



CENTER FOR TRANSATLANTIC RELATIONS



# THE LAW AND POLITICS OF ENGAGING DE FACTO STATES: INJECTING NEW IDEAS FOR AN ENHANCED EU ROLE

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**THE LAW AND POLITICS OF ENGAGING  
DE FACTO STATES:  
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ROLE**

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## Introduction

The territorial disputes of the Southern Caucasus that remain unresolved today represent a permanent and sad reminder that the optimism that endured throughout 1989 and 1991<sup>1</sup> has given way to a more sobering and rather painful state of nation-building in this volatile region at the East European periphery. Abkhazia, South Ossetia and Nagorno-Karabakh are three distinct and in some ways intertwined territorial entities that have defied the jurisdiction of their metropolitan states<sup>2</sup> and managed, over time and often with enormous external assistance,<sup>3</sup> to assume *de facto* state functions<sup>4</sup> which include more than the possession and exercise of the monopoly of power.<sup>5</sup> They also epitomize an unprecedented humanitarian catastrophe: there are approximately 2 million people throughout this region who have been forcibly displaced as a result of ethno-political mobilization and subsequent armed conflicts since the late 1980s.<sup>6</sup>

The conflicts that have shaken up the entire region after the collapse of the Soviet Union have been thoroughly covered by academic scholarship. They have received scholarly attention through methodological approaches, which emphasize the strategic importance of the region of the South Caucasus. Conveniently located between the Black and the Caspian Seas and at the interface between Christianity and Islam,<sup>7</sup> the region has is a hotspot for the competing desires of Great Powers and those who deem themselves such. Accordingly, those “frozen conflicts” of the region have turned into permanent bargaining chips in the geopolitics of the South Caucasus. Ethnic

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<sup>1</sup> With the adoption of the ‘Belovezh Accords’ in December 1991, the Soviet Union was considered to have also formally ceased its existence.

<sup>2</sup> Throughout this work, Georgia and Azerbaijan are referred to as *metropolitan states* with respect to the(ir) disputed territories. The author of the present work rejects the terminological concept of a ‘mother state’ or ‘parent state’ and other equally problematic denominations which fail, thus the author, to escape the bias trap. He maintains that, in particular for a legal analysis, the term “metropolitan state” resonates much better also with regard to international law scholarship in the field. See, e.g. Jorri C. Duursma, *Fragmentation and the international relations of Micro-States. Self-determination and statehood* (Cambridge: Cambridge University Press, 1996); James Crawford, *The Creation of States in International Law* (New York: Oxford University Press, 2006).

<sup>3</sup> This paper will not analyze or assess the extent of external support for the secessionist movements in all three cases. It will, rather, treat the *de facto* states resulting from the armed conflicts as consolidated entities which will exist for an indefinite period of time. Nevertheless, support by third states has always been a crucial factor in these conflicts, although not the only source of support.

<sup>4</sup> Indeed, Charles King has framed this quite convincingly: “The territorial separatists of the 1990s have become the state builders of the 2000s creating *de facto* countries whose ability to field armed forces, control their own territory, educate their children ... is about as well developed as that of the recognized state of which they are still notionally a part.” See: Charles King, “The Benefits of Ethnic War – Understanding Eurasia’s Unrecognized States”, in: *World Politics* (Vol. 53, No. 4, 2001), 524-552, 525.

<sup>5</sup> *De facto* states do, albeit on a modest level, provide health care and other public services.

<sup>6</sup> The very first documented instances of organized violence have been reported from Azerbaijan and Nagorno-Karabakh already by 1988.

<sup>7</sup> Brenda Shaffer argues convincingly that “[t]he Caucasus is an excellent laboratory for testing the influence of religious and cultural differences on the emergence of alliances and rivalries.” See: Brenda Shaffer, “The Geopolitics of the Caucasus”, in: *Brown Journal of World Affairs* (Vol. XV, No. 2, 2009), 131-142, 132.

diversity becomes, if one follows this logic, a liability for the stability of the region and of individual countries and a factor that pushes and pulls peoples in different directions. This picture resonates with national stereotypes of the local actors, be it state or *de facto* state actors. One widespread public narrative in Georgia designates a problematic definition of the institutional accommodation of ethnic and cultural diversity. It states that autonomous territorial formations on Georgian soil have always been “mines”<sup>8</sup> planted by Russia in order to weaken the Georgian state. Likewise, the French co-chairmanship in the OSCE Minsk Group – with Turkey being only an ordinary member of the OSCE Minsk Group – has always aroused suspicion in Azerbaijan, given the assumed pro-Armenian bias of French foreign policy infrastructure. In light of this, the external factors in both ameliorating and exacerbating the territorial disputes have always been a primary focus of academia and academic political advocacy in this context.<sup>9</sup> This is not to argue that these local narratives have been shared by the respective societies unanimously, instead they have been often too easily and rather uncritically picked up by observers and have shaped how we understand the logic of these conflicts.

This interplay between local narratives and outside observation has not been entirely helpful. It has allowed viewing conflicts such as those in Georgia exclusively through the lenses of proxy wars, which generally amounts to lazy analysis. By dismissing sources of support other than those provided by the patron state, we run into the trap of buying into the preferred discourse(s) of *all* conflict parties. By portraying these territorial issues as geopolitical confrontations with hardly any local dynamics, the parties can easily disengage and choose not to participate in substantial talks. The question of how power sharing and subsequent constitutional law arrangements can be accommodated after those conflicts has hardly been addressed at all.

Domestic factors that have contributed to these conflicts have been aptly researched as well. Part of these approaches was focusing on the critical dimension of the role of national elites and the mobilization tools used, thereby creating a security dilemma that quickly provided the opportunity to armed conflict. In particular, scholars such as Stuart Kaufman have, in this context, provided a most valuable glimpse into a reinvigorated *primordialism v. constructivism* debate, through which it is claimed that ethnic symbols and historical (competing) narratives have equally provided their share for the conflicts of the region.<sup>10</sup> One may reason that – in a complementary manner – Marc Beissinger<sup>11</sup> has illustrated the important interplay between structural underlying factors – particularly focusing on the Soviet ethno-federal system that has planted some of the underlying

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<sup>8</sup> Stuart Kaufman, *Modern Hatreds: The Symbolic Politics of Ethnic War* (New York: Cornell University Press, 2001), 94.

<sup>9</sup> Nina Caspersen, “Playing the Recognition Game: External Actors and De Facto States”, in: *The International Spectator* (Vol. 44, No. 4, 2009), 47–60; Annie Jafalian (Ed.), *Reassessing Security in the South Caucasus: Regional Conflicts and Transformation* (New York: Routledge, 2011); Dov Lynch, *Engaging Eurasia’s Separatist States - Unresolved Conflicts and De Facto States* (Washington, DC: United States Institute of Peace Press, 2004).

<sup>10</sup> See the already quoted Stuart Kaufman monograph *Modern Hatreds*. His truly fascinating contribution lies in the fact that he abstains from flogging the dead horse of a simple reading of primordialism.

<sup>11</sup> See in particular: Marc Beissinger, *Nationalist Mobilization and the Collapse of the Soviet State* (Cambridge: Cambridge University Press, 2002).

nasty seeds of conflict – the opening of the political space through *perestroika* and *glasnost* through which political and (!) ethno-political demands could publicly be voiced for the very first time and, finally, event-specific processes.<sup>12</sup> Likewise, there is also no scarcity of excellent insights into the inner workings of *de facto* states. Georgetown-based historian Charles King has, for example, provided important insights into the legitimate question of the longevity of these entities.<sup>13</sup> Furthermore, Nina Caspersen has provided excellent scholarly work in identifying sources of both support and stability for unrecognized states.<sup>14</sup> In a similar vein, Tom Trier and his co-editors have charted new academic territory by focusing on the internal legitimacy of *de facto* statehood through ethno-cultural policies through problematizing the example of Abkhazia.<sup>15</sup> And finally, there is a lot of literature and scholarship available about the Europeanization efforts of the EU with regard to both the conflicts as well as the *de facto* states of the South Caucasus.<sup>16</sup>

However, the *de facto* states of the South Caucasus have already existed for 25 years. Given their longevity and the growing intractability that comes as a byproduct, it seems to have become a commonplace to maintain that there is no ‘silver bullet’ that would quickly reconcile the divided societies. The question remains and will, for the time being, continue to remain how those entities *ought* to be addressed in a meaningful way to keep some form of rapprochement and institutional power sharing on the radar, no matter how much distant such a perspective may seem.

The fact that the disputes over these conflicts oscillate around core principles of international law – be it the right to self-determination of peoples or the prohibition of force – forces the observer to integrate the law aspect into the analysis. Indeed, the conflicts over disputed territories represent primary examples of how politics and law are mutually implicated and mutually informed. As a consequence, in these scenarios one is sometimes confronted with politicized law and legalized politics. Yet, this does not necessarily mean that the legal analysis should be restricted to a mere compliance question, which presupposes a context in which law is distinguished from agent. The question, for instance, of whether or not Nagorno-Karabakh is entitled to exercise a right to secede from Azerbaijan on the grounds of the principle of self-determination is to be asked separately from the interaction of law and politics, whereby this very interaction occurs in the domain of

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<sup>12</sup> For instance, the April 9 tragedy of 1989 became an important turning point in the conflict cycle over Abkhazia: On 9 April 1989, thousands of Georgians took to the streets of Tbilisi to voice their opposition to Abkhaz separatist demands and Soviet occupation. The demonstration was dispersed by the Soviet Army, resulting in the death of about 20 demonstrators. This event confirmed in the eyes of many Georgians that the Soviet Center is actually behind the Abkhaz separatist claim. Likewise, the 1988 pogroms of Armenians in the cities of Sumgait and Baku can equally be cited as event-specific instances which further fueled the tensions.

<sup>13</sup> Charles King, “The Benefits of Ethnic War – Understanding Eurasia’s Unrecognized States”.

<sup>14</sup> Nina Caspersen, *Unrecognized States: The Struggle for Sovereignty in the Modern International System* (Cambridge: Polity Press, 2012).

<sup>15</sup> Tom Trier, Hedwig Lohm and David Szakonyi, *Under Siege: Inter-ethnic Relations in Abkhazia* (Hurst Publishers, 2010), 121.

<sup>16</sup> One of the most important monographs in this field is: Nathalie Tocci, *The EU and Conflict Resolution: Promoting Peace in the Backyard* (Routledge/UACES Contemporary European Studies: New York, 2007).

law.<sup>17</sup> The principle of self-determination of peoples within the context of secession clearly demonstrates that agents, actions and norms are objects of such “discursive contestation”.<sup>18</sup> It allows the conflict parties to raise legally colored political claims or to reject legal arguments on non-legal grounds. It is in this context a rather telling example can be given: While Georgia still continues to publicly invoke the principle of territorial integrity as sufficiently strong argumentative basis, it couples this argument with the pressing needs of internally displaced persons (IDPs) and provides, thereby, an argument which is deemed as “too political” by their Abkhaz or Ossetian counterparts.<sup>19</sup> It is therefore also for this reason, that the *legal* aspect must represent an indispensable component of any meaningful attempt to grasp the underlying notions of those territorial conflicts.

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<sup>17</sup> Oisín Suttle has aptly investigated this matter by invoking the example of the UK-Irish dispute over Northern Ireland. His findings indicate that legal claims are always open to a legal-normative discourse, in which the apparent “legal” argument is only a subsection of political argumentation, which is revolving around and communicating with rules. See: Oisín Suttle, “Law as deliberative discourse: The politics of international legal argument – social theory with historical illustrations”, in: *Journal of International Law and International Relations* (Vol. 12, No. 1, 2016), 151-203, 159.

<sup>18</sup> *Ibid.*, 156.

<sup>19</sup> In turn, those arguments are to a considerable degree informed by the domestic political context. Since the IDP community in Georgia represents an important and valuable part of the nation’s electorate, hardly any government will want to risk its survival by proposing too many concessions to the secessionists.

## The Crux of the Matter: Defining the Problem(s)

### *Overcoming Incorrect Dichotomies*

Given the above, what does this essay seek to discuss? The international system is much more fluid, and as Florea rightly argues, much more kinetic than mainstream international relations theories and traditional international law approaches portray.<sup>20</sup> We are in reality not confronted with a binary situation in which the either-or dichotomy guides our reasoning and, consequently, must guide our policies. The classical and realist view according to which a state is either sovereign or it is not a state is – if we choose to admit it or not – seriously challenged by the continuous existence of *de facto* states.<sup>21</sup> This article is aimed at injecting some fresh blood into the discussion on reframing the understanding of sovereignty in the South Caucasus with regard to the disputed territories.

By building on the already mentioned vast bulk of excellent scholarship, the author of this book argues that the *de facto* states, representing the most notorious outcome of the wars in the 1990s, do not represent an anomaly in international politics, nor are they a ‘blind spot’ outside of the application of international law. By effectively defying the jurisdiction of Georgia and Azerbaijan, these entities have grown into indicators of a consolidated permanent dichotomy of the clash of (external) self-determination vs. territorial integrity of states.

While reintegration into Azerbaijan and/or Georgia appears to be a highly unlikely scenario, the other extreme will not ameliorate the crisis either. And indeed, diplomatic recognition of these entities does not seem to provide an exit out of these troubles: The most problematic decision of the Russian Federation in 2008 to diplomatically recognize Abkhazia and South Ossetia has probably removed the last incentive of the local population to constructively engage in discussions over sovereignty and/or a future power-sharing deal under a common state roof of the metropolitan state, the Republic of Georgia. Hence, Thomas de Waal’s point on the fact that it is inaccurate to speak of the possibility of “conflict resolution” and that it would be rather commendable to use the term of a slow “conflict transformation” is actually correct.<sup>22</sup> Moreover, this most dreadful decision has actually narrowed the independence of Abkhazia and South Ossetia rather than bolstered it. Both South Ossetia and Abkhazia are today less autonomous in their room for maneuver and decision-making capabilities than they used to be prior to 2008.<sup>23</sup> And also the

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<sup>20</sup> Adrian Florea, “De Facto States in International Politics (1945–2011): A New Data Set”, in: *International Interactions* (Vol. 40, 2014), 788-811, 789.

<sup>21</sup> Evidently, in this regard the South Caucasus represents only a part of the broader picture with many unrecognized entities all over the world.

<sup>22</sup> Thomas de Waal, “Whither the South Caucasus?” (*CTR Working Paper Series – Eastern Voices: Europe’s East Faces an Unsettled West*, March 2017).

<sup>23</sup> In a televised interview for an Abkhazian TV channel in December 2016, the former UN Special Representative for Abkhazia, Dieter Boden, referred to this decision as a “continuation of the conflict”. See:

governments of *de facto* states will gradually start to ask what they gain from partial diplomatic recognition, unless they are recognized by the metropolitan state. In order to address the issue of *de facto* states, we therefore have to overcome certain beliefs which have been, to some extent, the reason why we are still far away from conflict resolution in the South Caucasus.

## **Law: Neither *Just* nor a *Remedy* in Self-Determination Disputes**

### ***Legal Argument as a Subset of International Political Argument***

The stable existence of *de facto* states bluntly illustrates the obvious limitations to international law in its *remedial* function. Neither does the position, or probably much better put the “battle cry”,<sup>24</sup> of the *de facto* states – to have their “right” to *external* self-determination respected – nor the outcry of the metropolitan states – not to allow their territorial integrity to be infringed – translate into a viable solution *ipso facto*. The fact of the matter is and remains that self-determination disputes – in particular if they come with the notorious secessionist territorial connotation as in the South Caucasus – are effectively power-sharing disputes.<sup>25</sup> As such, they ought to be handled through comprehensive engagement, through avenues of dialogue and, in the long run, preferably through substantive negotiations between the conflict parties. To hold the position that sovereignty is absolute or indivisible would disregard the prevalent existence of consociational features which have proven to safeguard institutional arrangements in polities made up of different collective identities and divided societies.<sup>26</sup> Holding on to this, admittedly, toxic binary code will eventually drastically reduce the possible number of options to settle these and other comparable crises. Much to the regret of those who advocate this misconception the public international law on self-determination does not solve the underlying self-determination conflicts. No matter how strongly the metropolitan states push for an international endorsement of the principle of territorial integrity<sup>27</sup> and irrespective of the *de facto* states’ desire for their recognized

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[https://www.youtube.com/watch?v=H3NnEkR\\_Pps&feature=player\\_embedded](https://www.youtube.com/watch?v=H3NnEkR_Pps&feature=player_embedded). Apart from this, the international reputation of Abkhazia and South Ossetia as Russia-controlled entities was only strengthened after the recognition.

<sup>24</sup> See the very accurate description in: Peter Hilpold, “The Right to Self-determination: Approaching an Elusive Concept through a Historic Iconography”, in: *Austrian Review of International and European Law* (Vol. 11, 2006), 23-48, 48.

<sup>25</sup> Marc Weller, “Settling Self-Determination Conflicts: Recent Developments”, in: *European Journal of International Law* (Vol. 20, No. 1, 2009), 111-165, 115.

<sup>26</sup> The term ‘polity’, as *any* form of an entity, is deliberately chosen in this context, as it allows us to navigate around the discussion about the ‘state’ which has too many ideologically informed beliefs are attached to it. An example of a polity with strong consociational features is the European Union. Indeed, the central role of the member states’ governments and their corresponding veto rights in many fields reflects the components of proportional representation and mutual veto, which is central to the theory on consociationalism. See: Olivier Costa and Paul Magnette, “The European Union as a consociation? A methodological assessment”, in: *West European Politics* (Vol. 26, No. 3, 2003), 1-18, 10.

<sup>27</sup> To illustrate this dilemma of the metropolitan state, Azerbaijan has repeatedly, particularly over official channels, raised its concerns over US companies providing goods and services in Nagorno-Karabakh. A recent reaction by the US ambassador to the OSCE in Vienna to these complaints aptly captures the helplessness of the metropolitan state: “Our embassy in Baku has emphasized to the government in Azerbaijan that it is not against U.S. law for American

statehood, their shaky states makes sure that international law *in abstracto* will fail to deliver the extreme results they would approve of.

Yet international law fulfills central roles for both the metropolitan and the *de facto* states in shoehorning their actions and interests into legal categories. Lea Brilmayer, Professor of International Law at Yale University, provides an interesting metaphor. She compares in this context refugees and secessionists. While both want to escape from a political system which they both find intolerable, only the refugees want to leave it physically, while the secessionists lay claim on the territory. Hence, the latter assume a high duty of justification, which the first do not have to bear.<sup>28</sup> Accordingly, the secessionist party has to make sure to provide a sound legal rationale for its move.

And indeed, the *de facto* states invest a lot of effort in demonstrating their cases within the framework of a legal rationale. Law as a medium of politics is an important feature in all of these territorial disputes. The Abkhazian government describes its country as being established in accordance with the “right of self-determination.”<sup>29</sup> Likewise, the former President of the *de facto* Republic of South Ossetia, Leonid Tibilov, made similar remarks, opining that the people of South Ossetia had gone through many hardships, realizing their right to self-determination in accordance with all norms of international law.<sup>30</sup> In seeking multiple legal provisions favorable to the position of the *de facto* states, the concept of colonization is also sometimes made of use by proponents of the *de facto* states’ cause. Accordingly, one may argue that the Soviet Union featured some of the most notorious elements of a colonial system by arbitrary boundary-drawing, mass deportations on an ethnic basis or by policies which fundamentally altered the ethnic make-up of territorial entities.<sup>31</sup> Proponents of the *de facto* states find it unsettling that national self-determination in the form of external sovereignty has been “domesticized”<sup>32</sup> by limiting it to decolonization *stricto sensu*. And indeed, this position has some ingredient of accuracy as it seems somehow arbitrary

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companies to operate in the territories.” See: “Reply to Azerbaijan on illegal economic and other activities in the occupied territories of the Republic of Azerbaijan”, delivered by US Ambassador Daniel B. Baer to the Permanent Council, Vienna, September 8, 2016, PC.DEL/1295/16, 9 September 2016, <http://www.osce.org/pc/271256?download=true>.

<sup>28</sup> Lea Brilmayer, “Secession and Self-Determination: A Territorial Interpretation”, in: *Yale Journal of International Law* (Vol. 1, No. 1, 1991), 177-202, 189. Brilmayer argues that the claim on a territory does not flow automatically from ethnic distinctiveness, but from a territorial grievance. Hence, the argument made by the author of the present article is slightly different from Brilmayer’s; yet, at the same time it is based on her very useful metaphor.

<sup>29</sup> See English version of the brief information of the Republic of Abkhazia on the website of the President: [http://presidentofabkhazia.org/en/respublika\\_abkhazia/respublika-abkhaziya-obshchaya-informatsiya/](http://presidentofabkhazia.org/en/respublika_abkhazia/respublika-abkhaziya-obshchaya-informatsiya/).

<sup>30</sup> See his remarks (in Russian): <http://presidentruo.org/leonid-tibilov-yugoosetinskij-narod-proshel-tyazhelye-ispytaniya-i-otstoyal-pravo-na-samoopredelenie/>.

<sup>31</sup> In Abkhazia this particularly resonates with the massive relocation of ethnic Georgians to Abkhazia in the 1920s and 1930s. Apart from the Caucasus, one may also recall the massive relocation of ethnic Russians to the Baltic states, which was also presented and perceived in terms of colonialist behavior. Accordingly, the term ‘colonialism’ was used in common parlance not only in international Baltic ‘emigre’ circles during the Soviet era; its rhetorical and political power unfolded with full strength in the process of the Soviet collapse. See: Epp Annus, “The Problem of Soviet Colonialism in the Baltics”, in: *Journal of Baltic Studies* (Vol. 43, 2012), 21-45, 23.

<sup>32</sup> James Mayall, *Nationalism and International Society* (Cambridge: Cambridge University Press, 1990).

and runs counter to its philosophical underpinnings of enlightenment which designed this concept for universal consumption.<sup>33</sup> Yet this position will also not put things right for the *de facto* state.

Self-determination is a concept that has philosophical roots, but only later was this concept incorporated into the realm of the law. It represents a very important and powerful intellectual tool, which, as Hilpold rightly argues, performs crucial roles for political concepts whose force must not be easily dismissed.<sup>34</sup> As such, the right to self-determination may have defining features, which are not necessarily those that would have been shared by the Jacobins. It is fair to argue that even the decolonization process has never really been about restoring sovereignty on an exclusively ethnic basis.<sup>35</sup> This is confirmed through the application of the *uti possidetis* principle, which represents some of the most problematic legacies of colonial rule<sup>36</sup> and apart from this: Decolonization produced a long list of new multi-ethnic states. This is exactly what the governments of the *de facto* states of the South Caucasus are intending to defend. Let us not miss another crucial point: Colonialism was gradually seen after World War II as inherently evil, particularly as it was coupled with foreign domination and ruthless economic exploitation. It would be rather naïve to qualify “Soviet colonialism” in this light. The Soviet nationalities policies have been most successful in providing the crucial proto-state features to its constituent entities so that, by 1991, states like Kazakhstan, which have not been anywhere close to a taste of statehood before the end of World War I, were perfectly prepared for independence.

In addition, colonial powers, including the UK, began to grow tired of keeping colonies within their orbit. It started to become less profitable and did, indeed, drain resources which resulted in pressure to give those colonies up. Fatigue and exhaustion feature as additional factors at the core of understanding the conditions under which governing powers gradually started to relinquish their grip on their former colonies. This metropolitan fatigue, if one for instance takes the example of Azerbaijani state policies is not given at all in the South Caucasus cases. Why would Azerbaijan grow tired of what it currently does: Lobbying for its cause and portraying the conflict as an inter-state dispute with Armenia?<sup>37</sup> In addition, the so-called “saltwater doctrine”<sup>38</sup> required that there

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<sup>33</sup> Martti Koskeniemi, “National Self-Determination Today: Problems of Legal Theory and Practice”, in: *The International and Comparative Law Quarterly* (Vol. 43, No. 2, 1994), 241-269, 242.

<sup>34</sup> Peter Hilpold, “What role for academic writers in interpreting international law? – A rejoinder to Orakehlishvili”, in: *Chinese Journal of International Law* (Vol. 8, No. 2, 2009), 291-298, 293.

<sup>35</sup> The application of the *uti possidetis* principle, which, according to the Frontier Dispute Case of 1986, derives from a general rule of international law, has always served as a brake to full external sovereignty. Hence, decolonization has never really been about the entire removal of colonization; this would have included the removal of boundaries which came into being as a consequence of colonialist rule.

<sup>36</sup> Of course, the normative purpose behind *uti possidetis* must not be disregarded. It can be advocated on the grounds that it attempts to avoid endless conflicts of drawing and re-drawing borders. Yet, at the same time, this principle was always somewhat arbitrary as it rests on arbitrary measures of those who drew these boundaries. See: Peter Hilpold, “The Right to Self-determination: Approaching an Elusive Concept through a Historic Iconography”, 37.

<sup>37</sup> This is not limited to Azerbaijan but holds true for any country affected by secessionist uprising.

<sup>38</sup> In accordance with UN Resolution 637 (adopted on 16 December 1952), self-determination applies and is limited to those non-self-governing territories which are separated from their colonizers by the sea.

be logistical obstacles between the colonial power and the colony. And last but not least it must not go unnoticed that colonialism is not seen as a sociological phenomenon but as something, which is historically unique and cannot be extended to other regions.<sup>39</sup> It is also for these reasons that the frequent reference to decolonization is not convincing from the perspective of *de facto* states.

Evidently, the same functional interpretation of law with an inverted substantive content is provided by the governments of the metropolitan states. By invoking Article 2 (7) of the UN Charter, most states answer the question of the respective metropolitan state's jurisdiction in matters over self-determination.<sup>40</sup> Yet, at the same time they tend to view secessionist uprising not in terms of a domestic legal challenge within their state, but rather via a legal rationale in which third states are accused of infringing their integrity and instigating the uprising. The former chairman of the Autonomous Abkhazian government-in-exile, Giorgi Baramia, spoke of legal assessments, which allegedly deem both Abkhazia and South Ossetia to be categorized as 'occupied territories' and furthermore alleged that international law clearly favors the restoration of Georgian jurisdiction on these territories.<sup>41</sup> The website of the President of Azerbaijan, Ilham Aliyev, enumerates a couple of UN Security Council resolutions, which are affirming the territorial integrity of the Republic of Azerbaijan over Nagorno-Karabakh as the alleged guiding legal framework for the resolution of the conflict,<sup>42</sup> with the government in Baku spreading the notion of a direct inter-state conflict between Armenia and Azerbaijan. Azerbaijani authorities aggressively go after scholars and politicians who visit Nagorno-Karabakh or talk to officials of the *de facto* state of Nagorno-Karabakh, with some even being put on the wanted list of Interpol for this alleged misdemeanor.<sup>43</sup> They also use other channels to urge states to make a visit to Nagorno-Karabakh a criminal offense in their respective penal codes, as if it would violate international law. Indeed, by casting the political issue and question of secession as an act of military foreign occupation, governments of metropolitan states are able to raise an argument within the confines of international law.<sup>44</sup> This portrayal as infringements of the territorial integrity

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<sup>39</sup> Peter Hilpold, "The Right to Self-determination: Approaching an Elusive Concept through a Historic Iconography", 38.

