

International Law, Recognition and the Recent Practice of States in the Cases of Kosovo, South Ossetia and Abkhazia

Uluslararası Hukuk, Tanınma ve Kosova, Güney Osetya ve Abhazya Örnekleriyle Devletlerin Son Tecrübeleri

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Abstract

This work will examine the recent state practice of recognition in the case of Kosovo, South Ossetia and Abkhazia. Recognition despite its purely declaratory role in nature has been instrumentalized to advance legitimacy quests by secessionist movements. The recognition acts and the secessionist movements have led to interpretations of international law in terms of secession, self-determination of peoples and the nature of recognition. Diverging interpretations of international law due to political motifs contribute to further freezing and inhibiting the resolution of conflicts. Increasingly, the question of contested statehood moves to the forefront in international relations, as law by itself is not able to provide adequate answers to resolve these conflicts. Recognition has filled this void to consolidate claims of statehood.

Keywords: *Secession, Self-Determination of Peoples, State Recognition, Sovereignty, Conflict Resolution*

Öz

Bu çalışmada Kosova-Güney Osetya-Abhazya örnekleriyle devletlerin tanınmasına yönelik son tecrübeleri incelenmiştir. Diplomatik tanınma, doğasında bütünüyle izah edilebilen bir rol barındırmasına rağmen ayrılıkçı hareketlerin meşruluk arayışını araçsallaştırmasını sağlamıştır. Tanınma girişimleri ve ayrılıkçı hareketler, uluslararası hukukun “ayrılma”, “halkların kendi kaderini tayini” ve “tanınmanın doğası” yönünde yorumlanmasına yol açmıştır. Uluslararası hukukun politik nedenlerden dolayı farklı yorumlanması, çatışmaların çözümünün dondurulmasını ve engellenmesini artırmıştır. Tartışmaya açık devlet olma girişimleri sorunu, hukukun tek başına çatışmanın çözümüne yeterli olamamasından dolayı gittikçe uluslararası ilişkilerin temel sorunlarından biri olmaya başlamıştır. Dolayısıyla diplomatik tanınma, devlet olma talebindeki iddiayı emniyet altına alarak boşluğu tamamlamıştır.

Anahtar kelimeler: *Ayrılma, Halkların Kendi Kaderini Tayini, Devletin Tanınması, Egemenlik, Çatışma Çözümü*

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INTRODUCTION

The problem of recognition of states and governments has neither in theory nor in practice been solved satisfactorily. Hardly any other question is more controversial, or leads in the practice of states to such paradoxical situations. - Hans Kelsen, 1941¹

On 18 February 2008, following the declaration of independence by the representatives of Kosovo, three of the five permanent members of the UN Security Council (UNSC) – the US, Great Britain, and France, declared recognizing Kosovo as an independent and sovereign State in the international system. Additional acts of recognition ensued, despite objections by the mother state Serbia from which Kosovo seceded, deeming its independence illicit under international law and UNSC Resolution 1244 (1999). Under this resolution, Kosovo was placed under a UN administration, following a military NATO intervention in Kosovo in the spring of 1999 for the purpose of protecting the population in Kosovo against Serbian aggression. Incrementally, the United Nations (UN), the Organization for Security and Co-operation in Europe (OSCE), and the European Union (EU) supported the institution- and capacity-building of local authorities, without a roadmap for status resolution. Rather, it followed the logic of “standards before status”.

In parallel, only six months after the wave of Kosovo recognition, the Russian Federation officially recognized South Ossetia and Abkhazia as independent and sovereign states, although it refused to extend the same courtesy to Kosovo. The recognizing powers in each of these three cases based their recognitions on the same legal principles, only to interpret them differently. International law interpretations in matters of statehood, recognition and secession have ever since resurfaced and are confronted with political motifs by States in their choice for or against recognition. Currently, Kosovo is recognized by 111 UN member states,² while Abkhazia is recognized by four and South Ossetia by five UN members. Vanuatu and Tuvalu retracted their recognitions of South Ossetia and Abkhazia after passing mutual agreements with Georgia in 2014.³ South Ossetia and Abkhazia, meanwhile, are also recognized by other breakaway regions, namely Nagorno-Karabakh and Transnistria. These entities recognize each other mutually, thus affecting their bilateral relations, without legal grounds in the international system however.

HYPOTHESES AND POINT OF DEPARTURE

In this regard, this paper will analyze the issue of the legal basis under which South Ossetia and Abkhazia as well as Kosovo had a right to secession and in

¹ Hans Kelsen, “Recognition in International Law: Theoretical Observations”, *AJIL* 35/4 (1941): 605

² See Website <http://www.kosovothanksyou.com/> for a current number of recognitions. Last consultation: September 15, 2015.

³ Radio Free Europe, “Tuvalu Retracts Recognition Of Abkhazia, South Ossetia”, posted March 31, 2014, see <http://www.rferl.org/content/tuvalu-georgia-retracts-abkhazia-ossetia-recognition/25315720.html>

what way international law has been politically instrumentalized for trying to advance and potentially legitimize claims of statehood and independence. First and foremost, this is a qualitative study based on existing literature and doctrine, stemming from legal considerations and complemented by an International Relations point of view. The main assumption of this paper is that a consensus has seemed to emerge within the international community, supporting the independence and the sovereignty of Kosovo while negating this status to South Ossetia and Abkhazia, for political reasons. Recognition is in fact used to overturn basic principles of law to the extent that it consolidates the legitimacy of a secessionist movement. We are observing a willingness by the international community to resolve the status quo in the Balkans by allowing Kosovo to become independent. Given the deep involvement of Western powers in the Western Balkans ever since the mid-90s, this is a logical choice in order to finally stabilize the region. Simultaneously, the same right is refused in the South Caucasus which has also been subject to unrest and turmoil over the past 20 years.

In second place, the wave of recognition in the case of Kosovo suggests a modification of the *acquis* in international law in terms of recognition and secession law. The main preoccupation in international law is the preservation of the state; however, the struggles for independence and sovereignty by secessionist movements have counterbalanced this notion in the international sphere, balancing them with notions of respect for human rights and the self-determination of peoples.

Ultimately, recognition in the cases mentioned creates more conflict than it actually resolves. It leads to frozen conflicts and affirms their status as contested states. Recognition can hence lead to the paralysis in the resolution of and reconciliation after conflict. The main question currently for secessionist entities is the role of recognition and how it affects the legitimacy of these secessionist movements. In the case of Kosovo, 111 have recognized it as a State, and therefore trust in and recognize its capacity to exercise its rights as a State in the international system, and recognition has helped consolidate this power. On the other hand, in the Caucasus Republics, it is that state prerogative that is put to test and into question.

The paper is outlined as follows: First, a theoretical approach in legal terms will be provided in order to assess the legality of these independence movements. A second section will be dedicated to a practical study of the cases in question, and to examine the role of recognition in contemporary international law and conflict resolution.

1. CONTEMPORARY INTERNATIONAL LAW AND SECESSION: A LEGAL ASSESSMENT

In this first section, current legal principles will be analyzed in order to pose the basic applicable law regulating state formation, secession and recognition of these facts on a theoretical level.

1.1. Statehood and the Self-Determination of Peoples

The constitution of states is at the heart of international relations and in general terms highly regulated. UN General Assembly Resolution 2625 (XXV) as well as the judgment of the International Court of Justice (ICJ) in *Nicaragua vs. United States of America* (1986), pose the principle that “every State has an inalienable right to choose its political, economic, social and cultural systems, without interference in any form by another State”.⁴ For the creation of a State, Georg Jellinek⁵ has described three necessary elements an entity is required to dispose of in order to fulfill the criteria of statehood. The political organization of a population on a defined territory exercising its power and independence on said territory is the basic criterion to determine whether or not a state exists. Sovereignty is only a consequence of these elements of statehood, a basic attribute of statehood, where effective governance is a determining factor in deeming a state independent or not. Numerous texts add to these three basic elements of statehood. For instance, the Montevideo Convention on the Rights and Duties of States of 1933 adds another element to the existence of a state, namely: “the state as a person of international law should possess the following qualifications:

- a) a permanent population;
- b) a defined territory;
- c) government; and
- d) capacity to enter into relations with the other states.”⁶

According to this perception, while the three basic criteria are crucial, a supplementary condition is introduced, that of its capacity to insert itself into the international system. It is conditioned by the assumption of international obligations through entering into relations with other States, through which it can effectively exercise its State prerogatives.⁷ While entering into international relations is not necessarily a condition of the quality of statehood in international law, it is nevertheless indicative of an entity’s capacity to exercise its state power and sovereignty, and exist as a legal entity in international life.

