



Universität Hamburg

Status of the *De Facto State* in Public International Law

A Legal Appraisal of the Principle of Effectiveness

by

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To my mom

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List of Abbreviations

AD	Anno Domini
ADB	Asian Development Bank
AIT	American Institute in Taiwan
AJIL	American Journal of International Law
AO	Autonomous Oblast
APEC	Asia-Pacific Economic Cooperation
Appl.	Application
ARATS	Association for Relations Across the Taiwan Straits
Art.	Article / Artikel
ASIL	American Society of International Law
ASSR	Autonomous Soviet Socialist Republic
Aufl.	Auflage
AVR	Archiv des Völkerrechts
BBC	British Broadcasting Corporation
BC	Before Christ
Bd.	Band
BIOst	Bundesinstitut für ostwissenschaftliche und internationale Studien
BVerfGE	Entscheidungen des Bundesverfassungsgerichts
BYIL	British Yearbook of International Law
CCNAA	Coordination Council for North American Affairs
cen.	century
CEPS	Centre for European Policy Studies
ch.	chapter

Chinese JIL	Chinese Journal of International Law
CIA	Central Intelligence Agency
CIS	Commonwealth of Independent States
CISPKF	Commonwealth of Independent States Peacekeeping Force
Col.	colonel
CPC	Confederation of the Peoples of the Caucasus
CSCE	Conference on Security and Cooperation in Europe
CVN	Charta der Vereinten Nationen
d.h.	das heißt
DPP	Democratic Progressive Party
EC	European Community
ECHR	European Court of Human Rights
ed.	edition / editor
eds.	editors
e.g.	exempli gratia
EJIL	European Journal of International Law
EOKA	Ellenikos Organismos Kypriakon Agoniston
EPC	European Political Cooperation
EPIL	Encyclopedia of Public International Law
et al.	et alii
etc	et cetera
EU	European Union
ff.	and following pages
FRG	Federal Republic of Germany
FRY	Federal Republic of Yugoslavia
FS	Festschrift
FW	Die Friedens-Warte

GATT	General Agreement on Tariffs and Trade
GDR	German Democratic Republic
GUS	Gemeinschaft Unabhängiger Staaten
HESt	Höchstrichterliche Entscheidungen in Strafsachen
Hrsg.	Herausgeber
HuV	Humanitäres Völkerrecht
Ibid.	ibidem
IBRU	International Boundaries Research Unit
ICCPR	International Covenant on Civil and Political Rights
ICJ	International Court of Justice
ICLQ	International and Comparative Law Quarterly
ICTY	International Criminal Tribunal for the former Yugoslavia
IDPs	Internally Displaced Persons
i.e.	id est
IGFM	Internationale Gesellschaft für Menschenrechte
IISS	International Institute for Strategic Studies
IJBL	International Journal of Baltic Law
ILM	International Legal Materials
ILR	International Law Reports
INTERFET	International Force for East Timor
IOC	International Olympic Committee
IP	Internationale Politik
IPG	Internationale Politik und Gesellschaft
JCC	Joint Control Commission
Jg. / Jhg.	Jahrgang
JPKF	Joint Peacekeeping Forces
JuS	Juristische Schulung

JZ	Juristenzeitung
Kavburo	Caucasian Bureau
KFOR	Kosovo Force
KLA	Kosovo Liberation Army
km.	kilometer
KMT	Kuomintang
LDK	Lidhja Demokratike e Kosovës
LJIL	Leiden Journal of International Law
LNOJ	League of Nations Official Journal
Lt.	lieutenant
MFA	Ministry of Foreign Affairs
MPs	Members of Parliament
NATO	North Atlantic Treaty Organization
NKAO	Nagorno-Karabakh Autonomous Oblast
no. / No.	number
Nos.	numbers
Nr.	Nummer
NZWehrr	Neue Zeitschrift für Wehrrecht
OAU	Organization for African Unity
OLG	Oberlandesgericht
OSCE	Organization for Security and Cooperation in Europe
p.	page
para. / paras.	paragraph / paragraphs
PCIJ	Permanent Court of International Justice
PISG	Provisional Institutions of Self-Government
PLO	Palestine Liberation Organization
pp.	pages

PRC	People's Republic of China
Pt.	Part
PVS	Politische Vierteljahresschrift
RDI	Revue de Droit International, de sciences diplomatiques et politiques
Rdnr.	Randnummer
REG	Regulation
Res.	Resolution
RIAA	Reports of International Arbitral Awards
ROC	Republic of China
ROCOT	Republic of China on Taiwan
RSFSR	Russian Soviet Federative Socialist Republic
SAYIL	South African Yearbook of International Law
SC	Security Council
SCOR	Security Council Official Records
Sec.	Section
SEF	Straits Exchange Foundation
Ser.	Series
SFRY	Socialist Federal Republic of Yugoslavia
SIPRI	Stockholm International Peace Research Institute
SSR	Soviet Socialist Republic
SVN	Satzung der Vereinten Nationen
SWAPO	South-West Africa People's Organization
TESG	Tijdschrift voor Economische en Sociale Geografie
TMR	Trans-Dniester Moldovan Republic
TRA	Taiwan Relations Act
TRNC	Turkish Republic of Northern Cyprus

TRNZ	Türkische Republik Nordzypem
TSFSR	Transcaucasian Socialist Federative Soviet Republic
UÇK	Ushtria Çlirimtare e Kosovës
UDI	Unilateral Declaration of Independence
UdSSR	Union der Sozialistischen Sowjetrepubliken
UK	United Kingdom
UN	United Nations
UNAMET	United Nations Mission in East Timor
UNFICYP	United Nations Force in Cyprus
UNGA	United Nations General Assembly
UNHCR	United Nations High Commissioner for Refugees
UNMIK	United Nations Interim Administration Mission in Kosovo
UNO	United Nations Organization
UNOMIG	United Nations Observer Mission in Georgia
UNPO	Unrepresented Nations and Peoples Organization
UNSC	United Nations Security Council
UNSCR	United Nations Security Council Resolution
UNTAET	United Nations Transitional Administration in East Timor
UNTS	United Nations Treaty Series
UP	University Press
US / U.S.	United States
USSR	Union of Soviet Socialist Republics
usw.	und so weiter
v.	versus
viz.	videlicet
Vol.	Volume
VR	Völkerrecht

VRÜ	Verfassung und Recht in Übersee
WTO	World Trade Organization
ZaöRV	Zeitschrift für ausländisches öffentliches Recht und Völkerrecht
Ziff.	Ziffer
ZRP	Zeitschrift für Rechtspolitik

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Abstract

Various ethnic groups and peoples of the globe fight for their future and the right of self-determination. Sometimes, after the factual withdrawal from the ambit of the authority of a “mother state”, they manage to gain *de facto* control over the contested territory, and in doing so, they assert the claim to separate existence. Indeed, there are various conflicts on our planet inspired by the idea of self-determination of peoples and it is extremely difficult to pass a judgment on those claims because somebody has to decide whether those aspirations are justified or not. The decision in question has to be taken on the international plane, i.e. according to the norms and principles of the international legal order.

