. It exposes the inherent tension between the right of self-determination and territorial sovereignty.<sup>293</sup> The solution for groups unhappy within the administrative borders is to grant them a broad right of self-determination in the form of self-governance, and ensure that the rule of law is maintained and that there is a solid 'commitment to human rights with a special sensitivity to those of minorities, whether ethnic, religious, social or linguistic'.<sup>294</sup> If, nonetheless, internal self-determination is denied, then external self-determination is an option.<sup>295</sup> As Heintze maintains, such a stance finds some support among the OSCE States<sup>296</sup> and is also mentioned in an opinion of the Venice Commission.<sup>297</sup>

The conditions under which the option of what is often called remedial secession is available<sup>298</sup> are open for discussion. It is agreed that a certain threshold and intensity of violations committed against the people need to have been reached. The Supreme Court of Canada specified that the right to external self-determination 'arises only in the most extreme cases and, even then, under carefully defined circumstances.'<sup>299</sup> Buchanan asserts that '[t]hese injustices must be of such consequence as to void international support for the state's claim to the territory in question'.<sup>300</sup> In this vein, genocide and crimes against humanity would undoubtedly cross the threshold. Yet, not all human rights violations will lend themselves to the option of remedial secession. The group must be able to point at severe cases of human rights abuses and clear acts of oppression committed by the authorities.<sup>301</sup> In the words of the Supreme Court of Canada, it must have been denied 'meaningful access to government to pursue their political, economic, cultural and social development'.<sup>302</sup> The Venice Commission of the Council of Europe stated that 'a secession would only be an option of last resort in a situation where a people's right to internal self-determination has been *persistently and massively* violated and all other means have failed.'<sup>303</sup> Some scholars maintain that 'persistent and discriminatory exclusion from governance'<sup>304</sup> could also reach the required threshold.

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<sup>292</sup> See Klabbers (n 245).

<sup>293</sup> See Boutros Boutros-Ghali, *An Agenda for Peace, Preventive Diplomacy, Peacemaking and Peace-keeping*, 1992, para 19.

<sup>294</sup> *Agenda for Peace* (n 293) para 18.

<sup>295</sup> Charles Okeke, 'In Search of Consistency in International Law on the Right to Self-Determination, Non-Interference, and Territorial Integrity' (2022) 34 *Technium Social Sciences J* 331, 335; Buchanan (n 273) 335.

<sup>296</sup> Hans-Joachim Heintze, 'Selbstbestimmungsrecht und Demokratisierung' (1999) *Jahrb für int Sicherheitspolitik* 34, 47.

<sup>297</sup> Venice Commission Opinion No 763/2014 (n 272) para 26.

<sup>298</sup> See David L Sloss, 'Using International Court of Justice Advisory Opinions to Adjudicate Secessionist Claims' (2002) 42 *Santa Clara L Rev* 357, 358.

<sup>299</sup> *Re Secession of Quebec* (n 224) para 126.

<sup>300</sup> Buchanan (n 273) 338. See also African Commission on Human and People's Rights, *Katangese Peoples' Congress v Zaire*, Communication No 75/92, 1995, para 6.

<sup>301</sup> Wilson (n 199) 163.

<sup>302</sup> *Re Secession of Quebec* (n 224) para 154.

<sup>303</sup> Venice Commission Opinion No 763/2014 (n 272) para 26 (emphasis added).

<sup>304</sup> Marc Weller, *Escaping the Self-Determination Trap* (Nijhoff 2008) 59.

All *de facto* States studied in this chapter claim that they were not given any autonomy on the national level and thus have had to seek external self-determination. The lack of regard towards minorities no doubt contributed to these communities feeling discriminated against, even at the time of the Soviet Union.<sup>305</sup> The situation seemed to worsen towards the end of the reign of the Soviet Union. For example, although South Ossetia lacked under the Soviet period a strong identity and its population was rather well integrated with Georgia,<sup>306</sup> pronouncements made by the Georgian authorities viewing national minorities as ‘guests’ and questioning their loyalty to Georgia pushed them to demand increased autonomy,<sup>307</sup> moving from a region to a Republic.<sup>308</sup> This request for an ‘upgrade’ in autonomy was the reaction towards a fear of discrimination. Also, Armenians in Nagorno-Karabakh cited violations of their rights when they asked to become part of the Armenian Soviet Socialist Republic<sup>309</sup> and eventually, as the Soviet Union collapsed, led to its claims of statehood. For many of these entities, the situation did not improve after the fall of the Soviet Union.<sup>310</sup> For example, Moldova and Georgia tried to impose laws that limited the use of the language of minorities and the possibility to be taught in that language.<sup>311</sup> This antagonised the local populations who expressed not only their concerns that they would have a ‘potential inferior position “under” the new “nationalist” majority’ but also pro-Russian sentiments.<sup>312</sup> Georgia also suppressed the autonomous status of South Ossetia in December 1990, thus removing the South Ossetian people’s right of internal self-determination.<sup>313</sup> In relation to Transnistria, it is established that it was the prospect of the reunification of Moldova with Romania that led to the secessionist movement.<sup>314</sup> Nagorno-Karabakh also complained about the lack of autonomy within Azerbaijan and discriminatory policies<sup>315</sup> but these seem to be less prominently mentioned in the literature. It is nevertheless doubtful that the threshold of violations of human and especially minority rights reaches the level required to claim remedial secession.<sup>316</sup> Some *de facto* States have incorrectly labelled some of the policies ‘genocidal’. The Transnistrian authorities referred to ‘the policy of genocide against a part, as Moldova considers, of its people.’<sup>317</sup> In 2004 Kokoity, President of South Ossetia, requested from the Georgian Parliament the recognition of the genocide of the South Ossetian people between 1989 and 1991.<sup>318</sup> These are unsubstantiated claims.<sup>319</sup>

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<sup>305</sup> In relation to Abkhazia, see EU (n 20) 146 and Kolstø and Blakkisrud (n 45) 486.

<sup>306</sup> De Waal (n 256) 2-3.

<sup>307</sup> *Ibid* 3.

<sup>308</sup> EU (n 20) 144.

<sup>309</sup> Armenia’s Application for Membership (n 219) para 49.

<sup>310</sup> See Kurtskhalia (n 4) 75 in relation to South Ossetia and Abkhazia.

<sup>311</sup> See Quénivet (n 11) 494.

<sup>312</sup> See Mälksoo (n 118) 817.

<sup>313</sup> EU (n 20) 144.

<sup>314</sup> Parliamentary Assembly of the Council of Europe, *Application by Moldova for Membership of the Council of Europe*, Opinion 188 (1995), 27 June 1995, para 6; Bowring (n 11) 16.

<sup>315</sup> Tamzarian (n 109) 208.

<sup>316</sup> Wilson (n 199) 163.

<sup>317</sup> Declaration of the ‘Supreme Soviet’ and ‘Government’ of the Transnistrian Moldavian Republic (PMR) of 26 January 1995, Appendix 6 of Report on the Application by Moldova (n 156).

<sup>318</sup> Cited in German (n 73) 57. Russian Foreign Minister Lavrov also claimed that Georgia had ‘ordered the deportation of Ossetians to Russia’ in 1991. Address by Sergey Lavrov, Foreign Minister of the Russian Federation, at the 63rd Session of the UN General Assembly, 27 September 2008.

<sup>319</sup> In relation to South Ossetia, see e.g., EU (n 20) 145 (fn80).