The willingness of a permanent population to organize itself politically, better known as the self-determination of peoples, is, however, a precondition and one of the basic principles in international law. Separated into an internal right (the right to political representation, participation in political life, preservation of culture and heritage) and an external right (independent statehood), it allows

⁴ UN General Assembly, Resolution 2625 (XXV), “The Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States”, October 24, 1970, <http://daccess-dds-ny.un.org/doc/RESOLUTION/GEN/NR0/348/90/IMG/NR034890.pdf?OpenElement>

⁵ Georg Jellinek, *Allgemeine Staatslehre* (Darmstadt: Wissenschaftliche Buchgesellschaft, 1956), 396

⁶ Article 1 of the Montevideo Convention, “On the Rights and Duties of States”, December 26, 1933, <http://www.cfr.org/sovereignty/montevideo-convention-rights-duties-states/p15897>

⁷ Matthias Herdegen, *Völkerrecht*, (München: C.H. Beck, 8th edition, 2009), 70

a people to determine its own fate and express its political will as to how it wants to be governed. The external right to self-determination has, in the context of decolonization, become a positive right, in the sense that it is enforceable and enshrined in a variety of international law documents. It is gauged by self-attainment of effective control of a claimed territory, as defined by UN General Assembly Resolution 1514 (1960), UN General Assembly Resolution 1541 (XV), and the UN Charter which in Article 1, Paragraph 2, stipulates as one of the UN's purposes "to develop friendly relations among nations based on respect for the principle of equal rights and self-determination of peoples". All colonized peoples have the right to self-determination. This right has been included in numerous pacts, treaties and declarations, such as the Pact on Civil and Political Rights (1966), in Article 1, Paragraph 1 of the ICCPR (1966) and ICESCR (1966), as well as UN General Assembly Resolution 1514 (XV) and 1541 (XV).

In the decolonization context, the self-determination of peoples has been increasingly emerged as *jus cogens*, a non-peremptory norm in international law. It was acknowledged by the International Court of Justice (ICJ) in the East Timor case as *erga omnes*, making self-determination an "absolute law" whose respect is not measured against reciprocity but toward the right itself and hence towards all. In the ICJ's Advisory Opinion on the Construction of a Wall in the Occupied Palestinian Territory of 2004, it furthermore attests that no State shall "recognize situations violating the right of peoples to self-determination."⁸ In addition, UN General Assembly Resolution 2625 (XXV) formulates in a clear manner that, "Every State has the duty to refrain from any forcible action which deprives peoples referred to in the elaboration of the principle of equal rights and self-determination of their right to self-determination and freedom and independence."⁹ It continues by stipulating that, "all peoples have the right freely to determine, without external interference, their political status and to pursue their economic, social and cultural development, and every State has the duty to respect this right in accordance with the provisions of the Charter."¹⁰ This positive idea has been prevalent since the Second World War, where recognition intervenes as an acknowledgement of the attainment of statehood rather than a condition for it.¹¹

In addition, independence and the constitution into a new State can also happen by consent and agreement or as provided by a Constitution. Such is the case of Czechoslovakia, where both the Czech and the Slovak people decided politically and socially to each constitute independent states. By agreement

⁸ International Court of Justice (ICJ), Advisory Opinion, "Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory", July 9, 2004, §159, <http://www.icj-cij.org/doCKET/index.php?doCKET/index.php?pr=71&p1=3&p2=4&case=131&code=mwp&p3=4>

⁹ UN General Assembly, Resolution 2625 (XXV)

¹⁰ Ibid.

¹¹ Mikulas Fabry, "The contemporary practice of state recognition: Kosovo, South Ossetia, Abkhazia, and their aftermath" *Nationalities Papers: The Journal of Nationalism and Ethnicity* (2012): 663

and within the framework of a Federal Constitution, the separation of the two entities was considered a peaceful process. Furthermore, within a long and politically-sensitive process, the constitution into a new State can also be integral within a peace process and in order to resolve conflict, as is the case for example with Sudan and South Sudan, despite ongoing territorial disputes.¹² In fact, if we look at the creation of States since 1945 outside the colonial context, there has always been consent by the “mother State” or agreement between two federated entities¹³.

Despite the non-peremptory character of self-determination, it remains a controversial norm given the difficult question of identifying the titular of said right. Outside the colonial context, not much can be done to become independent if not secession. In this light, secession can be seen as an expression of the “negation of the right to self-determination”¹⁴ in cases where the mother state denies certain rights to a people within its boundaries. This is the subject of the cases analyzed in this research. It is argued that where cases of violent oppression, disrespect of human and minority rights, as well as the negation of adequate representation at state level occur, external self-determination/secession is the only viable option and hence legal, as a sort of remedy to the unbearable situation for a people’s survival and self-realization.¹⁵ A right to secession hence is induced as an “ultima ratio” solution which results in the theory of “remedial secession” in contexts of grave and persistent injustices,¹⁶ in order for a population to retrieve its dignity.¹⁷ If an internal right to secession is denied over long periods of time, it consequently makes secession the only viable way for a people to determine its own status.¹⁸ It is therefore conceivable that an external right to self-determination allows for secession, but only in exceptional cases.¹⁹ In addition, some experts go as far as saying that “genocide has to take place”²⁰ for the claiming this right. Pippan²¹ even states

¹² For a full historical overview of the conflict, please visit <http://www.insightonconflict.org/conflicts/sudan/conflict-profile/>, consulted on 07 December 2015.

¹³ CRAWFORD, James, *The Creation of States in International Law*, 2e édition, Oxford, Cambridge University Press, 2007, 415.

¹⁴ Stephan Hobe and Otto Kimminich, *Einführung in das Völkerrecht* (Tübingen: A. Francke Verlag, 8th Edition, 2004), 115.

¹⁵ *Ibid.*, 118.

¹⁶ Buchanan, 2003 in Lee Seshagiri, “Democratic Disobedience: Reconciling Self-Determination and Secession in International Law”, *Harvard International Law Journal* 51/2 (2010): 568

¹⁷ Christian Tomuschat, “*Self-Determination in a Post-Colonial World*” in *Modern Law of Self-Determination*, ed. Christian Tomuschat (Boston: 1993), 9.

¹⁸ Buchanan, 2003, in Seshagiri, “Democratic Disobedience”, 2010, 571.

¹⁹ Cedric Ryngaert and Sven Sobrie, “Recognition of States: International Law or Realpolitik? The Practice of Recognition in the Wake of Kosovo, South Ossetia, and Abkhazia”, *Leiden Journal of International Law* 24 (2011): 485.

²⁰ Angelika Nussberger, “The War between Russia and Georgia – Consequence and Unresolved Questions”, *Göttingen Journal of International Law* 1-2 (2009): 348.

²¹ Wolfram Karl and Christian Pippan, “Selbstbestimmung, Sezession und Anerkennung: Völkerrechtliche Aspekte der Unabhängigkeit des Kosovo (I)”, *EJM* 3 (2008): 154.

that a paradigm shift has occurred in international law, where the principle of territorial integrity is sacrificed for that of respect for human rights. Massive violations of human rights override any sovereign rights a State might have given their importance in international law.²² Cases where remedial secession is invoked constantly put the international community to test, as it is permanently balanced against territorial integrity, *uti possidetis* and self-determination of peoples. Therefore, the wide-spread approach has been to strike a balance with other principles, most notably that of territorial integrity and *uti possidetis juris*.