<sup>40</sup> Roya M. Hanna, "Right to Self-Determination in In Re Secession of Quebec" in: *Maryland Journal of International Law* (Vol. 23, No. 1, 1999), 214-246, 242.

<sup>41</sup> See Giorgi Baramia, *Speech*, delivered at the 'Georgia's European Way Conference' on 16 July 2010: [http://abkhazia.gov.ge/index.php?lang\\_id=ENG&sec\\_id=86&info\\_id=413](http://abkhazia.gov.ge/index.php?lang_id=ENG&sec_id=86&info_id=413).

<sup>42</sup> See website of the President of Azerbaijan: <http://en.president.az/azerbaijan/karabakh>.

<sup>43</sup> The case of the Luxembourg Member of the European Parliament, Frank Engel, is telling: After he visited Nagorno-Karabakh, the authorities of Azerbaijan have officially requested to put Engel on the wanted list of Interpol. This is yet another indicator of how autocratic regimes can abuse international institutions such as Interpol. See: "Frank Engel persona non grata", *Tageblatt*, 27 February 2017, <http://www.tageblatt.lu/nachrichten/frank-engel-persona-non-grata-18160281/>.

<sup>44</sup> International law will only be relevant in those cases in which secessionist forces receive support from third states. Other than this, secession remains a mere *fact* which may violate domestic (constitutional) law but which, except for peoples under colonial rule or foreign domination, will not involve the dimension of international law. See: Peter Hilpold, "What role for academic writers in interpreting international law? – A rejoinder to Orakehlishvili", 292 and 295.

coming from outside is in the interest of the governments of the metropolitan states as international law is mainly, or essentially, inter-state law. Hence, all actors on both sides of the divide and in all conflicts do not present contextualized factors to international audiences,<sup>45</sup> but instead turn their actions and interests into straightforward legal rationale to make their case and bolster their arguments.

## The Justice Dilemma

It seems that this interpretation of public international law as a remedy and the politicization of legal arguments comes together with another, by no means less problematic notion, according to which law equals justice or, at least, should strive for coming close to justice. The idea that law is not only seen to provide for social goods or to address social needs and – as it is the case with international law – to provide rules for horizontal coexistence, but to precisely deliver *justice*, is especially prevalent in those regions, where ethnic communities were released from a totalitarian heritage. This very heritage and corresponding collective memories of injustice and suffered traumas make those ethnic communities extremely sensitive to notions of justice.<sup>46</sup> The region of the Caucasus, which has been so dramatically shaken by those conflicts, has developed very dominant societal perceptions of good and evil. And these perceptions are translated into the manner how law is defined and which function is accorded to it.

This belief, coming very close to notions of natural law in which nature is presented as some form of normative authority regulating entirely *just* interpersonal relations,<sup>47</sup> has had a dramatic influence on how the opposing claims are legally justified. Not only is sovereignty, thereby, widely interpreted as indivisible, untouchable and absolute, it is also defined on a rather ethnic exclusivist basis relying on perceived “historical rights”.<sup>48</sup> Even promoting civic notions of statehood can sometimes be seen as a thinly veiled attempt to consolidate the rule of one ethnic community over another. This may even apply even more strongly to ethnic minority communities, who do not trust transition-period governments led by the majority group. All conflict parties wish to have *their* version of justice and *their* version of truth recognized by reference to some very problematic legal

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<sup>45</sup> Paradoxically, the Russian government officially provided only some factors rendering its decision to recognize both Abkhazia and South Ossetia as independent states as justified, and was ambiguous in its argumentation. Russia, essentially, abstained from articulating a comprehensive legal rationale for this dramatic shift, being fully aware of its explosive nature. Likewise, the EU states that recognized Kosovo either justified their decision by contextualized factors or did not officially justify it at all.

<sup>46</sup> Galina Starovoitova, *National Self-Determination: Approaches and Case Studies* (Thomas J. Watson Occasional Paper # 27, 1997), 1-178, 4.

<sup>47</sup> Hans Kelsen, *Was ist Gerechtigkeit?* (Reclam, 2016, reprint of 1953), 42.

<sup>48</sup> Starovoitova (see Galina Starovoitova, *National Self-Determination*) proposed a highly problematic “solution” to self-determination conflicts, e.g. asking who settled first and the degree of coherence of a group. This very primordialist notion of scholarship in the post-Soviet space that entirely disregards important developments in social sciences has equally provided its share to the conflicts. The position of Starovoitova reflects exactly what Valery Tishkov describes as “ontogolization” of ethnic communities. See: Valery Tishkov, *Chechnya: Life in a War-Torn Society* (Berkeley: University of California Press, 2004), 8.

doctrines as validators such as statehood and the right to self-determination, even if these very validators are being part of a belief system.<sup>49</sup> Their belief that *their* struggles are existential and that a victory without compromises under realization of their maximalist demands is possible has been the driving force in interpreting those legal doctrines. By referring to these legal validators, the conflict parties on both sides do not present a *rational* reasoning to provide a legal rationale, they provide a quasi-religious or metaphysical relationship to the legal doctrines which they regularly invoke. The underlying problem, which makes those conflicts in this fashion so intractable, is that these conflicts over self-determination turn into conflicts over *justice*, thereby making it impossible to provide rational knowledge to the apparent pivotal question as to who is right and who is wrong or whose position is just and whose is unjust. If we accept the above-mentioned notion of Jean D'Aspremont, according to which international law comes close to a belief system,<sup>50</sup> then this belief system perfidiously reinforces this logic of equalizing law and justice in the self-determination disputes of the South Caucasus. This line of reasoning reflects a deeper dilemma whereby norms and principles of international law only represent the raw materials of theorizing about justice. This has also been recognized explicitly in a much-quoted separate opinion by Judge Ammoun in the Barcelona Traction Case. He rightly opined, focusing on the issue of decolonization, that the norms, which the Third World wishes, are “norms profoundly imbued with the sense of natural justice, morality and humane ideals.”<sup>51</sup>

### **Making a Case Against the Binary Code of Sovereignty**

What does this constellation, of metropolitan states vis-à-vis the *de facto* states, which will soon be lasting for three decades, mean? It means on the one hand, that *de facto* states are, at least in a short and mid-term perspective, here to stay. Given the current lack of incentives to reengage in discussing sovereignty issues and sharing of sovereignty in all of the South Caucasus conflicts, they need to be dealt with not as an anomaly. On the other hand, the metropolitan states will continue to make sure that their grip on these territories in terms of not allowing them to gain international legitimacy, or even recognition, will keep tight. It must be underlined that no

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<sup>49</sup> Jean D'Aspremont argues, particularly with regard to the international law on statehood, that international law scholarship creates a “genealogical artificiality” as it applies to a doctrine some rule in such a way that this rule does not need to be explained or evidenced and, thus, turns into a self-referential ontology. For instance, the Montevideo Convention of 1933 was never really about statehood but rather about non-intervention and was never meant to systematize and codify international law for global consumption. Nevertheless, it is seen today as the central doctrine on statehood resembling a belief to which *de facto* states turn in order to make their claim. See: Jean D'Aspremont, *International Law as a Belief System* (Cambridge: Cambridge University Press, 2017).

<sup>50</sup> It should not go unmentioned that D'Aspremont's analysis is vulnerable as it understates the regulatory and normative nature of international law.

<sup>51</sup> International Court of Justice, *Case Concerning Barcelona Traction, Light, and Power Co., Ltd (Belgium v. Spain)*, Judgment, 5 February 1970, Separate Opinion by Judge Ammoun, 286-334, 311, <http://www.icj-cij.org/files/case-related/50/050-19700205-JUD-01-10-EN.pdf>.

immediate remedy, neither for the secessionist entity nor for the ‘legitimate’ metropolitan state is provided by international law,<sup>52</sup> making their respective positions unlikely to be realized.

Yet, paradoxically, to continue this situation of a very unstable equilibrium of peace seems to be in the short-term interest of both the metropolitan and the *de facto* states. States like Georgia and Azerbaijan can comfortably lean back since they have made sure that their breakaway territories are under effective international isolation. This is something for which they have furnished legislation precisely for this purpose, making it impossible for the *de facto* authorities of Sukhum/i, Tskhinval/i and Stepanakert to enjoy the privileges of statehood to the full extent.<sup>53</sup> Azerbaijan has also enacted legislation meant to isolate Nagorno-Karabakh. The most visible of these restrictions concern individuals who travel to Nagorno-Karabakh. Since travelling to Nagorno-Karabakh is considered a severe criminal offence according to Azerbaijani law, people who travel to this entity are permanently banned from entering Azerbaijan.<sup>54</sup> Likewise, the law on occupied territories of Azerbaijan also prohibits economic activities in Nagorno-Karabakh. This issue has even led to some temporary unease in US-Azerbaijani relations within the frame of the OSCE.<sup>55</sup>

In other words: This shaky equilibrium will, for the time being, remain. At the same time, this equilibrium enables the metropolitan states to avoid engaging in a possibly painful discussion about a future legal status of these territories within their respective constitutional configuration.<sup>56</sup> Such a discussion, which will need to go clearly beyond the mere guarantee of human rights in a

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<sup>52</sup> Marc Weller, “Addressing the Self-Determination Dispute”, in: Marc Weller and Barbara Metzger (Eds.), *Settling Self-Determination Disputes: Complex Power-sharing in Theory and Practice* (Leiden: Hotei Publishing, 2008), 387-406, 405.

<sup>53</sup> Georgia’s Law on Occupied Territories which was adopted in 2008 immediately after the Russian diplomatic recognition is a valid case in point. Not only does this law ban *any* kind of economic activities in Abkhazia and South Ossetia by all domestic and foreign companies but it also prohibits foreign citizens to travel to Abkhazia and South Ossetia without authorization of the Georgian authorities. The law also signifies a backpedaling on Georgia’s part: While Georgia has in many different agreements of the 1990s formally recognized Abkhazia as its counterpart with which it has to find a solution, since 2008 only the Russian Federation is depicted as military occupying force, whereby no place whatsoever is given to Abkhazia or South Ossetia. The situation of Nagorno-Karabakh seems to be less volatile in this respect since Armenia takes the function of a kin state rather than a patron state, forming one common political and economic space with Nagorno-Karabakh.

<sup>54</sup> The list of people declared *personae non gratae* has been growing over the years and includes some prominent names such as Kaupo Känd, legal senior advisor to the High Commissioner on National Minorities of the OSCE; Otto Luchterhandt, one of the most outstanding German professors of international law; EU special representative in the South Caucasus Peter Semneby had been on this list between 2012 and 2015; Spanish opera star Montserrat Caballe; and recently the Israeli-Russian blogger Alexander Lapshin.

<sup>55</sup> There has been an exchange of notes between the US and Azerbaijani delegations to the OSCE on the subject of US companies providing commercial services in Nagorno-Karabakh. Ambassador Baer mentioned in his note after receiving criticism for not intervening against these US firms: “Our embassy in Baku has emphasized to the government in Azerbaijan that it is not against U.S. law for American companies to operate in the territories.” See „Reply to Azerbaijan“, delivered by US Ambassador Daniel B. Baer, <http://www.osce.org/pc/271256>.

<sup>56</sup> Until the very day, there is not one comprehensive settlement proposal on the table. Georgia has even been backpedaling, eliminating the modest achievements of the 1990s agreements with the Ossetians and the Abkhaz.

democratic system<sup>57</sup> to the inhabitants of those three entities, will automatically touch upon the root causes for these conflicts and will necessarily ask for responsibility and accountability of political elites who are partly still in power. Apart from this, the appetite for complex power-sharing arrangements within the state structures in the post-Soviet space is rather marginal, as the empirical record of conflict resolution throughout in this volatile region shows.<sup>58</sup> Hence, we arrive at a most unsatisfactory result: The lack of progress in overcoming territorial divisions between all relevant stakeholders (including state- and non-state actors) as well as the lack of political solutions on the ground mirrors the lack of available tools for dealing with those entities – at least in a short and medium term. It has hardened to a fact, that the *de facto* states have successfully defied reintegration into their metropolitan states and that reintegration is unlikely, if not entirely impossible through peaceful means. They seem to be here to stay for a while, since they have equally defied earlier predictions that they will be forcibly incorporated into their metropolitan states, or will, quietly acquiesce to the metropolitan states' rule. This unsatisfactory situation compels us to open a new critical space for discussion on the *de facto* states and the manner in which they ought to be dealt with by the EU that will need to broaden the awareness about these subjects. It will, arguably, not suffice to approach these entities by applying the binary code of sovereignty as described above.

## **Selected Conflict Factors: What do these Conflicts have in Common?**

### ***Minority-Majority Dichotomies***

Although the three South Caucasus territorial conflicts over Abkhazia, South Ossetia and Nagorno-Karabakh were marked by very different conflict trajectories,<sup>59</sup> some similarities need to be mentioned from the outset.

*First* of all, in all three cases an ethnic minority community effectively and – in armed conflicts – successfully defied the metropolitan state in its bid to exercise jurisdiction over the territories. These decisive military victories were all achieved in the first half of the 1990s and in almost all cases these outcomes would have been impossible had it not been for significant external support,

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<sup>57</sup> Which Azerbaijan, in particular, is currently unable to provide.

<sup>58</sup> One can quote the simple but accurate one-liner of the British legal scholar Jennings who maintained already in 1953 (with respect to India): “Nobody would have a federal constitution if he could possibly avoid it.” See: Ivor Jennings, *Some Aspects of the Indian Constitution* (Oxford: Oxford University Press, 1953), 55. This seems to be even more true for the post-Soviet record of conflict resolution efforts in the South Caucasus: Metropolitan states and their contesting separatist regions have only been able to agree on very rudimentary principles for conflict resolution.

<sup>59</sup> Probably the most outstanding structural difference between Nagorno-Karabakh and the Georgian territorial disputes lies in the irredentist nature of this conflict. Only a changing geopolitical environment and the collapsing Soviet Union in 1991 compelled Nagorno-Karabakh and Armenia to change their course and to abandon their prior *irredentist* aspiration, turning it into a *separatist* cause.

be it in the form of support provided by third states like Russia, kin states such as Armenia or through assistance conveyed through other sources.<sup>60</sup> Even if the extent to which Russia has been supportive of and responsible for the break-off of Abkhazia and South Ossetia in the 1990s – one could argue whether Moscow became crucial by design or, rather, by default – with the advent of Putin to power, the Russian government has taken a stance that clearly discouraged the political elites of Abkhazia and South Ossetia from engaging in substantive conflict resolution efforts. Despite the high degree of indigenous capability to rise to power and popular support<sup>61</sup> for the cause of secession in Abkhazia and South Ossetia, the “geopoliticization”<sup>62</sup> of both breakaway territories can hardly be understood without the efforts of the Russian Federation to counter some of its neighbors’ intentions to come closer to the West. It seems particularly, that a stake in both Abkhazia and South Ossetia can ideally be used for breaking a process of rapprochement between Georgia and NATO. Likewise, the initial demand of the Armenians of Nagorno-Karabakh was unification with Armenia rather than independence. Only when it became apparent in 1991 that the international community would not tolerate or recognize irredentist aspirations, the Armenians changed their nominal stance favoring a secession of Nagorno-Karabakh. And Armenia has, since then, not only provided a lifeline for this entity, it has created a single common economic space in which the citizens of Nagorno-Karabakh are also taken care of.<sup>63</sup> The lack of diplomatic recognition by the Republic of Armenia for Nagorno-Karabakh should not be mistaken as expression of impartiality. Rather, it is and has always been intended to have an opposite effect, namely to bolster Nagorno-Karabakh’s separation from Azerbaijan.<sup>64</sup>

### ***Weak Settlement Mechanisms***

What seems to be evident in all cases is the absence of a comprehensive and robust conflict settlement mechanism of these disputes which is supposed to bring about an irreversible peace process. Instead, all of these conflicts have been steadily growing into an equilibrium of a very

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<sup>60</sup> This article *does not* analyze legal obligations of Russia and/or Armenia, for instance by testing whether their actions meet the ‘Nicaragua test’. “Other sources” were, e.g., provided by the Abkhaz diasporas in Turkey or the Chechens and the North Caucasus mercenaries who joined the fight against the Georgians.

<sup>61</sup> Scott Pegg claims that at least “some degree of indigenous capability” in the emergence of a *de facto* state is required in order to classify an entity as such. See: Scott Pegg, “De Facto States in the International System”, in: *Institute of International Relations/The University of British Columbia* (Working Paper No. 21, 1998), 1-23, 1, <http://www.sirag.org.uk/defactostates-somaliland.pdf>.

<sup>62</sup> This period, which started almost immediately after Vladimir Putin took office during his first presidential term, is thoroughly depicted in: Benedikt Harzl, *Der Georgisch-Abchasische Konflikt. Eine Rechtliche und Politische Analyse* [The Georgian-Abkhazian Conflict: A legal and political appraisal] (Baden-Baden: Nomos, 2016).

<sup>63</sup> This is particularly true for the conferral of Armenian citizenship, health services, higher education, etc.

<sup>64</sup> The author of this article has given an interview in April 2016 to the Russian political analysis website *politcom.ru* in which he considered why a diplomatic recognition of Nagorno-Karabakh by the Republic of Armenia would not provide any added value for both. See: “Benedikt Harzl: Ja seychas ne sovetoval Armenii priznavat’ NKR”, *Politcom.ru*, 8 April 2016, <http://politcom.ru/20960.html>.

shaky and deceptive notion of stability, which is often referred to as ‘frozen conflict’.<sup>65</sup> While the Nagorno-Karabakh conflict falls into the scope of the OSCE Minsk Group format, which has provided for a “phased-package” approach – a simultaneous agreement on all pivotal issues (save for the future status of Nagorno-Karabakh) with the individual components to be implemented sequentially –<sup>66</sup> the recognition of Abkhazia and South Ossetia as independent states by the Russian Federation has made sure that conflict resolution goes and continues to go nowhere since 2008 with regard to these conflicts in Georgia. Yet, even before this pivotal year, which has shaken the entire region and belied the terminology of ‘frozen’ conflicts, one had to seriously question the conditions under which conflict resolution was sought by the international community. The ineffective UN and OSCE formats with respect to Abkhazia and South Ossetia in the 1990s and the early 2000s painfully revealed how the consequences of the terrible armed conflicts remained largely unaddressed due to the lack of an internationalized and robustly equipped solution mechanism. The fact that the main responsibility to broker a deal in this context was only given to the state actor Russia – whose solution capacity and impartiality was always somewhat questionable, in particular after the rise of Vladimir Putin in 2000 – limited the chances of a lasting and comprehensive solution from the very outset.

A very telling policy brief by the German Marshall Fund of 2008 put it rather bluntly when it conceded: “Thus far, Western countries have considered the Russian presence ineffective but the lesser of alternative evils, given their reluctance to be involved in the issue directly.”<sup>67</sup> And indeed, an enhanced role of the EU was always explicitly demanded by states such as Georgia and it was Brussels, which declined, not willing to irritate Russia in its own perceived backyard. Yet, as a matter of fact, the double constellation between the Russia-dominated CIS and the UNOMIG<sup>68</sup> in the case of Abkhazia has never really been satisfactory at any point. The political structure of the CIS was not only dominated, but determined by Russia with hardly any comprehensive division

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<sup>65</sup> Even if this characterization appears to be flawed and has been often criticized (for good reasons: it does not give sufficient regard to the possibility of rapid thawing of the conflicts), it is insofar helpful as it depicts a situation in which the underlying goals of the warring parties have remained so far unaddressed and in which an unambiguous ending is still missing. See for an accurate description: Karin Aggestam and Annika Björkdahl, “Just Peace Postponed: Unending Peace Processes and Frozen Conflicts”, in: Hanne Fjelde and Kristine Höglund (Eds.), *Building Peace, Creating Conflict?: Conflictual Dimensions of Local and International Peace-Building* (Lund: Nordic Academic Press, 2011), 26, 25-46. Indeed, this picture is quite correct: While Abkhazia has arguably broken free of Georgia, its recognition by Russia has narrowed down its possibilities to really exercise its independence. At the same time, reintegration of these territories and the return of refugees/IDPs seems to remain as bleak as ever.

<sup>66</sup> Jonas Brown and Kaelyn Lowmaster, “The Minsk Group Mediation Process from 1992 to the Present”, in: Terrence Hopmann and William Zartman (Eds.), *Nagorno Karabakh: Understanding Conflict 2013* (Washington, DC: Johns Hopkins University, SAIS, 2013), 201-212, 207.

<sup>67</sup> Ron Asmus, Svante Cornell, Antje Herrberg, Nicu Popescu, , “Internationalizing the Georgia-Abkhazia Conflict Resolution Process: Why a greater European Role is Needed”, The German Marshall Fund of the United States, *Policy Brief*, June 2008, 1-6, 3, <http://www.gmfus.org/publications/internationalizing-georgia-abkhazia-conflict-resolution-process-why-greater-european>.

<sup>68</sup> United Nations Observer Mission to Georgia.

of competences in between them. And this double constellation, which was in part replayed in South Ossetia with the OSCE, was indicative of the failure of these attempts.<sup>69</sup>

Likewise, in the case of Nagorno-Karabakh, geopolitics seems to have dictated the failed course of stitching both the divided country and society together. Until today, the deliberate isolation of Armenia by Turkey is a factor in the conflict over Nagorno-Karabakh, which must not be underestimated. Iran, on the other hand, though having a population with a significant Azeri ethnic segment sided with Armenia and provided – and continues to provide – an important lifeline for the oldest Christian country in the world.<sup>70</sup> That effectively means that a further continued geopolitical confrontation between Turkey, Iran and the Russian Federation will likely mean that comprehensive conflict resolution over Nagorno-Karabakh will go nowhere.<sup>71</sup> This stand-off has also turned the entire region in and around Nagorno-Karabakh into one of the most militarized places in Eurasia. Nagorno-Karabakh – with an estimated population of less than 140,000<sup>72</sup> – has a standing army of about 21,000 soldiers with an obligatory conscription of two years.<sup>73</sup> Since reliable data on *de facto* states and their military spending do not exist, the view has also to be put on both Armenia and Azerbaijan. And the figures from these countries confirm the worrisome trend: According to the *Global Militarization Index*, Armenia ranks on the third and Azerbaijan on the eighth position of the most militarized countries of the world.<sup>74</sup> Therefore, in the years after the ceasefire agreement of Bishkek in 1994,<sup>75</sup> the region has literally turned into a powder keg, making it thereby very vulnerable to relapse to armed conflict. And regrettably, this geopolitical logic is partly reflected in the composition of the OSCE Minsk Group, which was established in 1994 at the OSCE Budapest Summit with the mandate to create the preconditions for a peace conference on Nagorno-Karabakh.

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<sup>69</sup> Nevertheless, one must not conceal some noteworthy achievements of the pre-2008 era. For instance, the report of the Secretary-General of the United Nations on the situation in Georgia of the 3rd of May 1994 (See: “Report of the Secretary-General concerning the situation in Abkhazia”, S/1994/529, Georgia, 3 May 1994, [http://www.un.org/en/ga/search/view\\_doc.asp?symbol=S/1994/529/Add.1](http://www.un.org/en/ga/search/view_doc.asp?symbol=S/1994/529/Add.1)) entailed a more detailed plan for a future reunified Georgian state, proposing some form of a co-nation status for the Abkhaz, in addition to what has already been agreed upon (return of refugees, etc.).

<sup>70</sup> To this day, this alliance is of utmost importance for the very survival of the Armenian state. Indeed, this cooperation is even reaching the realms of hard security. The only other existing lifeline for Armenia – Georgia – carries problems of its own since the issues over the Armenian minority in Javakheti remain a source of frictions in the relations between Yerevan and Tbilisi.

<sup>71</sup> Nevertheless, it would amount to analytical laziness to reduce these conflicts to proxy wars. These conflicts broke out within local contexts and due to decisions taken by local political elites.

<sup>72</sup> See “official” figures provided by the *de facto* authorities of Nagorno-Karabakh. Since these figures can hardly be verified, they ought to be read with a degree of caution and skepticism. See: [https://web.archive.org/web/20090327083447/http://www.stat-nkr.am/2000\\_2006/05.pdf](https://web.archive.org/web/20090327083447/http://www.stat-nkr.am/2000_2006/05.pdf).

<sup>73</sup> Jeffrey Dixon and Meredith Sarkees, *A Guide to Intra-state Wars: An Examination of Civil Wars, 1816-2014* (Thousand Oaks: SAGE Publications, 2016), 309.

<sup>74</sup> See: “Global Militarization Index”, *Bonn International Center for Convention (BICC)*, 2014, [http://gmi.bicc.de/index.php?page=ranking-table?year=2014&sort=rank\\_asc](http://gmi.bicc.de/index.php?page=ranking-table?year=2014&sort=rank_asc).

<sup>75</sup> “The Bishkek Protocol”, Bishkek, 5 May 1994, [http://peacemaker.un.org/sites/peacemaker.un.org/files/ArmeniaAzerbaijan\\_BishkekProtocol1994.pdf](http://peacemaker.un.org/sites/peacemaker.un.org/files/ArmeniaAzerbaijan_BishkekProtocol1994.pdf).

### *Soviet Legal and Ideological Approaches to Self-Determination*

And *finally*, the destructive effect of the Soviet nationalities policies, being embedded into an ethno-territorial ideological and very exclusivist way of political reasoning on governance and coexistence, further favored the rise of uncompromising claims coupled with ultranationalist and chauvinist interpretations of competing historical narratives. The fact that Abkhazia, South Ossetia and Nagorno-Karabakh were able to point to a pre-conflict territorial status under Soviet constitutional law – whereby it was by and large irrelevant whether in the fashion of an ethnically or not ethnically defined autonomous oblast or republic – enabled them to invoke what Lea Brilmayer so handsomely described as ‘territorial grievance’:<sup>76</sup> It also provided the institutional means necessary to make use of the opportunity of war and it provided, equally, a legal cover for blatant political claims that were officially sanctioned by the respective local authorities in all of the three entities. Moreover, the underlying rationale of Soviet federalism by and large guided the political decision-making process of all conflict parties. Nationalism in the South Caucasus was not only concerned with Soviet domination but with each nation’s and territorial entity’s behavior and policies as well as the relation among them. In this regard, Soviet federalism confirmed for every conflict party the view that the concept of exclusive national territories is the only player in town.<sup>77</sup> This belief was reinforced by the unconventional use of legal terminologies in the Soviet constitution and other sources of Soviet law. The Soviet Constitution<sup>78</sup> provided the right to secession for Union republics, yet, this right was rendered meaningless by Article 78, requiring that altering boundaries is subject to ratification by the Soviet center. At the same time, Article 76 described the Union republics as sovereign socialist states, whereby it remained open to which extent those “states” described by the law are having a “government” in accordance with the Montevideo Convention.<sup>79</sup> The same legal-terminological arbitrariness has also allowed for autonomous Soviet socialist republics to be labeled as *republics*. With the 1990 Soviet law on secession another law was enacted which constrained the right to secession and confirmed the view that the Soviet constitution equaled a “gentrified Potemkin Village masking the grim realities of Soviet power politics”.<sup>80</sup> Beyond doubt, the discussion on Soviet law in this context will produce limited outcomes since law must be understood in this context as a blueprint for power. However

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<sup>76</sup> In particular, she claimed that – in order to have a legitimate case – the secessionist movement has to explicitly invoke the aspect of territorial grievance rather than ethnic distinctiveness. See: Lea Brilmayer, “Secession and Self-Determination: A Territorial Interpretation”, 189.