But the present study is not aimed at evaluating the legitimacy of a claim to self-determination in each and every single case. The subject matter of my dissertation is a possible product of secessionist aspirations. My doctoral thesis has an objective to clarify the status of a *de facto state* within the realm of public international law on the basis of a legal appraisal of the principle of effectiveness.

Although it has been asserted that international law can accommodate *de facto states* by conceptual means as it is a flexible system adaptable to new developments¹, *de facto states* are still a problem. The reason is that generally, they exist somewhere on the edge of the international community, they are not fully integrated into the international system. It has to be stressed that this ambiguity concerning the status of the entities mentioned above has also affected international legal literature in that it promoted keeping these territorial units in the “shadow”². Nevertheless, as has already been mentioned above, there is one concept that is informative with regard to *de facto states*, this is the principle of effectiveness, the latter representing the foundation of a *de facto state's* existence. The fact that, in contrast to the different nation states of our planet, there are neither central legislative

¹ See S. Pegg, *International Society and the De Facto State*, Aldershot / Brookfield, 1998, p. 244

² “The combination of their small size, their limited numbers, their ambiguous status, and their conventional goals (sovereignty as constitutional independence) have all kept *de facto* states out of the international theoretical limelight.”, *Ibid.*, p. 246 (italics in original)

organs nor central law-enforcement authorities at the international level, makes the informative principle of effectiveness an issue of overwhelming importance if one tries to examine the status of the *de facto state*. International legal order is a system created by states as they are legislators and, at the same time, addressees of international legal rules, and the principle of effectiveness, being a mediator between the established factual situation, i.e. the *de facto state*, and public international law, stands out against this background as an expression of the factual state of affairs.

Definition of the Subject Matter

The objective of this doctoral dissertation is to clarify the status of a *de facto state* within the realm of public international law. In order to carry out this task, it is important to fix the definition of the subject that has to be examined throughout the study. It follows that I use the term “*de facto state*” instead of “*de facto regime*”. It is momentous to explain the delimitation of the subject in question towards this concept.

De facto regime

With regard to the notion of the “*de facto regime*” it has to be stressed that, in my opinion, the word “*regime*” is too narrow to encompass all those difficult constellations which are connected with *de facto* territorial situations. The notion of “*regime*” denotes the subjective nature of the situation involved. But, as the starting point of my study is the issue of statehood, the subject of the paper has to be introduced and examined by objective means, the concept, as such, must be one with objective characteristics. For the purpose of public international law the word “*regime*” has the following implications:

“1) The current government of a territory. 2) A set of rules which apply to a particular place or activity [...]”³

³ J. R. Fox (ed.), *Dictionary of International and Comparative Law*, Dobbs Ferry, N.Y., 1992, p. 372

Black's Law Dictionary refers to the notion of an "international regime" and also clarifies the essence of a "legal regime". Both manifestations have been described as "a set of rules, policies, and norms of behaviour [...] that facilitate substantive or procedural arrangements"⁴ in respective fields.

It has to be noted that a *de facto state* is a "political animal"⁵ and the word "regime" has its definition within the realm of politics as such. It must be stressed that it is again a respective form of government which occupies the prominent place in the definition mentioned above, as reference has been made to authoritarian or military regimes in this sense.⁶

The subject of examination in this study is more than a government of a respective territory. A distinction has to be made between a *de facto state* and a *de facto government*. This latter manifestation of a *de facto* situation exists when there is a recognized state controlled by an unrecognized government. In contrast to this state of affairs, the scope of examination of the present project is focused on an unrecognized territorial unit, as such, bearing in mind an issue of overwhelming importance, namely the question of statehood within the realm of public international law. Thus, it is evident that the notion of a "*de facto regime*" does not express the dimensions of the situation which has to be regarded as the subject of examination of the present study.

Why the term "de facto state"?

I have decided to use the term "*de facto state*" because it expresses the objective character of territorial situations irrespective of the status of elites governing the territorial unit in question. It is apparent that the term "*de facto state*" describes the dimensions of the situation which has to be examined in this study. The question of self-contained existence is of particular relevance to my project: is there a real self-contained regime in which a *de facto* territorial unit exists or is its standing governed by the

⁴ B. A. Garner et al. (eds.), Black's Law Dictionary, 7th ed., St. Paul, Minn., 1999, p. 1286

⁵ S. Pegg, International Society and the *De Facto* State, Aldershot / Brookfield, 1998, p. 29

⁶ See D. Nohlen et al. (Hrsg.), Lexikon der Politik, Bd. 7, Politische Begriffe, München, 1998, p. 548

international legal order? These are the issues which will be addressed in my doctoral thesis and which confirm the relevance of the concept of “*de facto state*” to the project.

Distinct concepts by different scholars

Pål Kolstø

It has to be stressed at this point that different terms have been suggested in international legal and political literature describing the situation which is the subject of examination of the present study. According to Kolstø, there is terminological confusion with regard to the notion of “quasi-states” as this designation is frequently used in respect of manifestations representing two opposite poles: the first one is a recognized state which has no effective machinery to assert factual control over its whole territory, the second case refers to the situation in which a region of a respective state has seceded from that state and has gained effective territorial control over a portion of the land claimed by its elites, but the lack of recognition is its essential feature. The author asserts that “in order to clear up this confusion, recognized but ineffectual states ought to be referred as ‘failed states’, while the term ‘quasi-states’ ought to be reserved for unrecognized, *de facto* states.”⁷ This conclusion is a convincing one and it entails a clear differentiation between individual characteristics of the situations depicted above.