### 3.2.3. Expressing the Right of Self-Determination by Way of Referendum

In addition, the external right of self-determination ‘must be the expression of the free and genuine will of the people concerned.’<sup>320</sup> Though this statement was made by the ICJ in relation to non-self-governing territories and thus in the context of decolonisation, academics and legal instruments have stressed the importance of ensuring that the people express their will. Crawford argues that if the ‘State forcibly denies self-determination to the territory in question [...] the principle of self-determination operates in favour of the statehood of the seceding territory, *provided that the seceding government can properly be regarded as representative of the people of the territory*’.<sup>321</sup> A slightly different position is adopted by the Parliamentary Assembly of the Council of Europe: it does not refer to (forceful) secession from a State and focuses more on the people than on the government: ‘independence and secession of a regional territory from a state may only be achieved through a lawful and peaceful process based on the *democratic support of the inhabitants of such territory* [...]’.<sup>322</sup> The Badinter Committee established referendums as a test to express the wishes of the population for secession,<sup>323</sup> but it is debatable whether holding a referendum is a requirement under customary international law<sup>324</sup> all the more as there might be other ways to show that the seceding government represents the people of the territory. Even if the referendum is not legally binding, it still has consequences; it would ‘weaken the democratic legitimacy’ of the parent State and ‘support [...] the democratic credentials of the independence movement’.<sup>325</sup> Yet, that does not mean that only a referendum can lead to secession; the aforementioned conditions must be fulfilled since a referendum ‘is *not a sufficient* condition under international law’.<sup>326</sup> Weller persuasively maintains that there are more than the three situations mentioned in the *Re Secession of Quebec Case*. In the case of implied constitutional self-determination, a referendum in favour of independence should be followed by negotiations in good faith,<sup>327</sup> which reinforces the view that it must be a ‘lawful and peaceful process’.

Two questions need to be raised in relation to referendums. First, the eligibility of the voters. Should they include the whole population of the State or should they be limited to those present on the territory of the authority that claims the right of self-determination? Georgia, for example, defended that the entire demos need to take part in the exercise of the right of self-determination,<sup>328</sup> claiming that ‘[c]ontemporary international law [...] repudiate[s] the right of [...] peoples to secede unilaterally without taking the will of the whole State into account’.<sup>329</sup> In contrast, the Venice Commission points out that in general, in federal and non-federal states, only those registered as the electorate for the territory in question are

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<sup>320</sup> *Chagos Advisory Opinion* (n 233) para 157.

<sup>321</sup> Crawford (n 8) 387 (emphasis added).

<sup>322</sup> PACE Resolution 1416 (2005) (n 151) (emphasis added).

<sup>323</sup> Opinion 4 Badinter Commission reprinted in ILM 31 (1992).

<sup>324</sup> Peters (n 152).

<sup>325</sup> *Reference by the Lord Advocate of Devolution Issue* (n 264) para 81.

<sup>326</sup> Peters (n 152).

<sup>327</sup> Marc Weller, ‘The UK Supreme Court Reference on a Referendum for Scotland and the Right to Constitutional Self-Determination (Part II)’ *EJIL:Talk!*, 13 December 2022.

<sup>328</sup> United Nations Economic and Social Council, *Implementation of the International Covenant on Economic, Social and Cultural Rights: Initial Reports Submitted by State Parties under Articles 16 and 17 of the Covenant, Addendum Georgia*, UN Doc E/1990/5/Add.37, 23 September 1998, para 29.

<sup>329</sup> UNGA, Right of Peoples to Self-Determination (n 192) para 4.

eligible.<sup>330</sup> In Opinion No 4, the Badinter Committee stressed that all ethnic groups of a specific territory ought to be allowed to take part in the vote.<sup>331</sup> Still, some might choose not to take part.<sup>332</sup> Should this be taken into account? Perhaps not as their lack of participation is in itself the expression of a political opinion. As the Venice Commission indicates, 'a decision to abstain from voting is nevertheless a legitimate attitude that citizens may adopt on a fundamental issue such as national independence'.<sup>333</sup>

Second, which standards should be applied when holding the referendum? At a minimum, the 2007 Code of Good Practice on Referendums<sup>334</sup> elaborated by the Venice Commission ought to be complied with. It reiterates the principles of universal, equal, free and secret suffrage and lays down conditions for implementing such principles, stressing the importance of respect for human rights as the basis of democratic referendums<sup>335</sup> and encouraging the use of national and international observers.<sup>336</sup> Referendums related to the external right of self-determination are nevertheless not mentioned in the Guidelines and one might rightly question whether higher standards should not be applicable given the high stakes of such referendums. The latest iterations carried out in Ukraine are testimonies of referendums used to mask territorial expansion.<sup>337</sup> However, the Venice Commission in its 2005 Opinion on the independence referendum in Montenegro referred to a wide range of guidelines and codes of good practice relating to electoral matters and referendums on the national level<sup>338</sup> and established that certain framework conditions for a free and fair vote had to be guaranteed<sup>339</sup> and that there were no recognised standards regarding the level of participation.<sup>340</sup> Where it differed from other types of referendum is in relation to the rules on majority, requiring a higher level than a simple majority of those voting.<sup>341</sup>

The overwhelming majority of these *de facto* States did not carry out a referendum at first; referendums were conducted to confirm declarations of independence made by the then regional/local authorities. In August 1990, the regional parliament of Abkhazia declared independence followed by local elections which supported the decision,<sup>342</sup> then in July 1992 the *de facto* authorities proclaimed a law that re-established the constitution of the Soviet Union of 1925 that saw Abkhazia as an independent republic.<sup>343</sup> In November 1994, the

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<sup>330</sup> European Commission for Democracy through Law (Venice Commission), *Opinion on the Compatibility of the Existing Legislation in Montenegro Concerning the Organisation of Referendums with Applicable International Standards*, Opinion No 343/2005, CDL-AD(2005)041, 19 December 2005, paras 51-52.

<sup>331</sup> Opinion 4 (n 323).

<sup>332</sup> This situation does not refer to individuals who are prevented from attending a polling station, notably because of the presence of menacing State authorities or individuals at the polling station.

<sup>333</sup> Venice Commission Opinion No 343/2005 (n 330) para 25.

<sup>334</sup> European Commission for Democracy through Law (Venice Commission), *Code of Good Practice on Referendums*, Study No 371/2006, CDL-AD(2007)008rev-cor, adopted by the Council for Democratic Elections at its 19th meeting (Venice, 16 December 2006) and the Venice Commission at its 70th plenary session (Venice, 16-17 March 2007).

<sup>335</sup> Venice Commission Code of Good Practice on Referendums (n 334) Point II(1).

<sup>336</sup> *Ibid*, Point II(3.2).

<sup>337</sup> See Leonaitė and Žalimas (n 3) 44.

<sup>338</sup> Venice Commission Opinion No 343/2005 (n 330) para 11.

<sup>339</sup> *Ibid*, para 17.

<sup>340</sup> *Ibid*, para 22.

<sup>341</sup> *Ibid*, paras 33 and 36.

<sup>342</sup> Hildemar Güerer, 'Konflikte im Südkaukasus', in Österreichisches Studienzentrum für Frieden and Konfliktlösung (ed), *Wie sicher ist Europa? Perspektiven einer zukunftsfähigen Sicherheitspolitik nach der Jahrtausendwende* (2001) 212, 212.

<sup>343</sup> *Ibidem*.

Supreme Council of the Republic of Abkhazia adopted a constitution. According to official figures, the Constitution was approved by 97.7% of the voters in October 1999 and led Abkhazia to issue its formal act of State independence.<sup>344</sup>

South Ossetia declared its independence on 29 May 1992. A first Constitution was approved in 1993 and a second in April 2001, this time by way of referendum.<sup>345</sup> On 12 November 2006, another referendum with results of 99.9% solidified South Ossetia's wish to be independent of Georgia.<sup>346</sup>

Nagorno-Karabakh declared its independence from Azerbaijan through a decision of its parliament on 2 September 1991 that was followed by a referendum on 10 December with 99.9% in favour of independence.<sup>347</sup> The referendum was boycotted by the Azeris<sup>348</sup> and thus some doubts can be cast over the results. The new parliament declared its independence again on 6 January 1992.

In contrast, it was a referendum between December 1989 and November 1990 that led the Congress of Deputies in Tiraspol (under the Soviet Union) to declare independence on 2 September 1990. Then, as claimed by the Transnistrian authorities, 'the Moldavian Republic of Pridnestrovye is an independent state, created as a result of an all-people referendum'<sup>349</sup> held on 1 December 1991. A further referendum was held on 17 September 2006 that clearly indicated that the population wished for independence with a subsequent free accession to the Russian Federation.