1.2. Territorial Integrity: Safeguarding Stability, Preserving the State

Although territorial integrity concerns first and foremost interstate relations and not intrastate relations, it is put in parallel to the right to self-determination to safeguard States from indefinite secessions by minority groups.²³ Only the 1966 Human Rights Covenants do not balance territorial integrity with the self-determination of peoples.²⁴ The balance between territorial integrity, which touches on interstate relations, and self-determination of peoples, which is an internal matter in essence, concerns the analysis of facts on a case-by-case basis. In order for self-determination not to “weigh on sovereign States like the Sword of Damocles”,²⁵ territorial integrity assures States of the inviolability of their borders and protects them from external intervention. In the internal sphere, the principal of *uti possidetis juris* has enlightened the question of balance particularly during the dissolution of Yugoslavia²⁶, acting as a counterweight to self-determination.

In the case of the dissolution of the Soviet Union in the early 1990s, Georgia opposed the referendum regarding the conservation of the USSR, although Abkhazia voted in favor of preserving federal Russia. The Belavezha Accords, signed 8 December 1991²⁷, proclaim solemnly in its Preamble that “the USSR, as a subject of international law and a geopolitical reality, is ceasing its existence”. The Constitution of the USSR allowed for secessions for Republics of the Union (Art. 72 of the 1977 Soviet Constitution); only with the consent

²² Ibid., 154.

²³ For illustrations of secession since World War II, please see Burri, Thürer, Secession; http://ilmc.univie.ac.at/uploads/media/self-determination_empil.pdf; last consultation 07 December 2015

²⁴ Martin Ott, *Das Recht auf Sezession als Ausfluss des Selbstbestimmungsrechts der Völker* (Berlin: BWV, 2008): 150; Helsinki Final Act (1975), Copenhagen Document on the Human Dimension of the CSCE (1990), Art.21 of the European Charter of Human Rights, Art.5 of the European Charter for Regional or Minority Languages (1992), are proof of this relation.

²⁵ Hobe and Kimminich, *Völkerrecht*, 115.

²⁶ Jean-François Guildhaudis, *Le droit des peuples à disposer d'eux-mêmes* (Grenoble : Presses Universitaires de Grenoble, 1976), 37.

²⁷ Accord portant sur la création de la Communauté des États indépendants, Minsk, le 8 décembre 1991, http://www.cvce.eu/obj/accord_portant_creation_de_la_communaute_des_etats_independants_minsk_8_decembre_1991-fr-d1eb7a8c-4868-4da6-9098-3175c172b9bc.html, consulté le 26 mars 2012

of the newly-independent State (former Soviet Republics), new delimitations would have been possible (Art. 78). South Ossetia and Abkhazia, who were more favorable to maintaining a federal Russia, did not however dispose of the right to secede from Georgia.

The principle of *uti possidetis juris* consists in “fixing borders according to internal administrative boundaries of a pre-existing State out of which the new State is born.”²⁸ This definition is well-placed in the colonial context, where administrative boundaries between dominating states and colonies, is obvious; outside of it, it is nonetheless a limit to secession, restricting it due to internal borders and for the sake of territorial integrity. In the context of decolonization, the principal of *uti possidetis juris* in fact orders a limit to secession, as it affirms that the frontiers of a republic or an autonomous region within a federation, are to be considered the new borders of that republic aiming for secession or independence from the federal State. This allowed for stability in the colonial context and in addition limits secession in non-colonial context where there is no autonomy within a federated State.²⁹ As an illustration, a minority within an autonomous region that is part of a Federation, could not under regular circumstances secede from that autonomous region.

In the break-up of Yugoslavia, the Badinter Commission³⁰ was mandated by the Council of Ministers of the European Economic Community to shed light on questions of applicable law, mainly in terms of recognition, self-determination of peoples, secession and respect for minority rights. Its 15 opinions have informed member states of how to react to the generalized secessions in the Western Balkan countries. For instance, it explained that, “The Committee considers that, whatever the circumstances, the right to self-determination must not involve changes to existing frontiers at the time of independence (*uti possidetis juris*) except where the states concerned agree otherwise.”³¹ In addition, the Commission explained that the old borders of the federated States of Slovenia and Croatia constitute its new legal boundaries as sovereign states. At the same time, in its Second Opinion, it also stated that this right does not apply to the minorities within these newly-formed States. Thereby, the Commission hindered a domino effect. On the one hand, the principle allows for relative stability, to have a clear territorial delimitation for newly-formed states according to their previous administrative boundaries;³² and on the other

28 Nguyen et al., *Droit international public* (Paris : LGDJ, 7th edition, 2002), 468, in: Laurent Lombart, “*L’Uti Possidetis Juris* et la mémoire des frontières en droit international”(Provence :Centre d’Études et de Recherches Internationales et Communautaires, 2005) : 2

29 Broder dispute, Case ICJ Journal 1986, p.554, in: RYNGAERT, Cedric; SOBRIE, Sven, „Recognition of States: International Law or Realpolitik? The Practice of Recognition in the Wake of Kosovo, South Ossetia, and Abkhazia”, *Leiden Journal of International Law*, 24, 2011, p.486

30 The Arbitration Commission of the Peace Conference on Yugoslavia, see Lombart, “*L’Uti Possidetis Juris*”, 6

31 Badinter Commission, Opinion N°2, <http://207.57.19.226/journal/Vol3/No1/art13.html>

32 FISCH, Jörg, *Das Selbstbestimmungsrecht der Völker: die Domestizierung einer Illusion*, München, C.H. Beck, 2010.

hand, it acts as a disadvantage for federal States who have granted a certain autonomy to regions within their territory and for that reason seem to have a better chance at claiming independence.³³ For this reason, as Croatia and Slovenia had large amounts of autonomy under the Yugoslav Constitution, it was “granted” independence. The same principle was applied in order to argue why the Republic of the Croat Community of Herzeg-Bosna, the Republika Srpska, and the Republic of Serbian Krajina had no grounds for independence, as they were not Republics of Yugoslavia at the time. In the cases of Western Sahara in 1975, as well as the East-Timor case, the ICJ applies and interprets this principle along the same lines. *Uti possidetis juris* has therefore become a norm that allows for a clear and objective way to determine new state borders, all the while hindering domino effects provoked by minority groups to also secede within newly formed states. However, one is not to confuse self-determination and the principle of *uti possidetis*: the first describes the willingness of a people to become independent, the other only serves to delimit the new borders between states³⁴.

1.3. The Two-Fold Nature of Recognition

The circumstances of independence and the attainment of statehood are important, as two theories of recognition oppose each other on a conceptual level. Both are in the recent practice of States at the heart of discussions, at a time when all these entities face the same problem: the *de jure* status of their existence rather than their *de facto* sovereignty and independence. First, the declaratory theory of recognition implies that the act of recognition of a state is only appreciative of facts: it recognizes that all conditions of statehood are reunited. It does not provide a judgment on the effectiveness or the existence of that entity as a sovereign state, but only that the elements of statehood are reunited. According to Article 13 of the Charter of the Organization of American States, “The political existence of the State is independent of recognition by other States. Even before being recognized, the State has the right to defend its integrity and independence...”³⁵ In opposition to this approach, the constitutive theory presumes that recognition is a precondition for the existence of states. An entity cannot aspire to a valid legal existence if this legal existence has not been recognized by other entities that share the same attributes, namely sovereignty. A State is hence entering into diplomatic relations with other States in the international community, proving its capacity to act as a State and accepting obligations and duties attached to this status. The constitutive theory was dominant until the Second World War, and yet can be considered allowing for arbitrary recognition or non-recognition without any objective criteria

³³ RYNGAERT, SOBRIE, 2011, 487.

³⁴ NESI, Giuseppe, « *L’uti possidetis* hors du contexte de la décolonisation : le cas de l’Europe », AFDI, 1998, 20, dans: LOMBART, 2005, 6.