It is of overwhelming importance to note that the concept of sovereignty is crucial in the context of clarifying the status of the territorial entities involved. Kolstø asserts that modern states are in possession of double sovereignty: internal (*vis-à-vis* their citizens) and external (*vis-à-vis* foreign states) and it follows that failed states and quasi-states represent deviations from this “normal” situation as the first category lacks internal sovereignty despite its international recognition and in the second case “the state as such is not accepted by the international community as legitimate.”⁸ It has to be

⁷ P. Kolstø, *The Sustainability and Future of Unrecognized Quasi-States*, in: *Journal of Peace Research*, Vol. 43, 2006, p. 723

⁸ *Ibid.*, p. 724

stressed that the decisive question in this instance is that of external sovereignty because the denial of status is not based on the assessment of a state's internal capabilities, the reason is that the entity in question has emerged on the basis of a secession from the ambit of the authority of a "mother state" and the loss of territory, as such, is not accepted by the latter.⁹ Bearing in mind these considerations, it becomes evident that the interplay of dimensions of the notion of sovereignty is a decisive matter.

Michael Rywkin

Rywkin refers to "quasi-states" and introduces their characteristic features: detachment from a "parent state" as a result of an ethnic or religious conflict or state disintegration, the wrong policy of a respective "mother state" causing fear among the population of the territory in question, existence of an outside protector supporting the claims of the quasi-state, lack of substantial recognition of the quasi-state, the fact that despite their need for external support, these territorial units function like real states.¹⁰

Charles King

King uses the term "unrecognized states" while referring to respective territories located in Eurasia and describes these entities in the following manner: "All have the basic structures of governance and the symbols of sovereignty. All have military forces and poor but working economies. All have held elections for political offices."¹¹ This statement demonstrates once again that the territorial units in question operate like genuine states.

Randall Baker

Baker mentions "states' that exist *de facto* but not *de jure*."¹² At the same time, the author describes these entities as "non-places" existing in an "unacknowledged condition"¹³.

⁹ *Ibid.*

¹⁰ M. Rywkin, The Phenomenon of Quasi-states, in: Diogenes, Vol. 53, 2006, p. 27

¹¹ C. King, Eurasia's Nonstate States, in: East European Constitutional Review, Vol. 10, 2001, p. 99

¹² R. Baker, Challenges to Traditional Concepts of Sovereignty, in: Public Administration and Development, The International Journal of Management Research and Practice, Vol. 20, 2000, p. 7 (emphasis and italics in original)

¹³ *Ibid.*

Vladimir Kolossov / John O'Loughlin

The variety of approaches with regard to the terminology employed while describing the subject in question also covers the notion of “pseudo-states”. It is the manifestation depicted as an “institutionalized pseudo-state” which causes academic interest because these entities represent territorial units that have declared sovereignty, are in possession of all the necessary attributes of a ‘normal’ state, control their respective territories, but are not recognised as states (and have little chance of recognition).¹⁴

Deon Geldenhuys

The term “isolated state” has been suggested by Geldenhuys in order to define respective territorial situations.¹⁵ It has also been stressed by this author that the designations “pariah” and “outcast” have been used on the international plane but he prefers to use the term “*ostracised state*”¹⁶ in this context.

Dov Lynch

Lynch describes *de facto* territorial units as “separatist states”¹⁷. The author asserts that post-Soviet entities of this kind derive support from two legal sources which should guarantee their legitimacy. The first one is considered to be an empirical definition of sovereignty based on the 1933 Montevideo Convention and denoting the fulfillment of necessary conditions in order to be regarded as a bearer of positive sovereignty. This means that the entity in question satisfies the traditional or empirical criteria for statehood and provides governmental services to its population. The second source of legitimacy is based on the right of peoples to self-determination. Respective elites claim that the right of all peoples to self-determination is applied to the territory and population they represent.¹⁸ It has been stressed by the author that the demand for statehood has its historical or moral backing and,

¹⁴ V. Kolossov / J. O'Loughlin, Pseudo-States as Harbingers of a New Geopolitics: The Example of the Trans-Dniester Moldovan Republic (TMR), in: Geopolitics, Vol. 3, 1998, p. 155

¹⁵ D. Geldenhuys, Isolated States: A Comparative Analysis, in: S. Smith et al. (eds.), Cambridge Studies in International Relations: 15, Cambridge et al., 1990, p. 4

¹⁶ *Ibid.*, p. 16 (italics in original)

¹⁷ D. Lynch, Separatist states and post-Soviet conflicts, in: International Affairs, Vol. 78, 2002, p. 831

¹⁸ *Ibid.*, pp. 836-837

on the basis of this contributing factor, respective elites in *de facto* territorial units assert their claim to absolute sovereignty, because any compromise would be considered an expression of injustice bearing in mind the fact that separatist leaders “insist on an inherent moral entitlement to self-determination in the face of ‘alien’ and ‘imposed’ rule.”¹⁹

It has to be noted at this point that the term “self-declared state” has been employed by the same author in another article with regard to the Pridnestrovyan Moldovan Republic, the Republic of South Ossetia, the Republic of Abkhazia and the Nagorno-Karabakh Republic.²⁰ Sometimes these entities are described as “breakaway regions” because the mode of their emergence is, in most cases, the notion of secession from a “mother state”. Lynch asserts that it is wrong to designate these areas as “breakaway regions”. According to him, separatism has to be regarded in these territories as a political project in furtherance of a people’s right to self-determination: “The fundamental project in each region has been the construction of the political institutions of independent statehood.”²¹ The second argument is that statehood that has been declared, serves as an impediment to progress which has to be achieved in respect of the conflict settlement.²²

The third reason is that separatist movements seeking the realization of the right of peoples to self-determination aspire after statehood, as such, because of the absolute nature of state sovereignty, other forms of existence are not suitable for them.²³ It has been stressed by the author that the issue of statehood is attractive to the elites because recognized sovereignty denotes protection, and guarantees a place in the international society of states, meaning the application of the principles of territorial integrity and equal sovereignty and the norm concerning non-intervention: “The separatist ‘state’ is not protected by the rules governing the legal state

¹⁹ *Ibid.*, p. 837 (emphasis in original)

²⁰ See D. Lynch, *De facto* ‘States’ around the Black Sea: The Importance of Fear, in: Southeast European and Black Sea Studies, Vol. 7, 2007, p. 484

²¹ *Ibid.*, p. 486

²² *Ibid.*

²³ *Ibid.*

regime, [...] This system pushes a separatist area towards the pursuit of full state sovereignty.”²⁴

The issue of statehood and the notion of secession, their relevance to the subject matter