Whether the referendums complied with the principles of universal, equal, free and secret suffrage is hard to assess as no information seems available on how these referendums were carried out. There were no international observers and figures of 95-99% of the population in favour of independence do tend to look suspicious. As Kolstø explains, 'many quasi-states have an authoritarian regime in which election results must be treated with great care as indicators of popular attitudes'.<sup>350</sup>

Overall, none of the peoples in these *de facto* entities appear to have a clear right to self-determination. Whilst three of them qualify as people (Transnistria does not), they cannot persuasively show that they are either colonised, under foreign or alien occupation or have a right to remedial secession since the threshold of violations against them has not been met. Unless a wider approach towards the conditions for the exercise of the right of self-determination including the right to secession by choice<sup>351</sup> is espoused, they cannot claim to be allowed to breach the principle of territorial sovereignty. Clearly, the *de facto* States in the post-Soviet space suffer from a far-reaching gamut of international violations that prevents them from being recognised as States. Be that as it may: despite claiming that they cannot be recognised, the problem of their factual existence for over 30 years does not disappear.

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<sup>344</sup> Act of State Independence of the Republic of Abkhazia, 12 October 1999.

<sup>345</sup> Bowring (n 11) 17-18.

<sup>346</sup> Kolstø and Blakkisrud (n 45) 503.

<sup>347</sup> *Chiragov* (n 78) para 17; *Sargsyan* (n 221) para 19.

<sup>348</sup> *Chiragov* (n 78) para 17; *Sargsyan* (n 221) para 19.

<sup>349</sup> Declaration of the 'Supreme Soviet' and 'Government' of the Transnistrian Moldavian (n 317).

<sup>350</sup> Kolstø (n 261) 731.

<sup>351</sup> See Coppieters (n 1).

## 4. Interests of Third Parties and Independence

Benneh argues that the additional 'criteria which have emerged from developing practices provide[] a basis for conceptualising and reconstructing *more viable states*'.<sup>352</sup> In other words, statehood is increasingly granted to those entities that are deemed to be likely to be viable and viability is determined by these factors. It is, on the other hand, doubtful that the aforementioned additional 'criteria' inevitably lead to more viable States as they truly relate to the ability and willingness to comply with international law rather than to stand as independent entities. The *de facto* States in the post-Soviet space prove the point: although they fulfil the essential requirements of statehood according to the Montevideo Convention, they are not 'lawful' entities; yet, they exist and survive and they do so because they have found support in interested third parties, patron States. Their viability is sadly linked to their increasing state of dependence on external support and concomitantly their growing lack of independence. This has, in turn, led to several important legal consequences and in fact further supports the claim that these entities are not States.

### 4.1. Link between Statehood, Viability and Independence

It is acknowledged that 'nascent political communities that receive international recognition during their attempts to secede *seem* more likely to become independent states than those that do not.'<sup>353</sup> Earlier recognition empowers *de facto* States and supports their (full) independence.<sup>354</sup> Unfortunately, this is too late for the four entities in the post-Soviet space. The reality is that they appear to be counterexamples of the theory propounded by many scholars that there is a strong correlation between recognition and survival,<sup>355</sup> not only of the State but also its citizens,<sup>356</sup> and that once recognised, an entity 'is much more likely to survive than if [States] say that they will have nothing to do with it'.<sup>357</sup>

The two main challenges faced by these entities are security issues as they are at the mercy of being taken back by their parent State or annexed by another State and economic problems: 'key actors in unrecognised states see the issues of underdevelopment and fragility as secondary to and by-products of the root cause issue of non-recognition.'<sup>358</sup> Often, emerging out of an armed conflict, they need to rebuild the economy and have no money to do so. Moreover, as they are not recognised very few foreign firms invest in the local economy.<sup>359</sup> More crucially, they are unable to trade with States (and set up trade agreements) and access vital loans and funds on the international level as they cannot become members of the relevant international organisations.

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<sup>352</sup> Emmanuel Yarw Benneh, 'Statehood, Territory, Recognition and International Law: Their Interrelationships' in Quashigah and Okafor (n 227) 375, 398.

<sup>353</sup> Alex Green, 'Successful Secession and the Value of International Recognition' in Lea Raible, Jure Vidmar and Sarah McGibbon (eds), *Research Handbook on Secession* (Edward Elgar 2022) 75, 76.

<sup>354</sup> Mendes argues that 'recognition contributes to the process of state formation'. Mendes (n 16) 34.

<sup>355</sup> Fikfak (n 49) 109.

<sup>356</sup> Costas Laoutides, 'Surviving in a Difficult Context: The Question for Development in Unrecognised States' in Anthony Ware (ed), *Development in Difficult Sociopolitical Contexts* (Springer 2014) 71, 73.

<sup>357</sup> Vaughan Lowe, *International Law* (OUP 2007) 60.

<sup>358</sup> Laoutides (n 356) 73.

<sup>359</sup> Kolstø (n 261) 729.



One of the reasons<sup>360</sup> they have survived is that they have turned towards States that either recognise or support them: an external patron State. As Caspersen states, '[d]ue to their lack of international recognition, unrecognized states are not spoilt for choice when it comes to attracting external support, and patron states therefore fill in an important gap. Based on ethnic links or strategic interests, these states choose to support unrecognized states with diplomatic, economic, and military assistance. Such external support helps compensate for the lack of international recognition and significantly assists the process of state-building'.<sup>361</sup> Yet, this support is not without interest: *de facto* States are often used as a proxy to achieve long-term aims, usually directed at the parent State.<sup>362</sup> This problem is compounded by the fact that 'this type of very small State might be particularly suited to forms of intervention and/or influence which could well characterize dangerous manifestations of neo-colonialism.'<sup>363</sup>

As Roeder explains, after the fall of the Soviet Union, outside allies such as Russia and Armenia prevented the parent State 'from reversing the secessions even after new unified [parent state] leadership had consolidated power',<sup>364</sup> a situation that has been reinforced in the past decade. Abkhazia, South Ossetia, and Transnistria have turned towards Russia though not all of them had originally a penchant for Russia. As Darchiashvili evinces, the separatist claims of Abkhazia and South Ossetia were 'not the result of a Russian plot but rather that of a process of "awakening" in these ethnic groups, which was distinct from the Georgian "rebirth"'.<sup>365</sup> That being said, South Ossetia has always enjoyed good relations with Russia.<sup>366</sup> In contrast, Nagorno-Karabakh found in Armenia natural reinforcement. These entities have subsequently (or concurrently) developed a relationship of clientelism and have sometimes been used and/or exploited by the supporting State, taking 'geopolitical advantage of minorities within former, non-Russian, Soviet republics'.<sup>367</sup> Abkhazia and South Ossetia are 'part of a Russia-dominated, post-imperial economic and cultural ecosystem'<sup>368</sup> whereas Transnistria 'survives by virtue of the military, economic, financial and political support given to it by the Russian Federation.'<sup>369</sup>

#### 4.2. Consequences of Obtaining Third Party Support to Survive

Whilst it seems *prima facie* an issue linked to international relations and not to international law, the legal consequences of such support are multifaceted.

First, support has led to *de facto* or *de jure* occupation and in some instances annexation, i.e., situations unlawful under international law. Following the 2008 armed conflict in South

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<sup>360</sup> Kolstø contends that there are at least five factors 'that contribute to the viability of unrecognized quasi-states: symbolic nation-building; militarization of the society; the weakness of the parent state; support from an external patron; and lack of involvement on the part of the international community.' *Ibidem*.

<sup>361</sup> Caspersen (n 99) 54-55.

<sup>362</sup> Laoutides (n 356) 74.

<sup>363</sup> United Nations Sub Commission on Prevention and Protection of Minorities, *The Right to Self-Determination: Implementation of United Nations Resolutions*, Study Prepared by Hector Gros Espiell, UN Doc E/CN.4/Sub.2/405/Rev.1, 1980, para 108.

<sup>364</sup> Roeder (n 162) 309.

<sup>365</sup> David Dachiashvili, 'Georgian Security Problems and Policies' in Pavel Baev *et al*, *The South Caucasus: A Challenge for the EU* (European Union Institute for Security Studies 2003) 107, 115. See also German (n 44) 157.

<sup>366</sup> Wilson (n 199) 155.