<sup>77</sup> Ohannes Geukjian, *Ethnicity, Nationalism and Conflict in the South Caucasus: Nagorno-Karabakh and the Legacy of Soviet Nationalities Policy* (London: Ashgate, 2012), 114.

<sup>78</sup> As far as this article provides references to the Soviet Constitution, it always refers to the “Constitution of the Union of Soviet Socialist Republics” adopted at the Seventh (Special) Session of the Supreme Soviet of the USSR Ninth Convocation on 7 October 1977.

<sup>79</sup> Jane Henderson, “Legal Aspects of the Soviet federal structure”, in: Alastair McAuley (Ed.), *Soviet Federalism: Nationalism and Economic Decentralisation* (Leicester: Leicester University Press, 1991), 33-55, 34.

<sup>80</sup> Raymond Pearson, “The historical background to Soviet Federalism”, in: Alastair McAuley (Ed.), *Soviet Federalism: Nationalism and Economic Decentralisation* (Leicester: Leicester University Press, 1991), 14-32, 30.

– and this is particularly true for the impact of Soviet federalism – the concept of sovereignty along national borders has influenced and energized national movements in the South Caucasus.

The next section will discuss some of the terminologies and corresponding terminological problems when dealing with *de facto* statehood before a case study on Abkhazia will critically test some of the tenets of the applicability of *de facto* statehood terminology in a narrow manner under public international law.

## Terminological Dilemmas

### *The International Community's Perception as a Political and Scholarly Problem*

The scholarship dealing with the territorial disputes of the South Caucasus sometimes equals walking along a minefield, mostly for two reasons, which are interconnected. One refers to the problematic outside perception of the *de facto* state while the other reason is tied to the entity's defining elements.

On the one hand, the contemporary *de facto* states, which grew out of separatist ideologies and wars in the 1990s, suffer from a serious image problem.<sup>81</sup> They are often characterized as “black holes”<sup>82</sup> and as sources of insecurity for the whole region in which they are located, posing threats to both their neighbors and the metropolitan states. Public media as well as governments draw a picture that depicts them as utterly corrupt and poor entities and they simultaneously create an image that these statelets are “safe havens” for criminals.<sup>83</sup> In addition, the way in which they have emerged did often not only involve warfare but outright ethnic cleansing. The case of Abkhazia and the displacement of nearly the entire Georgian population do not stand alone. One may even add the short-lived temporary *de facto* state of the Serbian Republic of Krajina to this equation. According to the prosecutors of the ICTY, the leadership of this unrecognized republic was largely responsible for crimes connected to the “forcible removal of a majority of the Croat, Muslim and

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<sup>81</sup> The following deliberations in this sub-chapter also strongly rely on Nina Caspersen's key thoughts on the image problem with which these “anarchical badlands” seem to struggle. See: Nina Caspersen, *Unrecognized States*, 20-24.

<sup>82</sup> These categorizations appear even in scholarly literature. ‘Black hole’ is the attribute which Janusz Bugajski used in his monograph. See: Janusz Bugajski, *Cold Peace: Russia's New Imperialism* (Washington, DC: CSIS, 2004), 107.

<sup>83</sup> See: Goga Chanadiri, “Abkhazia's beauty of sight”, *Civil.ge*, 22 August 2003, <http://www.civil.ge/eng/article.php?id=4807>. In addition, the Georgian government even made allegations concerning the smuggling of nuclear materials through Abkhazia and South Ossetia. See: “Georgia Draws Attention to Nuclear Smuggling in Abkhazia and South Ossetia”, *NTI*, 25 April 2012, <http://www.nti.org/analysis/articles/georgia-draws-attention-nuclear-smuggling-abkhazia-and-south-ossetia/>.

other non-Serb population”.<sup>84</sup> Moreover, the governments of the metropolitan states often simply do not accept the term of the *de facto* state and would even reject the label ‘unrecognized state’, too. Their point of view, which they also translate into vast bulk of legislation,<sup>85</sup> is clearly depicting these territories as being under military occupation by a third state, be it Armenia, Turkey (as in the case of the Turkish Republic of Northern Cyprus) or Russia. Therefore, they disregard any analysis which does not prioritize the role of the relevant patron or kin state in the respective analysis or media and scholarly coverage.

This reputational dilemma is, however, not only a reputational issue *per se*. It poses additional problems for three distinct, yet, intertwined reasons: *Firstly*, it strengthens not only the case for a strict non-recognition policy<sup>86</sup> of the international community, but it deems engagement with these entities and their political elites as something that is potentially unethical or dangerous. *Secondly*, these categorizations may even narrow down our analytical lenses through which we are able to explain and understand the nature of these entities. By only focusing on the displacements and the humanitarian circumstances through which the entity emerged, an observer may fail to grasp how successfully political institutions have been built in the past decades in these statelets. Likewise, the dimension of state legitimacy, both internal and external, and the corresponding pivotal aspect of the *de facto* state’s relation to its society is dismissed as irrelevant. Alternatively, as Caspersen argues aptly, by concentrating too strongly, for instance, on the economic interests and drivers of the political elites, one may become trapped in overly looking at the ‘greed thesis’ in conflicts.<sup>87</sup>

The overemphasis on the negative attributes may potentially prevent us to grasp the notion and meaning of internal sovereignty within these statelets. The same is true for viewing these states only in terms of the support provided by patron states and/or kin states. The same holds true for the tedious issue of military occupation. It distorts legal assessment and political expediency and does not give sufficient voice to the will of the populations of the *de facto* state. And *thirdly*, accepting these images and attributes will also involve and lead to some degree of bias in these utterly politicized conflicts. Indeed, total neutrality in these matters is rather unrealistic since absolute neutrality seems to require that an opinion on a given subject has *not yet* been formed. Yet, the downside of being too partial is disastrous: Accepting or endorsing the terminology of “occupied territories”, which some governments and parliaments have done in relation to the

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<sup>84</sup> See International Criminal tribunal for the Former Yugoslavia, Indictment against Milan Martić, *The Prosecutor of the Tribunal against Milan Martić*, Case No. IT-95-11, 14 July 2003, <http://www.icty.org/x/cases/martic/ind/en/mar-2ai051209e.pdf>.

<sup>85</sup> See for instance the law of Georgia on “occupied territories” which severely restricts access and economic exchange with Abkhazia and South Ossetia. Likewise, one can consider the law of Ukraine № 254-19-VIII of 17 March 2015 “On recognition of certain regions, cities, towns and villages in Donetsk and Luhansk regions as temporarily occupied territories” which entails similar propositions.

<sup>86</sup> Nina Caspersen, *Unrecognized States* (Cambridge: Polity Press, 2012), 21.

<sup>87</sup> *Ibid.*, 22.

conflicts over Abkhazia and South Ossetia,<sup>88</sup> can and will reduce the incentive of the population of these entities to seriously engage in conflict resolution talks and in trying to elevate the dispute on the level of power-sharing.

This situation is additionally compounded by the difficulties in accessing those territories and the relative scarcity of reliable and comprehensive information about these entities. As Yemelianova aptly puts it, the unpreparedness of Western scholarship to grasp the conflicts of the South Caucasus has allowed East European and Eurasian studies, which were long unaware about conflicts and political processes in non-Russian regions, to conceptualize these conflicts around a Russia-centered paradigm.<sup>89</sup> This has led to downsides not only in scholarship but also in how these entities are dealt with from a policy point of view.

### *An Attempt to Define these Entities*

The second factor that draws parallels to walking a minefield is related to the thorny issue of its definition. Partly relating to the reputational dilemma as outlined above, its distinction from other entities reflects the widespread practice of double standards in international politics. A possible starting point to approach this terminological dilemma would, therefore, entail focusing on what Jackson called “negative sovereignty”: The right, which negative sovereignty confers to the state correspond to the duties of other states not to interfere. He describes it as a “formal legal condition”<sup>90</sup> and, additionally, as the “legal foundation upon which a society of independent and formally equal states fundamentally rests.”<sup>91</sup>

Indeed, the “essentially normative”<sup>92</sup> shift in international law after 1945 has provided for state-building of former colonies without, in countless cases, satisfying the classical criteria of statehood for these colonies. This in turn has often led to the creation of *quasi-states*, which have a seat in the General Assembly of the UN, who participate in inter-governmental organizations and whose diplomats are accredited to other nations, yet, whose governments have very little capabilities to effectively run a state and control its territory. However, the *quasi-state*, as it appears, is treated as highly respected member of the international community, despite the fact that those entities are

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<sup>88</sup> For instance, in July 2011, the US Senate unanimously (!) approved a resolution calling upon the Russian Federation to withdraw its “occupying forces” from Abkhazia and South Ossetia. See: “U.S. Senate Unanimously Passes Shaheen-Graham Resolution Affirming U.S. Support for Georgian Sovereignty”, Jeanne Shaheen, *Press release*, 29 July 2011, <https://www.shaheen.senate.gov/news/press/us-senate-unanimously-passes-shaheen-graham-resolution-affirming-us-support-for-georgian-sovereignty>.

<sup>89</sup> Galina Yemelianova, “Western academic discourse on the post-Soviet de facto state phenomenon”, in: *Caucasus Survey* (Vol. 3, No. 3, 2015), 219-238, 225-226.

<sup>90</sup> Robert Jackson, *Quasi-States: Sovereignty, International Relations and the Third World* (Cambridge: Cambridge University Press, 1993), 27.

<sup>91</sup> *Ibid.*

<sup>92</sup> Robert Jackson, *Quasi-States: Sovereignty, International Relations and the Third World* (Cambridge: Cambridge University Press, 1993), 15.

often run by warlords and the only form of governance is unorganized or organized violence. Indeed, those warlords do not necessarily challenge the territorial integrity, let alone on an ethnic basis, of the respective state but they are often in control of the country or of some parts of it.<sup>93</sup> The *de facto* state, on the other hand, despite a documented high degree of excellent governmental capabilities in many cases – one should only think of the astounding economic performance of Taiwan – is treated with ignorance, caution, rejection or sometimes like a pariah state.<sup>94</sup>

How can we, therefore, define this polity? Rebecca Bryant captures the most central defining moment of these entities, which helps to approach the general underlying dilemma: “A *de facto* state is internationally unrecognized because it is part of an unresolved conflict where sovereignty is the main stake.”<sup>95</sup> Hence, diplomatic recognition or the lack thereof, being the central elements of a *de facto* state, is always closely tied to a sovereignty dispute, which is burning beneath the surface. Additionally, Nina Caspersen frames five general criteria along which we may utilize to come closer to the concept of *de facto* states:<sup>96</sup> 1) *de facto* independence after secessionist struggle; 2) the building of state institutions; 3) a formal declaration of independence; 4) no or hardly any outside diplomatic recognition; 5) existence for at least two years. Clearly, even partial diplomatic recognition does not suffice and has, thus, to be seen as most pivotal aspect of *de facto* statehood. The last criterion appears to be arbitrary, yet, it has helped Caspersen to include some entities into her research, which do not any longer exist, such as the Chechen Republic of Ichkeria. And indeed, on a closer inspection one may agree that some form of sustainability has to be achieved for the *de facto* state as well. The same holds true for the criteria of *de facto* independence after secessionist struggle, since both of these elements are important to distinguish temporary insurgents, planning to overthrow a government, from these specific situations.

What also makes the definition of a *de facto* state delicate and politically controversial is that the metropolitan state, partly supported by the international community, will likely repudiate the claim that the entity had sufficient capabilities at its own autonomous discretion to succeed in the creation of *de facto* independence. They will point to third states having violated against the prohibition of force, and importantly, will also claim that the *de facto* state could not have emerged had not ethnic cleansing occurred, facilitating the *de facto* state’s claim. And indeed, ethnic cleansing, forced

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<sup>93</sup> The argument of double standards does have some legitimacy if, for example, we look into the case of Liberia and Charles Taylor. Even before he was elected President, French companies imported tropical timber from Taylor-controlled enterprises. Not only did this trade fuel the ongoing civil war, it also provided enormous financial sources for Taylor’s war chest. See: Tim Boekhout van Solinge, “Eco-Crime: The Tropical Timber Trade”, in: Dina Siegel and Hans Nelen (Eds.) *Organized Crime: Culture, Markets and Policies* (New York: Springer, 2008), 97-112, 100–101.

<sup>94</sup> Treating a *de facto* state as pariah does not only involve legislation on the illegality of border crossing, business, etc. but includes active opposition which regularly takes the form of embargos. This has been the case in Northern Cyprus where such an embargo involves the ban on direct international flights or import bans supported by the EU.

<sup>95</sup> Rebecca Bryant, “Living with Liminality: De Facto States on the Threshold of the Global, in: *Brown Journal of World Affairs* (Vol. XX, No. 2, 2014), 125-143, 127.

<sup>96</sup> For the sake of terminological clarity, Caspersen uses the term ‘unrecognized state’. See: Nina Caspersen, *Unrecognized States*, 11.

migration and expulsion on an ethnic basis have to be seen as additional conditions by which the *de facto* states, particularly those in the South Caucasus, have come into being or,<sup>97</sup> which have provided factors conducive to the creation of *de facto* states. What additionally needs to be problematized about all the *de facto* states of the South Caucasus is that they were able to point to a pre-war constitutional territorial status, which has not only made it possible for them to put the claim on an already pre-defined territory: They made very effective use of institutions provided by the Soviet ethno-federal system, which had institutionalized primordialism. This dimension also opens up an interesting and not uncontroversial debate about the main tenets of the *uti possidetis* principle in international law. And lastly, as already argued, *de facto* states seek to justify their existence and moves, which they usually do by providing their case as a legally legitimate act of self-determination, even if they thereby place their bets on a sometimes erratic, but mostly very weak horse.

For many years we have been witnessing an increasingly vibrant debate on the characteristic features of those entities and the different levels of analysis have also generated diverse scholarship in this field. While the above-quoted Nina Caspersen uses an open definition of “unrecognized states” and includes also unrecognized states which no longer exist, Sakwa and Coppetiers favor the term of secessionist entities, investigating how the contextualized dimensions of culture, ethnic identities, history and politics have marked the understanding of statehood and sovereignty for the conflict parties.<sup>98</sup> Scott Pegg, on the other hand, has always put the focus on the indigenous capabilities of those entities and has provided important glimpse into the internal governance capabilities of those *de facto* states and their possible interplay with the international society.<sup>99</sup> There is some vagueness in the definitions, one may even say fuzziness, but some of the differences are rather about fine nuances. The author of this article, however, utilizes the term of a *de facto* state and he does so with full intention as those entities *are* subjects of international law and the degree, to what they may have achieved legal personality allows them to provide governance. It is this particular background, against which policies of engaging those entities without recognition must be understood. Therefore, the very nature of *de facto* statehood is very well placed in the

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<sup>97</sup> In particular, consider the fact that prior to the outbreak of the war in 1992 the Abkhazian population comprised only 17 percent ethnic Abkhaz, while the number of ethnic Georgians was just below 50 percent. It goes without saying that such a demographic constellation would not have allowed for a serious or even conceivable claim on external sovereignty on an ethnic basis. Today, the shift in the territory’s demography makes the Abkhaz claim to statehood sounds more reasonable. However, for the international community to consider a pragmatic approach in this context, accepting the reshuffling of the ethnic make-up is, indeed, a challenging task. This is what Gerard Toal – also referring to the Republika Srpska in Bosnia-Herzegovina – so aptly calls a desire for a “liberal ethnocratic state” claiming fair treatment of the returnees and an interest in performing as a liberal regime for the international community to gain tangible benefits. See: Gerard Toal, “Return and its alternatives: international law, norms and practices, and dilemmas of ethnocratic power, implementation, justice and development”, in: Conciliation Resources (ed.), *Forced displacement in the Nagorny Karabakh conflict: return and its alternatives* (London: Conciliation Resources, 2011), 7-22, 16.

<sup>98</sup> Bruno Coppetiers and Richard Sakwa (Eds.), *Contextualizing Secession: Normative Studies in a Comparative Perspective* (Oxford: Oxford University Press, 2003).

<sup>99</sup> See for instance: Scott Pegg, “De Facto States in the International System”.

capture of international law. The most important conceptual controversy on the operative standing of *de facto* states within international law pertains, however, to an old epistemological divide in legal scholarship, as the next chapter will exemplify with the case of Abkhazia.

## **Case Study: The Legal Status of Abkhazia**

### ***Why Facts Matter***

The *de facto* states' governments usually create their claim along the right of self-determination, notwithstanding the 'weak horse' they are thereby placing their bets on. Yet, the principle of self-determination in public international law is not only one of the most often invoked, but also one of the fuzziest, most ambiguous and most misunderstood ones. The question as to whether these entities have a right to external sovereignty by virtue of self-determination will and cannot be addressed in the framework of this paper. However, even if it may be assumed that *de facto* states such as Abkhazia cannot legitimately claim a right to secession, a separate and equally necessary question needs to be raised: Does today's Abkhazia qualify as a state under public international law? And furthermore, can the international law on statehood, one of the most principle basic doctrines in international law, possibly provide some sort of remedy for the unsatisfactory situation of the *de facto* states?

In this context, Abkhazia's *de facto* foreign minister Vyacheslav Chiribka alleges that Abkhazia fulfills all the criteria necessary in order to be defined as a state, therefore the non-recognition policy of the West, thus Chiribka, must be seen as purely political statement of intent.<sup>100</sup> The genealogical relation between legal containers of rules such as the 1933 Montevideo Convention, which he believes is conducive to make his claim and which he is obviously referring to, can be evidenced in other cases, too. Indeed, this claim has some substance as the declaratory theory of recognition is still not only widely endorsed in international legal scholarship, it is evidenced by state practice and represents the prevailing theory in this regard. The doctrine "ex factis jur oritur" is not only prevalent, it is also a repudiation that state-creation is necessarily to be found within notions of legalism. And the already quoted Montevideo Convention stipulates in its Article 3 that "even before recognition the state has to right to defend its integrity and independence".<sup>101</sup> The question arises whether objective criteria are sufficient to qualify an entity as a state under public international law in general – and whether these criteria are met in the particular case of Abkhazia.

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<sup>100</sup> Chiribka refers to the criteria of the 1933 Montevideo Convention on rights and duties of states. See: Viacheslav Chiribka, "The international legal status of the Republic of Abkhazia in the light of international law", in: John Colarusso (Ed.) *Independence of Abkhazia and Prospects for the Caucasus* (Istanbul: CSA Global Publishing, 2010), 17-33, 24.

<sup>101</sup> Montevideo Convention on Rights and Duties, Art. 3.

Indeed, there is no easy snapshot answer to this question. Two legal doctrines oscillate in this regard.

While certain factual criteria are applied in order to characterize statehood, the diplomatic recognition by other states, furnishing constitutive elements of recognition, remains in focus as well. Hence, *declaratory* and *constitutive* lines of theories on recognition are competing and, in fact, if seen through a narrow doctrinal lens, opposing each other. However, neither of them can solve the underlying problem of defining the state and clarifying the legal status of entities sufficiently and conclusively, as the case of Abkhazia clearly demonstrates.

Proponents of the declaratory theory appear to dogmatize the existence of empirical evidence, at the same time paying insufficient attention to the circumstance that these very empirical facts must inhibit a *legal* nature and that states should come into being on the basis of internationally recognized rules and standards.<sup>102</sup> Yet, the first question which will automatically follow from this is whether the creation of states is actually a process, which cannot be measured along the nest of rules of public international law. It would be a, rather, interesting exercise to investigate, which European nations have emerged *legally*.

Those who advocate the constitutive theory, on the other hand, seem to ignore crucial factual evidence. In particular, developing countries, as already discussed above, offer an array of examples of *quasi-states* which have been diplomatically recognized but still fail to provide effective authority or a minimum of traditional state functions, particularly with regard to the Montevideo criterion of an effective government.<sup>103</sup> In many cases, state authority is not extended beyond the respective capital. In the same vein, to consider that states only exist on the basis of the recognition would also pave the way for *ad hoc* law, so that a consistent and reliable legal practice could hardly come into being. If we follow this very way of reasoning of state recognition, the nature of statehood turns into a contract which resembles the character of private law. Yet, nobody is obliged to enter into a contract. And indeed, the very idea of external confirmation of statehood has only gradually come about as normative shift in the course of the 20<sup>th</sup> century. Before, it was widely believed that statehood is coming from within the entity itself as indigenous process.

Nevertheless, the constitutive theory does provide a good argument from another point of view. If a new state is created, then this creation should be subject to agreement of other, already existing states, since the emergence of a new state will automatically grow into (new) legal obligations for the existing states, such as the obligations relating to the principles of prohibition of violence or diplomatic immunity.<sup>104</sup> This would be in the current case of relevance for Georgia, because a

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<sup>102</sup> James Crawford, *The Creation of States in International Law*, 5.

<sup>103</sup> The African continent is full of such examples. See: Christopher Clapham, *Africa and the International System: The Politics of State Survival* (Cambridge: Cambridge University Press, 1996), 15.

<sup>104</sup> James Crawford, *The Creation of States in International Law*, 13.

Georgian recognition of Abkhazia would mean waiving the Georgian claim over this territory. Most probably, it would also result in the need abandoning Georgia's isolationist policies vis-à-vis Abkhazia.<sup>105</sup> Thereby Abkhazia would be free to join the international community and would equally be free to enter into diplomatic relations with other states. But there is more to that argument: Recognition bolsters the factual capabilities and reduces the vulnerability and exposure of an entity. For instance, the Russian diplomatic recognition of Abkhazia serves as very effective deterrence for a possible Georgian aim to forcibly return Abkhazia under the jurisdiction of Tbilisi. And finally, this is something which the political elites of the *de facto* states themselves realize: They are investing a lot into lobbying campaigns canvassing for recognition by other states. Recognition by some tiny states, which do not have a part in the big concert of great powers, can nevertheless provide some deal of emotional satisfaction as well.

Indeed, diplomatic recognition remains, thus, the principal condition for acceding to international organizations, with WTO membership as a rare exception to this rule.<sup>106</sup> Furthermore, recognition seems to have a security-related dimension too. For example, even though Chechnya may have fulfilled all objective criteria of statehood after the first Chechen war in 1996 and other states like Saudi Arabia or Kuwait even signaled their interest to recognize this entity, it became fully exposed to a new Russian attack at the outset of the second Chechen war – not least due to the lack of diplomatic recognition.<sup>107</sup> Also for courts, this question is rather tricky, as they do not regularly judge on the merits of the elements of statehood, whereby recognition could be for them an easier element to have a look at.<sup>108</sup>

Nonetheless, most scholars in the field of international law seem to approve the underlying tenets of the declaratory theory as withholding diplomatic recognition despite of the existence of all necessary criteria must not deny an entity's statehood.<sup>109</sup> In addition, the *Badinter Commission*, being a consultative body at its time which produced important outcomes helping to shape the law on statehood, decided in its Opinion No. 1 in favor of the declaratory principle:

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<sup>105</sup> Georgia has adopted a so-called law on "occupied territories" which basically prevents and penalizes investments in its break-away regions and prohibits entry to non-citizens from the Russian side of the border.

<sup>106</sup> Article XII of the WTO Treaty provides for the membership of "any state or separate customs territory possessing full autonomy in the conduct of its external commercial relations". Indeed, this makes the membership of Taiwan indisputable.

<sup>107</sup> Thomas D. Grant, *The Recognition of States: Law and Practice in Debate and Evolution* (Westport: Praeger Publishers, 1999), 29.

<sup>108</sup> The author of this article contends that the ease with which the ECtHR declared jurisdiction of Russia in *Ilascu v Moldova and the Russian Federation* is not only surprising but thoroughly unsettling.

<sup>109</sup> James Crawford, *The Creation of States in International Law*, 27.

*“The 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.”*<sup>110</sup>

Can we, therefore, easily forgo the aspect of recognition and focus only on the existence of apparently objective criteria, thereby surrendering to a purely empirical-analytical assessment ascertaining whether and to which degree objective criteria mentioned within a regional Convention in the Americas at the beginning of the 1930s are met? The legendary Austrian legal scholar and founder of the positivist school of law, Hans Kelsen, might have provided a useful way out of this dilemma. He identified two different elements of recognition. While the first element of recognition is of purely political nature, failing to establish the legal existence of a state, the second element of recognition symbolizes the declared will of the existing states to treat the recognized entity as state in the sense of international law.<sup>111</sup> Hence, this second element becomes relevant from a legal perspective. Kelsen, thereby, clearly takes a constitutive approach by which the *legality* of statehood is only conferred through recognition by other states.

If we apply this particular thesis of Kelsen in secessionist conflicts, objective criteria of statehood ought to be seen not in isolation from, but in conjunction with additional criteria of recognition, imposed by the international community or the respective state, when it comes to a necessary legal appraisal.<sup>112</sup> In this perspective, the normative power of the factual may not be assessed isolated of other premises – rather, it needs to be discussed in combination with, what the author of this paper argues, the *factual power of the normative*. It goes without saying that Kelsen’s approach is not without significant flaws: On the one hand, he failed to specify how many states need to recognize other entities before these entities can legitimately deem themselves as states and on the other hand, and probably more importantly, he seemed to have underestimated to which extent the granting and withholding of formal recognition is strongly politically motivated in practice.<sup>113</sup> Still, it could provide a useful prism, which may allow combining elements of both dimensions.

If applied, what does this mean for the case of Abkhazia? The following analysis of Abkhazia’s statehood shall be, therefore, framed in terms of its compliance with the elements of Article 1 of the Convention of Montevideo.<sup>114</sup> First, the criterion of *defined territory* appears to be fulfilled.

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<sup>110</sup> See: Opinion No. 1. Z 1 lit b, printed in: Allain Pellet, “The Opinions of the Badinter Arbitration Committee - A Second Breath for the Self-Determination of Peoples” in: *European Journal of International Law* (Vol. 3, 1992), 178-185, 182.

<sup>111</sup> Hans Kelsen, *General Theory of Law and State* (Cambridge: Harvard University Press 1945, reprinted 1999), 222-223.

<sup>112</sup> Thomas D. Grant, *The Recognition of States: Law and Practice in Debate and Evolution*, 32.