It is evident from these considerations that striving for statehood is an essential feature of *de facto* territorial units and this circumstance is of great importance with regard to the present study as it represents the “starting point” for the examination of the status of those entities. This assertion has been confirmed by Radoman. According to her, respective elites of South Ossetia and Abkhazia emphasize that the institutions established in these areas can function as “normal” political organs and as a result, the territorial units in question can survive outside the ambit of the authority of a “mother state”, i.e. Georgia: “In this way both the rebels and secessionists seek to obtain the legitimacy of state creators.”²⁵ It is obvious that those elites try to legitimize their claims by asserting that they do create states, as such. In order to achieve this goal, it is necessary to find an appropriate form to further those claims. But, first of all, it is momentous to “initiate a process”, namely the process which would underscore the distinctiveness of the ethnic group in question. The notion of a secessionist bid is exactly the issue that encompasses the dynamics of this whole advance:

“Secessionist conflicts are defined here as violent confrontations between a state and an armed grouping seeking to take control over territory within the state with the aim of establishing an independent state.”²⁶

The question of secession is of great importance because it essentially denotes the mode of the emergence of a *de facto* territorial unit and it will be argued in the present paper that the status of that unit is strongly dependent upon the circumstances in which such an emergence took place.

²⁴ *Ibid.*, p. 487 (emphasis in original)

²⁵ J. Radoman, Future Kosovo Status-Precedent or Universal Solution, in: Western Balkans Security Observer-English Edition, Issue no. 3, 2006, p. 17

²⁶ P. K. Baev, Russia’s Stance Against Secessions: From Chechnya to Kosovo, in: International Peacekeeping, Vol. 6, 1999, p. 73

The concept of a “de facto state” and its dimensions

Definition of the term

It is essential at this stage to introduce the highly probable result of a secessionist attempt mentioned above, i.e. the definition of the subject of my dissertation together with its dimensions. These theoretical considerations rest on Pegg’s definition of the *de facto* statehood and its characteristic features. The explanation mentioned above is of such importance that it has to be quoted at some length:

“A *de facto* state exists 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.”²⁷

This is the definition of *de facto* statehood which must be regarded as a starting point within the framework of the present thesis. It has to be stressed that all these elements that supplement each other and represent in conjunction the notion of the *de facto state*, can vary with regard to different situations. For example, one entity can enjoy more popular support than another or can exist for a longer period of time etc.

The main feature of the *de facto state* is that it enjoys effective control over the territory in question but this control is not recognized by the international community. This lack of substantive recognition is its hallmark. The effectiveness of respective entities is informative with regard to their status because it represents the “basis” of their existence. Thus, the principle of effectiveness is the focus of my paper. Moreover, it is a central

²⁷ S. Pegg, *International Society and the De Facto State*, Aldershot / Brookfield, 1998, p. 26

question, the subject of examination in connection with the status of the *de facto state*.

Dimensions of de facto statehood

The following dimensions of *de facto* statehood have been mentioned by Pegg in order to distinguish the *de facto state* from other territorial units: 1) *de facto* states vs. a power vacuum or state-less situation; 2) *de facto* states vs. riots, terrorists, sporadic violence and random banditry; 3) perseverance, length of time; 4) there is a goal and the goal is sovereignty as constitutional independence; 5) secession vs. emigration, the need for a territorial justification; 6) *de facto* states vs. puppet states; 7) *de facto* states vs. peaceful secession movements; 8) *de facto* states vs. other non-sovereign entities with greater international legitimacy; 9) *de facto* states vs. the premature recognition of colonial liberation movements; 10) democratic accountability.²⁸

The first criterion denotes that generally, a *de facto state* effectively controls part of a “mother state” but it does not mean that each and every single situation where this state cannot exercise power with regard to the part of its own territory, leads to the creation of the *de facto state*. The second criterion refers to the *de facto state* as a system having clear political goals, providing governmental services and enjoying a high degree of popular support.

Of course, there are no mandatory requirements with regard to the period of time needed for the existence of a *de facto state*. This period can differ in various situations. But it is interesting that the *de facto* status of a territorial entity existing for less than one month has been rejected by the author and two years have been established “as the minimum time period necessary to qualify as a *de facto state*.”²⁹

Although a *de facto state* can be forced to accept another status, its goal is primarily to achieve sovereignty as constitutional independence, so it does not seek other arrangements within an existing state. The fifth criterion

²⁸ *Ibid.*, p. 29

²⁹ *Ibid.*, p. 32 (italics in original)

expresses territorial concern of the *de facto state*'s claims as it “seeks to secede from the existing state and to take its territory with it.”³⁰ In doing so, it tries to establish a claim with regard to the territory in question, the claim which could be justified. This justification is declared to be self-determination of peoples, a concept favoured by leaders of the *de facto state*. An important link is made between the self-determination of peoples and the *de facto state* in this way: the link is the notion of secession with its territorial dimension. With regard to criterion number six it can be asserted that the development of a *de facto state* in the direction of puppet statehood is not excluded but, generally speaking, these two entities are different. A puppet state is controlled by a foreign power and enjoys less popular support than a *de facto* one.

One important feature that differentiates peaceful secession movements from *de facto states* is an agreement between a “mother state” and a secessionist entity on the issue of secession, the agreement that is followed by respective arrangements. According to criterion number eight, a distinction can be made between the status of a *de facto state* and the status of a protectorate or colony, or the territory which is associated with another state by constitutional means, the status that was chosen by a respective entity. As is evident from criterion number nine, it refers to the colonial situation, namely to the colonial liberation movements. It is expressed in the tenth criterion that the *de facto state* with a democratic system has a better chance of success in the end. As the democratic form of governance is generally favoured, there is a supposition that the international community will be sympathetic towards such an entity. Of course, this does not mean that a democratic system is a guarantee of future success.

Lack of “substantive recognition” – a hallmark of *de facto* statehood

It must be noted that the comparison between empirical and juridical dimensions of statehood is an integral part of Pegg's definition cited above.