³⁵ Organization of American States, Charter, Art.13.

to determine statehood. Originally a doctrine proposed by Georg Hegel,³⁶ this constitutive nature of recognition opposes the principle of sovereign equality in the international sphere: no State could aspire to statehood without the confirmation by another State.

Recognition has nevertheless an important consolidating effect. According to Held, recognition can “compensate the doubts on the existence of all the elements of Statehood, particularly the one on effectiveness.”³⁷ Recognition can therefore be considered a destabilizing force which can legitimize – or not – secessionist movements and consolidate missing elements of the criteria of statehood. This is particularly interesting in the context of the recent state practice since the independence of Kosovo, South Ossetia and Abkhazia.

2. RECENT STATE PRACTICE AND SECESSION: A POLITICAL ASSESSMENT

The recent practice of States indicates that Kosovo has indeed created a precedent with direct consequences for the Russian recognition of secessions in the South Caucasus. Guided by political motifs, Russia recognized Abkhazia and South Ossetia only following Western support for Kosovo’s independence. This section will examine the claims of statehood by these entities and look at the intervention of recognition in the resolution of their statuses.³⁸

2.1. The Kosovo Precedent

In the case of Kosovo, declarations of recognition referred to the *sui generis* nature of its independence, in particular in the context of the exceptional circumstances of the Yugoslavian dissolution. Arguments for recognition were heavily based on international law and especially embraced the notion of independence given wide-spread repressions of Human Rights over a longer period of time by the Kosovar population. The approach taken is in line with a certain acceptance of a right to remedial secession in the case of Kosovo, which had been “activated” under the Slobodan Milosevič regime in the 1990s. Since autonomy of Kosovo in 1989, Serbian politics had allegedly become more radical towards Kosovo, and the “following phase of systematic exclusion of Kosovo-Albanians and the emigration of approximately 800.000 Kosovars”³⁹ in the aftermath of the war, constitutes a negation of the (internal) right to self-determination. In parallel to the 2006 adoption of the Serbian Constitution, which conceded an autonomous status for Kosovo, but did not

³⁶ Saskia Hille, *Völkerrechtliche Probleme der Staatenanerkennung bei den ehemaligen jugoslawischen Teilrepubliken* (Münich: VVF, 1996), 15.

³⁷ Herdegen, *Völkerrecht*, 73.

³⁸ For case studies regarding self-determination, basic rules and the UN’s approach, please visit <http://www.una.org.uk/content/safer-world-state-recognition-and-self-determination>, consulted last 07 December 2015

³⁹ Karl and Pippan “Selbstbestimmung”, 159.

include Kosovo-Albanians in consultations or the vote on the Constitution,⁴⁰ the participation in public life was ultimately denied to Kosovo. Hence, a co-existence within the same State had increasingly seemed unrealistic due to a lack of confidence between parties, the late Serbian cosmetic concession of a certain status for Kosovo, and the permanent exclusion of Kosovo in the political sphere.⁴¹ Secession in this respect, it is argued, was the only viable option, even under UNSCR 1244 (1999), thanks in part to a roadmap, though rejected by Serbia, on the Status Settlement of Kosovo (Athisaari Plan). In fact, the international administration in Kosovo had supported the capacity-building of local institutions, for the purpose of working towards some kind of autonomy within the State of Serbia.⁴² The legal basis of the declaration of independence by the Kosovo representatives can be found in Annex 2 of UNSCR 1244, which refers to the Rambouillet Agreement: Although unsigned by the Yugoslav Republic, it had legal force due to its inclusion in a UN Security Council Resolution which is binding. The Rambouillet Agreement explicitly refers to self-determination⁴³ and the willingness of the people to determine its status.⁴⁴ In addition, the *ultima ratio* nature of the Kosovo case which finally found its independence after years of striving for the resolution of its status legitimized the secession. Ultimately, an international consensus seemed to have emerged which accepted the independence of Kosovo as a *sui generis* case and a solution of *ultima ratio*, in order to remedy the repeated oppression of Kosovo-Albanians under Serbian rule.

The International Court of Justice in its advisory opinion on the question submitted by the UN General Assembly on “whether the unilateral declaration of independence of Kosovo is in accordance with international law” did not clarify the predominant law in terms of self-determination, territorial integrity and secession. While it would have been the ideal opportunity to clarify existing norms of international law in this respect, considerations of consequences, new doctrine and dissenting opinions, only allowed for an advisory opinion that circumvents the question by analyzing the circumstances in which the declaration was made. As Lippold points out, “by remaining silent on these questions the Court implicitly showed how far away international law today is from a consensus with regard to secession and self-determination.”⁴⁵ The

⁴⁰ Constitution of the Republic of Serbia of 8 November 2006, see Preambular and Art. 176 onwards, http://www.wipo.int/wipolex/en/text.jsp?file_id=191258

⁴¹ Katharina Parameswaran, “Der Rechtsstatus des Kosovo im Lichte der aktuellen Entwicklungen” *Archiv des Völkerrechts* 46 (2008): 180.

⁴² Christian Schaller, “Die Sezession des Kosovo und der völkerrechtliche Status der internationalen Präsenz”, *Archiv des Völkerrechts* 46 (2008):139-140.

⁴³ Karl and Pippan, “Selbstbestimmung”, 160.

⁴⁴ UN Document, S/1999/648, “Interim Agreement for Peace and Self-Government in Kosovo”, June 7, 1999, http://www.un.org/peace/kosovo/99648_4.pdf

⁴⁵ Matthias Lippold and Mindia Vashakmadze, ““Nothing but a road towards secession”? – The International Court of Justice’s Advisory Opinion on Accordance with International Law of the Unilateral Declaration of Independence in Respect of Kosovo”, *Göttingen Journal of International Law* 2 (2010): 647.

Serbian litigator Dr. Andreas Zimmermann nevertheless correctly presented a different idea that has allegedly invaded the international sphere:

“61. On all occasions, the respective territorial States have given their consent to such United Nations administration. The consent of Croatia with regard to Eastern Slavonia and the consent of the FRY with regard to Kosovo are two pertinent examples. It would constitute a most dangerous precedent not only with regard to general international law, but also with regard to the system of collective security provided for by the Charter, if States were now to learn that the setting-up of such a United Nations administration constitutes nothing but a first step in a process of secession by the territory concerned, otherwise not provided for in international law.

62. Indeed, one might wonder whether both, the relevant members of the Security Council, as well as the individual States concerned, would in the future accept such solutions, were the Court to tolerate that such United Nations-led administration is nothing but a road towards secession.”⁴⁶ Given the rather weak outcome of the advisory opinion and meager recognition acts following the ICJ’s opinion however, it almost had a “non-effect” than an actual impact on international law or secessionist movements in general.

Three years after initial recognition acts, Kosovo has adapted to sovereignty⁴⁷, allowing to compensate for its “sovereignty in the making.”⁴⁸ International law did take the back seat in the recognition process of Kosovo⁴⁹ and left the field open for political considerations and games. Looking at declarations of recognition by EU countries, references to international law are indeed scarce and only refer generically to “international law”, “rule of law” or other superfluous formulations. The *sui generis* character of this recognition is nevertheless mentioned in numerous declarations by Western countries⁵⁰ in parallel to the “exceptional circumstances” in Kosovo that allow for recognition, given the failure of political resolution and the potential of an otherwise prolonged conflict.⁵¹ Furthermore, Condoleezza Rice affirmed in the US declaration that “the unusual combination of factors found in the Kosovo situation – including the context of Yugoslavia’s break-up, the history of ethnic cleansing and crimes against civilians in Kosovo, and the extended period of UN administration– are not found elsewhere and therefore make Kosovo a special case.”⁵²

⁴⁶ ICJ, Verbatim Records, CR 2009/24, §61 and §62, <http://www.icj-cij.org/docket/files/141/15711.pdf>

⁴⁷ Herdegen, *Völkerrecht*, 73

⁴⁸ Schaller, “Sezession“, 138

⁴⁹ Ryngaert and Sobrie, “Recognition“, 479

⁵⁰ Latin term, “of its own kind”

⁵¹ Canada, Columbia, France, Hungary, Lithuania, Peru, Sweden and the United States of America mention the *sui generis* character of the Kosovo case in their recognition statements.