<sup>113</sup> In this context, Kelsen and Lauterpacht were equally idealistic. The latter maintained that the presence of objective criteria for the attainment of statehood automatically confers a duty upon existing states to recognize the states fulfilling these criteria. It seems obvious that this approach is on direct collision course with some of the most important realist tenets of international politics. For Lauterpacht see: Hersch Lauterpacht, “Recognition of States in International Law”, in: *The Yale Law Journal* (Vol. 53, No. 3, 1944), 385-458.

<sup>114</sup> See the Convention on the Rights and Duties of States, Montevideo, 26 December 1933, signed by the 7th International American Conference.

Abkhazia's (administrative) boundaries both in contemporary form and in the shape of the former Autonomous Soviet Socialist Republic (ASSR) are generally undisputed by both Georgia and Abkhazia. Even Abkhazia's recapture of the Kodori valley in 2008, a valley in the North-East, which had been under Georgian control for some time after the war in the 1990s, does not change this assessment: Lithuania's statehood after 1919 also remained undisputed, notwithstanding the annexation of the Memel/Klaipeda region in 1923.<sup>115</sup> Therefore, the territorial criterion of Abkhazia existed throughout the period of the conflict, despite its territorial claim over the Kodori valley before 2008.

Yet, when it comes to the question of a *permanent population*, first interpretational difficulties inevitably appear. Generally, one can reason that this element requires the existence of a core people in terms of citizenship, thereby emphasizing again that the Montevideo criteria ought to be understood as *legal* criteria. If we put this into a larger historical and comparative context, the peace treaty of Saint Germain after the collapse of the Austro-Hungarian Monarchy provided that each former citizen of the Danube Monarchy shall be given citizenship of the respective newly created successor state. Therefore, Sudeten Germans received the citizenship of the Czechoslovak state, while German-speaking South Tyrolians were given the Italian citizenship. Thus, the collapse of a multinational state and the question of how citizenship issues in the successor states should be handled is not a new phenomenon and provided some soft precedential character.

In the same vein, the European Court of Human Rights found in the landmark decision of *Kuric and others v. Slovenia*<sup>116</sup> that Slovenia violated Articles 8, 13, and 14 of the ECHR: The names of about 18,000 Yugoslav citizens which had an official residence in Slovenia but not the Slovenian citizenship were erased from the official civil registry in 1992. As a result, these people were unable to apply for Slovenian citizenship, effectively becoming stateless persons.<sup>117</sup> More than that, these individuals were not even informed of this decision to eliminate their names from the register, thus they could not have used effective legal remedies against this decision.

This is not to say that the ECtHR delivered a groundbreaking judgment on the equality of stateless persons. Yet, this judgment signifies quite plainly that each successor state needs to introduce rules compliant with the Convention for all individuals legally residing on that very territory. Precisely the question of citizenship makes the appraisal of Abkhazia in conjunction with the element of a *permanent population* so disputed.

Why is the citizenship issue so crucial in Abkhazia? Obtaining the *de facto* Abkhazian citizenship is, understandably, of enormous importance for all individuals residing in this territory: It entitles them to possess real estate; it enables them to receive pensions and other (extremely modest) social

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<sup>115</sup> James Crawford, *The Creation of States in International Law*, 51.

<sup>116</sup> European Court of Human Rights, *Case of Kuric and others v Slovenia* (Application No. 26828/06), Judgment, 26 June 2012.

<sup>117</sup> *Ibid.*, para 32.

gratifications and, plausibly, allows the individual to actively participate in the social and political life of this entity. How is this regulated by public law in the *de facto* state of Abkhazia? According to Article 5 litera a of the *de facto* Abkhazian citizenship law, all *ethnic* Abkhaz – notwithstanding their official residence – have a right to Abkhazian citizenship.<sup>118</sup> An unmistakably clear *ethnic* connotation was chosen to serve as gatekeeper for the inclusion/exclusion dichotomy.

Indeed, the Abkhazian *de facto* government spends enormous efforts to encourage ethnic Abkhaz to settle down in Abkhazia and to accept Abkhazian citizenship in a desperate attempt to change Abkhazia's demographic composition.<sup>119</sup> Yet, Article 5 litera b constitutes an indirect discrimination on ethnic grounds: It stipulates that for all those who do not qualify under Article 5 litera a, other criteria are introduced: Accordingly, these individuals may apply for citizenship, provided that they have been residing in Abkhazia on the key date of 12 October 1999<sup>120</sup> no less than five years. On this basis, about 200,000 ethnic Georgians, who have been residents of the former ASSR and became forcibly displaced in 1993, are denied the possibility to obtain *de facto* Abkhazian citizenship.

Article 6 of this law stipulates that – with the exception of the Russian citizenship – the possession of double citizenship is prohibited. Hence, ethnic Georgians who obtain *de facto* Abkhazian citizenship are required to waive their Georgian citizenship. However, this turns them into stateless persons effectively, since they face enormous difficulties obtaining Russian citizenship and their *de facto* Abkhazian citizenship is recognized only in Russia.

This *de facto* law has been, as a consequence, repeatedly criticized by international organizations.<sup>121</sup> Indeed, it does discriminate purely on ethnic grounds and is very revealing in terms of the political practice in this entity: On the eve of the *de facto* presidential elections in August 2014, about 22,000 voters, mostly ethnic Georgians, were eliminated from the electoral register since officials *presumed* that these people had an additional Georgian citizenship.<sup>122</sup>

How does all of this add up to the element of a *permanent population*? It might be accurate from a strictly dogmatic view that this criterion only refers to the requirement of a stable community<sup>123</sup> on a given territory, which does not have any minimum standards in terms of size, but which does

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<sup>118</sup> See: Zakon Respubliki Abkhaziya o grazhdanstve Respubliki Abkhaziya, prinyat i podpisan, 2005 god: [http://www.emb-abkhazia.ru/konsulskie\\_voprosy/zakon\\_j](http://www.emb-abkhazia.ru/konsulskie_voprosy/zakon_j).

<sup>119</sup> However, this „Ethnicization” of Abkhazia's population does not seem to be successful: Most of these individuals stranded in Abkhazia are Syrian refugees who speak neither Abkhazian nor Russian, facing enormous difficulties to integrate into this entity. See: “Syrian Refugees Grapple with Adapting to Life in Abkhazia”, *Eurasianet*, 26 March 2014: <http://www.eurasianet.org/node/68194>.

<sup>120</sup> 12 October 1999 is the day when this law was adopted.

<sup>121</sup> “Abkhazia Today Europe Report N°176 - International Crisis Group”, *AbkhazWorld*, 15 September 2006, 9, <http://abkhazworld.com/aw/reports-and-key-texts/611-abkhazia-today-europe-report-nd176>.

<sup>122</sup> André Ballin, „Abchasien: Wahl mit ungeduldigen Wählern”, *DerStandard Online*, 24 August 2014, see: <http://derstandard.at/2000004705862/AbchasienWahl-mit-ungeduldigen-Waehlern>.

<sup>123</sup> Martin Dixon, *Textbook on International Law* (Oxford: Oxford University Press, 2007), 119.

require this population to identify, in this case, Abkhazia as the center of its vital interests. Likewise, international law fails to provide consistent guidance with respect to matters of citizenship in successor state scenarios.<sup>124</sup> Nevertheless, and even if one agrees that *permanent population* exists in Abkhazia, this criterion must be seen in light of the most critical citizenship issues since ethnic Georgians constituted a significant part of the Abkhazian pre-war population.

If we continue our ride through the criteria, the most important element is the one relating to an effective *government* in the sense of Article 1 of the Montevideo Convention.<sup>125</sup> This element requires the respective government to exercise effective control and to assert its authority over the country's population as well as throughout its territory. In particular, the government must be able to act independently of external influence or assistance.<sup>126</sup> However, since the Georgian conflict side *in particular* considerably disputes the existence of this element, the thorny issue of *substantial independence* needs to be addressed.<sup>127</sup> With regard to this sub-question, it needs to be said that the delineation between the genuine state authority on the one hand and puppet-state character on the other hand, usually runs along the boundaries of Article 4(1) of the UN Charter.<sup>128</sup> Hence, if a state is born as a result of a prohibited intervention by an external state, the existence of the *government* element has to be denied. If, in contrast, a state has come into being as a consequence of an internal secession without sufficient assistance which could be attributed to another (third) state, the usual Montevideo criteria could apply, since this situation is not covered by international law. This situation would not be of interest for international law as it only may violate domestic law.

The case law of the ECtHR confirms this: The Court ruled in the landmark decision of *Louizidou v. Turkey*<sup>129</sup> that the term of "jurisdiction" in the sense of Article 1 ECHR does not (only) refer to the territory of the respective signatory state, but, rather, refers to the state's capacity to exercise state authority and to enforce law, even if this happens outside of the respective signatory state's territory. In this judgement, the Court stated that it does not need to be examined whether each and every authoritative measure can be attributed to the Turkish Republic of Northern Cyprus. For the Court, both the massive presence of Turkish troops<sup>130</sup> and the existence of a high number Security Council Resolutions condemning the Turkish military occupation of Northern Cyprus have been sufficient in order to attribute state authority in Northern Cyprus directly to Turkey, effectively making Turkey responsible for state action of Northern Cyprus.<sup>131</sup>

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<sup>124</sup> Andreas Zimmermann, *Staatennachfolge in völkerrechtliche Verträge* (Berlin/Heidelberg/New York: Springer, 2000), 747-751.

<sup>125</sup> The "capacity to enter in diplomatic relations" is widely seen as obsolete. Yet, a *Kelsenian approach* may indeed justify international recognition as prerequisite to enter into diplomatic relations.

<sup>126</sup> Thomas D. Grant, *The Recognition of States: Law and Practice in Debate and Evolution*, 7.

<sup>127</sup> James Crawford, *The Creation of States in International Law*, 64-65.

<sup>128</sup> *Ibid.*, 134.

<sup>129</sup> European Court of Human Rights, *Case of Loizidou v. Turkey* (Preliminary Objections), Judgment, 23 March 1995.

<sup>130</sup> *Ibid.*, para. 56.

<sup>131</sup> Again, as mentioned above, the way how the ECtHR sometimes constructs jurisdiction is not without controversy.

How could the Abkhazian issue be seen in light of this jurisprudence? Has the *de facto* state of Abkhazia been created because of a violation of the prohibition of force? It seems quite evident that Georgia's ultimate loss of jurisdiction over Abkhazia in 1993 can hardly be attributed to Russia.<sup>132</sup> Even under the broadest interpretation of the so-called strict control test established in the Nicaragua case of the ICJ, Russia did not control the Abkhaz rebels. Since 1993, the *de facto* state has established state institutions, which have, albeit on a very modest and rudimentary basis, provided the usual state functions. Likewise, an exclusive Russian supervision over Abkhazia can hardly be proven by factual evidence. Quite to the contrary: In many well-documented cases, the Abkhazian government has opposed the Kremlin's policies quite openly. Abkhazia has also, so far, been resistant towards a stronger embrace by the Russian Federation through treaties forcing them to give up parts of their hard-won independence. As a matter of fact, the (asymmetric) axis between Moscow and Sukhum/i is only owed to the pragmatic attitude of Abkhazian politicians, since their call for independence is indeed authentic. It needs, however, to be mentioned that some scholars maintain that – in the case of South Ossetia which is in this context very comparable – the fact of mass conferral of Russian passports has eliminated the criterion of effective government since, thus Nussberger, Russia could claim personal jurisdiction over them.<sup>133</sup> The problem of this perspective is that the legal order in many states, whose effective government is not casted doubts on, allow double citizenship, even on a mass basis.<sup>134</sup>

On the other hand, Abkhazia is extremely dependent on Russia in economic terms. It essentially owes its socio-economic survival exclusively to Russia. Likewise, border management between the *de facto* boundary between Abkhazia and Georgia is, notwithstanding the fact that this is part of "bilateral agreements" between Moscow and Sukhum/i, exercised, sometimes by Russian troops themselves, sometimes with support of the Russian troops. Against this background, a legal appraisal of Abkhazia under Article 1 of the Montevideo Convention seems to be quite difficult or at least not without a great amount of controversy and will, probably, in future be dealt with by the ECtHR in similar cases. Nevertheless, the criterion of government also appears to be met in the case of Abkhazia, which illustrates that its declaratory existence can be affirmed in spite of all difficulties. Yet, the issue of the constitutive element of recognition, if one continues to apply the normative power of the factual, is considerably more difficult to justify.

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<sup>132</sup> For a detailed legal appraisal of the 1992-93 war, see: Benedikt Harzl, *Der Georgisch-Abchasische Konflikt. Eine rechtliche und politische Analyse*.

<sup>133</sup> Angelika Nussberger, "South Ossetia", in: *Max Planck Encyclopedia of Public International Law* (last updated 2013), para. 20.

<sup>134</sup> One may consider Moldovan citizens in possession of Romanian citizenship.

## Is Recognition completely out of the question?

The foreign policy conducted by Abkhazia is Janus-faced, to some degree: While most of the Abkhazian political elites vocally maintain that the objective Montevideo criteria and, in addition, the Russian recognition suffice to qualify Abkhazia as a state, they nevertheless continue their efforts in international lobbying activities in order to obtain diplomatic recognition, even if the addressed states are playing only a marginal role on the international scene.<sup>135</sup> It still remains to be seen how, for instance, the diplomatic recognition by island republics like Nauru helps Abkhazia in state-building. The efforts of the Abkhaz diaspora in Turkey to promote their cause are far more serious, yet the prospects achieve tangible results are also very unlikely.

This illustrates the problematic crux of the matter between declaratory and constitutive theories of recognition. Arguably, the existence of objective criteria cannot be automatically translated into corresponding state capabilities,<sup>136</sup> thus, international engagement in and with Abkhazia still takes place either only by acquiescence of the parent state Georgia or, alternatively, upon explicit request of the parent state Georgia.<sup>137</sup> Hence, objective criteria of statehood should not be entirely seen and understood outside of the realm of diplomatic recognition. Only this can verify that a state does not only receive legal identity through empirical facts, but that it can also act as a state within this identity as member of the international community. To put it in less technical and more figurative terms: It makes a difference to be invited to the cocktail party only or to both, the cocktail party and to dinner.

Yet, states which consider recognizing other entities do not operate in a legal vacuum. To provide recognition is not fully left only to their discretionary interpretation. On the contrary, states are obliged under public international law to consider with great care and caution how the entity, wishing to be recognized, has come into being. Territorial entities that have come into being as a consequence of aggression or annexation must not find rewards through outside diplomatic recognition. Such a move would amount to nothing less than the recognition of the legal effects that emerged through unlawful action.

Likewise and in this context, Article 41(2) of the ILC Articles on the *Responsibility of States for Internationally Wrongful Acts*<sup>138</sup> provides that no state may recognize a situation as lawful if it has been created by a serious breach of a general norm of international law on the part of another state. If this were applied to the Abkhazian case, it could mean a general prohibition of recognition of

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<sup>135</sup> Nina Caspersen, *Unrecognized States: The Struggle for Sovereignty in the Modern International System*, 116.

<sup>136</sup> These capabilities can be seen required through the criterion to “enter into diplomatic relations with other states” which also features as one of the elements of the Montevideo Convention.

<sup>137</sup> Nina Caspersen, “From Kosovo to Karabakh: International Responses to De Facto States”, in: *Südosteuropa* (Vol. 56, No. 1, 2008), 58-83, 69.

<sup>138</sup> See: “Responsibility of States for Internationally Wrongful Acts”, Yearbook of the International Law Commission, 2001, Vol. II (Part Two), [http://legal.un.org/ilc/texts/instruments/english/draft\\_articles/9\\_6\\_2001.pdf](http://legal.un.org/ilc/texts/instruments/english/draft_articles/9_6_2001.pdf).

Abkhazia, provided that the emergence of Abkhazia's statehood is interpreted as a result of Russia's violation of the territorial integrity of the Republic of Georgia. However, two objections in this context must be raised: First, this interpretation, which is being massively spread by the Georgian government, represents quite an oversimplification of the empirical evidence at hand and does not reflect the complex realities on the ground. As already stated above, *de facto* states dispose of various sources of support and made use of them very skillfully during the 1990s. Second, the longer an unlawful situation persists, the more difficult it is to perpetuate the assumption of a legal invalidity.<sup>139</sup> Enrico Milano argues very accurately that an original unlawful territorial situation can enter a transitional period by which it may turn lawful.<sup>140</sup> Indeed, Georgia lost its jurisdiction over Abkhazia already in 1993, whereas the Russian diplomatic recognition was granted only in 2008. In between this time frame, both Georgia and Abkhazia, explicitly referred to as conflict parties, have concluded various agreements with all having one substantive provision in common: The prohibition of force and the restriction to act on exclusively peaceful means. And it did not start any earlier than with the advent of Vladimir Putin as head of state that the Russian government became more supportive of the Abkhazian cause and started to pursue policies, supportive of Abkhazia such as the mass conferral of Russian passports/citizenships.

Does this, however, mean that states which might be considering recognizing Abkhazia are should not be guided in any way by substantive criteria such as the internal political system? A normative shift seems to have made its way through the law and politics of state recognition after the fall of Communism in Europe.

The collapse of Yugoslavia and the Soviet Union has shown that the international community has, in its consideration to recognize new states, veered away from an absolute dogmatization of objective facts determining statehood, whereby it has started to subject new emerging statehood to an examination on an additionally normative basis. This shift is well expressed and illustrated in the so-called *Declaration on the Guidelines on Recognition of New States in Eastern Europe and the Soviet Union*,<sup>141</sup> a document, which the foreign ministers of the member states of the European Community (EC) have adopted in December 1991. According to this declaration, only successor states of Yugoslavia and the Soviet Union should receive diplomatic recognition if they have organized themselves on a democratic basis; subscribed to the Final Act of Helsinki and in

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<sup>139</sup> Burkhard Schöbener, *Völkerrecht: Lexikon zentraler Begriffe und Themen* (Heidelberg: C. F. Müller, 2014), 114.

<sup>140</sup> For him, the key is legitimacy in bridging effectiveness and territorial unlawfulness. See: Enrico Milano, *Unlawful Territorial Situations in International Law: Reconciling Effectiveness, Legality and Legitimacy* (Leiden/Boston: Martinus Nijhoff Publishers, 2006), 190.

<sup>141</sup> European Community, *Declaration on the Guidelines on Recognition of New States in Eastern Europe and the Soviet Union*, 31 (1992) International Legal Materials, 1485, <http://www.dipublico.org/100636/declaration-on-the-guidelines-on-the-recognition-of-new-states-in-eastern-europe-and-in-the-soviet-union-16-december-1991/>.

the Charter of Paris; and, importantly, provide guarantees with regards to the rights of ethnic and national groups.<sup>142</sup>

The conditionality aspect of this declaration was not really successful and often failed to prevent conflicts. This remains a controversial issue today that boils up every now and then, whether the recognition of some former Yugoslav republics was too premature and effectively poured further fuel on the existing flames. The Georgian case reveals that these guidelines were consistently applied by the international community, at least for quite some time. At the beginning of 1992, after the ousting of first Georgian President Zviad Gamsakhurdia, was Georgia diplomatically recognized by the EC member states and the United States.<sup>143</sup> The minority rights-based conditionality seems to be a remarkable development in this context, thereby limiting the tenets of the declaratory view.<sup>144</sup>

Against this background, the question remains whether Abkhazia can be recognized as a state and would deserve recognition given this obvious shift on international norms guiding matters of legitimate statehood. In all likelihood, the answer should be, at least for the time being, negative. Abkhazia is governed by a relatively strong presidential system with a so-called people's assembly as legislative organ, which, however, lacks the possibility to impeach the president or to dissolve the government.<sup>145</sup> Even if the American NGO *Freedom House* categorizes Abkhazia as “partly free”<sup>146</sup> and even if many Abkhazian *de facto* officials do have a vivid past and experience in reconciliation processes and civic engagement,<sup>147</sup> the entire political system and the political life of Abkhazia are organized and channeled on the basis of an exclusive ethnic worldview with a hardly challengeable presidency, which moreover, embraces the ethnic understanding of statehood and rejects the civic model of state-building.

In addition to the above-mentioned questionable *de facto* citizenship law, even the *de facto* constitution can be criticized for its suboptimal compliance with internationally accepted human rights standards. According to Article 49 of the *de facto* Constitution, the President of Abkhazia not only has to be an Abkhazian citizen – (s)he must be of Abkhaz ethnicity additionally. This provision alone would clearly not comply with the requirements for recognition as elaborated above.

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<sup>142</sup> Naturally, the most problematic concept of *uti possidetis*, whereby only federative republics of both the Soviet Union and Yugoslavia was given the golden price of recognition, clearly limited the extent of the self-determination principle.

<sup>143</sup> Also Azerbaijan and Uzbekistan were longer in the waiting room for recognition by the international community. See: Thomas D. Grant, *The Recognition of States: Law and Practice in Debate and Evolution*, 95.

<sup>144</sup> *Ibid.*, 98.

<sup>145</sup> Tom Trier et al., *Under Siege. Inter-Ethnic Relations in Abkhazia*, 87.

<sup>146</sup> Also Georgia was only categorized as „partly free“. See: Freedom House, „Abkhazia“, *Freedom in the World 2013, Report*, <https://freedomhouse.org/report/freedom-world/2013/abkhazia>.

<sup>147</sup> Nina Caspersen, *Unrecognized States*, 136.

Moreover, in light of the landmark decision of *Sejdic and Finci v. Bosnia and Herzegovina*<sup>148</sup>, this constitutional provision would also make Abkhazia's accession to the Council of Europe impossible.<sup>149</sup> It would, aside from that, also belie those widely held positions within this entity, which describe this *de facto* state as light in a, rather, sinister regional environment being equipped with resilient democratic institutions.<sup>150</sup> Yet, statements like these are also an indicator that *de facto* states face an image problem, which the respective metropolitan state makes use of in order to deepen isolation. A portrayal of competitive democratic systems will, hence, always be at the heart of the political leadership of these entities such as Abkhazia.

In the same vein, Abkhazia's *de facto* language law is marked by a high degree of ethnic exclusivity,<sup>151</sup> demonstrating once more the exclusivist notion of citizenship, which appears to be based on a rather romantic definition of nationhood. According to Article 2(6) of this law, the Russian language has – alongside the official state language Abkhazian – the purpose of “inter-ethnic communication”. Yet Article 22 of this law includes a rather toxic provision: If applied, it would provide that after 2015, Abkhazian would remain the sole state language, thereby excluding half of the citizens of contemporary Abkhazia who, actually, do not speak Abkhazian at all.<sup>152</sup>

Political life in Abkhazia also betrays emphasis on ethnicity. Notwithstanding that only half of Abkhazia's contemporary population is of Abkhaz nationality, in practice all the deputies of the parliament of this *de facto* state are ethnic Abkhaz.<sup>153</sup> Likewise, all the heads of the regional administration of Abkhazia as well as the presidential commissioner for the Gali district – all appointed by the *de facto* President – are of Abkhaz ethnicity.<sup>154</sup> The same holds true for the composition of legislative organs: Only three members of the past parliament were non-Abkhaz by ethnicity – two Armenians (even though eleven ran for office) and one Georgian (two ran).<sup>155</sup>

And lastly, ethnic discrimination in Abkhazia is particularly evident in the thorny issue of land and house ownership. The *De facto* citizens of Abkhazia of Russian or Armenian origin, which have

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<sup>148</sup> European Court of Human Rights, *Case of Sejdic and Finci v Bosnia and Herzegovina* (Application nos. 27996/06 and 34836/06), Judgment, 22 December 2009.

<sup>149</sup> Abkhazia's Foreign Ministry describes the country as „a dynamically developing free and democratic European state, based on the supremacy of law and respect for human rights, including the rights of national minorities”, see: “Statement of the MFA of the Republic of Abkhazia concerning the European Parliament Resolution on the EU – Georgia Association Agreement”, *AbkhazWorld*, 23 November 2011, <http://www.abkhazworld.com/aw/statements/188-statement-mfa-abkhazia-eu-nov-22>. In light of this overly ambitious self-definition, compliance with ECHR standards should be assessed.

<sup>150</sup> George Hewitt, British Professor and advocate of Abkhazia has provided this opinion in an op-ed in 2012. See: George Hewitt, “Democracy in Abkhazia: a testing year”, *OpenDemocracy*, 21 April 2012, <https://www.opendemocracy.net/george-hewitt/democracy-in-abkhazia-testing-year>.

<sup>151</sup> See: Zakon Respubliki Abkhaziya „o gosudarstvennom yasyke Respubliki Abkhaziya“, 29 noyabrya 2007 g., [http://www.abiblioteka.info/rus/doc/section\\_6/abk\\_law/lang.html](http://www.abiblioteka.info/rus/doc/section_6/abk_law/lang.html).

<sup>152</sup> Tom Trier et al., *Under Siege. Inter-Ethnic Relations in Abkhazia*, 77.

<sup>153</sup> *Ibid.*, 88.

<sup>154</sup> *Ibid.*, 89.

<sup>155</sup> See: <http://new.civil.ge/clarion/news/3/1400/eng>.

fled the war in 1992 and wish to reclaim their abandoned homes, are often exposed to the official arbitrariness by Abkhazian *de facto* courts and authorities, if their homes have been occupied by ethnic Abkhazians in the meantime.<sup>156</sup> Hence, Abkhazia constitutes a national state concept which is fully based on cultural-ethnic vectors. Against this background, a diplomatic recognition in theory would have to be denied on the basis of the normative development with regard to recognition as mentioned above.

### **Conclusion**

What conclusion can be drawn from this? Abkhazia appears to have fulfilled the objective criteria of statehood pursuant to main landmarks of the Montevideo Convention. The diplomatic recognition of Russia, still a great power, has additionally bolstered some of the elements described in the Convention. Indeed, its consolidated statehood, albeit still a *de facto* state, entitles Abkhazia to invoke certain rights against third states, such as the prohibition of force in accordance with Art 2 (4) UN Charter.<sup>157</sup> Yet, at the same time, Abkhazia has failed to build an operating state, which is actively participating within and involved into the international community on the basis of this achievement.

Could, therefore, recognition be an answer to help finding an exit out of this stalemate? From a normative point of view, its current legal and political system would deny a possible Western diplomatic recognition in light of the shift of international norms on recognition which emerged as a consequence of the collapse of Yugoslavia and the Soviet Union. If we understand this normative shift as a development, by which new criteria will consort with the Montevideo principles, then recognition turns into an act of state-building, which, for the time being, is something Abkhazia has not fully reached. This interim conclusion demonstrates, however, a vicious circle. In order to promote democracy, the rule of law, human and, particularly, minority rights – those criteria necessary to have attained in order to be allowed to access the international community – a stronger international engagement, and an enhanced interaction with other states or international organizations, most importantly with the EU, would be desirable for Abkhazia. The lack of recognition of Abkhazia makes this perspective, however, rather unrealistic,<sup>158</sup> thus

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<sup>156</sup> Thomas de Waal, "Abkhazia: All politics is local", *Eurasia Outlook*, Carnegie Moscow Center, 30 May 2014, <http://carnegie.ru/eurasiaoutlook/?fa=55749>.