³⁰ *Ibid.*, p. 35

Moreover, it represents the core of a subject. Empirical statehood rests on the principle of effectiveness, i.e. the traditional criteria for statehood enshrined in the Montevideo Convention of 1933³¹ and the juridical criteria are essentially based on the principle of legitimacy. These two aspects of the question of statehood are of overwhelming importance with regard to my project as the issue of statehood itself represents the starting point in respect of the examination of the *de facto state's* status. Lynch has acknowledged the relationship of tension between these two elements inherent in the definition quoted above and he notes the following: "In this light, the *de facto* 'state' has no judicial right to claim a certain territory as this land already is part of a recognised state. However, such an entity may make the case for an empirically defined claim to statehood."³²

Thus, the subject of the present thesis is to clarify the status of the *de facto state* on the basis of the principle of effectiveness. In order to perform this task, it is inevitable to consider the issue of statehood, as such, i.e. to make a careful assessment of the situation connected with the criteria for statehood. The reason is that *de facto states* are territorial entities which carry out the normal functions of a state, and which (generally) enjoy the support of significant parts of their population, but they are not "*de jure states*", because they are not sanctioned by the international order.³³

It follows that *de facto states* do have a problem of substantial character as their existence is not "sanctioned" by the international system. But if these territorial entities are not "sanctioned", where do they function? Where is the place of *de facto states*? An answer has been provided with regard to the environment in which these territorial units operate. This situation represents "a state of no peace and no war, where *de facto* states survive in a functional state of legal limbo."³⁴ Clarification of the status of the *de facto state* requires an introduction of the position occupied by it. The objective of

³¹ The issue of traditional criteria for statehood will be addressed below and respective developments with regard to this question will also be examined in the present study

³² D. Lynch, *De facto* 'States' around the Black Sea: The Importance of Fear, in: Southeast European and Black Sea Studies, Vol. 7, 2007, p. 485 (italics and emphasis in original)

³³ See J. McGarry, Foreword: De facto states and the international order, in: T. Bahcheli et al. (eds.), *De Facto States, The quest for sovereignty*, London / New York, 2004, p. x

³⁴ W. Kemp, Selfish Determination: The Questionable Ownership of Autonomy Movements, in: *Ethnopolitics*, Vol. 4, 2005, p. 86 (italics in original)

the present study is to demonstrate this standing within the realm of public international law despite the assertion that “*de facto* states operate outside international law [...]”³⁵. The problem of a *de facto state*’s “unsanctioned existence” is expressed through the lack of “substantive recognition” of the territorial entity in question. It is important at this stage to refer to the essence of this kind of recognition:

“To attain substantive recognition, an entity would need success in at least a majority of the following five areas. First, it would secure recognition from some of the major powers of the day [...] Second, it would secure recognition from the existing juridical state which it was seeking to leave, or at least no objections from them to others recognizing it [...] Third, it would secure recognition from neighbouring countries and countries with which it shares borders. Fourth, it would secure recognition from a majority of countries in the UN General Assembly. Fifth, it would be able to participate in global and regional international organizations.”³⁶

These are the dimensions of the notion of substantive recognition against which the status of *de facto states* has to be measured in the part dedicated to the case studies.

Author’s terminological choice: the concept of the “*de facto state*”

Bearing in mind the considerations mentioned above and the variety of terms employed for the description of the territorial unit in question, it has to be stressed that the definition used in this dissertation is the “*de facto state*”. This definition underscores the relevance of the principle of effectiveness to the subject in question. The territorial unit, the status of which has to be examined in this study is an expression of the factual state of affairs, it is a fact, as such. Moreover, it is an accomplished fact and the “*de facto*” or factual character of the situation involved means that this wording falls within the scope of the notion of effectiveness and its

³⁵ *Ibid.*, p. 88 (italics in original)

³⁶ S. Pegg, *International Society and the De Facto State*, Aldershot / Brookfield, 1998, p. 38

manifestations which will be examined in the present paper. According to Palmer, “*De facto* is a term used to describe the objective existence of a state of facts which otherwise lack legal force or effect.”³⁷ This is exactly the notion that falls within the purview of my thesis as the subject of examination.

As with regard to the word “*state*” it has to be noted that the entity in question represents an aspirant for statehood and the issue of statehood has to be considered as the starting point with regard to the status of this entity. Hence, the term “*state*” has to be established as an appropriate designation of the subject in question.

³⁷ D. G. Palmer Jr., Taiwan: *De Jure* or Not *De Jure*? That is the Question. An Analysis of Taiwan’s Legal Status Within the International Community, in: John F. Kennedy University Law Review, Vol. 7, 1996, footnote 12, p. 68 (italics in original)

Outline of the Project and Methodical Approach to the Subject Matter

The present study has an objective of theoretization of law-fact interaction within the realm of public international law and, at the same time, it is aimed at introducing the status of the *de facto state* with reference to the attitude of the international community towards this kind of territorial entity. I have divided my doctoral dissertation into two parts encompassing ten chapters. The first part of my dissertation represents the theoretical framework dedicated to three different approaches to the principle of effectiveness: the manifestation known as “*normative Kraft des Faktischen*”, the concept of “*ex factis jus oritur*” and the notion of “*fait accompli*”.

The first chapter explores the notion known as “*normative Kraft des Faktischen*”, being an expression of the very essence of alleged law-creating force of effective situations. The second one refers to the concept described as “*ex factis jus oritur*”, being an expression of the fulfillment of traditional or empirical criteria for statehood based on the principle of effectiveness. It has to be stressed that the issue of statehood will be regarded as a theoretical “chapeau” and the guideline for the elaboration of the status of the *de facto state* within the realm of public international law. In order to rebut the argument denoting a self-evident normative force of effective situations in the form of *de facto states*, the cases of Katanga, Biafra, Southern Rhodesia and the South African homelands will be referred to in a separate section of the second chapter.

The notion of “*fait accompli*” will be considered in the third chapter as the final “level” of theoretization of the principle of effectiveness. This manifestation represents the political component of public international law implying the maintenance of an effective situation as a matter of political interest pursued by certain members of the international community of states. The problem of secessionist self-determination is an issue of overwhelming importance in the context of emergence and existence of *de facto states*. Secession will be considered in my dissertation as a means of creation of the *de facto state*. So, together with the examination of

theoretical approaches to the concept of secession, the fourth chapter will refer to the case of Chechnya, the latter being an example confirming the difficulty connected with the realization of secessionist claims.

In the second part of the present thesis, I will explore the peculiarities of five *de facto states* on the basis of the case studies: chapter 5 – the “Republic of China on Taiwan”, chapter 6 – the “Turkish Republic of Northern Cyprus”, chapter 7 – the “Republic of Kosovo”, chapter 8 – the “Republic of Abkhazia” and chapter 9 – the “Republic of South Ossetia”. I will approach each *de facto state* from a different viewpoint and there will be no standard approach applicable to all of them. The point here is that those distinctive features of the territorial units under consideration will be regarded as particular manifestations of the principle of effectiveness. This method implies the examination of the normative character of the principle of effectiveness and is aimed at drawing a respective conclusion with regard to the normative value of the principle in question.