⁵² Declaration of Condoleezza Rice regarding the recognition of Kosovo, in The Associated Press, “Rice Text on Kosovo”, USA Today, February 18, 2008, http://usatoday30.usatoday.com/news/washington/2008-02-18-755882181_x.htm

Therefore, Kosovo cannot be a precedent in international law for any other situation in the world today.⁵³ The Council of the EU for example confirms the principles of territorial integrity and sovereignty, but reiterates that “the EU’s adherence to the principles of the UN Charter and the Helsinki Final Act, inter alia the principles of sovereignty and territorial integrity and all UN Security Council resolutions. It underlines its conviction that in view of the conflict of the 1990s and the extended period of international administration under SCR 1244, Kosovo constitutes a *sui generis* case which does not call into question these principles and resolutions.”⁵⁴ The ICJ confirmed the *sui generis* nature of the Kosovo case, and hence the extraordinary circumstances of Kosovo secession seem to have become an *acquis*.⁵⁵

On the other hand, States that refused to recognize Kosovo largely based themselves on international law, in particular UNSCR 1244 (1999) which affirms the territorial integrity of Serbia. Other states waited for further developments before recognizing,⁵⁶ most notably the ICJ Advisory Opinion which did not shed additional light on the question. Interestingly, the Foreign Ministers of China, India and Russia conjointly declared the following: “We believe [recognition] must be solved solely on the basis of international law... In our statement we recorded our fundamental position that the unilateral declaration of independence by Kosovo contradicts Resolution 1244. Russia, India and China encourage Belgrade and Priština to resume talks within the framework of international law and hope they reach an agreement on all problems of that territory.”⁵⁷ Officially, non-recognition was based on international law, while political considerations are implicit. The fear of a Kosovo precedent for other secessionist movement also played a part for countries such as Spain, Cyprus, Russia and Greece. In an OSCE conference, Russia stated that “A serious challenge has arisen in the form of the unilateral proclamation of independence by Kosovo, a step that has set an extremely dangerous precedent in leaving the framework of the fundamental principles of the Helsinki Final Act. As a result, issues involving the territorial integrity of States and the inviolability of borders have once again moved to the center of the European agenda.”⁵⁸ This however, did not hinder Russia to formally recognize South Ossetia and Abkhazia six months later, although their independence movements are far from being clear-cut examples of secession.

⁵³ Ibid.

⁵⁴ Council of the European Union, Press release 18 February 2008, 6946/08, www.consilium.europa.eu/uedocs/cms_data/docs/pressdata/en/gena/98818.pdf

⁵⁵ ICJ, Judgment in *Yugoslavia vs. Bosnia-Herzegovina*, 1996: 7, §71.

⁵⁶ For example Brazil, as mentioned in Jessica Almqvist, “The Politics of Recognition, Kosovo and International Law” *Working Paper 14 for the Real Instituto Eleano (2009): 10*.

⁵⁷ Conference in Ekaterinburg, “Joint Statement of the Foreign Ministers of India, Russia and China, regarding Kosovo”, May 15, 2008, in: Almqvist, “Politics of Recognition”, 11.

⁵⁸ Declaration of Alexander Grouchko, PC.DEL/547/08, July 1, 2008, <http://www.osce.org/cio/32636>

2.2. The Caucasus Secessions

The Minsk Agreement of 8 December 1991⁵⁹ officially declares in its preamble, that “the USSR has ceased to exist as a subject of international law and a geopolitical reality”. Following the dissolution of the USSR in 1990/91, Georgia opposed the Union referendum on the preservation of the USSR, while Abkhazia voted in favor of its continued existence, counting approximately a 13% Russian population. On 31 March 1991, Georgia favorably votes for independence and equipped itself with a new constitution, thereby restoring the independence of 1918-1921. During this period, Abkhazia formed an integral part of Georgia, while enjoying some degree of autonomy. The Russian refusal to annex Abkhazia leads to the war of independence with Georgia and is followed by the unilateral declaration of independence by Abkhazia on 23 July 1992. The cease fire agreement of 1994 under the auspices of the UN and the OSCE was further supported by recommendations of the Secretary-General to resolve the issues in Georgia.⁶⁰ These proposals were aimed at achieving a certain constitutional autonomy for Abkhazia under Georgian law, in order to grant internal self-determination to Abkhazia. The latter, however, did not accept concessions made on the Georgian side, in light of Russian troops on the territory of Abkhazia.

Ossetia, itself splintered across borders with North Ossetia finding itself in the Soviet Union and South Ossetia on the Georgian territory, enjoyed a large degree of autonomy under Soviet law as well. Georgia nevertheless reintegrated South Ossetia, suppressing the entity’s autonomy, following its own independence. Violence between South Ossetia and Georgia following the Ossetian reintegration into Georgian territory erupted, the result being thousands of displaced civilians and refugees.⁶¹ Following the signature of the cease fire agreement of 1992, South Ossetia became increasingly independent to the extent that relations with Georgia remained more or less calm in the coming years. In 2006, following a decade of general tranquility and only sporadic assaults by both parties, South Ossetia proclaimed its independence, based on a referendum with a 90% approval rate for independence. No international institution recognizes the results of the referendum and the EU, OSCE and the USA are quick to condemn the unilateral organization of the referendum. Russia, on the other hand, was the only country to accept and commend the South Ossetians for the result of the popular vote.

⁵⁹ The Minsk Agreement, signed by the Head of State of Belarus, the Russian Federation and Ukraine on December 8, 1991, creating the Commonwealth of Independent States (CIS), http://lcweb2.loc.gov/frd/cs/belarus/by_apnb.html

⁶⁰ UN Secretary General, „Report of the Secretary General on the Situation in Abkhazia, Georgia“, May 3, 1994, <http://daccess-dds-ny.un.org/doc/UNDOC/GEN/N94/202/07/IMG/N9420207.pdf?OpenElement>

⁶¹ Estimations of internationally displaced due to the war amount to approximately 60.000 Georgians and Ossetians.

Problematic in this context is the fact that South Ossetia had started building up parallel independent institutions, although maintaining ties to Russia. The tension between Russia and Georgia in particular in the lead-up to the Blitzkrieg of August 2008, was marked by deep mistrust, mutual embargoes and provocations through the playing field of South Ossetia. During the night of 7 August 2008, all commercial routes to Russia were blocked by Georgia,⁶² while Russian troops stood ready to quickly enter South Ossetia only 12 hours after a Georgian presence had entered South Ossetia. The five-day war led to more displaced persons, increased violence and most importantly, political games at the detriment of the South Ossetian population. With the signature of a cease-fire agreement on 16 August 2008, a sanitary cord was implemented, but Russian troops continue to be present on Georgian/Ossetian territory to this day.

According to Volume N°2 of the Independent International Fact-Finding Mission on the Conflict in Georgia, mandated by the Council of the European Union to investigate the events of August 2008,⁶³ the Abkhaz and South-Ossetian populations can be qualified as „peoples” in international law.⁶⁴ It gives them a right to self-determination, but first and foremost an internal right. The report notes that during the Perestroika, South Ossetia wanted to change its status from “autonomous region” to “autonomous Republic”, giving it the same status as North Ossetia. This tentative had been blocked by Georgia in December 1990. The former Soviet Constitution served as the basis for dealing with breakaway regions and the dissolution of the Union. It only conceded the right to secession for the Republics of the Union (Art.72 of the Soviet Constitution of 1977), while other administrative territories within Soviet boundaries did not dispose of this same privilege. Such a right would have only been possible in case of consent by the mother State in order to change state boundaries (Art.78),⁶⁵ which Georgia did not consent to in the cases of Abkhazia and South Ossetia. While it is true that the Ossetian people suffered from limitations to its internal right to self-determination such as participation in public life and exercise of cultural freedoms, in parallel to the abolishment of the autonomous status it enjoyed under Soviet law, South Ossetia’s internal right to self-determination was neither converted into an external right to self-determination, nor a right to remedial secession. The International Fact-Finding mission confirmed that at least in the 90s during the dissolution of the USSR,

⁶² The Roki tunnel was blocked by the Russians in order to be able to easily with heavy military equipment by Russia, in Schulze, “Geopolitics at Work”, 330.