<sup>367</sup> Mälksoo (n 118) 816; *De Waal* explains well how Russia has used South Ossetia and Abkhazia to counter moves and pronouncements made by the EU and the USA on Georgia. *De Waal* (n 256) 6.

<sup>368</sup> Mälksoo (n 118) 816

<sup>369</sup> *Ilaşcu* (n 157) para 392; Similar phrasing can be found in *Mozer* (n 77) para 110.

Ossetia and Abkhazia, a six-point cease-fire plan was brokered. As Russia deployed more forces in Abkhazia<sup>370</sup> and South Ossetia to the extent that it is claimed Russia occupies Abkhazia<sup>371</sup> and South Ossetia.<sup>372</sup> Transnistria is also considered to be occupied by Russia. For some scholars, the presence of Russian troops in Transnistria since 1991 is a form of occupation.<sup>373</sup> Some observers argue that Armenia controls Nagorno-Karabakh since 1994,<sup>374</sup> whilst others go as far back as January 1992, a couple of weeks after Nagorno-Karabakh declared its independence.<sup>375</sup> The United Nations General Assembly passed a resolution in 2008 referring to Nagorno-Karabakh as occupied territory<sup>376</sup> whilst the Parliamentary Assembly of the Council of Europe has impliedly referred to the *de facto* annexation of Nagorno-Karabakh by Armenia.<sup>377</sup>

The way the 'independence' of Ukrainian regions was recently handled by Russia is undoubtedly an additional cause for concern. For example, as the Republics of Donetsk and Luhansk declared their independence in April 2014, the international community viewed it as a *de facto* annexation by Russia. The next step was the official recognition by Russia of these entities as independent States on 21 February 2022 and eventually in September 2022 their incorporation into the Russian Federation, i.e., their *de jure* annexation. The pace at which this took place was fast and one might rightfully question whether this process might not be applied to other *de facto* States.

Indeed, in March 2022 the President of South Ossetia announced that it would 'take the relevant legislative steps [for] [t]he republic of South Ossetia [to be] part of its historical homeland – Russia' and expressly referred to Russia's invasion of Ukraine as a 'window of opportunity'.<sup>378</sup> The referendum was however cancelled in May 2022.<sup>379</sup>

Second, independence is a requirement for statehood. In 1963, Higgins observed that 'international law has long demanded that before an entity can be acknowledged as a state, it must possess independence and sovereignty'<sup>380</sup> and that 'independence is an indispensable element in the notion of statehood under international law.'<sup>381</sup> Indeed, '[s]ince independence is an expression of sovereignty, that, according to international law, is the evidence of statehood.'<sup>382</sup> The importance of the independence criteria is supported by an alternative to the Montevideo Convention definition. In many States and legal literature, the last two

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<sup>370</sup> Welt (n 153) 14.

<sup>371</sup> Ioannis E Kotoulas, 'Russia as a Revisionist State and the 2022 Invasion of Ukraine' in Collective Scientific Monograph, *The Russian-Ukrainian War (2014-2022): Historical, Political, Cultural-Educational, Religious, Economic and Legal Aspects* (Baltija 2022) 551, 552; See also Parliamentary Assembly of the Council of Europe, *Challenge, on Substantive Grounds, of the Still Unratified Credentials of the Delegation of the Russian Federation*, Resolution 2034 (2015), 28 January 2015, para 12.1.

<sup>372</sup> Kotoulas (n 371) 552.

<sup>373</sup> *Ibidem*.

<sup>374</sup> See report mentioned in *Chiragov* (n 78) para 63.

<sup>375</sup> Roeder (n 162) 313.

<sup>376</sup> UNGA, *Resolution 62/243. The Situation in the Occupied Territories of Azerbaijan*, UN Doc A/RES/6/243, 14 March 2008, para 2.

<sup>377</sup> PACE Resolution 1416 (n 151) para 2.

<sup>378</sup> Cited in No Author, 'Georgia's South Ossetia Plans to Take Steps to Join Russia' *Al Jazeera*, 31 March 2022.

<sup>379</sup> No Author, 'Georgia's South Ossetia Cancels Referendum on Joining Russia' *Al Jazeera*, 31 May 2022.

<sup>380</sup> See also Brigitte Stern 'La succession d'Etats' (1996) 262 *RCADI* 9, 68; Joe Verhoeven, 'La reconnaissance internationale: déclin ou renouveau' (1993) 39 *AFDI* 7, 37.

<sup>381</sup> Rosalyn Higgins, *The Development of International Law Through the Political Organs of the United Nations* (OUP 1963) 25. Grant also argues that '[a] putative state experiencing "substantial external control" ... may lack the essential attribute of statehood' (Grant (n 83) 437.

<sup>382</sup> Doli (n 50) 109.

criteria are merged and replaced by the criterion of an independent power and/or government;<sup>383</sup> in many European States,<sup>384</sup> the three-elements doctrine (*'drei-Elementen-Lehre'*) coined by Jellinek<sup>385</sup> prevails. These three elements of understanding are also found in the Opinion 1 of the Badinter Committee<sup>386</sup> and in the Tagliavini report.<sup>387</sup> According to this doctrine, the elements of the State are a territory (*'Staatsgebiet'*), a population (*'Staatsvolk'*) and 'sovereign' power (*'"souveräne" Staatsgewalt'*). For example, in German international law literature, the two last elements are understood as state power (*'Staatsgewalt'*) that can be divided into internal and external power.<sup>388</sup> Consequently, a State is constituted by 'a sedentary population living on a defined territory and organised under a self-imposed, effective and lasting order, not derived from a State.'<sup>389</sup> In short: 'a territory, a population and an effective and independent government.'<sup>390</sup>

Consequently, independence is an excellent gauge of an entity's ability to function as a State. Independence can be divided into internal and external independence, the former referring to the constitutional autonomy of the entity and the latter requiring the State to be under no other authority than international law (*'Völkerrechtsunmittelbarkeit'*) and not under any other authority (and especially no other State authority).<sup>391</sup>

States, of course, enjoy a broad range of links with other States but one they cannot have is a constitutional relationship with another State.<sup>392</sup> The power of the *de facto* State is not derived from another State;<sup>393</sup> the government is the ultimate authority.<sup>394</sup> Only those entities that are constitutionally independent are considered States by the international community.<sup>395</sup> This stresses the importance of a constitution that spells out the principles and basic rules in light of which the population is to be governed. Independence is, of course not absolute, as the State is still bound by international law.<sup>396</sup> In other words, the only dependence that is allowed is that of international laws, be they general or particular.<sup>397</sup> It is in this frame that a State is allowed to pass over to another State certain rights (e.g., the right to deploy troops on its territory; the right to take binding decisions on its behalf) but this must be done in such a way that there is genuine consent and that the ultimate decision-maker is the State.

To appraise the level of independence of a *de facto* State, a broad view is adopted; the focus is not only on the constitutional setting and military support but also on political and

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<sup>383</sup> Prior to the Montevideo Convention, international law supported a definition of statehood based on three elements. *Deutsche Continental Gas-Gesellschaft* (n 36) 14-15.

<sup>384</sup> Germany: *Fürstentum Sealand* (n 31); BVerwG 1 C 25.92, 28 September 1993, para 20; Switzerland: BGer, *Wang et consorts c Office des juges d'instruction fédéraux*, BGE 130 II 217, 221ff.

<sup>385</sup> Georg Jellinek, *Die Lehre von den Staatenverbindungen* (1882); Georg Jellinek, *Allgemeine Staatslehre* (1905).

<sup>386</sup> '[T]he state is commonly defined as a community which consists of a territory and a population subject to an organized political authority; that such a state is characterized by sovereignty'. See also Opinion 1 (n 107) 182.

<sup>387</sup> EU (n 20) 130-134.

<sup>388</sup> Volker Epping, 'Völkerrechtssubjekte' in Knut Ipsen (ed), *Völkerrecht* (7<sup>th</sup> edn, Beck 2018) para 137.

<sup>389</sup> Germany, BVerwG 1 C 25.92, 28 September 1993, para 20.

<sup>390</sup> *Wang et consorts* (n 384) 221; see also Belkahl (n 108) 240.

<sup>391</sup> Kälin *et al* (n 35) 150.