There will be two common features inherent in the method employed for the exploration of the status of respective *de facto states*. I will examine each case, on the one hand, with reference to its political setting and, at the same time, in the international legal context. Furthermore, I will apply the “substantive recognition test” to each and every single case, in order to clarify the status enjoyed by respective territorial entities.

Following the case studies, the notion of recognition will be addressed. The concept in question is informative with regard to the very essence of *de facto* statehood because the lack of substantive recognition is a hallmark inherent in the definition of the *de facto state* and, accordingly, recognition as a state has its direct impact on the status enjoyed by *de facto* territorial entities. The section dedicated to the concept of recognition encompasses the examination of theoretical considerations and dimensions of recognition (and non-recognition) of statehood and the practice of recognition.

The present study includes preliminary remarks expressing important “findings” of my dissertation at different stages of the exploration of the subject matter. Those results will be summarized in the final section

dedicated to the conclusions. The latter embodies the concluding assessment of the principle of effectiveness in the context of *de facto* statehood and the subsequent introduction of the status of the *de facto state*. But, before addressing the questions mentioned above, it is important to begin the exploration of the issue of law-fact interaction in international law and this will be done in the introductory section submitted below.

Introduction: General Problem of Law-Fact Interaction within the Realm of Public International Law

The essence of the “special relationship” of the principle of effectiveness and public international law in the context of states’ emergence and existence denotes the relationship of tension between two important manifestations, namely the law-fact interaction. It is an alleged law-creating influence of facts which is of decisive importance with regard to the *de facto state*. This influence will be examined thoroughly in the present study.

The above mentioned law-creating influence of facts encompasses “many faces” of the principle of effectiveness: *normative Kraft des Faktischen*, *ex factis jus oritur* and *fait accompli*. These manifestations have been examined by eminent legal writers and each “face” of the principle of effectiveness deserves to be considered appropriately in the context of the examination of a *de facto state’s* status under public international law. But before addressing the issue of different embodiments of the principle of effectiveness, it is important to refer to the reasons why the notion of effectiveness has played such a prominent role within the realm of public international law. Interestingly enough, this reference leads us to the very nature of the latter, to the core of the international legal system.

Distinguishing features of public international law: why do facts matter?

“We must not confuse the pathology of law with law itself.”³⁸

It is widely recognized that public international law is a *sui generis* system of rules and principles³⁹ and differs from the national legal order of a particular state. One important feature of public international law which is decisive in the context of the law-fact interaction seems to be its special

³⁸ M. Akehurst, *A Modern Introduction to International Law*, 5th ed., London, 1984, p. 7

³⁹ See B. Broms, *Subjects: Entitlement in the International Legal System*, in: R. St. J. Macdonald / D. M. Johnston (eds.), *The Structure and Process of International Law: Essays in Legal Philosophy Doctrine and Theory, Developments in International Law*, The Hague, 1983, p. 384

“vulnerability” to the existence of a particular *de facto* situation, i.e. the factual situation determines an emergence of a legal right (or a title) after it has been firmly established, after it has become effective. It has to be mentioned that this characteristic of public international law rests on the decentralized nature of the latter. The lack of a central enforcement organ has been regarded as a source of alleged “weakness” of this legal system in the sense that it cannot overcome the reality by effective means, it cannot regulate facts without “paying tribute” to them:

“Das Völkerrecht muß [...] aus eigener Kraft und auf eigenartige Weise alles das bewirken, was für staatliche Rechtsordnungen der Staat bewirkt. Will man wissen, um was es sich hierbei handelt, so ergibt sich eine erste Orientierung dadurch, daß man die Leistungen des Staates für die staatsverbundenen Rechtsordnungen in Betracht zieht. Man wird finden, daß jeder dieser Leistungen jeweils eine spezifische Art von Selbsthilfe des Völkerrechts entspricht. Alle diese Selbsthilfen wiederum werden einen Zug aufweisen, der hier mit „Prinzip der Effektivität“ bezeichnet und als die besondere Wirklichkeitsnähe des Völkerrechts verstanden wird.”⁴⁰

As it has been mentioned above, this “particular proximity to reality”⁴¹ finds a certain degree of justification within the realm of public international law because the latter lacks central enforcement organs, this system represents a decentralized one, its nature can also be described as horizontal (contrary to the vertical national order).⁴²

The national legal system is highly developed. There is a constitution of a respective state, there are other legal acts that deal with different forms of jural relations within the internal order and there is an enforcement machinery that backs this whole system. State authority rests on the principle of the separation of powers and guarantees the functioning of domestic institutions:

⁴⁰ H. Krüger, Das Prinzip der Effektivität, oder: Über die besondere Wirklichkeitsnähe des Völkerrechts, in: D. S. Constantopoulos et al. (Hrsg.), Grundprobleme des Internationalen Rechts, FS für J. Spiropoulos, Bonn / Düsseldorf, 1957, p. 265

⁴¹ See G. Kreijen, State Failure, Sovereignty and Effectiveness, Legal Lessons from the Decolonization of Sub-Saharan Africa, Leiden, 2004, pp. 180-181

⁴² See E. Blenk-Knocke, Zu den soziologischen Bedingungen völkerrechtlicher Normenbefolgung, Die Kommunikation von Normen, Ebelsbach am Main, 1979, p. 64

“By contrast, in the international community no State or group of States has managed to hold the lasting power required to impose its will on the whole world community. Power is fragmented and dispersed. [...] The relations between the States comprising the international community remain largely *horizontal*. No *vertical* structure has as yet crystallized, as is instead the rule within the domestic systems of States.”⁴³

One can compare the “particular proximity to reality” of public international law mentioned above with the structural capabilities of a national legal order and the result will be following:

“Das staatliche Gesetz kann die Entfernung von Norm und Wirklichkeit sehr viel weiter bemessen als staatloses Gewohnheits- oder Vereinbarungsrecht, und das heißt wiederum, daß das staatliche Gesetz von vornherein sehr viel strengere materielle Anforderungen an die Wirklichkeit richten kann als ein ohne staatliche Hilfe existierendes Gewohnheits- oder Vereinbarungsrecht.”⁴⁴