<sup>157</sup> It goes without saying that this is controversial, as it would enable Abkhazia to invoke Article 51 of the Charter which could be made use of by any other state. Indeed, governments usually repudiate the applicability of Article 2 (4) of the Charter as they are uneasy with the applicability of the Common Article 3 of the Geneva Conventions of 1949, since this would mean admitting to be no longer in control of a given territory. The author of this article, however, maintains that the prohibition of force is applicable, as both Georgia and Abkhazia have concluded various agreements over the 1990s in which both have, as conflict parties, vowed not to use force as means of conflict resolution.

<sup>158</sup> Tom Trier et al., *Under Siege. Inter-Ethnic Relations in Abkhazia*, 80.

Abkhazia can receive this assistance only from Russia, if at all. So it is for this reason that the permanent invocation of law and some of its underlying doctrines will not help.

## **The EU and the South Caucasus: An Unfinished Story in Three Acts: What Role for *de facto* States?**

### ***Introduction: Why Engagement is (also) about the EU***

In retrospect, the belief of an overly successful transformative role of the EU and the West in general for the South Caucasus as for the wider post-Soviet space has been based on rather optimistic assumptions. The policies which were so far provided to this region have been, so far, too little to really provide the incentives necessary for a profound transformation. Neither the Partnership and Cooperation Agreements (PCA) of the 1990s or the European Neighborhood Policy of 2004 with its arguably “tailor made” Action Plans (AP) nor the Eastern Partnership with the track of Association Agreements (AA) and Deep and Comprehensive Free Trade Agreements (DCFTA) have actually addressed or satisfied what the countries in question *really* want: A fully-fledged EU membership perspective and, particularly in the case of Georgia, the prospect of NATO membership as well. And even the very ambitious legal approximation agenda, which Georgia has obliged to fulfill through its ratification of the AA seems only beneficial in a cursory reading. Indeed, the DCFTA liberalizes about 95 percent of trade between the EU and Georgia. Yet, upon closer inspection this number does not reflect too much as the five percent, which is excluded from this equation, represents the only segment in which Georgia is truly competitive.<sup>159</sup>

The conflicts over Abkhazia, South Ossetia and Nagorno-Karabakh have become *the* defining features of every individual state’s political and economic environment.<sup>160</sup> Therefore, also conflict management has, at least gradually and to some extent, become another component of the EU’s policies in the South Caucasus. Yet, it is – in particular for the case of Georgia – fair to argue, that the conflicts over the disputed territories have not been a brake on progress in domestic affairs. Even if it seems to be at odds with common political sense – if one has for instance the staggering number of internally displaced persons (IDPs) in mind – the territorial dismemberment of Georgia has, over the long run, facilitated the consolidation of the country’s political stability. It has, thus, increased its domestic institutional capacity, and, finally, has left free space for a straightforward

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<sup>159</sup> Daniel S. Hamilton and Stefan Meister, “What the West must do”, in: Daniel S. Hamilton and Stefan Meister (Eds.), *The Eastern Question: Russia, the West and Europe’s Grey Zone* (Washington, DC: Center for Transatlantic Relations, 2016), 39-89, 59.

<sup>160</sup> It is, indeed, fair to argue that no other region of the former Soviet Union has experienced more instability, conflict and enduring unease than the South Caucasus. If one counts the wars over Chechnya into the equation, the humanitarian consequences of all the conflicts in the entire region would dwarf the Balkan wars of the 1990s.

integration with the EU through various the various instruments provided by Brussels.<sup>161</sup> The humanitarian implications of the armed conflicts in the 1990s, probably with some exception in the case of Azerbaijan,<sup>162</sup> have gradually been overcome and absorbed by Georgia. Therefore, one could critically pose the following question: Why would, for example, the Georgian government want to radically amend the status-quo in relation to Abkhazia and South Ossetia? Why would Tbilisi, Chisinau – if one wishes to put the Moldovan case into this equation – or even Baku change their rhetoric and abandon their perception, according to which the governments of the *de facto* states are Kremlin or Yerevan-directed puppets, entirely lacking any independence whatsoever.

Part of the answer can be given in the light of the major shift that occurred in the EU policies towards the region after the Eastern Partnership Summit of 2009. EU integration and rapprochement with the West has always been a primary objective of Georgia, Moldova and Ukraine,<sup>163</sup> which joined the club of states with a territorial issue in 2014.<sup>164</sup> However, the issue of breakaway states has not been very high on the agenda with regard to the negotiations with the EU on the conclusion of the Association Agreement (AA) of states like Georgia. Correspondingly, the AA does only not apply to Abkhazia and South Ossetia pursuant to the Protocol to the AA, which recognizes that the central government of the Republic of Georgia/Moldova fails to establish jurisdiction over these disputed territories.<sup>165</sup> Only a decision by the Association Council could, in theory, include these territories under the scope of application of the agreement.<sup>166</sup> Hence, these territories have never substantially been a stumbling block in the way of the countries' bid for European integration.

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<sup>161</sup> One can think of the TACIS, ENPI, the PCA, the Action Plan or the recent Association Agreement. Hence, an immensely diverse spectrum of different instruments such as treaties, EU regulations and/or recommendations are offered.

<sup>162</sup> The IDP community in Azerbaijan, however, still remains an important political vehicle for the legitimacy of the totalitarian regime under President Ilham Aliyev.

<sup>163</sup> Azerbaijan chose not to engage into negotiations on an Association Agreement with the EU. Nevertheless, Baku remained strongly interested in maintaining close ties to the West.

<sup>164</sup> The negotiated text of the EU-Ukraine Association Agreement did not contain any specific provision on its scope of application in Crimea or the Donetsk and Lugansk oblasts. These territories were annexed or broke away from Ukraine only after initialing of the Association Agreement. Therefore, products originating from Crimea would, theoretically, still fall into the scope of the DCFTA. Yet, the Council of the EU imposed an import ban on goods from Crimea and a full ban on investment with a prohibition to supply tourism services on the Crimean peninsula. See: The Council of the European Union, "EU restrictive measures in response to the crisis in Ukraine", <http://www.consilium.europa.eu/en/policies/sanctions/ukraine-crisis/>.

<sup>165</sup> See Protocol I of the Georgia-EU Association Agreement (similar provision on Transnistria can be found in the Protocol II of the Moldova-EU Association Agreement). Nevertheless, the text of the DCFTA could, one day, theoretically also apply to these breakaway states. Pursuant to the Georgian and the Moldovan AA, the Association Council adopts a decision when the full implementation and enforcement of the norms of the DCFTA is guaranteed (See in both cases Article 462 (2)).

<sup>166</sup> In the case of Moldova, following an informal agreement between the authorities of Chisinau and Tiraspol, the DCFTA was extended to the territory of Transnistria. See: Benedikt Harzl, "Keeping the Transnistrian conflict on the radar of the EU", *ÖGfE Policy Brief* (17 October 2017, Vol. 24, Vienna, 2016), [http://oegfe.at/wordpress/wp-content/uploads/2016/10/OEGfE\\_Policy\\_Brief-2016.24.pdf](http://oegfe.at/wordpress/wp-content/uploads/2016/10/OEGfE_Policy_Brief-2016.24.pdf).

The potentially problematic fallout of this situation can hardly be overlooked. It shows that, while the separatists may, what Caspersen so nicely put, “have won the first round”<sup>167</sup> in securing military victories on the ground, the metropolitan state seems to have more pull in the long run, particularly by preventing the *de facto* state to effectively make use of its war-won independence and, thus, having very little incentive to engage in comprehensive discussions with their counterparts about a future power-sharing deal. It is in this constellation highly unlikely that the government of the metropolitan state agrees to anything beyond some modest form of territorial-cultural autonomy, thus, further narrowing down the avenues for sincere dialogue or even negotiations.<sup>168</sup> Hence, one may ask to which extent, after more than two decades after the wars in the South Caucasus, the governments of the metropolitan states are really serious about territorial unification and what they are willing to do, not only to become more attractive for their breakaway states, but what they are additionally willing to sacrifice to this end.

In the meantime, the *de facto* states failed and continue to fail in obtaining loans from international credit institutions,<sup>169</sup> they failed to secure foreign direct investments due to the political unpredictability as well as the lack of rule of law and their citizens face enormous problems to travel abroad, since their passports are not considered to be valid travel documents.<sup>170</sup> Therefore, the immediate question to be raised in this context is the one of potential costs as a consequence of a continuation of a non-engagement policy. Some problematic implications are already unfolding: In the case of the Georgian breakaway states, Russia has signed treaties on alliance and strategic partnership with Sukhum/i and Tskhinval/i, even extending to the military dimension in which the local militias are to be gradually integrated under Russian command. And this seems to be only an indicator that both *de facto* states are driven into the arms of Russia, not least because of the complete lack of an alternative development scenario. From this perspective, it appears that the mantra of “illegal military occupation” is in some way a self-fulfilling prophecy, being the

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<sup>167</sup> Nina Caspersen, *Unrecognized States* (Cambridge: Polity Press, 2012), 47.

<sup>168</sup> For instance, in 2014 Georgia’s Prime Minister Irakli Garibashvili offered a “broad autonomy” to the people living in Abkhazia and South Ossetia within the “united, sovereign and independent Georgia”. See: “PM Garibashvili offers autonomy within Georgia to Abkhazians and Ossetians”, *Agenda.ge*, 27 October 2014, <http://agenda.ge/news/23430>. In other words, there seems to be little critical reflection in Georgia on decentralization or the already existing façade autonomy of Adjara. Likewise, Azerbaijan’s President Ilham Aliyev only proposes “local autonomy” to Nagorno-Karabakh. See: “Nagorno-Karabakh can be autonomous republic – Aliyev”, *Tert.am*, 18 October 2016, <http://www.tert.am/en/news/2016/10/18/baku/2166243>.

<sup>169</sup> Nina Caspersen, *Unrecognized States*, 42. Foreign investment and credit are particularly needed for the reconstruction of the war-destroyed infrastructure in these territories. The patron or kin state will be unable to carry this burden alone.

<sup>170</sup> Notably, this occasionally applies even when the residents of these *de facto* states are in possession of the citizenship of their internationally recognized patron or kin state. In this regard, it seems that the Armenians of Nagorno-Karabakh are better off than the Ossetians or Abkhaz. In the latter case, the citizens of these *de facto* states cannot travel to Europe on their Russian passports since the EU governments bar the issuance of Schengen visas to passport holders whose Russian passports were issued in these territories. As a matter of fact, these passports are often issued by the Russian embassy to Abkhazia or South Ossetia.

direct result of non-engagement. Apart from this, Caspersen makes an important observation of another direct implication of inaction:

*“The parent state often hope that time is on their side: They hope that the unrecognized state becomes gradually weaker due to international isolation, while they themselves have the time to build up a stronger army.”<sup>171</sup>*

It almost seems that this above valuable point is a precise description of the conflict dynamics over Nagorno-Karabakh, which has again just in April 2016 escalated to armed conflict at a high scale along the so-called line of contact. Hence, the inaction of the metropolitan states to push for dialogue and some form of ties in their relations with the *de facto* states can only be overcome meaningfully by a more robust and proactive role of the EU in reaching out to both, the metropolitan states and these disputed entities. Even if all three South Caucasus states have very different expectations and interests, which accordingly have to be addressed in a differentiated manner,<sup>172</sup> the European perspective and rapprochement with the West overall is still a top priority and a foreign policy objective, given the lack of other equally attractive cooperation as well as development scenarios. Hence, it will be up to the EU to seek engagement in order to keep the vision of conflict resolution, even as a very distant possibility, alive.

### **Cautiously Approaching a Volatile Region: The PCA Doctrine**

From the onset of the EU's policies vis-à-vis the South Caucasus, the aspect of humanitarian aid has featured prominently among the instruments that were made operational by Brussels. Most importantly, the Technical Assistance to the Commonwealth of Independent States (TACIS) has rightly been in the spotlight of the early European advances into the region. During its existence between 1992 and 2006, the TACIS program earmarked for Georgia alone more than 130 million euros,<sup>173</sup> which were primarily spent on the reform of the country's justice sector as well as humanitarian projects, which became necessary not least because of the implications following the armed conflicts over Abkhazia and South Ossetia.<sup>174</sup> Still, these first ideas and policies tackling the volatile region of the South Caucasus were based on small-scale humanitarian projects, which failed, at the beginning of the 1990s, to provide for a more harmonized and comprehensive

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<sup>171</sup> Nina Caspersen, *Unrecognized States*, 47.

<sup>172</sup> Daniel S. Hamilton and Stefan Meister, “What the West must do”, 57.

<sup>173</sup> By 2007, TACIS was followed up by the European Neighborhood Policy Instrument (ENPI). For more figures, see the website of Delegation of the European Union to Georgia: [http://eeas.europa.eu/delegations/georgia/eu\\_georgia/tech\\_financial\\_cooperation/instruments/tacis/index\\_en.htm](http://eeas.europa.eu/delegations/georgia/eu_georgia/tech_financial_cooperation/instruments/tacis/index_en.htm).

<sup>174</sup> For instance, the Food Security Program which was granted not only to Georgia but also to Armenia became part of the unconditionally given humanitarian backbone of the EU for the region. See: Laure Delcour, “The European Union's Policy in the South Caucasus: In Search of a Strategy”, in: Annie Jafalian (Eds.), *Reassessing Security in the South Caucasus: Regional Conflicts and Transformation* (Burlington: Ashgate, 2011), 177-194, 181.

approach of the EU. In all fairness, TACIS was never intended to serve these far more ambitious goals. Yet, with the inception of bilateral Partnership and Cooperation Agreements (PCA) by the mid-1990s, this picture started to change and triggered a debate about Europeanization of states, which were not given an explicit membership perspective.

If we follow Radaelli's definition of Europeanization, we can identify a "process of construction, diffusion, and institutionalization of formal and informal rules, procedures, policy paradigms and shared beliefs ... defined and consolidated in the making of EU decisions and then incorporated in the logic of domestic discourses, identities, political structures, and public policies."<sup>175</sup> Hence, Europeanization in this understanding does not necessarily equal norm diffusion or legal approximation *per se*. This becomes even more visible in the field of conflict resolution. As the EU has primarily been dealing with the South Caucasus region on a bilateral manner with the three states individually, the transformative notion of the EU's transformation program is manifested in its unwritten philosophy to provide, over the long run, conditions which could turn out to be conducive for eventual conflict resolution and could, thus, create conditions to positively influence the conflict environments. Therefore, it would be fair to argue that this philosophy of norm diffusion and, as an intended side-product, contributing to an eventual positive outcome in terms of conflict can be understood as an effort within the realm of conflict transformation.

For instance, the political dialogue between the government of Georgia and the European Union within the framework of the Partnership and Cooperation Agreement (PCA), which was made operational by a specifically designed Cooperation Council on ministerial level,<sup>176</sup> revolved about issues pertaining to democracy, human rights, and, importantly, the rights of persons belonging to national minorities. And this dialogue was stipulated in the text of the PCA without even mentioning Abkhazia and/or South Ossetia specifically. One may, therefore, reason that the political dialogue is also part of what Nathalie Tocci described as social learning process, by which new institutional and discursive frameworks are set up to induce the re-articulation of identities in a manner directly conducive to the resolution of the conflicts in the long term.<sup>177</sup>

However, it should not go unnoticed that some of the EU policies also specifically targeted the frozen conflicts, by e.g. earmarking financial resources for the conflict zones or through, as Tocci aptly calls it, "decentralized cooperation"<sup>178</sup> by which the EU avoided having direct contacts or ties with the separatist regimes in Abkhazia and South Ossetia but still financed NGOs on the ground for purposes of the promotion of human rights and the rule of law. In other words: Whenever dealing with the conflicts directly, the EU did not envisage to replace the existing

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<sup>175</sup> See: Claudio M. Radaelli, "Whither Europeanization? Concept Stretching and Substantive Change", *European Integration Online Papers* (Vol. 4, No. 8, 2000), see [eiop.or.at/eiop/texte/2000-008a.htm](http://eiop.or.at/eiop/texte/2000-008a.htm).

<sup>176</sup> See Articles 6 and 81 of the Georgia-EU PCA.

<sup>177</sup> Nathalie Tocci, *The EU and Conflict Resolution: Promoting Peace in the Backyard*, 15.

<sup>178</sup> *Ibid.*, 141. Moreover, the EU has become a major donor of the mediation formats. For instance, it provided 500,000 euros to the JCC in South Ossetia, see: CFSP Action Profile, 2001/759/CFSP, 2001.

mediation formats, be it under the OSCE auspices in South Ossetia or Nagorno-Karabakh or within the UN umbrella in Abkhazia, but, rather, intended to play an economic role. The general philosophy of legal approximation or norm diffusion remained the primary cornerstone of EU action in the South Caucasus.

And apart from this philosophy of norm diffusion and socialization over the long run, one of the main instruments at stake to operationalize this process has always been conditionality. Indeed, conditionality has become *the* cornerstone of the EU's enlargement philosophy and practice, by which certain benefits, particularly EU membership, are promised to political elites of the respective countries in exchange for costs that may incur to them, particularly, comprehensive reform and adaptation to the Copenhagen criteria of Article 49 of the Treaty of the European Union (TEU). One of the most important issues, though, which distinguishes the underlying philosophy of enlargement-based conditionality from how the EU made use of conditionality in the post-Soviet space, was the lack of an explicitly formulated membership perspective for states such as Georgia. This brings up two interwoven issues, which may have hampered the full realization of the transformative agenda as well as of the intended outcome of conflict transformation: On the one hand, the ostensible rewards to be expected have not always been credible due to disagreement among EU states how far they should go. While Poland and other East European EU member states have always been vociferous supporters of an EU membership of countries like Ukraine or Georgia, countries like Germany or Austria appeared to have been stepping on the brake in this regard. The same holds true for the uncertain time span of granting these rewards, an issue which has also had its problematic effect on the success of Europeanization and its intended by-products. On the other hand, one may also assume that the consistency and determinacy of rules has not always been unequivocally clear either. Particularly, the provisions of the respective PCA concluded with the countries in the post-Soviet space incorporated only very ambiguous and softly-formulated legal approximation obligations.<sup>179</sup> Quite tellingly, the respective provision of the EU-Georgia PCA merely reads that “[G]eorgia shall endeavour to ensure that its legislation will be gradually made compatible with that of the Community”.<sup>180</sup> Indeed, this formulation is much too vague to be treated as a formal legal commitment as it does not say either anything about priorities and areas to be harmonized<sup>181</sup> and comprehensively reflects the rather “minimalistic approach” of the instrument of Partnership and Cooperation Agreements.<sup>182</sup>

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<sup>179</sup> These two considerations on the functioning of conditionality - credibility of rewards and clarity of rules - have been thoroughly discussed in Paul Kubicek, “Political conditionality and European Union’s cultivation of democracy in Turkey”, in: Sandra Lavenex and Frank Schimmelfennig (Eds.), *Democracy Promotion in the EU’s Neighbourhood: From Leverage to Governance?* (New York: Routledge, 2013), 26-47, 28.

<sup>180</sup> Pursuant to Article 43 of the EU-Georgia PCA.

<sup>181</sup> See the discussions over the similarly formulated Ukrainian PCA: Guillaume Van der Loo, Peter Van Elsuwege and Roman Petrov, “The EU-Ukraine Association Agreement: Assessment of an Innovative Legal Instrument”, *EUI Working Papers LAW* (2014/09), 1-28, 4, <http://cadmus.eui.eu/handle/1814/32031>.

<sup>182</sup> *Ibid.*

## Greater Awareness for the Periphery: The ENP Doctrine

The ambiguities of the provisions of the PCA provide quite a telling example of the early stages of EU involvement in the entire post-Soviet region. While the respective PCAs, which were concluded with all South Caucasus republics, were meant to strengthen political dialogue as well as to foster the gradual economic transition of those countries,<sup>183</sup> the core dilemma of any EU policy approach with regard to these states remained unaccounted: How to significantly influence states, which Brussels does not wish to become member states of the EU in a short or medium term. The discrepancy between enlargement fatigue on the one hand and geostrategic interests has led to a stalemate, effectively until the eve of the EU's Eastern enlargement.

These historic enlargement rounds of 2004 and 2007 have not only provided a landmark in the political development of the continent, they have, moreover, set in motion the EU's interest in closer cooperation with its new neighbors that were located at what was for a long time considered to be the exclusive backyard of the Russian Federation.<sup>184</sup> Moreover, both enlargement rounds provided the hope that states that are currently located on the geographic periphery of the European Union might one day become part of the process of an enhanced relationship, even joint institutional ownership, definitely going beyond the rather narrow PCA-approach.

However, the presence of so many international actors in the region and in the existing conflict management formats, such as the Organization for Security and Co-operation in Europe (OSCE), the UN,<sup>185</sup> but also states such as Russia, Turkey, the United States and Iran, has complicated the European approach towards the South Caucasian region and has left no doubt that there is little room for the EU to claim. It seems that the lines of confrontation as well as congruence are not well defined. Dov Lynch put it aptly: "The activities of Russia and the US, not to mention the policies of other regional actors such as Turkey and Iran, muddle rather than clarify the strategic shape of the region".<sup>186</sup> Indeed, it would have been utterly naïve to believe that the EU or, let alone, some of its member states could match the amount of efforts invested by other state actors such as the Russian Federation. And equally important, the limited possibilities of the EU are also related to disagreements within the EU itself. For instance, there has always been controversy surrounding whether and to which extent the EU should also assume the role of providing hard security to the states of this region, and whether the conclusions of the NATO Bucharest summit of April 2008 should be turned into reality, thereby allowing Georgia as well as Ukraine to join NATO. This was

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<sup>183</sup> The EU-Russia PCA is also noteworthy in this respect. Until the very day, it is the only formal bilateral link between the EU and the Russian Federation, yet it seems the most of its provisions are obsolete due to Russia's accession to the WTO.

<sup>184</sup> Notably, the EU did not wish to become part of the peace settlement and negotiation formats after the armed conflicts in the South Caucasus. Only after the 2008 war over South Ossetia did the EU prop up its presence through the EUMM, the initiation of the Geneva talks and the enhanced activities Special Representative.

<sup>185</sup> Both were involved in the conflict settlement mechanisms in South Ossetia, Abkhazia and Nagorno-Karabakh.

<sup>186</sup> Dov Lynch, "The EU: Towards a Strategy", in: *The South Caucasus: A Challenge for the EU* (Chalioit Papers, Institute for Security Studies, Paris, 2003), 171–196, at 176.

also an issue on the political agenda of the EU, given the situation that most EU states are NATO members at the same time.

By the same problematic token, the logic of geostrategic competition, in which the whole region was embedded and is viewed by the great powers, did not really match the transformative nature of the EU approximation policies. Even if those policies and their underlying philosophy are and have been benign in nature for they do not aspire a zero-sum game among peer competitors, they end up being competitive by default. And this mismatch between the Europeanization as a positive transformative agenda and geostrategic interests in the region – if one thinks of the South Caucasus as important transit hub for Azerbaijani and Central Asian gas and oil for European consumption – has never really been addressed in a comprehensive manner by the EU. On the contrary, the EU itself got instrumentalized in the domestic politics of those countries: It is still widely believed in Georgia that eventual EU membership of the country will create such an irresistible appeal for the insubordinate Abkhaz and Ossetians that they would want to voluntarily reintegrate with Georgia. As Buchheit has aptly observed: “It appears that many groups would gladly embrace an impoverished, defenseless existence in return for the emotional satisfaction of self-government”.<sup>187</sup> Apart from the major flaws of this economy-driven misjudgment – the lack of such an EU accession perspective and the competing non-economic but historical narratives revolving around those conflicts – this position has also helped Georgia to abandon searching for complex solutions. The belief that a quick EU integration would enhance the bargaining position of Georgia vis-à-vis its breakaway territories as well as the Russian Federation so that intractable conflicts such as the one over Abkhazia can be easily solved on Tbilisi’s terms has always overshadowed the effectiveness of the Europeanization policies as a whole.

Apart from this, the South Caucasus must not only be seen as a sum of three independent states, but as geographic concept as well. And as such, it has had for a long time no promoter within the European Union to generate a greater awareness for this volatile region.<sup>188</sup> While France has always put the emphasis on enhanced cooperation with the states of Maghreb, Poland represented – already before the signing of the Association Agreement in 2014 – the main lobbyist for Ukraine in its membership aspirations and is very actively engaged in civil society projects in Belarus<sup>189</sup>; and Austria regards itself as the promoter of the states of the Western Balkans and a hands-on supporter of these states’ membership perspective. Somehow it seems, as a consequence, that the South Caucasus as a strategically important *region*, being more than just the sum of the three states but as a nexus between Christianity and Islam connecting Europe and Eurasia, has long been left along the road by the European Union.

Yet, things started to gain some positive momentum: The first attempts to draft a new framework addressing neighboring countries and future neighbors were unveiled in 2003, following the

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<sup>187</sup> Lee C. Buchheit, *Secession: The Legitimacy of Self-Determination* (Yale University Press, 1978), 8.

<sup>188</sup> Dov Lynch, “The EU: Towards a Strategy”, 179.

<sup>189</sup> Consider in particular the Polish engagement for the satellite TV channel “Belsat” which is intended to provide an alternative to state-run TV stations for Belarusians.

conclusions of the 2002 Copenhagen European Council. This subsequent communication, which became known as “Wider Europe” document confirmed “that the Union should take the opportunity offered by enlargement to enhance relations with its neighbors on the basis of shared values”<sup>190</sup> and equally flagged out that the countries covered by this document should be offered the “prospect of a stake in the EU’s internal market”.<sup>191</sup> This process demonstrated that the EU increasingly started to see itself as a fully-fledged foreign policy actor that is able to act beyond the antagonism of membership/non-membership in order to pursue its interests. Although this ‘Wider Europe Communication’ of 2003 launched, thereby, a healthy and much-needed debate about its new and future neighbors and the ways in which they ought to be dealt with, this policy document did not initially include the South Caucasus countries.<sup>192</sup> Although all three states of the South Caucasus remained unmentioned in the first policy initiative on a new neighborhood policy, the culmination of a series of discussions and debates on the EU’s policy in this fragile region resulted in the appointment of an EU Special Representative for the South Caucasus on 7 July 2003.<sup>193</sup> Importantly, the region therefore started to move into the European focus and this move signaled that the EU will want to play a more active role on the ground. The mandate of the Special Representative also covered the “contribution to the prevention of conflicts”<sup>194</sup>, making it clear that the territorial conflicts are seen by Brussels as a real stumbling block to a positive overall transition.