<sup>392</sup> James (n 106) 461.

<sup>393</sup> Ulrich Schneider, *Die Rechte- und Pflichtenstellung des Unionbürgers. Der Beginn einer europäischen Staatsangehörigkeit?* (LIT 2000) 22.

<sup>394</sup> Okosa (n 19) 110.

<sup>395</sup> James (n 106) 462.

<sup>396</sup> Kälin *et al* (n 35) 150.

<sup>397</sup> Jolicoeur (n 50) 86.

economic ties. The reason for this is because, when examining whether a State is in effective control over the territory and inhabitants of another State, the European Court of Human Rights' 'assessment will primarily depend on military involvement, but other indicators, such as economic and political support,'<sup>398</sup> will also be used since the Court is evaluating whether the State exercises 'significant and decisive influence'<sup>399</sup> on the territory of another State. That jurisprudence is particularly apposite as the *de facto* States are on the territory of States parties to the European Convention on Human Rights and violations committed in *de facto* States have been the subject of seminal cases. A further element to investigate relates to the citizenship/nationality of the inhabitants. Can inhabitants of the territory be granted the nationality of the *de facto* States since '[n]ationality is dependent upon statehood, not vice versa'?<sup>400</sup>

The 'capacity of self-government equally affect (sic) the ability of a state to enter into international relations with other states.'<sup>401</sup> If a State struggles to maintain independence on the national level, it is highly unlikely to be able to maintain it externally. This vindicates the argument that 'the capacity of the State to establish legal relations with other States is an expression of independence'.<sup>402</sup> Likewise, if an entity is not able to be in contact with other States, then it cannot be under international law.<sup>403</sup> Many micro-States have endowed another State with the exercise of their external powers and especially handed over their defence and are, yet, considered States.<sup>404</sup> Based on criteria often mentioned in national jurisprudence on State recognition, some of the elements that need to be assessed are: who is in charge of border controls? Are there custom duties and, if yes, who is collecting them? Is the entity free to determine its foreign policy?

### 4.3. Lack of Independence of *de facto* States in the Post-Soviet Space

#### 4.3.1. Abkhazia and South Ossetia

Abkhazia and South Ossetia are rather similar. The constitutions of Abkhazia and South Ossetia refer to the people as 'the bearer of sovereignty and the only source of authority'.<sup>405</sup> Noteworthy is Article 3(1) of the Constitution of South Ossetia that states that '[t]he Republic of South Ossetia independently determines its state-legal status, resolves issues of political, economic, socio-cultural development.'

Their political system is, on paper, independent of Russia in the sense that they have their own institutions of governance, but the problem concerns political parties and elites. The problem is particularly acute in South Ossetia where a number of institutions were already prior to 2008 'staffed by Russian representatives or South Ossetians with Russian citizenship

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<sup>398</sup> *Chiragov* (n 78) para 169.

<sup>399</sup> *Chiragov* (n 78) para 186.

<sup>400</sup> Crawford (n 8) 52. See also France, Cour Nationale du Droit d'Asile, *M G*, No 15036058, 18 October 2016, para 3.

<sup>401</sup> Chinemelu and Oraeto (n 18) 34.

<sup>402</sup> Doli (n 50) 108.

<sup>403</sup> Kälin *et al* (n 35) 154.

<sup>404</sup> Sterio (n 18) 217. See also Rosalyn Cohen, 'The Concept of Statehood in United Nations Practice' (1961) 109 *U Pa L Rev* 1127, 1140. Examples are the Marshall Islands, the Federated States of Micronesia and Palau and the US (see ICC, *Situation in the State of Palestine*, Submissions Pursuant to Rule 103 (John Quigley), ICC-01/18, 3 March 2020, para 48); Monaco and France (see ICC, *Situation in the State of Palestine*, Submissions Pursuant to Rule 103 (John Quigley), ICC-01/18, 3 March 2020, para 47); Liechtenstein and Switzerland; Cook Islands and New Zealand.

<sup>405</sup> Constitution of Abkhazia, Art 2; Constitution of South-Ossetia, Art 1(2).

that have worked previously in equivalent positions in Central Russia or in North Ossetia'.<sup>406</sup> In elections in South Ossetia the choice is rather limited<sup>407</sup> as candidates must be allowed by Russia, and the local authorities and its institutions are dependent on Moscow's political and economic support.<sup>408</sup> Previously, and especially in Abkhazia, whilst the political elite was generally supportive of Russia, it did not necessarily agree with Russian policies and at times clashed with it.<sup>409</sup> This changed around 2015-2016 with a political elite loyal to Russia and 'integrated into the Russian vertical power structure and accountable more to Moscow rather than their own population.'<sup>410</sup> In Abkhazia, there were occasional demonstrations against pro-Moscow policies viewed as diminishing its independence,<sup>411</sup> and the government had even in 2021 to deal with opposition protesters.<sup>412</sup> Elections in Abkhazia can be said to be generally relatively free.<sup>413</sup>

Whilst both entities are able to adopt their own legislation, they have gradually unified their legal system with that of Russia.<sup>414</sup> Some authors argue that South Ossetia has as a matter of fact copied Russian law,<sup>415</sup> Freedom House specifically mentioning that 'South Ossetia uses a modified version of the Russian criminal code.'<sup>416</sup> In 2016, it was revealed that Russian government agencies were drafting bills to be adopted by the parliament of South Ossetia.<sup>417</sup> Economically, both States are tied to Russia. Russia pays local pensions and contributes to the State budgets of Abkhazia and South Ossetia.<sup>418</sup> Whilst South Ossetia completely relies on Russia,<sup>419</sup> Abkhazia still draws money from tourism and some foreign economic links.<sup>420</sup> Recent data also reveals that Moscow's contributions to Abkhazia's budget have declined in the past few years.<sup>421</sup> After Russia had signed a Treaty of Friendship, Cooperation and Mutual Assistance in 2008 with South Ossetia and Abkhazia respectively, it signed with both a Treaty of Alliance and Strategic Partnership, in February 2015 with South Ossetia<sup>422</sup> and in November 2014 with Abkhazia.<sup>423</sup> These treaties provide extensive assistance from Russia on the economic, social and educational levels.

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<sup>406</sup> EU (n 20) 132. See also De Waal (n 256) 4.

<sup>407</sup> De Waal (n 256) 4.

<sup>408</sup> Freedom House, *Freedom in the World 2022 – South Ossetia*, available at <https://freedomhouse.org/country/south-ossetia/freedom-world/2022>.

<sup>409</sup> Polina I Kvacheva and Svetlana V Petrova, 'Political and Legal Status of Unrecognized States in the Modern World: Historical and Legal Aspects (A Case Study of the Republic of Abkhazia)' (2017) 1(35) *Perm University Herald Juridical Sciences* 56, 59; EU (n 20) 133; Kolstø and Blakkisrud (n 45) 500.

<sup>410</sup> Kvacheva and Petrova (n 409) 60.

<sup>411</sup> See *ibid* 59.

<sup>412</sup> Freedom House, *Freedom in the World 2022 – Abkhazia*, available at <https://freedomhouse.org/country/abkhazia/freedom-world/2022>.

<sup>413</sup> *Ibidem*.

<sup>414</sup> Kvacheva and Petrova (n 409) 63.

<sup>415</sup> Kolstø and Blakkisrud (n 45) 506.

<sup>416</sup> Freedom House *South Ossetia* (n 408).

<sup>417</sup> Cited in De Waal (n 256) 5.

<sup>418</sup> Caspersen (n 99) 56. According to Kvacheva and Petrova 90% of the South Ossetian and 70% of the Abkhazian budgets are stemming from Russia. Kvacheva and Petrova (n 409) 59.

<sup>419</sup> De Waal (n 256) 8.

<sup>420</sup> German (n 44) 161.

<sup>421</sup> Freedom House *Abkhazia* (n 412).

<sup>422</sup> Treaty between the Russian Federation and the Republic of South Ossetia on Alliance and Integration, available at <http://kremlin.ru/supplement/4819>.

<sup>423</sup> Treaty between the Russian Federation and the Republic of Abkhazia on Alliance and Strategic Partnership, available at <http://kremlin.ru/supplement/4783>.