⁶³ The Council of the European Union mandated the Independent International Fact-Finding Mission on the Conflict in Georgia on 2 December 2008 by Decision 2008/901/PESC to find the origins of the conflict, with a particular attention to international law, international humanitarian law and human rights, see <http://eur-lex.europa.eu/Notice.do?mode=dbl&lng1=fr,fr&lang=&lng2=bg,cs,da,de,el,en,s,et,fi,fr,hu,it,lt,lv,mt,nl,pl,pt,ro,sk,sl,sv,&val=484042:cs&page=&hwords=null>

⁶⁴ Report of the Independent International Fact-Finding Mission, Vol.II, 2009 : 144-146.

⁶⁵ Report of the Independent International Fact-Finding Mission, Vol.II, 2009: 141.

there was no basis for remedial secession.⁶⁶ More importantly, in the context of international assistance and protection of rights by UN Security Council, the OSCE and other international organizations which have affirmed the territorial integrity of Georgia,⁶⁷ South Ossetia never disposed of an external right to self-determination. Even after the armed conflict in August 2008, the UN and other organizations reconfirmed the territorial integrity of Georgia.⁶⁸

In the same vein, the Abkhazian population can be indeed considered a people in terms of international law and hence inherits the right to self-determination, according to the International Fact-Finding Report. More interestingly, Abkhazia's status under the Soviet Constitution was that of a "Soviet Socialist Autonomous Republic" according to Art.85. Subsequently, it sought to become either independent of Georgia or integrated into Russia during the dissolution of the USSR, in the aftermath of the Belavezha Agreements of 1991 which conceded independence to former Soviet Socialist Republics. As Russia declined, it declared its independence as a sovereign state. At the moment of its declaration of independence, the Report notes, it had nevertheless already been an integral part of Georgia under domestic law,⁶⁹ an argument following the logic of *uti possidetis juris*.

A right to external self-determination – or remedial secession due to the grave violations of human rights and the urgency to become independent at that time

⁶⁶ *Ibid.*, 144.

⁶⁷ A full list of resolutions regarding the conflict in Georgia has been included in the Report of the Independent International Fact Finding Mission, Vol.II, 2009 : 145, see: "See SC Res 876 (1993), SC Res 896 (1994), SC Res 906 (1994), SC Res 937 (1994), SC Res 971 (1995), SC Res 993 (1995), SC Res 1036 (1996) SC Res 1065 (1996), SC Res 1124 (1997), SC Res 1150 (1998), SC Res 1150 (1998), SC Res 1187 (1998), SC Res 1225 (1999), SC Res 1255 (1999), SC Res 1287 (2000), SC Res 1462 (2003), SC Res 1494 (2003), SC Res 1524 (2004), SC Res 1554 (2004), SC Res 1582 (2005), SC Res 1615 (2005), SC Res 1666 (2006), SC Res 1752 (2007), SC Res 1781 (2007), SC Res 1808 (2008). For the Organization for Security and Cooperation in Europe (OSCE): Decision of the OSCE Budapest Summit, 6 December 1994; decision of the Oslo OSCE Ministerial Council on Georgia, 1 December 1998; Resolution on the conflict in Abkhazia, Georgia, adopted by the OSCE Parliamentary Assembly, Warsaw, 8 July 1997; Resolution of the OSCE Parliamentary Assembly adopted at the seventeenth Annual Session on the security environment in Georgia, Astana, 29 June to 3 July 2008; Resolution of the Parliamentary Assembly adopted at the fourteenth annual session on the situation in Abkhazia, Georgia, Washington, D.C., 1 to 5 July 2005. For the EU: Extraordinary European Council, Brussels 1 September 2008, Presidency Conclusions, 12594/2/08 REV 2; For the Council of Europe: Council of Europe Parliamentary Assembly Report Fifth sitting, 28 January 2009 Add. 2: "The humanitarian consequences of the war between Georgia and Russia" (Recommendation 1857 (2009) Parliamentary Assembly, Provisional edition). "The Humanitarian Consequences of the War between Georgia and Russia" (Parliamentary Assembly Doc. 11789 of 12 January 2009). "The implementation of Resolution 1633 (2008) on the consequences of the war between Georgia and Russia" (Parliamentary Assembly Doc. 11800 of 26 January 2009). "The consequences of the war between Georgia and Russia" (Parliamentary Assembly Resolution 1633 of 30 September and 2 October 2008). "The implementation of Resolution 1633 (2008) on the consequences of the war between Georgia and Russia" (Parliamentary Assembly, Provisional edition, Resolution 1647 of 28 January 2009)."

⁶⁸ *Ibid.*, 144.

⁶⁹ *Ibid.*, 146.

– was nevertheless never existent, given that ever since 1994, a UN Mission and a Commonwealth of Independent States (CIS) Mission had guaranteed the protection of Human Rights in Abkhazia. Thus, under Soviet law, Abkhazia did make use of its internal right to self-determination, while under Georgian law, the previously autonomous status had been revoked, a status cemented under the Georgian constitution.

As far as South Ossetia is concerned, the claims of sovereignty were ambiguous to the extent that the Ossetian authorities were looking to be recognized as independent states and yet at the same time pleaded for reintegration with North Ossetia and consequently with Russia.⁷⁰ While all “criteria of statehood in political and legal terms are gradual”,⁷¹ the Russian influence was too strong to justify independence as a sovereign state, in particular in the security and defense sector where Russian military personnel has been infiltrated ever since 2006. In addition, about 90% of populations on both territories possess Russian passports,⁷² thereby undermining territorial law of Georgia but also subjecting these peoples to Russian legislation in regards to social security, retirement benefits, and others. This puts the independence of both entities’ authorities in question. Simultaneously, the bilateral security and cooperation agreements with Russia as well as the financial support Russia lends to South Ossetia and Abkhazia, could qualify these entities as “Russian protectorates”⁷³. In South Ossetia, the situation seems rather dire, where 350 million Euros invested by Russia have been lost in dubious channels.⁷⁴ Abkhazia has for a long time tried to become more independent and less dependent on Russian aid. Since 1994 it has not sought to reintegrate with Russia, and has ever since become a „quasi-State“, while South Ossetia is qualified as an entity just “short of statehood”.⁷⁵ In conclusion, the Fact-finding Mission confirms that South Ossetia should not be recognized given its lack of statehood, while Abkhazia never disposed of the right to self-determination on an external level in the first place.⁷⁶

Finally, the events of August 2008 did not reinvigorate claims of independence or secession by Abkhazia, as it was not directly touched by Russian/Georgian aggression. Allegations of genocide towards Georgia, mainly advanced by South Ossetia, were largely exaggerated,⁷⁷ and hence neither Abkhazia nor

⁷⁰ Report of the International Fact-Finding Mission on the Conflict in Georgia, Vol.II, September 30, 2009, 129: <http://www.ceiig.ch/Report.html>

⁷¹ Ibid., 134.

⁷² Ibid., 14.

⁷³ Peter W. Schulze, “Geopolitics at Work: the Georgian-Russian Conflict”, *Göttingen Journal of International Law 1-2* (2009): 331.

⁷⁴ Uwe Halbach, “Georgienkrise” und “Kaukasuskonflikt”: Die regionale Dimension des neuerlichen Kriegs im Südkaukasus”, *EJM 1* (2009):14.

⁷⁵ Report of the International Fact-Finding Mission on the Conflict in Georgia, Vol.II, September 30, 2009, 135: <http://www.ceiig.ch/Report.html>

⁷⁶ Ibid., 135.