Echoing these considerations, the much-cited “ENP Strategy Paper” of 2004 issued by the European Commission to politically fine-tune the first ideas of how to handle the challenge of the European neighborhood after the enlargements provided not only for an inclusion of the South Caucasus states under its coverage. It also provided for so-called Action Plans that should give the necessary flexibility to agree with each country on a tailor-made reform agenda, thereby supplementing the already existing PCAs.<sup>195</sup> However, these Action Plans did not represent legally binding documents. They, rather, are to be categorized as “recommendations” pursuant to Article 288 of the Treaty on the Functioning of the European Union (TFEU), thereby making it exclusively dependent on the political will of Georgia and other ENP states to fulfill the reform program as stipulated in the respective Action Plans.<sup>196</sup> In addition, the sometimes unreasonable formulation of some of the provisions of the Action Plans appears to be a wasted chance to bring countries

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<sup>190</sup> Communication from the Commission to the Council and the European Parliament, “Wider Europe Neighbourhood: A New Framework for Relations with our Eastern and Southern Neighbours”, COM(2003) 104 final, 11 March 2003, 3, see [http://eeas.europa.eu/archives/docs/enp/pdf/pdf/com03\\_104\\_en.pdf](http://eeas.europa.eu/archives/docs/enp/pdf/pdf/com03_104_en.pdf).

<sup>191</sup> *Ibid.*, 4.

<sup>192</sup> It just said in a footnote that – due to their location – the three South Caucasus countries fall outside of the scope of this initiative, even if, paradoxically, the Russian Federation was explicitly mentioned. See: *ibid.*

<sup>193</sup> See: Council Joint Action of 7 July 2003 concerning the appointment of an EU Special Representative for the South Caucasus, 2003/496/CFSP, <https://www.consilium.europa.eu/uedocs/cmsUpload/L169-8.7.2003.pdf>.

<sup>194</sup> *Ibid.*, Article 3 (c).

<sup>195</sup> See: Communication from the Commission of 12 May 2004, entitled “European Neighbourhood Policy - Strategy paper”, COM(2004) 373, <http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=uriserv%3Ar17007>.

<sup>196</sup> For instance, the Georgian Action Plan also contained a priority section on the reform of local self-administration which, thematically, at least indirectly pertains to the issue of the territorial structure of the Republic of Georgia.

together. The most striking example are the Action Plans of Armenia and Azerbaijan: While the Armenian Action Plan featured the principle of self-determination quite prominently in its priority area 7,<sup>197</sup> the Azerbaijani Action Plan did not mention self-determination in the parallel priority area 1<sup>198</sup> but, rather, explicitly referred to the territorial integrity of Azerbaijan in the introduction of the document.<sup>199</sup> Even if some of the provisions mentioned in both Action Plans could represent a reasonable starting point for dealing with the conflict over Nagorno-Karabakh,<sup>200</sup> it was regrettable from the outset that the EU failed to reach in this particular instance one common and comprehensive formulation for both Action Plans which would have equally obliged the governments of both countries to the same extent.

However, one important novelty was created in 2003: A so-called “Joint action”<sup>201</sup> of the European Council installed the office of the European Special Representative for the South Caucasus (EUSR). For the purpose of dealing with *de facto* states, two intertwined elements in this context should deserve to be mentioned here. On the one hand, the mandate of the EUSR included a reference to “assisting in the resolution of conflicts”<sup>202</sup> and on the other hand, another provision allowed the EUSR to get in contact with so-called “interested actors”.<sup>203</sup> It is not a far-fetched conclusion that this formulation was an attempt to have the office of the EUSR also dealing with the unrecognized governments, at least on an informal level. Indeed, the presence of the EUSR has been pivotal in maintaining some ties of information and exchange with the *de facto* states. Therefore, the EU has become more constitutive in its desire to be more intensively involved in peace and mediation efforts in the South Caucasus.<sup>204</sup> However, the opportunities given by this pivotal office were never really matched by the financial means which were made available to the EUSR<sup>205</sup> and more importantly, the August war of 2008 had a disastrously disruptive effect on those projects and initiatives of the EUSR, which had had not gone beyond the stage of early flourishing.

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<sup>197</sup> See EU/Armenia Action Plan, Priority Area 7:

[https://eeas.europa.eu/sites/eeas/files/armenia\\_enp\\_ap\\_final\\_en.pdf](https://eeas.europa.eu/sites/eeas/files/armenia_enp_ap_final_en.pdf).

<sup>198</sup> Which seems to be symbolically higher than the mirroring priority area 7 in the Armenian Action Plan.

<sup>199</sup> See EU/Azerbaijani Action Plan for 2014-2016,

[https://eeas.europa.eu/sites/eeas/files/azerbaijan\\_enp\\_ap\\_final\\_en.pdf](https://eeas.europa.eu/sites/eeas/files/azerbaijan_enp_ap_final_en.pdf).

<sup>200</sup> For instance, enhancement of people-to-people contacts, intensification of EU dialogue, etc.

<sup>201</sup> See: Council Joint Action of 7 July 2003 concerning the appointment of an EU Special Representative for the South Caucasus, 2003/496/CFSP.

<sup>202</sup> *Ibid.*, Art. 1 (1b): „These policy objectives include ... in accordance with existing mechanisms, to prevent conflicts in the region, to assist in the resolution of conflicts, and to prepare the return of peace, including through promoting the return of refugees and internally displaced persons (IDPs)”.

<sup>203</sup> *Ibid.*, Art. 3e.

<sup>204</sup> Since its inauguration, the EUSR has developed a number of peace-building projects, particularly in Abkhazia and South Ossetia. The EUSR has, in addition, been frequently travelling to the breakaway regions.

<sup>205</sup> Moreover, from the very outset the office of the EUSR was given little competences, even if its mandate had been upgraded.

## Eastern Partnership and the EU as Conflict Manager after 2008

The EU remained poorly prepared to engage in conflict resolution throughout its entire engagement with the South Caucasus since the launch of the TACIS program, and it was incapable of replacing existing OSCE and UN-led mediation formats.<sup>206</sup> However, the events of the August war of 2008 provided a landmark change in this respect. Not only did the then-French EU presidency – in conjunction with the Finnish OSCE chairmanship – broker the so-called “six points plan” between the Russian Federation and Georgia,<sup>207</sup> the Council of the EU also agreed in September 2008 – again through a joint action – to establish an EU-led civilian observatory mission to Georgia, which would become known as European Union Monitoring Mission to Georgia (EUMM).<sup>208</sup> The EU continued its previous practice of ‘buying’ itself into the conflict mediation by providing sponsorship to the so-called Geneva talks which are regularly held in the format 3 plus 3 (EU, OSCE, UN plus USA, Russia, Georgia) beginning in October 2008.<sup>209</sup> This enhanced involvement of the EU may have nourished unrealistic hopes for a rapid resolution of the conflicts, which remain unfulfilled, even if some notable exceptions of effective conflict mediation successes of the EU must not be concealed.<sup>210</sup> Yet, the main dilemma, that the EU was given this role by default rather than by design, remained unchanged. All of these new responsibilities of the EU in the field of conflict resolution only apply to Georgia, whereas the EU’s role in the conflict over Nagorno-Karabakh is and remains still rather marginal.

The inauguration of the Eastern Partnership at the Prague Summit of 2009 seemed to have confirmed this tendency, by which the EU strengthened its underlying philosophy to influence the *internal* reform process of the successor states of the Soviet Union, rather than tackling the disputed territories directly. Holding out the prospect of the completion of Association Agreements, the EU has provided a fundamentally new legal framework for Georgia, Ukraine and

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<sup>206</sup> This reluctance on the part of the EU has frequently led to criticism by Georgian officials.

<sup>207</sup> See the original text of this document: “Background: Six-point peace plan for the Georgia-Russia conflict”, *Reliefweb*, 15 August 2008, <http://reliefweb.int/report/georgia/background-six-point-peace-plangeorgia-russia-conflict>.

<sup>208</sup> See: Council Joint Action 2008/736/CFSP of 15 September 2008 on the European Union Monitoring Mission in Georgia, EUMM Georgia, <http://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=CELEX:32008E0736&from=EN>.

<sup>209</sup> Indeed, within this 3 plus 3 constellation, the thorny issue of how to involve the *de facto* states has been a controversial issue from the very outset. While the Abkhaz and the Ossetians do not feel sufficiently represented on this forum, the Georgians have made it clear that they are not prepared to meet the breakaway states’ representatives on eye level within these discussions. Nevertheless, a reasonable compromise was found: The official delegations are allowed to invite so-called “guests” to the discussions. Hence, Abkhaz and Ossetians take part in unofficial working groups on IDPs and security but remain excluded from the plenary sessions. See: Nona Mikhelidze, “The Geneva Talks over Georgia’s Territorial Conflicts: Achievements and Challenges”, *Documenti IAI 10*, 25 November 2010, 1-7, 3, <http://www.iai.it/sites/default/files/iai1025.pdf>.

<sup>210</sup> In particular, the so-called Incident Prevention and Response Mechanism (IPRM) provided an instrument for Georgians as well as Abkhaz and Ossetians to communicate through facilitation of the EUMM in the case of security-related incidents.

Moldova, which is characterized, as Van Elsuwege puts it aptly, by the three dimensions of comprehensiveness, complexity and conditionality.<sup>211</sup> It is comprehensive in that it covers the entire spectrum of the relations between the countries and the EU; it is complex since it has a high level of ambition through the legal approximation obligation and the economic integration in the EU internal market through the Deep and Comprehensive Free Trade Agreements (DCFTA); and finally it is conditional, governed by the general idea of ‘more for more’ so that certain rewards will only be available as a result of successful reforms. This illustrates rather aptly that some approaches were borrowed from enlargement practices.

Therefore, the EU’s preference of long-term and structural-transformative over short-term and politicized approaches was reinforced by the instrument of the Association Agreement. However, it created for the very first time a couple of divisive lines. *First of all*, the completion of Association Agreements led to the creation of ‘haves’ and ‘have-nots’. While Georgia and Ukraine initialed and ratified their AAs and, in addition, were given a clear roadmap to full visa liberalization with the Schengen space, Armenia has – under significant Russian pressure – signed up to the Eurasian Economic Union (EAEU) and Azerbaijan declined to sign up to either one.<sup>212</sup> It has also been argued that Azerbaijan raised the stakes by demanding a tougher EU stance on Armenia and the crisis over Nagorno-Karabakh.<sup>213</sup> Of course, one can sugarcoat this development with the need for differentiation as stipulated in the Joint Declaration of the Council of the EU at the Prague Summit in 2009.<sup>214</sup> The lack of differentiation and the “one size fits all” character of EU policies towards the post-Soviet space have led to legitimate criticism. Yet the fact that only Georgia was put on track with the instrument of an Association Agreement with the EU may, in the future, contribute to the creation of dividing lines, something which has been explicitly contrary to the primary objective of the Europeanization philosophy of the EU.<sup>215</sup> That acceleration of an economic integration of the post-Soviet Eurasian space already indicates that, *secondly*, the EU became part of a renewed geopolitical rivalry with the Russian Federation in their common neighborhood, as the AAs and the Eurasian Customs Union are essentially incompatible. By theoretically becoming a member of the Eurasian Economic Union, the Republic of Georgia would lose its exclusive

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<sup>211</sup> Guillaume Van der Loo, Peter Van Elsuwege and Roman Petrov, “The EU-Ukraine Association Agreement: Assessment of an Innovative Legal Instrument”.

<sup>212</sup> Azerbaijani President was quoted to have said that the offer of an Association Agreement with the EU was not an agreement but rather a “unilateral instruction” for the Azerbaijani side. See: “Ilham Aliyev attended panel discussion at Munich Security Conference”, *Press release*, 18 February 2017, <http://en.president.az/articles/22827>.

<sup>213</sup> Eugene Rumer, Richard Sokolsky, and Paul Stronski, *U.S. Policy Toward the South Caucasus Three* (Washington, DC: Carnegie Endowment for International Peace, 2017), 21.

<sup>214</sup> See: Joint Declaration of the Council of the EU of the Eastern Partnership Summit, Prague, 7 May 2009, [http://www.consilium.europa.eu/uedocs/cms\\_data/docs/pressdata/en/er/107589.pdf](http://www.consilium.europa.eu/uedocs/cms_data/docs/pressdata/en/er/107589.pdf).

<sup>215</sup> The European Neighborhood Strategy Paper of 2004 explicitly reads: “It is designed to prevent the emergence of new dividing lines between the enlarged EU and its neighbours and to offer them the chance to participate in various EU activities, through greater political, security, economic and cultural co-operation.” See: Communication from the Commission - European Neighbourhood Policy - Strategy paper {SEC(2004) 564, 565, 566, 567, 568, 569, 570} /\* COM/2004/0373,

<http://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=CELEX:52004DC0373&from=EN>.

legislative competence in the field of foreign trade, which would make it impossible to liberalize trade relations with the EU. This geopolitical rivalry, irrespective of it came into being on a voluntary or involuntary way, will most definitely complicate the already complex post-2008 macro-political situation, particularly regarding Abkhazia and South Ossetia.<sup>216</sup> And *thirdly*, the Association Agreement with Georgia, notwithstanding to represent a massive convolute amounting up to more than 2000 pages<sup>217</sup> remains relatively silent on the issues of Abkhazia and South Ossetia. It only stipulates that the government of Georgia has, so far, failed to establish control over these territories, which is why the AA does not apply to those breakaway states.<sup>218</sup> Indeed, one may say that this could open up an incentive for the Georgian government to cut a deal with the governments of the *de facto* states for allowing them under the umbrella of the AA and thereby getting their products to be treated in preferential terms.<sup>219</sup> However, this seems to be a rather unlikely perspective, as the current dependency of those *de facto* states on Russian support has only dramatically increased over the past years.

## **Engagement with *de facto* States – What Kind of Engagement?**

### ***Sailing against Heavy Headwinds***

When the key documents on the Eastern Partnership unequivocally call for a strengthened role of the EU in conflict resolution and confidence building efforts,<sup>220</sup> a rather sobering thought will follow suit: There appears to be a clear mismatch between challenges and ambitions on the one hand, and the political instruments to address those challenges and ambitions, on the other hand. And in one way or another, the need to involve *de facto* states on a limited scale and to abandon treating them as undesired anomaly has become a commonplace of scholarly and political discussions. However, any form of naïve credulity in this matter is uncalled for, also due to underlying structural factors: Even if there seems to be widespread agreement that the current

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<sup>216</sup> Ironically, today the Nagorno-Karabakh conflict appears to be the *only* remaining field on which the Russian Federation and the West are able, by and large reasonably, to cooperate and coordinate their actions.

<sup>217</sup> If one adds all the Annexes and Protocols, the amount of text is astounding.

<sup>218</sup> In Georgia and Moldova, the territorial dismemberment of the country had already existed prior to the adoption of the Association Agreement. However, the text of the Ukrainian AA was drafted before the annexation of Crimea, so there is no formal provision whatsoever as to the geographical application of this AA. Nevertheless, this shortcoming is eliminated by the sanctions against products originating from Ukraine and prior case law of the European Court of Justice on the applicability of preferential trade regulations within the context of Association Agreements. See in particular ECJ Cases C-386/08 *Brita GmbH v Hauptzollamt Hamburg Hafen* (Judgment of 25 February 2010) and C-432/92 *R v Minister of Agriculture, Fisheries and Food, ex part SP Anastasiou (Pissouri) Ltd. and Others* (Judgment of 5 July 1994).

<sup>219</sup> Moldova does indeed provide such a case. The extension of the Moldovan DCFTA to Transnistria following informal talks between Chisinau and Tiraspol in 2016 was a very important and remarkable step. See: Benedikt Harzl, *Keeping the Transnistrian conflict on the radar of the EU*.

<sup>220</sup> See Prague, Warsaw and Vilnius Declarations.

stalemate over conflict resolution in the South Caucasus is intolerable in the long run, there should be no illusion about the profound difficulties in both devising smart strategies and in the problematic overall conditions of the very setting, in which this engagement policy should be designed and carried out.

To start with those problematic conditions first, a critical perspective vis-à-vis the current state of the EU has to be taken. Indeed, the migration crisis, the British exit from the EU and the crisis of democracy in numerous member states has led many to question the ability of Brussels to provide a successful transformative agenda for its periphery. As the EU has become more inward-looking over the past years, the position of Hamilton and Meister, according to which “Europe is today turning away from being an exporter of stability to an importer of instability”<sup>221</sup> may sound somewhat exaggerated but still has some grains of painful truth upon closer inspection. The manner in which the migration crisis, which came to a critical culmination point by autumn 2015, was handled has turned the political systems of many countries upside down.<sup>222</sup> This may have contributed to the not wholly unrealistic perception that every four or five years in many EU member states<sup>223</sup> governments are now thrown into some state of panic, scared by the serious competition of an anti-EU, anti-establishment and anti-immigration candidate or party against an apparently “civilized” candidate or party. The populist surge throughout Europe, which has some characteristics of a serious systemic crisis, will make sure that the EU will remain preoccupied with its own problems indefinitely. And this preoccupation will undoubtedly be and has already been reflected in how domestic politics have a negative impact on EU external policies in the Eastern periphery. For instance, the Dutch referendum on the EU-Ukraine Association Agreement in early 2016 has not only come as an embarrassment for the Dutch government, which happened to be holding the EU Council Presidency at the time of the poll, it had additionally undermined the consistency and the legitimacy of the EU’s external action as a whole.<sup>224</sup> By the same token, the broader regional competition with the Russian Federation over the shared neighborhood, which had led to a metastasizing dysfunctional relationship between both, cannot be denied any longer and can, evidently, not be comprehensively addressed unless a broader agreement is found to

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<sup>221</sup> Daniel Hamilton and Stefan Meister, “Western Dilemmas” in: Daniel Hamilton and Stefan Meister (Eds.), *The Eastern Question: Russia, the West and Europe’s Grey Zone* (Washington, DC: Center for Transatlantic Relations, 2016), 33-38, 33.

<sup>222</sup> Just consider the first round of the Austrian presidential elections in 2016: Norbert Hofer, the then relatively unknown candidate of Austria’s Freedom Party, unexpectedly won more than 35 percent of the poll, with the governing two parties’ candidates of the Social Democrats and the Peoples’ Party each polling at only about 11 percent. It is not an exaggeration to call this result a political earthquake as the office of President of Austria has, since 1945, always been in the hands of either the Social Democrats or the Peoples’ Party. This election has exposed the public opposition towards mass immigration as Hofer was explicitly running his campaign on this ticket.

<sup>223</sup> Depending on the respective legislative or presidential terms.

<sup>224</sup> Still, it must not go unnoticed that the practical legal implications of this vote are rather minimal. For a brief legal analysis of the referendum, see: Peter Van Elsuwege, *What will happen if the Dutch vote ‘No’ in the Referendum on the EU-Ukraine Association Agreement?*, *VerfassungsBlog*, 10 February 2016, <http://verfassungsblog.de/what-will-happen-if-the-dutch-vote-no-in-the-referendum-on-the-eu-ukraine-association-agreement/>, DOI: <https://dx.doi.org/10.17176/20160210-165521>.

regulate those profound matters of dissent. Therefore, one may legitimately ask how EU external relations, currently paralyzed by the upheavals and distractions of domestic politics of the member states on the one hand and the structural disagreement with the Russian Federation on the other hand, can be injected with some fresh ideas to operationalize constructive engagement with *de facto* states. This is compounded by the fact that the member states of the EU – with EU foreign policy being still for most of its parts guided in an inter-governmental way – have differently reacted to the conflicts in the Caucasus. While states like Poland or Lithuania have adopted parliamentary resolutions, denouncing Russia as occupying power in Abkhazia and South Ossetia, similarly harsh statements have not been heard from Germany, Italy or Austria. One must not ignore that a comprehensive policy vis-à-vis the *de facto* states will always reflect only the lowest common political denominator among EU member states.

The role of the metropolitan states in devising an engagement strategy is not unproblematic either. Those states are traditionally very cautious when international strategy papers tackling their breakaway regions are discussed or devised. For instance, the Georgian government adopted in 2010 its own ‘State Strategy on Occupied Territories’,<sup>225</sup> in which it stipulates that “the Government of Georgia strives to extend to the populations in Abkhazia and the Tskhinvali region/South Ossetia the benefits of its continual progress in national reforms, and its closer integration into European and Euro-Atlantic structures and institutions”.<sup>226</sup> Even if this strategy paper seems to follow a rather benign rhetoric, it remains to be seen how its extensive and very ambitious action plan<sup>227</sup> can be successfully operationalized given the restrictive legislative constraint, imposed by Georgia’s law on occupied territories that criminalize every single kind of economic activity on the ground. It is, therefore, not a far-fetched assumption to suppose that this strategy paper was primarily designed to address some PR needs of the Georgian government, particularly because not a single proposal of this paper has ever been implemented. Some observers go one step further and suggest that the adoption of this strategy was in line with Georgia’s interest to anticipate the formulation of an eventual EU policy vis-à-vis its breakaway states, as Tbilisi thereby keeps the political upper hand in matters related to Abkhazia and South Ossetia and prevents any direct interaction between them and the EU.<sup>228</sup> This monopolization of exchange with Abkhazia and South Ossetia will also contribute to get the exclusive Georgian conflict narrative across to European audiences. The law on occupied territories of Georgia requires that all activities of International Organizations and NGOs have to be coordinated with Georgian authorities first, thereby, limiting very drastically the ambit of the engagement idea. Furthermore, Clause 11 of this law foresees that the provisions on transactions including real estate property extend to all relations

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<sup>225</sup> See: State Strategy on Occupied Territories: Engagement Through Cooperation, 28 January 2010, <http://www.civil.ge/files/files/SMR-Strategy-en.pdf>.

<sup>226</sup> *Ibid.*, Art. 8.

<sup>227</sup> On the face of it, the State Strategy contains a lot of potentially positive proposals, ranging from economic rehabilitation of the regions to the improvement of health care for the local populations.

<sup>228</sup> See: International Alert, *The De-Isolation of Abkhazia* (London: International Alert, 2010), <http://abkhazworld.com/aw/Pdf/1107Abkhazia.pdf>.

formed since 1990, thereby including highly problematic *retroactive* provisions, which are clearly in open conflict with Article 1 of the First Protocol to the ECHR.<sup>229</sup>

Alternatively, one may take Azerbaijan, which has always been utterly rigid in disrupting not only any exchange with Nagorno-Karabakh, but also at targeting individuals who travel to this *de facto* state as an example. Yet, what the Azerbaijani government has recently done seems to extend even these proportions: By making use, or rather, by misusing the principle of unanimity within the OSCE, the Azerbaijani government has vetoed the extension of the OSCE field office in Yerevan, since, thus the Azerbaijani ambassador to Austria, the office's agenda would have included de-mining activities of Nagorno-Karabakh.<sup>230</sup> In this light, de-mining is already seen as a prerequisite of state-building and strengthening of the structures of Armenian rule in Nagorno-Karabakh.<sup>231</sup> These cases demonstrate how states usually, albeit to varying degrees, are prepared to resist what they call "creeping recognition", either by hijacking the engagement discourse or through the deliberate frustration of efforts to normalize and stabilize somehow the status quo. They fear that any independent engagement with those entities will initiate a slippery slope towards eventual validation of their opponents' claims. Yet, in all fairness, one must note that states will almost always react to challenges to their sovereignty, irrespective of how insignificant those challenges are. Therefore, the negative and cautious position of Georgia and Azerbaijan is not fully contrary to worldwide state practice.<sup>232</sup>

### **Engagement without Recognition: Not an Entirely New Idea**

Irrespective of these heavy headwinds, a number of outstanding scholars have begun to problematize the issue of engaging with *de facto* states in the Caucasus as a possible way to keep the vision of conflict resolution alive. In a thought-provoking piece for the *Washington Quarterly* in 2010, Alexander Cooley and Lincoln Mitchell not only yielded the first scholarly impulse for those debates, they also outlined some interesting ideas on how to engage Abkhazia without

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<sup>229</sup> The Venice Commission has handed down a rather critical assessment of this law in 2009. See: Venice Commission Report, Opinion no. 552/2009, CDL-AD(2009)015, 14 December 2009 [http://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-AD\(2009\)051-e](http://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-AD(2009)051-e). Likewise, to refuse recognizing marriage certificates, birth certificates etc. could also amount to a violation of Art. 8 ECHR.

<sup>230</sup> See interview with Galib Israfilov, "Galib Israfilov: Closing of OSCE Yerevan office - result of Armenia's attempt to consolidate occupation of Azerbaijani lands", *AzerNews.az*, 5 May 2017, <https://www.azernews.az/nation/112501.html>.

<sup>231</sup> It seems that this time, Azerbaijan has gone overboard as the US ambassador to the OSCE mission in Vienna issued a clear warning to Baku already in February 2017: "Should the Office in Yerevan be forced to close, this will reflect poorly on Azerbaijan and its government's commitment to the OSCE." See: "U.S. Warns Azerbaijan Over OSCE Office In Yerevan", *Armenian Service of Radio Free Europe*, 9 February 2017, <https://www.azatutyun.am/a/28300755.html>.

<sup>232</sup> One may just consider the incident in Waco, Texas in 1993. The sectarian political group "Branch Davidians" claimed that US laws did not apply on their compound. The Texas Army National Guard reacted with full force and raided the compound. See: Stephen Orvis and Carol Ann Drogus, *Introducing Comparative Politics: Concepts and Cases in Context* (Washington, DC: CQ Press, 2012), 41. Similarly, Austria is preparing amendments to its criminal code in order to address the growing "Reichsbürger" movement which comprises groups and individuals who reject the legitimacy of the Austrian state.

recognizing it. For instance, both authors mentioned the possibility to allow a limited number of Abkhaz individuals to travel to the EU or the United States with their Abkhazian passports, as this could be seen as a benign and positive political signal to the secessionist entity.<sup>233</sup> Likewise, people-to-people contacts, inter-societal dialogue as well as academic mobility for Abkhazian students were part of their set of recommendations in which they also emphasized the need for economic diversification of Abkhazia and the possible means to reach that goal. Some months later, the need for de-isolation and transformation was also recognized by Sabine Fischer in another policy paper, in which she proposed entering into a “structured dialogue” with the authorities of the *de facto* states.<sup>234</sup> Similarly, the famous scholar and political observer of Caucasus-related issues, Thomas de Waal, has recently focused in a piece for Carnegie on education as an integral ingredient of an enhanced EU profile in the secessionist entities of the South Caucasus.<sup>235</sup> This underlying idea has also been picked up by policy makers. In particular, the office of the EUSR, especially under Peter Semneby, has started to reflect on notions that could possibly provide some ideas in this regard. However, while the “non-recognition” part of those ideas was thoroughly and consequently implemented, the “engagement” part, which is always more challenging, has not yet been operationalized.

What these approaches have in common is that they start from the assumption that maintaining isolationist policies vis-à-vis these entities is counter-productive. They also repudiate the notion that the authorities of the *de facto* states are Kremlin-directed puppets which are unable or incapable of formulating autonomous political decisions. They concur that in all cases, even if to varying degrees, endogenous capabilities exist. Moreover, they all agree on the need to stimulate inter-societal dialogue, people-to-people contacts as well as academic mobility. To follow these normative goals, thus the argument, a limited exchange with the *de facto* state is the only way to keep the vision of conflict transformation alive, notwithstanding the risk of creeping recognition and bolstering the confidence of the authorities of *de facto* states.