Whilst the constitution of Abkhazia makes no reference to its borders or territorial integrity, the constitution of South Ossetia stresses the important function played by the State in protecting its sovereignty and territorial integrity.<sup>424</sup> That being said, in 2006-2008 the key security posts in South Ossetia and Abkhazia were held by current or former Russian officials<sup>425</sup> and following the 2008 armed conflict and the signature of the 2008 agreements, Russia significantly increased its military presence on the territory of these two entities,<sup>426</sup> thereby indicating their reliance on Russia for their security.<sup>427</sup> The 2014/2015 treaties now provide for a 'single space of defence and security' in relation to South Ossetia<sup>428</sup> and a 'common space for defense and security' in relation to Abkhazia.<sup>429</sup> The agreement with South Ossetia also envisages the incorporation of the armed forces, security agencies<sup>430</sup> and custom authorities<sup>431</sup> of South Ossetia into those of Russia<sup>432</sup> whilst the agreement with Abkhazia is less straightforward, providing for 'joint efforts in protecting the state border'<sup>433</sup> and a gradual standardisation and harmonisation.<sup>434</sup> Abkhazia thus retains its own armed forces. The borders of Abkhazia<sup>435</sup> and South Ossetia<sup>436</sup> are also controlled by or with Russia<sup>437</sup> and a policy of borderisation, i.e., the installation of physical infrastructure along the administrative boundary line, has been implemented on the territories of Abkhazia and South Ossetia.<sup>438</sup> An armed attack on one of them is considered as an armed attack on the other.<sup>439</sup> Based on the 2015 treaty, Abkhazia also signed a programme on the formation of common social and economic space with Abkhazia in November 2020,<sup>440</sup> as it faced economic hardship during the pandemic and thus dropped its lukewarm approach towards further integration with Russia.<sup>441</sup>

Article 3 of the Constitution of Abkhazia claims that it is subject to international law and can enter into relations with other States by way of treaties. It thus recognises no other authority but international law. Article 10 of the Constitution of South Ossetia similarly refers to its right to enter into alliances with other States and in Article 11(2) refers to South Ossetia's relationship with other States being based on treaties and principles and norms of international law, thereby stressing its independence. With regard to independence in the matter of foreign policy, as mentioned before, their ability to conduct an independent foreign policy is limited because of the lack of recognition though South Ossetia has shown little

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<sup>424</sup> Constitution of South-Ossetia, Art 3(3).

<sup>425</sup> For South Ossetia, see German (n 73) 59. For both entities, see EU (n 20) 17-18 and 127-135.

<sup>426</sup> ECtHR, *Georgia v Russia (II)*, Application No 38263/08, 21 January 2021, para 43.

<sup>427</sup> For South Ossetia, see German (n 44) 160.

<sup>428</sup> Treaty with South Ossetia (n 422) Art 2(1).

<sup>429</sup> Treaty with Abkhazia (n 423) Art 5.

<sup>430</sup> Treaty with South Ossetia (n 422) Art 2(2).

<sup>431</sup> Treaty with South Ossetia (n 422) Art 5(1).

<sup>432</sup> See German (n 44) 159.

<sup>433</sup> Treaty with Abkhazia (n 423) Art 9(1).

<sup>434</sup> See e.g., Treaty with Abkhazia (n 423) Arts 11 and 12.

<sup>435</sup> PACE Resolution 2034 (n 371) para 12.2.

<sup>436</sup> Treaty with South Ossetia (n 422) Art 2(2); see German (n 44) 160.

<sup>437</sup> *Georgia v Russia (II)* (n 426) para 171.

<sup>438</sup> Tracey German, 'Russia and the South Caucasus: The China Challenge' (2022) 74(9) *Eur-Asia Stud* 1596, 1606; De Waal (n 256) 7.

<sup>439</sup> Treaty with South Ossetia (n 422) Art 2(3); Treaty with Abkhazia (n 423) Art 6(1).

<sup>440</sup> No Author, 'Moscow, Sokhumi Sign 'Common Social-Economic Space' Program, Tbilisi Decries' *Civil Georgia*, 25 November 2020.

<sup>441</sup> Freedom House Abkhazia (n 412).

interest in developing relations with States other than Russia.<sup>442</sup> Whereas Article 11 of the Constitution of South Ossetia spells out the principles upon which South Ossetia's foreign policy is built it is Abkhazia's formal act of independence of 1999 that refers to such principles.<sup>443</sup> They include the classic principles of equality, non-interference in internal affairs, good neighbourhood, etc. Yet, the 2015 Treaty evidently states that South Ossetia and Russia on the one hand and Abkhazia and Russia on the other are to 'pursue a coordinated foreign policy',<sup>444</sup> thereby leaving very little room for an independent foreign policy.

An interesting feature of the Constitution of South Ossetia is its reference to its relations with the Republic of North Ossetia which, it declares, is built 'on the basis of ethnic, national, historical and territorial unity, socio-economic and cultural integration.'<sup>445</sup> It should be remembered that North Ossetia is part of Russia and that the idea of an 'integration' mentioned in the constitution no doubt conveys the impression that, in the long run, the aim is its incorporation into Russia. The Treaty signed between Russia and South Ossetia further supports this view. First, in contrast to the one with Abkhazia whose title contains 'alliance and strategic partnership', the one with South Ossetia refers to 'alliance and *integration*'. Second, the treaty with South Ossetia contains 15 straightforward clauses and is valid for 25 years, automatically extended for successive ten-year periods<sup>446</sup> whereas the one with Abkhazia is more elaborate with 24 provisions and is concluded for 10 years, automatically renewed for successive five-year periods.<sup>447</sup> As South Ossetia announced a referendum to join Russia in 2022 (which was later cancelled), Abkhazia, on the other hand, declared that it had no plans to join Russia.<sup>448</sup> The population of the latter has always been divided on whether it ought to be independent or become a part of Russia.<sup>449</sup>

Although both States grant nationality to the inhabitants, the overwhelming majority of the population also holds Russian nationality and the 2015 Treaty has simplified the procedure for acquiring Russian citizenship.<sup>450</sup> Whilst this means that Russian citizens are entitled to Russian medical insurance,<sup>451</sup> health care,<sup>452</sup> pensions,<sup>453</sup> etc.<sup>454</sup>, this passportisation policy<sup>455</sup> has also given Russia the opportunity and the legal authority to claim that in intervening in these *de facto* States against Georgia it was protecting its own nationals. Russia's claims have nevertheless been dismissed by scholars as unsound.<sup>456</sup> As *German* concludes, '[w]ithout Russian patronage, South Ossetia is not a viable state and would not survive, unable to function as a state entity'.<sup>457</sup> The same observation can be made of Abkhazia though to a

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<sup>442</sup> De Waal (n 256) 5.

<sup>443</sup> Act of State Independence of the Republic of Abkhazia, 12 October 1999.

<sup>444</sup> Treaty with South Ossetia (n 422) Art 1(1); Treaty with Abkhazia (n 423) Art 4(1).

<sup>445</sup> Constitution of South-Ossetia, Art 8.

<sup>446</sup> Treaty with South Ossetia (n 422) Art 5.

<sup>447</sup> Treaty with Abkhazia (n 423) Art 23.

<sup>448</sup> No Author (n 378).

<sup>449</sup> Pegg and Berg (n 3) 272.

<sup>450</sup> Treaty with South Ossetia (n 422) Art 6; Treaty with Abkhazia (n 423) Art 13.

<sup>451</sup> Treaty with Abkhazia (n 423) Art 16; Treaty with South Ossetia (n 422) Art 9.

<sup>452</sup> Treaty with Abkhazia (n 423) Art 17.

<sup>453</sup> Treaty with Abkhazia (n 423) Art 15; Treaty with South Ossetia (n 422) Art 8.

<sup>454</sup> See discussion in EU (n 20) 132.

<sup>455</sup> See EU (n 20) 155-183.

<sup>456</sup> See James Green, 'Passportisation, Peacekeepers and Proportionality: The Russian Claim of the Protection of Nationals Abroad in Self-Defence' in James A Green and Christopher PM Waters (eds), *Conflict in the Caucasus. Implications for International Legal Order* (Palgrave 2010) 54-79.