It is evident that the decisive criterion for Krüger is that of “statelessness of the international legal order”⁴⁵ as there is no central authority which could effectively enforce respective decisions on the international plane. An emergence of the notion of self-help within the realm of public international law is connected with this statelessness (*Unstaatlichkeit*) of the international legal order, it follows that public international law is regarded as a weak system and its realization depends on the interests of respective powers.⁴⁶

Another author argues in the same sense that the effectiveness of public international law strongly depends on its social foundation as it represents the system without a central authority:

⁴³ A. Cassese, *International Law*, Oxford, 2001, p. 5 (italics in original)

⁴⁴ H. Krüger, *Das Prinzip der Effektivität, oder: Über die besondere Wirklichkeitsnähe des Völkerrechts*, in: D. S. Constantopoulos et al. (Hrsg.), *Grundprobleme des Internationalen Rechts*, FS für J. Spiropoulos, Bonn / Düsseldorf, 1957, p. 266

⁴⁵ See G. Kreijen, *State Failure, Sovereignty and Effectiveness*, *Legal Lessons from the Decolonization of Sub-Saharan Africa*, Leiden, 2004, p. 179

⁴⁶ “Die Unstaatlichkeit des Völkerrechts gebietet vielmehr, seine Verwirklichung primär an die Selbstwirksamkeit der Interessen zu knüpfen.”, H. Krüger, *Das Prinzip der Effektivität, oder: Über die besondere Wirklichkeitsnähe des Völkerrechts*, in: D. S. Constantopoulos et al. (Hrsg.), *Grundprobleme des Internationalen Rechts*, FS für J. Spiropoulos, Bonn / Düsseldorf, 1957, p. 275

“ [...] eine Diskrepanz von Recht und generellen, sozialen Tatsachen ist in keinem Rechte so selten wie im Völkerrecht, weil eben dieses Recht mangels einer mit selbständiger Macht ausgestatteten Sozialorganisation sich nie gegenüber seiner sozialen Grundlage stark verselbständigen kann.”⁴⁷

Krieger asserts that a legal order with a central enforcement authority guarantees a higher degree of independence of law and the latter can make demands on the reality.⁴⁸ The situation with regard to public international law seems to be quite different:

“Eine Rechtsordnung aber wie das Völkerrecht, das als Recht der selbstherrlichen Gemeinschaften, der Staaten, über eine koordinationsrechtliche Struktur verfügt, weist eine geringere Diskrepanz zwischen Rechtsnorm und Wirklichkeit auf. Die soziale Grundlage des Rechts vermag den Gehalt der Norm zu bestimmen. Dieser Gegebenheit ordnet die Lehre den Begriff Effektivität zu und behauptet damit den Bestand eines dem Völkerrecht besonderen Prinzips.”⁴⁹

It is evident from these statements that facts, as such, are important to the international legal order and that the alleged law-creating influence of facts is decisive with regard to the present project. One important question has to be answered in this context: is it really so hard for public international law to cope with the existence of facts and different factual situations? If one believes that facts have to be considered as a source of rights under public international law on the basis of their mere existence, an answer will be in the affirmative and it will denote the presence of a self-evident and automatic law-creating influence of facts. It is quite true that facts play an important role within a legal system as such and they are relevant to the latter in general, as Anzilotti puts it: “Eine rechtserhebliche Tatsache ist jeder Tatbestand, an den eine Rechtsordnung bestimmte Wirkungen, d.h.

⁴⁷ M. Huber, Die soziologischen Grundlagen des Völkerrechts, Internationalrechtliche Abhandlungen (H. Kraus (Hrsg.)), zweite Abhandlung, Berlin-Grunewald, 1928, p. 10

⁴⁸ H. Krieger, Das Effektivitätsprinzip im Völkerrecht, Schriften zum Völkerrecht, Bd. 137, Berlin, 2000, p. 29

⁴⁹ *Ibid.*

bestimmte Rechte und Pflichten der Rechtsgenossen knüpft.”⁵⁰ This statement can be considered as an “objection” to the automatic law-creating influence of facts. It describes the situation in which rights and duties, certain effects, are attached to facts by a legal order, i.e. the legal order is a source of those rights and duties as such, and not the facts on the basis of their mere existence. This assertion has been confirmed by the same author.⁵¹

The situation with regard to public international law seems to be the same as this legal system functions on the basis of its own rules and principles. It follows that facts, as such, have to be “legitimized” by international legal norms before they can serve as a source of rights and duties under public international law. It is a legal rule that ascribes normative force to certain facts and if this legitimizing factor is absent, those facts cannot validate respective state of affairs on the basis of their mere existence:

“Die Normen des Völkerrechts machen die Verwirklichung bestimmter Rechtswirkungen von sehr verschiedenen Umständen abhängig. Diese Umstände sind die völkerrechtserheblichen Tatsachen, Tatsachen, mit denen die Völkerrechtsnormen sich befassen, um an sie das Entstehen oder das Erlöschen bestimmter Rechte und Pflichten der Rechtssubjekte zu knüpfen.”⁵²

Kelsen describes public international law as a primitive legal order as it lacks organs which would create and apply respective norms of the system. He considers public international law as still being at the stage of decentralization.⁵³ An interesting statement has been made by this writer with regard to the law-fact constellation: “Wirksamkeit ist eine Bedingung der Geltung, aber ist nicht diese Geltung selbst.”⁵⁴

⁵⁰ D. Anzilotti, *Lehrbuch des Völkerrechts*, Bd. 1: Einführung-Allgemeine Lehren, Berlin / Leipzig, 1929, p. 251

⁵¹ *See Ibid.*

⁵² *Ibid.*, p. 252

⁵³ H. Kelsen, *Reine Rechtslehre*, Mit einem Anhang: Das Problem der Gerechtigkeit, 2. Aufl., Wien, 1960, Unveränderter Nachdruck 1976, p. 323

⁵⁴ *Ibid.*, p. 220

Criticism of an approach implying self-evident prevalence of facts in the context of law-fact interaction

An assertion that facts prevail in the context of law-fact interaction within the realm of the international legal order, as this latter is a weak system which functions on the basis of sole self-help, seems to be rather an extreme attitude concerning the emergence of legal rights and duties under public international law. It is also important that even legal writers of the period in which the notion of effectiveness was regarded as a dominant concept on the international plane (scientific or political), maintain some criticism concerning the foundation of the attitude mentioned above. Huber, for example, asserts that it would be incorrect to regard public international law solely as an expression of collective international interests.⁵⁵ More important is his statement with regard to the fact that public international law tends to free itself from the social substratum: “Auch dem Völkerrecht ist die Tendenz nach Selbständigkeit gegenüber dem sozialen Substrat immanent.”⁵⁶