⁷⁷ The death toll is rather limited, therefore it is difficult to define the conflict as genocide, see

South Ossetia enjoyed a “renewed” right to secession. There was no new factual basis to justify a right to secession for Abkhazia.⁷⁸ In this respect, only internal self-determination in the form of either federalism or internal autonomy would have been (and potentially still is) an option for both entities.⁷⁹ Recognition by Russia in the end was aimed at compensating for these facts.

2.3. The Politics of Russian Recognition

As stated, the declaratory nature of recognition should only be appreciative of facts on the ground in terms of statehood. Thus, before August 2008, South Ossetia had not been recognized by any state, just like Abkhazia. On 26 August 2008, the President of the Russian Federation, Dimitri Medvedev, officially declared in a televised speech that “Russia has recognized the independence of South Ossetia and Abkhazia” taking into account “the expression of free will by the Ossetian and Abkhaz peoples”. He continued by stating, “That was no easy choice to make, but it is the sole chance of saving people’s lives.”⁸⁰ The official recognition act reads as follows: “Making this decision, Russia was guided by the provisions of the Charter of the United Nations, the Helsinki Final Act and other fundamental international instruments, including the 1970 Declaration on Principles of International Law concerning Friendly Relations among States. It should be noted that in accordance with the Declaration, every State has the duty to refrain from any forcible action which deprives peoples of their right to self-determination and freedom and independence, to adhere in their activities to the principle of equal rights and self-determination of peoples, and to possess a government representing the whole people belonging to the territory. There is no doubt that Mikhail Saakashvili’s regime is far from meeting those high standards set by the international community.”⁸¹ The texts the Russian Federation has evoked are thus all related to international law and stipulate principles of self-determination, statehood, secession and territorial integrity. In particular, the reference to “saving people’s lives” is an implicit reference to the Russo-Georgian war and alludes to a potential right to remedial secession, presupposing violence against South Ossetians as a fact. Other States were fast in condemning the recognition by Russia, such as France which deemed the act “a regrettable decision”. Great Britain reiterated its perception that this recognition was contrary to obligations Russia had accepted under various UNSC Resolutions, and does not support the peace process in the Caucasus in any way.⁸² Even the United States confirmed

Nussberger, “The War between Russia and Georgia”, 359-360.

⁷⁸ *Ibid.*, 363.

⁷⁹ Report of the Independent International Fact-Finding Mission on the Conflict in Georgia, Vol. II, 119

⁸⁰ *L’Express*, „La Russie reconnaît l’indépendance de l’Abkhazie et de l’Ossétie du Sud“, August 26, 2008, http://www.lexpress.fr/actualite/monde/europe/la-russie-reconnait-l-independance-de-l-abkhazie-et-de-l-ossetie-du-sud_554388.html

⁸¹ Declaration of the Minister of Foreign Affairs of the Russian Federation, August 26, 2008, www.mid.ru

⁸² *Ibid.*

that “for us, this decision is unacceptable. Russia has to respect the territorial integrity and sovereignty of Georgia.”⁸³ NATO, having had its own role to play in the Kosovo independence, declared its disapproval of the recognition as well, following which Russia replied that its condemnation was “a politically motivated, selective interpretation of international law, based on double standards.”⁸⁴

In the context of these statements, it is interesting to note that Russia applied the same principles it reiterated in its non-recognition case against Kosovo for recognizing Abkhazia and South Ossetia as sovereign states. Russia considered the Kosovo case as a precedent for other secessionist entities, which would have sparked further secessionist movements around the globe. However, the “precedent formula of Kosovo” was utilized selectively in its own recognition acts in order to exercise pressure on Georgia.⁸⁵ Already in 2006, Putin declared that “We need common principles to these problems for the benefit of all people living in conflict-stricken territories... If people believe that Kosovo can be granted full independence, why then should we deny it to Abkhazia and South Ossetia?”⁸⁶, hence interpreting international law according to Russian political motivations. It becomes evident from these declarations that Russia instrumentalized the Kosovo case for its own political agenda of further legitimizing the independence of Abkhazia and South Ossetia where it already had regional interests and a military presence.

By recognizing the Caucasus secessionist movements, Russia has made a play to consolidate its power in the Caucasus as a regional player.⁸⁷ It allows Russia to “legally” adopt bilateral treaties with the governments of the entities in question, and station troops on the territories through such agreements.⁸⁸ On a practical basis, this also means that Russia can agree to treaties with them in the economic, social, scientific-technical, information-sharing, cultural and education domain, a willingness it has already expressed.⁸⁹

On the other hand, recognitions of South Ossetia and Abkhazia by other States are in fact not necessarily significant, as Nauru has allegedly received extensive financial assistance by Russia following its recognition of Abkhazia and

⁸³ Bogomir, „La Russie reconnaît l’indépendance de l’Abkhazie et de l’Ossétie du Sud“, August 26, 2008, <http://www.theatrum-belli.com/archive/2008/08/26/la-russie-reconnaît-l-independance-de-l-abkhazie-et-de-l-oss.html>

⁸⁴ Ryngaert and Sobrie, “Recognition”, 482.

⁸⁵ Report of the Independent International Fact-Finding Mission on the Conflict in Georgia, Vol.II, 27

⁸⁶ AKCAKOCA, et al., *After Georgia: conflict resolution in the EU's Eastern Neighbourhood*, European Policy Centre 1 (2009): 9, in Report of the Independent International Fact-Finding Mission on the Conflict in Georgia, Vol. II, 26-27.

⁸⁷ Bernhard Knoll, „Kosovo: Statusprozess und Ausblicke auf die staatliche Souveränität“, OSCE Core Year Book (2008): 146.

⁸⁸ Schulze, “Geopolitics at Work”, 331.

⁸⁹ Report of the Independent International Fact-Finding Mission on the Conflict in Georgia, Vol.II, 27

South Ossetia, while Venezuela and Nicaragua are rumored to have profited from Russian investments, according to some reports.⁹⁰ Ultimately, given the lack of recognition or the outright non-recognition of these entities by some States and doubts on their *de jure* sovereignty in the context of lacking effectiveness (despite *de facto* governmental control with the help of Russia), the status of these territories remain to a large extent unresolved.

2.4. Consequences of Recognition: International Relations Assessment

What are in the end the practical implications for these entities as state or state-like entities which do not enjoy full rights under the international legal system due to their non-recognition? Compared to Abkhazia and South Ossetia, whose governmental effectiveness and independence is doubtful, Kosovo has – officially in September 2012 – attained full, unsupervised sovereignty. It was exercising an effective control over its territory and over 90% of its population (Northern Kosovo excluded).⁹¹ With the Priština-Belgrade Agreement of 18 April 2013⁹² on the normalization of relations between the two parties, an additional step towards full normalization between the parties and effectiveness of Kosovo has been achieved. Endorsed by the international community and facilitated by the EU, this agreement is historic as it allows both parties to move forward with their respective European paths. According to Clause N°14 of the agreement, “It is agreed that neither side will block, or encourage others to block, the other side’s progress in their respective EU path.” Additionally, Kosovo has become a member of the International Monetary Fund and the World Bank,⁹³ advancing on a practical level to working relations and arrangements in international fora. It is improbable for Kosovo to attain collective recognition by the UN in the near future, as a Security Council Recommendation to the General Assembly according to Art.4 of the UN Charter would be necessary for the formal admission of Kosovo into the UN, which Russia and China are likely to block. However, Kosovo is moving in the direction of attaining full direction, while this scenario is more than unlikely in the cases of South Ossetia and Abkhazia.