<sup>457</sup> German (n 44) 158.

lesser extent.<sup>458</sup> In 2008, the Tagliavini report referred to ‘creeping annexation’<sup>459</sup> but it was undoubtedly the 2008 armed conflict and the ensuing recognition by Russia that decreased South Ossetia’s and Abkhazia’s claims of independence and thus their claims to statehood. It is quite telling that two Russian scholars state that ‘many officials in Moscow started to treat the republics as two additional constitutional territories of the Federation.’<sup>460</sup>

#### 4.3.2. Transnistria

Transnistria is different from the previous *de facto* States though it shares common features. Under Article 1 of its Constitution, the people are ‘the bearer of sovereignty and the only source of power’. The political governance system appears independent as the entity has its own institutions and laws but it is corrupt and there is no meaningful opposition.<sup>461</sup> Elections are run periodically and there are no reports of Russian meddling but given that the entire political elite supports Russia’s role as a patron-state,<sup>462</sup> no such interference is necessary. Moreover, some of the ministerial posts were held by former KGB officials,<sup>463</sup> thus questioning the independence of the political elite. It should also be noted that on 17 September 2006, a second independence referendum was held, supporting the independence with the subsequent free association with Russia. In the long run, it appears that Transnistria wants to be incorporated into Russia. In addition, notwithstanding Article 3 which provides for the nationality of Transnistria, as explained earlier, the majority of the population has also acquired Russian nationality.

Transnistria’s economic system is boosted by Russia which supports local companies, offers special gas prices,<sup>464</sup> economic aid<sup>465</sup> and economic subsidies more generally.<sup>466</sup> As a result of the lower price of gas, local enterprises are more competitive and household energy prices have been kept low.<sup>467</sup> Russia has also opened its market to goods from Transnistria, thereby boosting its economy.<sup>468</sup> More worryingly, Sheriff Enterprises, the second largest company in Transnistria, is a powerful business conglomerate that dominates not only the Transnistrian economy and has also a stronghold on political matters.<sup>469</sup>

The President is assigned the key role of adopting measures relating to the sovereignty, independence and territorial integrity of the entity<sup>470</sup> whilst the armed forces are to defend these principles.<sup>471</sup> The reality is that the Russian 14<sup>th</sup> army has been in Transnistria since its inception and that it appears to be with the consent of the State authorities<sup>472</sup> even though Russia had, as part of its accession commitments to the Council of Europe, agreed that it

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<sup>458</sup> See EU (n 20) 134.

<sup>459</sup> EU (n 20) 18-19.

<sup>460</sup> Kvačeva and Petrova (n 409) 59.

<sup>461</sup> Freedom House, *Freedom in the World 2022 – Transnistria*, available at <https://freedomhouse.org/country/transnistria/freedom-world/2022>.

<sup>462</sup> *Ibidem*.

<sup>463</sup> Kolstø (n 261) 732.

<sup>464</sup> Freedom House *Transnistria* (n 461).

<sup>465</sup> *Catan* (n 77) paras 39 and 41.

<sup>466</sup> Parliamentary Assembly of the Council of Europe, *The Honouring of Obligations and Commitments by the Russian Federation*, Doc 13018, 14 September 2012, para 157.

<sup>467</sup> Laoutides (n 356) 74.

<sup>468</sup> *Ibidem*.

<sup>469</sup> Freedom House *Transnistria* (n 461).

<sup>470</sup> Constitution of Transnistria, Art 70.

<sup>471</sup> Constitution of Transnistria, Arts 11 and 94.

<sup>472</sup> A referendum held in 1995 supported the presence of Russian troops in Transnistria.



would remove the 14<sup>th</sup> army<sup>473</sup> though never did. How much this consent is genuine is difficult to gauge. Criticizing the presence of the so-called ‘peacekeeping’ troops has been penalised in the criminal code.<sup>474</sup> As the European Court of Human Rights already stated in *Catan* ‘[t]he continued Russian military and armaments presence in the region sent a strong signal, to the ‘MRT’ leaders, the Moldovan Government and international observers, of Russia’s continued military support for the separatists.’<sup>475</sup> In examining acts that took place in 1991-1992, the European Court of Human Rights stated that Transnistria was ‘under the effective authority, or at the very least under the decisive influence, of the Russian Federation’<sup>476</sup> which had provided military, economic, financial and political support.<sup>477</sup> Such support was still visible between 2004 and 2007,<sup>478</sup> between 2008 and 2010<sup>479</sup> and is likely to be still in place at the time of writing. It is doubtful that without these armed forces, Transnistria would exist.<sup>480</sup>

The Constitution of Transnistria spells out that should a treaty conflict with national law, it can only be ratified following a change in national law,<sup>481</sup> thereby accepting the primacy of international law. Alike the Constitution of South Ossetia, that of Transnistria refers to its relationship with other States being based on treaties and principles and norms of international law, thereby stressing its independence.<sup>482</sup> Article 10 of the Constitution spells out the principles upon which the foreign policy of Transnistria is based but, much like the two Caucasian entities, is, owing to a lack of recognition, unable to exercise it. In its foreign economic relations, Russia not only is its main trading partner but also controls its borders. As noted by the European Court of Human Rights, Russia was able to ban imports from Moldova, thus controlling the ‘economic’ borders of Transnistria.<sup>483</sup> Undoubtedly, without Russian support, Transnistria would not be able to survive. Its independence is and has always been highly questionable and so is its statehood.

#### 4.3.3. Nagorno-Karabakh

That of Nagorno-Karabakh, this time in relation to Armenia, is even more questionable. Already in 2010, *Krüger* was arguing that Nagorno-Karabakh and Armenia were a loose *de facto* federation.<sup>484</sup> Its population tends to favour unification with Armenia rather than independence<sup>485</sup> and Armenia never recognised its independence. In point of fact, Article 19 of the Constitution specifically refers to the ‘Ties with the Republic of Armenia and Armenian Diaspora’, explaining that Nagorno-Karabakh ‘shall implement a policy aimed at political, economic and military cooperation and ensuring comprehensive ties and security with the Republic of Armenia.’ The Preamble of the Constitution refers to ‘Motherland Armenia’. It

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<sup>473</sup> PACE Resolution 2034 (n 371) para 12.3.

<sup>474</sup> Freedom House Transnistria (n 461).

<sup>475</sup> *Catan* (n 77) para 121. See also Freedom House Transnistria (n 461).

<sup>476</sup> *Ilaşcu* (n 157) para 392.

<sup>477</sup> See also *Catan* (n 77) para 105.

<sup>478</sup> ECtHR, *Ivanțoc and Others v Moldova and Russia*, Application No 23687/05, 15 November 2011, para 118.

<sup>479</sup> *Mozer* (n 77) paras 107-108.

<sup>480</sup> *Kolstø* (n 261) 732.

<sup>481</sup> Constitution of Transnistria, Art 57.

<sup>482</sup> *Ibid*, Art 10.

<sup>483</sup> *Catan* (n 77) paras 29 and 30.

<sup>484</sup> *Krüger* (n 9) 112-113.

<sup>485</sup> *Pegg and Berg* (n 3) 272.

could not be more explicit in stating its close relationship with Armenia whilst still stressing its independence and statehood in the same Preamble.