Yet, given the fact that windows of opportunity close very rapidly – the South Ossetians recently voted in a referendum to rename their republic and endorsed a very pro-Russian political stance – it is high time for the EU to move beyond fragmented policy papers to develop a better structured framework with its underlying components to reinvigorate the discussions and debates necessary

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<sup>233</sup> Alexander Cooley and Lincoln Mitchell, “Engagement without Recognition: A New Strategy toward Abkhazia and Eurasia’s Unrecognized States,” *Washington Quarterly* (Vol. 33, No. 4, 2010), 59-73, 67.

<sup>234</sup> Sabine Fischer, “The EU’s non-recognition and engagement policy towards Abkhazia and South Ossetia”, *ISS Seminar Reports* (2010), 6, <https://de.scribd.com/document/203529573/NREP-Report>.

<sup>235</sup> See Thomas de Waal, “Enhancing the EU’s Engagement With Separatist Territories”, *Carnegie Europe*, 17 January 2017, <http://carnegieeurope.eu/2017/01/17/enhancing-eu-s-engagement-with-separatist-territories-pub-67694>. Many others who cannot be named here for reasons of space constraints have also meaningfully contributed to these discussions. It is also important to note that Georgia has come up with its own engagement strategy. The problem is, however, that the engagement strategy devised by the Georgian government is considerably hampered by the law on occupied territories.

to keep these conflicts on the agenda. In light of the limited time horizon, the following points will attempt to contribute to this necessary debate in a more systematized way.

## **Possible Approaches Guiding Engagement**

### ***The “Big” Schemes as Deceptive Blueprints***

One may argue that European history is full of grand examples which illustrate how former historical foes have successfully embarked on a path of mutual understanding and closer cooperation in order to put down to rest the horrors of their past. It seems almost inconceivable, particularly to a younger generation, that France and Germany have been facing each other as antagonistic nations on the European continent. Consequently, the Franco-German reconciliation pathway is frequently quoted in this respect, in which alleged inescapable ontological realities can be overcome. Indeed, these exchanges after World War II have led to the completion of the Élysée Treaty in 1963, which had provided not only for funds,<sup>236</sup> facilitating the exchange of students, pupils, and workers from both countries, this treaty also contained extensive and frequent consultation mechanisms between France and Germany on the level of heads of states and governments.<sup>237</sup> However, on closer investigation, the Franco-German model can only in a limited fashion serve as an exemplary toolbox full of ideas only waiting to be applied to the frozen conflicts in the South Caucasus as the differences, both structural and proximate, are too stark. First of all, even if the historical Franco-German dichotomy has been somewhat influenced by territorial issues, most notably over Alsace-Lorraine, the confrontation between both nations was not always purely about territory. Furthermore, and most importantly, the friendship aspect with all of its joint actions was consolidated through various bilateral as well as multilateral treaties. And that leads us to the crux of the matter: France and Germany have never refused, since the time of Napoleonic imperialism until the very day, to recognize the independence and/or sovereignty of either side. That is essentially what makes comparisons rather difficult, as the underlying structural problem is thereby still left unaddressed: How to operatively cover engagement in a constellation of contested sovereignty and territorial disputes? Hence, one may only cherry-pick some of the more successful elements of the Franco-German reconciliation process if those elements are not necessarily tied to the bilateral operationalization. Yet, even this may be too optimistic. The Franco-German reconciliation was, undoubtedly, also facilitated by external factors such as the Soviet threat, which has glued together former foes and contributed to the formulation of common interests. While the Franco-German reconciliation process does not seem

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<sup>236</sup> See Section C of this treaty.

<sup>237</sup> Carine Germond, “Die deutsch-französische Verständigung als Wegweiser für eine europäische Gesellschaft?“, in: Wilfried Loth (Ed.), *Europäische Gesellschaft: Grundlagen und Perspektiven* (Wiesbaden: VS Verlag für Sozialwissenschaften, 2005), 211-229, 217.

to be fully transferrable, neither content-wise nor through the aspect of its operationalization, one can put the focus on another historical quasi-bilateral conflict.

The question of West German-East German relations during the Cold War could also provide approaches for dealing with *de facto* states. In contrast to the previously mentioned example the Federal Republic of Germany (FRG) had a strict stance on the non-recognition of the German Democratic Republic (GDR) the 1950s and did, through the so-called Hallstein Doctrine, even publicly declare to abstain from establishing diplomatic relations with any country that would recognize the GDR.<sup>238</sup> There are similarities with other metropolitan states like Georgia as the FRG was also claiming the sole and exclusive mandate to represent the whole sovereign German nation and regarded it as unfriendly act, if a state recognized the GDR. However, the Hallstein doctrine in its pure form was, analogously to the current isolationist attempts of the metropolitan states in the Caucasus, doomed to fail. On the one hand, this doctrine was not always fully implemented and on the other hand, it proved to be counter-productive as it clearly limited the FRGs effect on developments *within* the GDR.<sup>239</sup> With the new *Ostpolitik* of Chancellor Willy Brandt, the German-German relations received some new momentum: While the distant goal of German reunification was never explicitly abandoned, the FRG government sought to improve the daily life of the citizens of the GDR and was ready to make some significant concessions such as recognizing the GDR. In the so-called Basic Treaty (*Grundlagenvertrag*) of 1972 between the FRG and the GDR, did the FRG not formally establish diplomatic relations with the GDR, however, it did only provide its recognition of statehood of the GDR (*staatsrechtliche Anerkennung vs. völkerrechtliche Anerkennung*).<sup>240</sup> This was, therefore, also an interesting high wire act as, consequently, the ‘embassies’ were officially denominated as ‘permanent missions’ in order not to create the misperception that the FRG would formally abandon its claim to have the mandate to represent the entire German nation.

In hindsight, the *Ostpolitik* of Willy Brandt, which was continued even under his Christian-democratic successor Helmut Kohl, was in the end successful not only in providing changes within the GDR leading up to the fall of the Berlin wall, but also in simultaneously reaching out to the USSR. However, this is also precisely the reason, why only some modest aspects of the *Ostpolitik* may be transferrable to the Caucasus: In contrast to Nagorno-Karabakh or Abkhazia the GDR was created as a result of full-scale inter-state war and subsequent military occupation rather than

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<sup>238</sup> This doctrine was named after Walter Hallstein, the State Secretary of the German Foreign Office in the 1950s. This doctrine was, however, flawed and inconsistent from the very beginning as the FRG established diplomatic relations with the Soviet Union just one year after the Soviet Union itself diplomatically recognized the GDR.

<sup>239</sup> More than that: It must not be forgotten that the GDR government reacted with its own ‘Ulbricht doctrine’, thereby supervising travels to the FRG with even greater suspicion and dropping the words “*gesamtdeutsch*” (all-German) and “*innerdeutsch*” (referring to intra-German affairs across the border between the FRG and the GDR) from the official vocabulary, making it evident that the distinction between East and West Germany is final. See: Bernd Schaefer, *The East German State and the Catholic Church: 1945-1989* (New York/Oxford: Berghahn Books, 2010), 102.

<sup>240</sup> This distinction is rather shaky as in both cases the recognizing state confirms the very existence of statehood via recognition.

through ethnically colored secession. Therefore, the citizens of the GDR genuinely felt to live involuntarily under occupation and, naturally, embraced the easing of travelling or receiving relatives, which was part of the *Ostpolitik*. If we accept the notion by Max Weber, according to which a state claims to have monopoly over the *legitimate* use of physical force, then two distinct elements will surface: On the one hand, one can identify the claim of states as to *why* they have a right to rule and on the other hand, we have to investigate the empirical fact whether their populations embrace or tolerate that rule. Therefore, Nagorno-Karabakh has a much higher degree of internal legitimacy and, consequently, much less internal rule than the GDR had. That leads to the fact that the Soviet Union provided a critical economic and military lifeline to the regime of the SED party<sup>241</sup> in the GDR. Therefore, to maintain a criterion of genuinely independent statehood in the case of the GDR would be utterly wrong, however, also this constellation enabled the FRG to provide loans of many billion German Marks in the 1980s to the GDR as they thought that this may tie the GDR closer to the FRG and reduce the dependency on Moscow. Simultaneously, the German-Soviet rapprochement was insofar critical, as the Soviet Union finally paved the way for German reunification and did not provide resistance. To illustrate this difference: Even if the Russian Federation revoked its diplomatic recognition of Abkhazia or if it withdrew all of its troops from the *de facto* states, would the underlying Georgian-Abkhaz conflict be solved?

Even if those big schemes of dealing with one another may have some inspirational moments for a policy vis-à-vis the *de facto* states of the Caucasus, they will fail to deliver exact blueprints as the underlying conditions and factors in those discussed cases are too strongly disconnected. One will need to devise an engagement policy on a case-by-case analysis and the next three sub-sections will discuss some possible avenues in this context by providing legal and political rationales. It must be noted, though, that those discussed avenues are intertwined normative prescripts and should also be read in combination with one another.<sup>242</sup>

### **First Avenue: High Political Acts vs. Other Acts**

International as well as domestic case law on *de facto* states and, more broadly, on unrecognized states has always favored the declaratory approach of recognition over the constitutive effect of recognition, even if it had not fully dismissed the latter. These questions have particularly kept US state courts as well as the US Supreme Court busy from the early 1920s. When the US government broke off diplomatic relations with Russia following the October Revolution in 1917, interesting judgments by various US Courts were handed down, addressing the thorny issue of how to deal

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<sup>241</sup> The SED (Sozialistische Einheitspartei Deutschlands – Socialist Unity Party of Germany) was the governing Communist party of the GDR in accordance with the one-party-system of Communist state ideology.

<sup>242</sup> Moreover, it must not go unnoticed that these three avenues were greatly inspired by the thought of Thomas D. Grant. See: Thomas D. Grant, *The Recognition of States: Law and Practice in Debate and Evolution*. In his book, Grant dealt with the various doctrines of recognition and provided reference to judicial decisions, which are also discussed in this present study.

with an unrecognized entity.<sup>243</sup> Some of them could provide interesting thoughts for the current question in approaching the *de facto* states of the South Caucasus. In the 1923 case *Wulfsohn v Russian Socialist Federated Soviet Republic*<sup>244</sup> the US Court of Appeals declared the Soviet government, though not diplomatically recognized at that time by the US, to be legally immune from being sued in the US as a foreign corporation. Judge Andrews argued:

*“Whether or not a government exists, clothed with the power to enforce its authority within its own territory, obeyed by the people over whom it rules, capable of performing the duties and fulfilling the obligations of an independent power, able to enforce its claims by military force is a fact, not a theory.”*<sup>245</sup>

One may, evidently, argue in this context that the conclusion for *de facto* states is rather limited. It confuses the recognition of an entity as sovereign state with the recognition of a government. The US only broke off diplomatic relations with Moscow in 1917 after the Bolsheviks seized power in Petrograd and after having entertained diplomatic relations since the US declaration of independence of 1776. Moreover, the concept of an ‘objective’ legal personality of a state, which is only based on ‘objective’ facts, even in the absence of *any* recognition whatsoever is quite artificial as this was demonstrated by the post-1989 recognition practice, which had bolstered weak statehood insofar, as external recognition has provided a significant strengthening of shaky and yet unconsolidated statehood.<sup>246</sup> However, what this above judgment provided was to put the aspect of ‘internal sovereignty’ as opposed to ‘external sovereignty’, which is often equalized with international recognition as “minimal standard”,<sup>247</sup> into the spotlight. Internal Sovereignty is in this context understood as the sole authority within a territory to enforce laws and policies,<sup>248</sup> which could provide a useful point of departure when dealing with the *de facto* states of the South Caucasus, as those entities do fulfill a certain degree of independence.

Yet, the problem is that courts do regularly not judge on the very merits of the objective elements of statehood. This is particularly an issue in the case law of the ECtHR and there have been many cases in which the ECtHR has been very quick in establishing the jurisdiction of a state in a *de facto* state without really and profoundly investigating this most important question.<sup>249</sup> If we

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<sup>243</sup> Ibid., p. 62. In discussing *Wulfsohn* and other cases, Grant problematized the important distinction between high political acts and other acts. And this important distinction, which can provide normative guidance in the case of secession, is therefore also applied in this sub-chapter.

<sup>244</sup> US Court of Appeals of New York, 1923, 234 N.Y. 372, 138 N.E. 24.

<sup>245</sup> Ibid.

<sup>246</sup> Anne Peters, “Compensatory Constitutionalism: The Function and Potential of Fundamental International Norms and Structures”, in: *Leiden Journal of International Law* (Vol. 19, No. 3, 2006), 579-610, 589.

<sup>247</sup> Stephen Orvis and Carol Ann Drogus, *Introducing Comparative Politics; Concepts and Cases in Context*, 39.

<sup>248</sup> Ibid., 40.

<sup>249</sup> See in particular the legitimate criticism of Marko Milanovic in the Armenian cases before the ECtHR. In *Chiragov and Others v Armenia* (Application no. 13216/05, Judgment, 16 June 2015) the Court established belligerent occupation referring to reports by NGOs such as Human Rights Watch or International Crisis Group and by discourse analysis of a speech of the Armenian President. See: Marko Milanovic, “The Nagorno-Karabakh Cases”, *EJIL: Talk!*, 23 June 2015, <https://www.ejiltalk.org/the-nagorno-karabakh-cases/>. Likewise, also in the case *Loizidou v Turkey*

therefore see that those entities are politically undesirable, the question in which basis to deal with them will come up with even stronger vigor.

In reflecting which actions may be recognizable and which must not be considered for recognition, it would make sense to distinguish between “high political acts” and other, less important matters,<sup>250</sup> which are not intrinsically linked to the juridical effects that statehood would trigger. And the case law of the US Supreme Court may give some interesting guidance. After the American Civil War, the US Supreme Court handed down a number of decisions, some of which became famous such as *Texas v White*,<sup>251</sup> and some dealing with the problematic and quite burdensome legacy of the legislative and administrative acts of the Confederate States, adopted during the time of the rebellion.

In *Horn v. Lockhart*<sup>252</sup> of 1873, the US Supreme Court dealt with a dispute over inheritance between family members during the time of the rebellion in the Confederate States. It held, that generally all transactions, judgments, and decrees which were adopted in accordance with existing laws in the Confederate states between the citizens thereof “except such as were directly in aid of the rebellion, ought to stand good”.<sup>253</sup> In a related earlier case of *Hickman v. Jones*<sup>254</sup> of 1869, dealing with a court decision of the Confederate States prosecuting someone for treason in aiding the troops of the United States, the judges found such an act, which may not be given any recognition whatsoever. By describing the rebellion of the Confederate States as an “armed resistance to the rightful authority of the sovereign”<sup>255</sup> the Court made a clear distinction between high political acts and matters of lower significance:

*“The act of the Confederate Congress creating the tribunal in question was void. It was as if it were not. The court was a nullity, and could exercise no rightful jurisdiction. The forms of law with which it clothed its proceedings gave no protection to those who, assuming to be its officers, were the instruments by which it acted.”*<sup>256</sup>

Hence, all acts of a *de facto* authority, which are necessary to maintain public life and some degree of stability were seen legitimate in order to avoid a legal vacuum.<sup>257</sup> This was explicitly decreed in the already mentioned landmark case *Texas v White* in which the transfer of property, domestic

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(Application no. 15318/89, Judgment, 18 December 1996), the Court only made reference to United Nations Security Council Resolutions (UNSC) resolutions which speak of Turkish occupation of Northern Cyprus. However accurate this may be, UNSC are expressions of political positions rather than independent judgments.

<sup>250</sup> Thomas D. Grant, *The Recognition of States: Law and Practice in Debate and Evolution*, 61.

<sup>251</sup> *Ibid.*, also *Texas v White* was expertly discussed by Grant in this context. This case of 1869 dealt with the legality of the attempted secession of Texas from the Union. This and other Supreme Court cases, which Grant refers to in his excellent contribution are re-narrated here for the purposes of assessing *de facto* states.

<sup>252</sup> *Horn v Lockhart*, 84 U.S. 17 Wall. 570 570 (1873).

<sup>253</sup> *Ibid.*, 575.

<sup>254</sup> *Hickman v Jones*, 76 U.S. 9 Wall. 197 197 (1869).

<sup>255</sup> *Ibid.*, Page 76 U.S. 200.

<sup>256</sup> *Ibid.*, Page 76 U.S. 201.

<sup>257</sup> Daragh Murray, *Human Rights Obligations of Non-State Armed Groups* (Oxford: Hart Publishing, 2016), 129.

relations, matters of marriage etc. were described valid, “even if emanating from an unlawful government”.<sup>258</sup> However, acts which are intended to impair, wholly or in part, the sovereignty of the lawful government are not in consideration to be treated as valid.

And that leads directly to the question of how to deal with *de facto* states such as Abkhazia, South Ossetia and Nagorno-Karabakh. If we, therefore, argue that acts, decrees and judgements, not intrinsically linked to the very juridical standing of a state may be seen valid, we can discuss what those acts could be. It goes without saying that this will require some degree of flexibility, but one can show this necessary flexibility with regard to diplomas issued by institutions of higher education in those entities tackling the thorny issue of university affiliations of those students and academics. Scholars and students of the *de facto* states are basically excluded to take part in European exchange programs. And this exclusion, thus, only reinforces the siege mentality and some of the most counter-productive narratives about both the metropolitan states and the EU. Even Serbia, which still continues to regard Kosovo as part of its territory, had managed to reach an agreement with Kosovo on mutual recognition of university diplomas in 2011. Indeed, accepting diplomas or involving, for instance, the Abkhazian State University into the Erasmus program does not prejudice any position about the juridical nature of the contemporary *de facto* state of Abkhazia. So even if a diploma displays sometimes a coat of arms and the denomination of the issuing University being authorized by a certain state, that does not represent the important aspect in this context. This aspect is, rather, the contents of the diploma, giving evidence of higher education in a given subject.<sup>259</sup>

The same holds true for passports and for the, admittedly, controversial and delicate question of whether or not to allow a number of Abkhazians and South Ossetians to travel with these travel documents to EU countries. It has to be kept in mind that passports are, after all, not more or less than evidence of identity, and accepting a passport as valid travel document does not constitute necessarily the recognition of a separate citizenship.<sup>260</sup> It also needs to be considered that citizens of the Turkish Republic of Northern Cyprus (TRNC) are allowed to travel on their passports to France and even to the US.<sup>261</sup> The US authorities allow TRNC passport holders to travel to the US with a visa attached to a stand-alone form. Alternatively, the EU may encourage the international community to devise status-neutral travel documents like the UNMIK documents which were handed to the Kosovars prior to Kosovo's recognition by the United States and most EU states in 2008. It is quite absurd that after the lifting of the visa regime for Georgian citizens, the residents

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<sup>258</sup> Texas v White, 1869, 74 US 700, 733.

<sup>259</sup> Evidently, there are grey zones: A law degree of a University in a *de facto* state may raise some questions even as to the contents of this higher education.

<sup>260</sup> Citizens of Northern Cyprus are already allowed to travel with their passports to the United States and a number of EU states.

<sup>261</sup> The US Embassy to the Republic of Cyprus even maintains a representative office in north Nicosia, which is used for limited consular business and other activities. See: Samuel Charap, “Frozen Conflicts in Eurasia: The Cyprus Analogy”, *Center for American Progress*, 16 April 2012, <https://www.americanprogress.org/issues/security/news/2012/04/16/11378/frozen-conflicts-in-eurasia-the-cyprus-analogy/>.

of the Gali district in Abkhazia can freely travel to the EU, while the majority of Abkhazian citizens fail to enjoy this privilege.

Likewise, the issue of trade can also come into our radar accordingly. Trade does not necessarily require the acceptance, let alone explicit recognition of statehood, yet, it could provide very positive stimulus to those regions. The interplay between trade and confidence in those disputed area shows a valuable example that should not be compromised because of alleged lack of sufficient legal standing. Trade is a pivotal area, in which elites discover opportunities of constructive engagement with their counterparts without necessarily and immediately compromising the status quo.<sup>262</sup> Of course, the counter-argument would quickly be that trade with apparently ‘unlawful entities’ may end up in massive tax and customs evasion, smuggling and corruption and may even have a reverse effect by consolidating the status quo as the revenues of trade will end up in the pockets of political elites. However, from a legal assessment does the lack of the full juridical standing not preclude the possibility of trade, just to the contrary: Both the World Trade Organization (WTO) as well as the Asia-Pacific Economic Cooperation (APEC) do not include ‘states’ but rather ‘economies’ as its constituent members.<sup>263</sup>

To sum up this sub-section: The question, which one has to ask in deciding which acts of *de facto* states may be considered for recognition, support or acquiescence, will necessarily address the particularity of the juridical nature of the state. Even if this does not provide a panacea, such an approach can provide some helpful guidance as a normative precept, even if some of those acts are clearly located in a grey zone.<sup>264</sup> To provide a counter example: UNICEF as well as other organizations have field offices in Sukhum/i and have a long history of providing vocational training for, e.g., medical professionals. This training does provide some form of capacity building for the *de facto* state of Abkhazia as health care is – just like the maintenance of roads and the infrastructure of transportation – an item of what Robert Rotberg aptly calls, “political goods”<sup>265</sup>, and therefore forms part of the components of what functioning states should provide. However, it seems that health care as, for instance, opposed to law enforcement is ranking low in the “hierarchy of political goods”.<sup>266</sup> And as a consequence, one can without difficulties provide training in this regard, without bumping into the fragile walls of what metropolitan states call ‘creeping recognition’. If an International Organization or a third state, however, intends to provide training for civil servants of *de facto* states, a group of individuals who authoritatively issue

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<sup>262</sup> OSCE Network of Think Tanks and Academic Institutions, *Protracted Conflicts in the OSCE Area: Innovative Approaches for Co-Operation in the Conflict Zones* (Hamburg: OSCE Network, 2016), 25.

<sup>263</sup> In the case of APEC, this was due to the inclusion of Hong Kong and Taiwan alongside with the People’s Republic of China. See: Scott Pegg, “De Facto States in the International System”, 8.

<sup>264</sup> Consider for instance the question whether a couple of landings of civilian aircrafts in *de facto* states should be allowed. Those are decisions that do not clearly fall in either category.

<sup>265</sup> Under this definition, one can also enumerate functioning harbors, communication networks, educational facilities, money and banking systems etc. He claims that states fail once they cease delivering those goods. See: Robert Rotberg (Ed.), *When States Fail* (Princeton: Princeton University Press, 2003).

<sup>266</sup> *Ibid.*; he argues that the state’s primary function is to provide security.

decisions on the basis of the law of the *de facto* state, another perspective could be taken, depending on the concrete circumstances.

## **Second Avenue: Internal vs. External Dimensions**

Another avenue, which is not unrelated to the first one but still deserves to be scrutinized separately, is the delicate issue which character the external dimension of *de facto* statehood should be given. If we understand internal sovereignty as the freedom to develop and adopt laws, to adopt policies and to provide for law enforcement on a given territory over a stable population, one may ask to which degree this power extends and should extend the boundaries of that very territory. In other words: Is a *de facto* state entitled to demand external treatment as a member of the family of recognized states?

In discussing this distinction, Thomas D. Grant handsomely analyzes<sup>267</sup> the most important judgment of *Russian Socialist Federated Soviet Republic v Cibrario* of 1921.<sup>268</sup> In this rather entertaining case, an agent was hired to purchase movies in the US, yet, he was accused of embezzling the government funds which were handed over to him for these transactions and the RSFSR filed, as the official plaintiff, a lawsuit against him. The Court in its decision reiterated the right of states, recognized by the US government, not only to be treated as an independent sovereign power, but also as an entity having the competency to enforce its rights in a court of justice.<sup>269</sup> And the court further argued that the plaintiff – in this very case the RSFSR – claims to be the *de facto* government, yet fails to provide evidence of acts of recognition by the US government. And the lack of recognition made the Court quickly close its proceedings by simply concluding that there is no plaintiff before the court having the capacity to sue<sup>270</sup> and, thereby, indirectly stating that there is no proper party to be dealt with. Judge Andrews provided an interesting opinion to this case and argued, by quoting an international law textbook of that time:

*“So long, indeed, as the new state confines its action to its own citizens and to the limits of its own territory, it may well dispense with such recognition. But if it desires to enter into the great society of nations, all the members of which recognize rights to which they are mutually entitled, and duties which they may be called upon reciprocally to fulfil, such recognition becomes essentially necessary to the complete participation of the new state in all the advantages of this society.”*<sup>271</sup>

One can reason from the above judgment that recognition plays a critical role when a state would wish to be treated as such on the international arena by its peers. This shifts again the focus to the constitutive theory of recognition. The issue of state recognition has not at all been a topic of

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<sup>267</sup> See for his interesting analysis, from which this present study has enormously profited: Thomas D. Grant, *The Recognition of States: Law and Practice in Debate and Evolution*, 64-68.

<sup>268</sup> *Russian Socialist Federated Soviet Republic v Cibrario*, 198 App. Div. 869 (N.Y. App. Div. 1921).

<sup>269</sup> *Ibid.*, referring to *Republic of Mexico v De Arangoiz*.

<sup>270</sup> *Ibid.*

<sup>271</sup> See: Judge Andrews Opinion in *Cibrario*.

international law in the 19<sup>th</sup> century, as sovereignty was still predominantly seen at that time to emerge from within a polity as endogenous product. However, the normative shift towards recognition also signaled the emergence of human rights law, questioning how states are treating their citizens and how states are configured,<sup>272</sup> and one may even add how states came into being. There is a lot of discretionary competency of the states to demand their own prerequisites for an eventual recognition as only recognition signifies their intention to treat the other state as a state under international law. Hersch Lauterpacht put it aptly, as he argued that rights and obligations prior to recognition only existed “to the extent to which they have been expressly conceded or legitimately asserted”.<sup>273</sup> It would be rather a naïve position to assert that the objective criteria of statehood are sufficient for a state and its officials to be treated as such, as the above comprehensive discussion on Abkhazia has shown.

What would this mean for treating Abkhazia and other unrecognized entities? It is indeed an important idea that representatives of Abkhazia and South Ossetia should be allowed to go to Washington DC to join political events and discussion rounds and to meet US politicians<sup>274</sup> and to give them the opportunity to be heard but also, to familiarize with other points of view on the conflict. Theoretically, members of the parliaments of the *de facto* states should also be encouraged to join inter-parliamentary fora such as the Euronest Parliamentary Assembly, which was established in 2009 as a central inter-parliamentary component of the Eastern Partnership. Likewise, human rights defenders and spokespersons for ethnic minorities of *de facto* states may also be invited to have exchanges with their counterparts in both the EU and the US. Those offices are dealing with the most vulnerable of the societies of the *de facto* states. However, the obvious conclusion and, simultaneously, most important restriction of the above stated is that state officials, parliamentarians etc. of the *de facto* states would not be eligible for the enjoyment of diplomatic immunity abroad. They may also not be entitled to be called along their capacity. Moreover, they would be hosted and invited only as individuals and should not be given the opportunity to be received in their respective *de facto* state-related capacity. At the same time, their involvement as well as the overall participation of the *de facto* states’ governments in mediation formats is crucial, however, the status should explicitly be not of a fully-fledged state. It seems that the Geneva talks and the participation of Abkhazia and South Ossetia as “guests” in informal working groups is very well placed as it makes sure that the metropolitan state is not overly alienated by their inclusion.