In fact, recognition has led to more issues on the resolution of conflict than it helped solve, in the sense that it worsened the pre-2008 period where control and administration of the territory was clearer and certainly calmer. In the current context, the question has become less of a legal nature, but focuses on

⁹⁰ Dimitri Vivodtzev „Nauru et le «business diplomatique»», March 31, 2011, <http://dimitri-vivodtzev.suite101.fr/nauru-et-le-business-diplomatique-a26935>

⁹¹ Wolfgang Benedek, “Implications of the Independence of Kosovo for International Law”: 407, in *International Law between Universalism and Fragmentation, Festschrift in Honour of Gerhard Hafner*, ed. Isabelle Buffard et al. (Leiden : IDC Publishers, 2009) : 391-412

⁹² Milena Stojilkovic, “Belgrade – Kosovo agreement text published”, April 19, 2013, <http://inserbia.info/news/2013/04/belgrade-kosovo-agreement-text-published/>

⁹³ International Monetary Fund (IMF), Press release 09/240, “Kosovo Becomes the International Monetary Fund’s 186th Member”, June 29, 2009, <http://www.imf.org/external/np/sec/pr/2009/pr09240.htm>

statuses of these entities and approaches the issue from an International Relations point of view. From this perspective, most theoreticians, such as Locke, Hobbes, Machiavelli, Hegel, Morgenthau, Carr, Waltz, Keohane or Krasner, States are “self-constituted and self-contained bodies”,⁹⁴ whose existence is conditioned by their capacity to constitute themselves as States and form effective governments. Recognition in the international relations realm is a dry and fussy exercise,⁹⁵ while mutual recognition for Grotius or Vattel is “at the heart of international society”⁹⁶ because it bestows legitimacy to the claimed sovereignty of an entity. They become members of the international society only by accepting obligations and rights which fall on them upon the affirmation of society, once they are in an interconnected web of States. What else is the purpose of the international community, if not to entertain relations with each other? If entities are not recognized however, they are not able to enjoy these prerogatives and hence their whole existence as a full-fledged State is put into question.

As of today, Abkhazia and South Ossetia have organized into “*de facto* states”, which according to Scott Pegg, “exist where there is an organized political leadership which has risen to power through some degree of indigenous capability; receives popular support; and has achieved sufficient capacity to provide governmental services to a given population in a specific territorial area, over which effective control is maintained for a significant period of time. The *de facto* state views itself as capable of entering into relations with other states and it seeks full constitutional independence and widespread international recognition as a sovereign state. It is, however, unable to achieve any degree of substantive recognition and therefore remains illegitimate in the eyes of international society.”⁹⁷ Consequently, internationalists have long argued for the establishment of a certain status for quasi- or *de facto* States in international affairs; while it may not be equal to that of a full-fledged sovereign State, there might be solutions to assign some kind of status to non-recognized entities. These entities do indeed profit from the protection of their territorial integrity through principles of non-intervention of external forces which apply, despite non-recognition.

A practical problem for the quasi-State is its heavy dependence on external aid, to “preserve their existence”.⁹⁸ The EU provides humanitarian aid to Abkhazia and South Ossetia, and Russia invests in the territories of the two entities for economic purposes. This external factor plays a crucial role for the survival of these entities, however subjects them to the will of foreign actors, subsequently

⁹⁴ Nina Caspersen and Gareth Stansfield, *Unrecognized States in the International System* (New York: Routledge, 2011): 3-4.

⁹⁵ In the same vein, see Mikulas Fabry, *Recognizing States: International Society and the Establishment of New States Since 1776* (Oxford: Oxford University Press, 2010); 2

⁹⁶ *Ibid.*, 3.

⁹⁷ Scott Pegg, *International Society and the De Facto State* (Aldershot : Ashgate, 1998) : 26

⁹⁸ *Ibid.*

putting into question the exact element of statehood they are claiming to have, effectiveness and independence. In addition, these States are often “politically and economically socialized”⁹⁹ in the eyes of the international community: They are pretending to be sovereign and want to demonstrate their ability to remain independent and entertain diplomatic relations with third countries, and therefore present themselves as “*de facto* sovereign”, respecting Human Rights on a domestic level, and posing as domestically legitimate. Their chances of getting recognized are higher if they aspire to international standards of human rights, hence the socialization in the international sphere. In this context, the Kosovo recognition is often considered as the confirmation of a “merited sovereignty”,¹⁰⁰ as it has dedicated itself to democracy and strives for the implementation of and the respect for human and minority rights. In Abkhazia, the authorities have aimed for an increasingly “inclusive national identity”¹⁰¹ along the same lines and invited Georgian displaced persons back to Abkhazia as an effort of good-will, but also to demonstrate its willingness to give into conditions by the international community. A direct consequence of this act is the fact that Abkhazia is perceived less as a quasi-State solely basing its legitimacy on the support of one particular ethnic group.¹⁰² Simultaneously however, the loss of momentum in the independence movements and the meager recognition wave even when they try to respect conditions by third parties, increases the risk of losing steam and deviation from reform implementation, as recognition seems - over the course of time - more unlikely.¹⁰³

On an economic level, the recognition of the Caucasus entities is also difficult, and their *de facto* status makes them the playing ground of “illicit economic activity”,¹⁰⁴ to the extent that stakeholders have an interest in upholding this semi-legal status.¹⁰⁵ The region of the Caucasus is assumed to have rich hydrocarbon reserves which have yet to be exploited; the Roki tunnel is the only commercial passage way from Georgia to the North and is located on the territory of South Ossetia. The existence of natural resources in this region is a positive factor which could potentially lead to increased efforts by the international community to resolve the conflict for the benefit of natural resources. This is also one of the reasons why the territorial questions in the Caucasus remain relevant, as South Ossetia and Abkhazia remain at the center of the international playing field.¹⁰⁶ Whether this will allow them to further advance their legitimacy is nonetheless doubtful and only a new status in international

⁹⁹ Ibid.

¹⁰⁰ The idea of “merited” or “earned sovereignty” is taken up in Caspersen and Stansfield, “Unrecognized States”: 60, 66

¹⁰¹ Caspersen and Stansfield, “Unrecognized States”, 86

¹⁰² Ibid., 86.

¹⁰³ Ibid., 87.

¹⁰⁴ Ibid., 134.

¹⁰⁵ Ibid., 134.

¹⁰⁶ Ibid., 24.

affairs for quasi-States with certain rights, duties and obligations could potentially benefit all stakeholders involved, to at least concede a certain existence to them in the international realm.

CONCLUSION – THE POLITICIZATION OF INTERNATIONAL LAW

This paper has maintained the position that international law, while posing the principles which should guide states for recognition, is not rigid, to the extent that it is subject to interpretation. A direct consequence is that while some States have recognized Kosovo as a sovereign State on the basis of self-determination of peoples and remedial secession, others have used the exact same argument in order to deny this recognition in the cases of Abkhazia and South Ossetia. The three entities share the qualities of quasi- or de facto States, although Kosovo finds itself on a path to consolidation of its legitimacy with over 100 recognitions by UN member States. At the same time, this is more difficult to conceive in the case of Abkhazia and South Ossetia. Russian recognition, having instrumentalized Kosovo's secession for political motifs, has only affirmed the frozen conflict, making its financial, economic and military support the only survival options for South Ossetia and Abkhazia.

Obviously, the three cases, and in particular the Kosovo case, have put international law to the test, because it has reinvigorated the debate on remedial secession, self-determination outside the colonial context, and questions regarding effective control over territory, statehood and the role of recognition. Although some authors might argue that Kosovo has not created a precedent in international law, a notion which deserves merit, it has nevertheless sparked unprecedented international debate on doctrine and the interpretation of international law and enabled Russia to derive its recognition towards South Ossetia and Abkhazia from the same principles. Hence, despite the obvious politicization of international law, the repeated insistence on each case not serving as a precedent makes further consequences of these cases for other secessionist movements unlikely. It is nonetheless clear that the role of recognition in international law remains of an ambiguous political nature which has constitutive effects depending on context, all the while ascertaining frozen conflicts as such, rather than resolving them. In particular the Russian interventionism in Crimea and the recent conflict in Ukraine bring the issue of statehood, (non-)recognition and the self-determination of peoples again to the forefront, in contrast to the principle of territorial integrity and inviolability of frontiers. The question thus remains unresolved and requires the international community to act and reflect upon the status of unrecognized entities.

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