From a political perspective, the Constitution states that the power belongs to the people<sup>486</sup> and provides for the establishment of institutions to govern the entity. Elections are held at regular intervals and in contrast to previous years, the 2020 Presidential elections were assessed as relatively free and fair.<sup>487</sup> However, there is an interchange of prominent politicians (including Ministers) between Armenia and Nagorno-Karabakh,<sup>488</sup> and there are claims that they are in truth appointed by Armenia,<sup>489</sup> thereby raising the issue of the real political independence of the entity. Armenia in 2000 acknowledged that its authorities 'wield[ed] major influence over Nagorno-Karabakh'.<sup>490</sup> On the other hand, the tail has sometimes been able to wag the dog as, for example, Nagorno-Karabakh was instrumental in toppling the Armenian president.<sup>491</sup> In addition, since the 2018 changes in Armenia that led to its disengagement in Nagorno-Karabakh, the political elite has grown in size with many independent candidates.<sup>492</sup> The 2020 defeat against Azerbaijan has also seen a withdrawal of Armenia's influence in local politics.<sup>493</sup> It is claimed that some of the laws adopted in Armenia are applicable in Nagorno-Karabakh.<sup>494</sup> The Armenian government transfers large amounts of money to Nagorno-Karabakh to sustain its economy.<sup>495</sup>

The inhabitants hold Armenian passports<sup>496</sup> even though Nagorno-Karabakh has its own citizenship. As the nationality of Nagorno-Karabakh was not recognised and the constitution of the time did not refer to a citizenship, a 1999 Agreement provided that Armenia could deliver Armenian passports for travel purposes only.<sup>497</sup> This type of 'citizenship' however does not make holders of such passports eligible for benefits reserved to Armenian citizens.<sup>498</sup> Overall, 'when it comes to economy, culture and defense, Nagorno-Karabakh and Armenia can be seen as a single space'.<sup>499</sup> Clearly, Nagorno-Karabakh is not able to maintain itself without Armenia.<sup>500</sup>

Under Article 5 of the Constitution, international law has primacy over national law. Like for the other entities, the President is the most important power in relation to national security and armed forces.<sup>501</sup> However, the Armenian armed forces are constantly present,<sup>502</sup> despite claims to the contrary,<sup>503</sup> and conscripts sent to Nagorno-Karabakh.<sup>504</sup> The 1994 agreement on Military Cooperation between the Governments of the Republic of Armenia and the

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<sup>486</sup> Constitution of Nagorno-Karabakh, Art 2(2).

<sup>487</sup> Freedom House Nagorno-Karabakh (n 43).

<sup>488</sup> *Chiragov* (n 78) paras 78 and 181; Kolstø and Blakkisrud (n 45) 501.

<sup>489</sup> *Chiragov* (n 78) para 68.

<sup>490</sup> Armenia's Application for Membership (n 219) para 59.

<sup>491</sup> Kolstø (n 261) 733.

<sup>492</sup> Freedom House Nagorno-Karabakh (n 43).

<sup>493</sup> *Ibidem*.

<sup>494</sup> Claimed made by the applicants in *Chiragov* (n 78) para 182.

<sup>495</sup> *Chiragov* (n 78) paras 68, 80-82, 183; Kolstø and Blakkisrud (n 45) 496; Kolstø (n 261) 733.

<sup>496</sup> *Chiragov* (n 78) para 83.

<sup>497</sup> Cited in *ibidem*.

<sup>498</sup> Kolstø and Blakkisrud (n 45) 501.

<sup>499</sup> Caspersen (n 99) 56.

<sup>500</sup> Bowering (n 11) 21.

<sup>501</sup> Constitution of Nagorno-Karabakh, Art 94.

<sup>502</sup> *Chiragov* (n 78) paras 62, 65, 68.

<sup>503</sup> See Armenia's Application for Membership (n 219) para 60.

<sup>504</sup> ECtHR, *Zalyan, Sargsyan and Serobyan v Armenia*, Applications No 36894/04 and 3521/07, 17 March 2016.

Republic of Nagorno-Karabakh provides for close military cooperation between Armenia and the *de facto* State,<sup>505</sup> and has formalised Armenia's military involvement.<sup>506</sup> Foreign policy is conducted by the President but again is rather limited, owing to the lack of recognition of the entity. The Constitution also mentions the principles of foreign policy<sup>507</sup> though it does not specify that its relationship with other States is based on treaty law and other related international law norms. Of the four *de facto* States, Nagorno-Karabakh is undoubtedly the least independent entity and thus does not fulfil the requirements of statehood.

## Conclusion

The four entities analysed in this chapter possess many trappings of statehood, similar to sovereign recognised States. They have a defined territory, a permanent population, an effective government though it is more basic in its functions than one would expect, especially in a European context, and have shown their capacity to enter into relations with other entities. However, owing to a lack of recognition, they are unable to conduct effective foreign relations with States apart from their patron State.

Lack of recognition should not be a problem since, after all, there is some agreement that recognition as a unilateral act, i.e., an act based on political considerations that has legal consequences, is declarative. In other words, an entity is deemed a State from the moment it fulfils the Montevideo Convention requirements and no recognition to this effect is required. Such theory ensures that an entity does not need to seek recognition from major powers and can without official recognition defend its territorial integrity and independence as well as organise itself without undue interference.<sup>508</sup> However, for entities that are seceding from their parent State, recognition is essential.

In the 1970s, the international community via the United Nations declared that failure to comply with some key principles of international law would inexorably lead to a denial of recognition of the emerging State. Some of the *de facto* States studied in this chapter breached one of these principles but not all. The problem is that as the Soviet Union was collapsing, assessing whether they seceded from the Soviet Union, a Soviet Republic or an independent State – especially when multiple declarations of sovereignty/independence were made – is difficult and so is the lawfulness of their creation.

As for their claim to the right of self-determination, the current state of the law is that they do not fulfil the criteria; a broad definition of alien/foreign occupation or of remedial secession (provided it is accepted) would need to be adopted. As much as one might sympathise with their claims and especially decades of discrimination and lack of meaningful self-governance, they cannot claim a right to self-determination. A change in the interpretation of the circumstances under which a people can invoke such a right is unlikely to be adopted any time soon. The latest jurisprudence of the UK Supreme Court on the Scottish people's claim is nothing but a reiteration of previous case law. Moreover, even if the UK Supreme Court 'almost accepted remedial secessions' validity *de plano*' and the doctrine of remedial secession is gaining traction,<sup>509</sup> the use of the referenda in Ukraine leading to

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<sup>505</sup> Cited in *Chiragov* (n 78) para 74.

<sup>506</sup> *Ibid* para 175.

<sup>507</sup> Constitution of Nagorno-Karabakh, Art 13.

<sup>508</sup> Montevideo Convention (n 13) Art 3.

<sup>509</sup> See Andrea Maria Pelliconi, 'Self-Determination as Faux Remedial Secession in Russia's Annexation Policies: When the Devil Wears Justice' *Völkerrechtsblog*, 26 January 2023.

declarations of independence and eventual incorporations into Russia has led the international community to grow worried about deploying such means to detect the peoples' longing for independence and grant independence more generally.

The problem for the international community is, as much as it was hoped that these entities would come back into the fold of their 'parents', they have survived for 30 years. These three decades have not made them stronger in the sense of State- and nation-building, it has led them to seek the support of a patron State or allow a third party State to offer its support. The consequences are wide-ranging but, from a legal perspective, the most obvious one is that now their claim to statehood is even weaker than it was before; their governments might be effective, but they are not independent. 2008 was a watershed year for South Ossetia and Abkhazia; Transnistria and Nagorno-Karabakh have gradually (the former more slowly than the latter) slipped into the hands of their patron State.

At this point, it is even more difficult to recognise them. Too late? Abkhazia, South Ossetia, and Transnistria are more or less *de facto* constituent parts of Russia, and it is doubtful that their recognition by the international community (if it were to ignore the unlawfulness of their emergence and set aside the complicated history of the dissolution of the Soviet Union) would boost their (real) independence and thus contribute to reinforcing their statehood. Given Russia's attitude towards its near abroad, the international community might recognise three satellite statelets, all mouthpieces of Russia. As for Nagorno-Karabakh, the situation at the time of writing has sadly reached new lows with a blockade of the Lachin corridor. Maybe, indeed, too late.

Whether there is a point for them to continue striving for independence and statehood is very much a question for these entities to answer for themselves. They do not want to go back into the fold of their parent State; they even prefer to fall within the legal, political, economic, social, and cultural realm of another State with which they sometimes originally did not share much affinity. To some extent, their claim to statehood seems to be a reflex grounded in the past with no actual will or teeth in the contemporaneous world.

From a legal perspective, their situation is troubling because their territory is formally governed by the law of their parent State which can be held responsible for international law violations occurring on the territory without yet having any means of implementation or enforcement of the law. The only State that would have such power is the patron State which often denies any involvement or influence on the entity. The result is the creation of a lawless area that does not even aspire any more to comply with international law and be recognised as a State by the international community.