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<sup>272</sup> Anne-Marie Slaughter, “Pushing the Limits of the Liberal Peace: Ethnic Conflict and the “Ideal Polity”, in: David Wippman (Ed.), *International Law and Ethnic Conflict* (Ithaca: Cornell University Press, 1998), 128-144, 140.

<sup>273</sup> Hersch Lauterpacht, *Recognition in international law* (Cambridge: Cambridge University Press, 1948), 6.

<sup>274</sup> That was initially proposed by Alexander Cooley in Alexander Cooley and Lincoln A. Mitchell, “Engagement without Recognition: A New Strategy toward Abkhazia and Eurasia’s Unrecognized States”, 67.

### Third Avenue: Public vs. Private Dimensions

Another crucial avenue can be found when shifting the focus to the distinction between private and public law as well as between private and public matters for the purpose of codifying a normative prescript on engagement without recognition.<sup>275</sup> In matters of private law, the functional competence rather than the juridical standing of a legal person is usually considered to be the hallmark of different judgments and legislation. This has also been true for US case law. For instance, in the 1934 judgement *Amtorg Trading Corp. v United States*<sup>276</sup> the court has allowed a corporation, founded under the laws of the state of New York but controlled and owned by the Soviet government, to have legal standing as plaintiff in a court of justice. It thereby might have, to some degree, eroded the earlier position of the *Cibrario* case.<sup>277</sup> However, this case was less about the fact that this corporation was controlled by the Soviet government; rather, it was about its functional competence as importing corporation of strike-on-box safety matches from the Soviet Union. Therefore, judicial doctrine might have developed since that that unrecognized states may be given legal standing if they are operating through legal persons of private law or if they operate directly in the realms of economy and cultural issues.

Yet, there is more evidence that international law and, particularly, domestic legislation is far more pragmatic in dealing with those entities when economic and/or trade issues are at stake. Both Australia and the UK explicitly allow corporations pursuant to their respective foreign corporations' laws to have a legal standing in court, hence to have the right to sue and be sued, even if they originate from unrecognized states.<sup>278</sup> In a prominent UK case "saga",<sup>279</sup> this issue has led to a landmark judgement before the European Court of Justice (ECJ). In *Anastasiou*,<sup>280</sup> the UK Ministry of Agriculture had accepted import certificates issued by the Turkish Republic of Northern Cyprus (TRNC) for the local fruit and vegetable export company "Cypfruvex", which was operating in Northern Cyprus and which was consequently enabled to export those goods under preferential conditions to the UK. However, this preferential customs treatment occurred in accordance with the 1972 Association Agreement between the European Communities and the Republic of Cyprus, which failed and continues to fail establishing jurisdiction over the Northern part of the island. A Greek competitor corporation, *Anastasiou*, challenged this decision, and consequently filed various lawsuits at different courts in the UK. The British subsidiary of

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<sup>275</sup> The private v public "dichotomy" has been greatly influenced by Grant, op. cit., pp. 67-71.

<sup>276</sup> *Amtorg Trading Corp. v United States*, 71 F.2d 524 (1934).

<sup>277</sup> Victor H. Li, "The Law of Non-Recognition: The Case of Taiwan", in: *Northwestern Journal of International Law and Business* (Vol. 1, No. 1, 1979), 134-162, 144.

<sup>278</sup> The UK law reads that in the case of doubts "that question and any other material question relating to the body shall be determined (and account shall be taken of those laws) as if that territory were a recognised State."

<sup>279</sup> This very accurate definition was used in: Stephanie Laulhe Shaelou, "On the 'Edge' of Good Neighbourliness in EU Law: Lessons from Cyprus", in: Dimitry Kochenov and Elena Basheska (Eds.), *Good Neighbourliness in the European Legal Context* (Leiden/Boston: Brill Nijhoff, 2015), 184-215, 199.

<sup>280</sup> See C-432/92 R v *Minister of Agriculture, Fisheries and Food, ex part SP Anastasiou (Pissouri) Ltd. and Others* (Judgment of 5 July 1994).

*Cypfruvex* was, against the protest of *Anastasiou*, however, allowed intervening in those proceedings. The judge was quoted: “I do not accept that by giving them leave to intervene that it is likely to lead to any sort of recognition of the TRNC or to suggest its legitimacy or sovereignty.”<sup>281</sup>

Yet, those courts referred the cases to the ECJ, which handed down in its first judgment that authorities, who are not effectively under control of the Republic of Cyprus, could not issue customs certificates. The court stated that the “acceptance of certificates by the customs authorities of the importing State reflects their total confidence in the system of checking the origin of products as implemented by the competent authorities of the exporting State.”<sup>282</sup> It continued stating that “The Association Agreement therefore precludes acceptance by the competent authorities of a Member State, upon importation of citrus fruit or potatoes from Cyprus, of movement certificates issued by authorities other than the competent authorities of the Republic of Cyprus.”<sup>283</sup> In other words: Imported goods from the TRNC, which is out of reach for the legitimate Cypriote government do not fall under the preferential treatment of the Association Agreement. However, that does not preclude the possibility to import goods from Northern Cyprus or any other unrecognized *de facto* state. Only when considering the application of association agreements, one will have to have a closer inspection upon the underlying terms. It only means that these imports are treated as if they originate from a state not associated with the EU.<sup>284</sup>

What does this mean for dealing with *de facto* states in the South Caucasus? It means, first of all that trade is possible and, ideally even desirable. As of today, the *de facto* states are not least isolated because there is hardly any interaction between them and the rest of the world as well as the metropolitan states. In Abkhazia, the only interaction concerns the Enguri power dam on the administrative border, which is managed and can, technically, only be managed and maintained from both sides. Yet, this cooperation has not led to other activities on other fields. The same holds true for South Ossetia, where trade with the rest of Georgia has come to a halt after the August 2008 war, even if it was already heavily restricted after the closure of the Ergneti market by the Saakashvili administration. And Nagorno-Karabakh does not have any interaction with Azerbaijan whatsoever. The discussion above, however, makes clear that metropolitan states can enter into trade relations with *de facto* states without precluding their claim over these territories. The same holds true for the EU and in particular does this apply to a possible extension of the DCFTA towards Abkhazia and South Ossetia.

Yet, private law is also crucial from another point of view. And some interesting aspects in this context can be filtered from the US state practice and legislation in dealing with Taiwan after its “derecognition” following Nixon’s outreach to the People’s Republic of China (PRC). Quickly

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<sup>281</sup> *Ibid.*, para 252-254

<sup>282</sup> *Ibid.*, para 39.

<sup>283</sup> *Ibid.*, para 55.

<sup>284</sup> Nikos Skoutaris, “Legal Aspects of Membership”, in: James Ker-Lindsay, Fiona Mullen and Hubert Faustmann (Eds.), *An Island in Europe: The EU and the Transformation of Cyprus* (London: I.B. Tauris, 2011), 42-64, 62.

after the recognition of the PRC, the US adopted the Taiwan Relations Act, which provided for, as Scott Pegg aptly calls it, the “privatization of diplomatic relations”.<sup>285</sup> It established the American Institute in Taiwan (AIT), which is officially a non-profit and non-governmental organization. However, this institute fulfills functions and services, which are usually performed by US Consulates.<sup>286</sup> And indeed, the American Institute in Taiwan receives money through appropriation of the State Department and many of its personnel are seconded by the State Department.<sup>287</sup> The Taiwan Relations Act also explicitly states that the AIT shall be the linchpin through which, irrespective of derecognition, relations between the US and Taiwan should be conducted.<sup>288</sup> And this could encourage us to reflect about an eventual EU information office in the *de facto* states of the South Caucasus. Not necessarily to entertain relations but first of all, to send a signal to the populations of these territories that they are not abandoned by Europe and secondly that information on the ground can be gathered. As of today, we are often flying blind in political fog not being able to generate objective information from those entities, which again reinforces politicization. It seems, however, that such offices have to be founded on the basis of private law as this could address some of the concerns of metropolitan states on “creeping recognition”.

### **What Engagement Does *Not* and Must *Not* Mean**

To lay out the contours of a comprehensive engagement strategy with the *de facto* states of the South Caucasus, the legitimate concerns of the metropolitan state have to be seriously addressed. It must be made clear to both the metropolitan state and the *de facto* state that this policy approach, regardless of its innovative courage, is not about recognition and under no circumstances whatsoever will it end with the formal recognition of those entities. Diplomatic recognition is still an affirmative act by governments and it is fully within the discretionary competence of states whether to recognize diplomatically other entities or not. This constitutive effect is still undeniable in which EU states would treat other would-be states as such. Yet, recognition of those entities will not and must not be part of this policy. Even hypothetically keeping the possibility of recognition on the table would not only undermine the EU’s credibility, it could send a dreadful signal to other would-be secessionist groups, since, contrary to the orthodox declaratory doctrine, recognition is an act of state-building, as it *bolsters* statehood. Having the metropolitan state on board is absolutely critical for the success of a policy of engagement. Hence, the individual provisions have to be designed in a way that would make them beneficial also to the metropolitan state, serving the mutual interests of the actors on both sides of the administrative boundaries.

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<sup>285</sup> Scott Pegg, “De Facto States in the International System”, 10.

<sup>286</sup> For instance, in the case of an emergency, the American Institute in Taiwan can issue a travel letter to permit a US citizen who may have lost his or her passport to return to the US.

<sup>287</sup> Scott Pegg, “De Facto States in the International System”, 10.

<sup>288</sup> “[o]r such comparable successor nongovernmental entity as the President may designate”, See: The Taiwan Relations Act, (TRA; Pub.L. 96–8, 93 Stat. 14, enacted April 10, 1979; H.R. 2479).

Apart from this, the *de facto* states, too, deserve to be treated with honesty: EU engagement policy must not nourish unrealistic hopes, even if the governments of the *de facto* states believe these hopes to be legitimate after years of isolation and rejection. By embracing this engagement policy, they should understand that their current status quo is not endangered, yet they should simultaneously understand that it will not be further strengthened either.

Second, policy makers and the conflict parties should be aware that an engagement policy is not supposed to bring about quick solutions or expected to serve as a panacea. The very idea of engagement ought to be embedded within the concept of gradual conflict transformation rather than the overly ambitious goal of conflict resolution. This means accepting that, for the time being, the conflicts over Abkhazia and South Ossetia are totally intractable and will require much more than just a reiteration of already-known positions which are presented in a legalistic grammar as a medium of politics. We have to leave the trap of the territorial integrity vs. self-determination dichotomy. Rather, this policy has to look inside the societies on both sides of the administrative boundaries and focus on people *within* the conflict parties and *within* the societies and regions affected, and should deal with their main concerns. This suggests the adoption of a comprehensive and wide-ranging approach that will need to provide support for groups within the society in conflict rather than for the political mediation of outsiders.<sup>289</sup> And evidently, a couple of layers will need to be activated. Some of the underlying ideas of the *Ostpolitik*, which are flagged above, could also at least create conditions furthering the goal of rapprochement between the populations on the ground.<sup>290</sup> However, the geopolitical aspect should not be too strongly considered as this consideration has been one of the main obstacles to conflict transformation in the first place. Those layers should also not one-sidedly focus on the economy or trade as a field of interaction or, let alone, some simplistic showcases to generate EU support. Buchheit has aptly observed in 1978: “It appears that many groups would gladly embrace an impoverished, defenseless existence in return for the emotional satisfaction of self-government”.<sup>291</sup> And examples of these behavioral traits are easy to find in the *de facto* states of the South Caucasus. In this context, one must finally also be prepared for possible setbacks, since no guarantee can be given that this policy framework will eventually help stitch the divided societies together. It is a process-oriented rather than outcome-oriented approach.

Finally, with the option of diplomatic recognition off the table, an engagement policy does not and must not assess the juridical standing of those entities. For instance, Abkhazia appears to have

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<sup>289</sup> This is strongly based on John Paul Lederach’s concept on conflict transformation. See John Paul Lederach, *Conflict Transformation Across Cultures* (Syracuse: Syracuse University Press, 1995).

<sup>290</sup> We must not forget that Russia is not the USSR. The sense of both equal eye level of power and mutual respect appears to be unlikely. Likewise, to believe that a major deal between the West and Russia will make things easier is quite naïve. And even if there was a deal, then the question is what it would be about precisely. The concessions that Russia may demand from the West should not be dismissed either. Finally, for the time being a ‘deal’ is not necessarily in the best interest of Russia: since 2014 the Black Sea has turned into a new ‘mare nostrum’ of the Kremlin.

<sup>291</sup> Lee C. Buchheit, *Secession: The Legitimacy of Self-Determination*, 8.

fulfilled the objective criteria of statehood pursuant to main landmarks of the Montevideo Convention of 1933. Diplomatic recognition by Russia, which is still a great power, has strengthened some of the elements described in the Convention. Indeed, its consolidated statehood, albeit still a *de facto* state, entitles Abkhazia theoretically to invoke certain rights against third states, such as the prohibition of force in accordance with Art 2 (4) of the UN Charter. Yet, at the same time, Abkhazia has failed to build an operating state actively participating within the international community on the basis of this achievement. Therefore, the discussion should cease to revolve around the current legal status of the *de facto* states, and should equally abandon feckless discussions about sovereignty. Rather, it should focus on governance issues within these entities. Governance always takes place, both in unrecognized and recognized states, even if we refuse to admit this. It would be helpful to abandon the vociferous and omnipresent rhetoric on territorial integrity and/or military occupation, as this has rendered these meaningful terms more or less meaningless.

### **What Engagement *Should* be About**

Until now, it seems that the primary purposes of engagement strategies and ideas as outlined above remain largely ambiguous. Should an engagement policy represent an end in itself or is it about mitigating the isolation of those territories, together with the desire to drag those entities ever so slightly out of their strong Russian embrace? Discussing the purpose of this policy is crucial in identifying instruments that could and should be applied within this framework.

First, engagement without recognition is about reestablishing destroyed lines of inter-societal communication. The collapse of communication after the South Ossetian war in 2008<sup>292</sup> has been one of the key features influencing the political process in Georgia, whereby not only people on both sides of the administrative boundary were deprived of opportunities to interact, but it has become increasingly difficult for intergovernmental organizations as well as NGOs to generate knowledge and insights from the affected region. Hundreds of thousands of people live off the radar of the vibrant Europeanization of the post-Soviet Eurasian space. Hence, their exclusion must be treated also as an ethical issue. An engagement policy should thus be guided by the belief in the agency of civil society and the equally important belief in societal change.

The need for communication and the belief in societal change suggest some policy instruments. For instance, the EU could expand to citizens of the *de facto* states its academic mobility programs both for early stage researchers as well as for more advanced academics. Such a step, stimulating academic mobility, may not only help the younger generation to escape the siege mentality and environment of their statelets; it would open up new encounters of mutually stimulating exchange possibilities. The same applies to politicians of these statelets, who should be given the possibility

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<sup>292</sup> The situation in Abkhazia is considerably better, as people are allowed to cross the administrative boundary over the Enguri river. Mobility along the South Ossetian boundary, on the other hand, has come to a total halt.

to be invited to public workshops and round tables in Brussels or Washington. This all can further advance the goal of spreading EU values and making them better understandable on the ground.<sup>293</sup> As discussed above, those actions are fully in line with international law and have thus been implemented by domestic legislation of various states.

Similarly, if the economic diversification of these entities is in the vital interest of both the *de facto* state<sup>294</sup> as well as the international community, one could think about the perspective of offering trade relations. This is not unusual and not contingent on diplomatic recognition. Even during the Japanese occupation, the Chinese maintained trade relations with the puppet state of Manchukuo, and so did Croatia with the rebel Republika Krajina during its occupation. Also today, well documented state practice seems to confirm a trend allowing enterprises to participate in international trade and commerce regardless of whether they are based in recognized states or not.<sup>295</sup> Since this opening up is predominantly in the interest of the *de facto* states, it should not come without conditions. This could not only help the EU to regain some leverage in a seemingly intractable stalemate along the false dichotomy of territorial integrity v. self-determination, it could essentially provide some real influence on critical governance issues in those entities which would otherwise remain absolutely unaddressed.<sup>296</sup>

Furthermore, the idea of establishing a status-neutral field presence of the OSCE on the ground in Abkhazia and South Ossetia is attractive as well. The OSCE still is the most inclusive European security organization and could be preferable to others in this context.<sup>297</sup> Yet, there is no reason why such an office cannot be institutionalized by the EU. In order to navigate the delicate issue of strict status neutrality, the EU could find an appropriate role model, as discussed above, for this in the American Institute in Taiwan, which is an excellent example how diplomatic and consular ties can be "privatized." Being officially a non-profit NGO, yet, receiving its money through appropriations to the U.S. State Department, and with many of its personnel seconded by the State Department, it serves as *de facto* representation of the United States in Taipei.<sup>298</sup> In addition, this is not an end in itself: it can be used to sense important political signals and to generate necessary knowledge on the ground of the situation. The above outlined three avenues can, indeed, provide

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<sup>293</sup> At the same time, this policy must also ensure that the citizens of the metropolitan state can participate in these encounters and, possibly in joint summer courses, meet their counterparts from the unrecognized entities in neutral settings in the EU.

<sup>294</sup> The Abkhazian Black Sea diaspora and business community in Turkey have sought for many years to make use of the trade turnover between Abkhazia and Turkey to counter the overly dominant position of the Russian Federation. See Eric Reissler, "Can Turkey De-Isolate Abkhazia," in: *Turkish Policy Quarterly* (Vol. 12, No. 3, 2013), 125-135, 132.

<sup>295</sup> This also appears to be fully in line with WTO logic which does not require members to be recognized states but rather "states or separate customs territory possessing full autonomy in the conduct of its external commercial relations" (See Article XII WTO).

<sup>296</sup> This could open up ways to address human rights abuses and the widespread discrimination on ethnic grounds which remain prevalent issues in those entities.

<sup>297</sup> Daniel S. Hamilton and Stefan Meister, "What the West must do", 65.

<sup>298</sup> Scott Pegg, "De Facto States in the International System", 10. Additionally: Section 7 of the Taiwan Relations Act authorizes the employees of the American Institute in Taiwan to fulfill the functions and services of US consular officials.

some normative prescripts in determining which actions and activities may be permissible in dealing with those entities.

Endorsing an engagement with *de facto* states means also to understand and to accept that this is a European responsibility in the first place. The EU has been gradually developing its conflict resolution capacity in the South Caucasus since 2003 with the installment of the EUSR for the South Caucasus. And the success of this proposed engagement policy will depend on the degree to which the EU allows to be more involved. In almost all conflicts of the South Caucasus, the EU is, to varying degrees, involved in mediation and peace-building efforts. Even in Nagorno-Karabakh, which does not see a direct involvement of the EU, it is indirectly present through the participation of some of its member states in the OSCE Minsk Group. The EU also seems to be best equipped and positioned to provide some outreach to these entities: Even if some of the policies of the EU, particularly Association Agreements and the elaboration of DCFTAs, are arguably vulnerable to be drawn into geopolitical logics,<sup>299</sup> the underlying policy leitmotif is still that of providing a transformative and positive scenario to the whole region. And there is another, often-overlooked aspect of an EU lead in the engagement policy: It could lead some politicians in the *de facto* states, who have made success in stigmatizing the EU and the West as foes to the separatist cause, to lose some of their influence in these entities. Through the promotion of pro-European voices in those *de facto* states – and there is also a comparatively vibrant segment in the Abkhazian society – the EU could, theoretically, gain some unexpected leverage over those entities.<sup>300</sup>

Finally, this set of policy proposals as well as ideas to open an EU information office in those statelets will not be easy to swallow for the metropolitan states as their restrictive positions vis-à-vis those entities will necessarily erode. Therefore, not only does an engagement policy have to fall short of recognition, it must not come without conditions for the leadership of the *de facto* states.

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<sup>299</sup> Samuel Charap and Timothy J. Colton argue in their recent book that the policies of the EU and of Russia aim at achieving only one-sided advantage and have, as a consequence, reached a dead end. See: Samuel Charap and Timothy J. Colton, *Everyone Loses: The Ukraine Crisis and the Ruinous Contest for Post-Soviet Eurasia* (Boston/Leiden: Brill Nijhoff, 2017).

<sup>300</sup> This does not, however, preclude involvement of other organizations such as the OSCE. The OSCE is still needed due to the fact that it remains the only remaining inclusive security organization in Europe. For instance, one could also engage the OSCE and look out for a status-neutral field presence in Abkhazia and South Ossetia or Nagorno-Karabakh. (See: Daniel S. Hamilton and Stefan Meister, *Eastern Question*, 65).

## Conclusion

The author of this paper argued that statehood and sovereignty are not seen, as they actually should be, as matter of degree, with some entities achieving more independence and others less.<sup>301</sup> This binary ideology of either something exists or something does not exist, of either something succeeds or it does not succeed, does not seem to provide any transformation scenario and will not yield any result. This binary approach, which has dominated the political agenda of both the metropolitan states and the *de facto* states for more than two decades, has also contributed to the political stalemate in finding a solution for the conflicts of the South Caucasus. It has only cemented the intractability.

Dealing with *de facto* states will require in the long run disentangling territoriality and power-sharing. The emphasis must be laid on the fact that sovereignty is not absolute and not indivisible either. Instead of reiterating old positions along the territorial integrity vs. self-determination logic, the normative idea of this article was to shift the discussion back where it belongs: to the power-sharing dimension. Still, *sovereignty* can be very significant even below the threshold of having and running an own state. Invoking law and its arguable remedial and just connotations will, as it was demonstrated, not help on either side. It cannot be repeated often enough that the law on self-determination will not comprehensively solve self-determination conflicts and territorial disputes. As one of the most invoked but also one of the most misunderstood principles of international law, it will fail to push a problem over the edge towards solution. It ought to be understood that self-determination is only in conflict with territorial integrity if it comes with a separatist aim to build another state. Hence, it is high time to reframe problems, not only for these conflicts, but also for the sake of international law scholarship: Instead of permanently discussing these conflicts under the umbrella of self-determination and territorial integrity, one could focus on terminological issues of belonging or issues of identity, making it clear that power-sharing is and has to be the final avenue.

The phrase “self-determination short of full independence” is also essentially shorthand for the belief that self-determination should embody a greater variety of choices than just sovereign statehood<sup>302</sup> and this comes together with the sheer impossibility to define criteria of *just secession*. Again also the ideas of codifying remedial secession is offering only exclusive either-or approaches, and, thereby, suffer from the underlying problem to reconcile the two diametrically opposed principles of external statehood and territorial integrity, irrespective of the very fact that it involves a lot of subjectivity in a highly politicized international society. Hence, to invoke these ideas or to point to the alleged colonialist nature of the Soviet Union in attempting to have a case for external self-determination will not cut the water.

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<sup>301</sup> Just consider South Korea’s vulnerability without US military support. Nobody would, however, claim that South Korea is not a sovereign nation.

<sup>302</sup> Scott Pegg, “De Facto States in the International System”, 19.

It needs to be, thus, shown that only solutions, which are “fudging sovereignty”,<sup>303</sup> are promising in the long run. It has to be clearly stated that we need to arrive at an understanding of multiple sovereignty. This will also require addressing binary problems of other kinds: Florea rightly argues that “though empirical evidence suggests that separatism is a matter of degree, the phenomenon is typically analyzed in binary terms—separation either succeeds or fails.”<sup>304</sup> Yet, this approach is not entirely true, so by accepting these additional binary notions, the observer buys a little bit into the preferred narrative of the conflict parties. Those binary ideologies also reflect another, no less dramatic, problem: So far, the conflict constellations disregard minority communities in the *de facto* states. We speak about the frames of a Georgian-Abkhazian, Armenian-Azerbaijani and Georgian-Ossetian conflict, but fail to see the position of the Armenians of Abkhazia. The pivotal question of what role they should be given is easily dismissed in those frames. Hence, an engagement policy could, therefore, set in motion a process, which does not only aim at overcoming those binary approaches but which still has – as a long term objective – the idea of power-sharing on its radar.

What this engagement policy ought to be about is focusing on the *de facto* states’ involvement and inclusion into international society while not antagonizing too much the metropolitan state. Accordingly, it is about recognizing that such a policy is fully in line with international law and not about finding loopholes within the law. The terminology of an “acceptable breach,” which is sometimes used in the context of humanitarian interventions,<sup>305</sup> would in this particular context be entirely inaccurate. Precisely to the contrary: the *de facto* state does have, as Pegg aptly puts it, a “juridically cognizable existence.”<sup>306</sup> There is no serious reason why it cannot be incorporated into international society in some way, as the author attempted to demonstrate by the above avenues. International law provides a vast array of instruments to deal with entities that have gradational forms of sovereignty. Thus, it is capable of accommodating for the existence of such entities.

Indeed, there are some understandable reasons for metropolitan states to oppose these policies as their fear of “creeping recognition” is not fully imagined: every form of interaction in, or with, *de facto* states or can enhance those entities’ confidence and could contribute to a further alienation between *de facto* and metropolitan state. And indeed, the risks must not be concealed. However, the question has to be raised what alternatives are available, given the rapidly closing time window to keep the vision of conflict resolution and power-sharing discussions alive. Ample effort must be invested to convince the metropolitan state that, at least in the long run, this policy is beneficial to its interests as well. It will be up to the EU, which is the only actor in the South Caucasus providing a positive transformation scenario and not viewing the region in terms of geostrategic competition to step up its engagement and start devising a comprehensive policy.

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<sup>303</sup> Nina Caspersen, *Unrecognized States*.

<sup>304</sup> Adrian Florea, “De Facto States in International Politics (1945–2011): A New Data Set”, 805.

<sup>305</sup> This term, which is actually an oxymoron, has been thoroughly problematized by David Wippman, “Kosovo and the limits of international law,” in: *Fordham International Law Journal* (Vol. 25, No. 1, 2001), 129-150, 135.

<sup>306</sup> Scott Pegg, “De Facto States in the International System”, 16.



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# THE LAW AND POLITICS OF ENGAGING DE FACTO STATES: INJECTING NEW IDEAS FOR AN ENHANCED EU ROLE

Benedikt Harzl

The secessionist entities that emerged out of the turbulent upheavals in the 1990s in the South Caucasus have, over many years and with enormous external assistance, successfully defied the jurisdiction of their metropolitan states. As entities that have attained a status of *de facto* statehood, they epitomize unresolved conflicts between core principles and doctrines in public international law. This study addresses the interplay between law and politics against this context and problematizes false dichotomies that have arguably hindered the transformation of these territorial disputes. The author devotes particular attention to different ways of engagement with the *de facto* states below the level of political endorsement.

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