But in its “quest for independence” public international law has to remain effective in dealing with different facts because their emergence affects international legal order, as such, the system as a whole. This assertion is of decisive importance because one has to be aware of the circumstance that “[...] the preponderance of pathological effectiveness is not an inherent weakness of law; it is a defect which may be remedied by a creative effort of man.”⁵⁷ Bearing in mind the considerations submitted so far, it becomes evident that the principle of effectiveness is a controversial topic within the realm of international legal theory: it has been regarded as a feature inherent in public international law and, at the same time, as a “defect” of the latter. The specific issue of “pathological” effectiveness has to be elucidated in this paper. For the present author, the term “pathological effectiveness” denotes an alleged self-evident or automatic law-creating influence of facts.

⁵⁵ M. Huber, *Die soziologischen Grundlagen des Völkerrechts*, *Internationalrechtliche Abhandlungen* (H. Kraus (Hrsg.)), zweite Abhandlung, Berlin-Grunewald, 1928, p. 11

⁵⁶ *Ibid.*

⁵⁷ K. Marek, *Identity and Continuity of States in Public International Law*, Geneva, 1968, p. 564

As is evident from the assertions of some writers considered above, they regard facts as a kind of “self-evident justification” for the application of legal rules and especially, public international law as it has been considered as a weak system in which the mere existence of a factual situation would serve as a source for the emergence of legal rights. It is also clear that public international law is different from a national legal order as it has no central enforcement organ and that the monolithic structure of a domestic legal order is absent within the realm of the international legal system. But does this “weakness” mean that facts decide everything? Of course, an answer has to be formulated in the negative, because public international law is nevertheless the legal system, and it is the legal order which has to deal with a variety of conflicting interests.⁵⁸ The objective of this paper is to demonstrate the extent to which those facts really serve as elements of a normative system. At the same time, it is important to introduce the limits set by the international legal order with regard to the law-creating influence of factual situations.

What has been tackled at this stage is an introduction to the problem of facts within the realm of the international legal system, with reference to the decentralized or horizontal nature of the latter, i.e. “statelessness” of the international legal order. A source of the problem has been displayed in the context of special features of public international law. It has already been stated that facts do not decide everything within the realm of public international law and what they do decide, will be considered later together with the question of that alleged law-creating influence of factual situations.

⁵⁸ See M. Akehurst, *A Modern Introduction to International Law*, 5th ed., London, 1984, pp. 1-11

Part I

“Different Faces” of the Principle of Effectiveness

Chapter 1: The concept known as “normative Kraft des Faktischen”

It is important at this stage to address the following manifestations of the principle of effectiveness, i.e. its “many faces”: *normative Kraft des Faktischen*, *ex factis jus oritur* and *fait accompli*. These notions are interrelated and they express the very essence of the argument favouring the law-creating influence of facts. It is worth noting that *normative Kraft des Faktischen* has to be regarded as a more general notion in comparison with others, as if it were their theoretical foundation.

1.1 Jellinek’s “normative Kraft des Faktischen” and its relevance to the international legal system

Jellinek has been referred to as probably the first author to theorize the principle of effectiveness, even though in his work the principle in question was never addressed by name.⁵⁹ It is important to note that Jellinek regarded psychological elements as a foundation of his approach concerning the normative force of factual situations. He asserts that a human being considers different manifestations during a lifetime not just as pure facts, but also as some kind of criteria of assessment of deviation from the usual behaviour. The following statement has been made by this eminent scholar with regard to the basis of the *normative Kraft des Faktischen*:

“Das Tatsächliche kann später rationalisiert werden, seine normative Bedeutung liegt aber in der weiter nicht ableitbaren Eigenschaft unserer Natur, kraft welcher das bereits Geübte physiologisch und psychologisch leichter reproduzierbar ist als das Neue.”⁶⁰

⁵⁹ See E. Milano, *Unlawful Territorial Situations in International Law, Reconciling Effectiveness, Legality and Legitimacy*, *Developments in International Law*, Vol. 55, Leiden / Boston, 2006, p. 25

⁶⁰ G. Jellinek, *Allgemeine Staatslehre*, 3. Aufl., 6. Neudruck, Bad Homburg vor der Höhe / Darmstadt, 1959, p. 338

Jellinek proceeds to the psychological sources of law and introduces the notion described as “*normative Kraft des Faktischen*”. Interesting assertions have been made by the writer with regard to the force of factual situations; Jellinek asserts that *normative Kraft des Faktischen* is important not only in the sense of the origin of legal norms, but also with regard to their existence:

“Weil das Faktische überall die psychologische Tendenz hat, sich in Geltendes umzusetzen, so erzeugt es im ganzen Umfange des Rechtssystems die Voraussetzung, daß der gegebene soziale Zustand der zu Recht bestehende sei, so daß jeder, der eine Veränderung in diesem Zustand herbeiführen will, sein besseres Recht zu beweisen hat.”⁶¹

Jellinek refers to the protection of ownership as an example. In the context of the existence of a *de facto state* it would mean the following: the *de facto* territorial unit is a fact, if it has been firmly established after some period of time, its factual existence becomes the basis of an assertion that this social order has to be regarded as a legitimate one, and the alteration of the *status quo* must be based on the right which would override that entitlement. Jellinek tries to justify the theory of the normative force of factual situations by reference to the transformation of the purely factual power of a state into its legal authority. He stresses that this process is accomplished on the basis of the view of a human being that respective factual situations are of a normative nature, that this is the state of affairs that ought to be: “daß es so sein sollte, wie es ist.”⁶²

1.2 Assessment of the concept of “normative Kraft des Faktischen”

It has to be noted that the theory of *normative Kraft des Faktischen* has been criticized for two main reasons: the first one asserts that the transformation of the notion of is (*Sein*) into the world of ought (*Sollen*) is impossible as these manifestations represent two completely different spheres.⁶³ Another reason concerns an alleged immorality of the concept in

⁶¹ *Ibid.*, pp. 339-340

⁶² *Ibid.*, p. 342

⁶³ See W. Jellinek, Über die normative Kraft des Faktischen, in: JZ, Jg. 6, 1951, p. 348

question. This second consideration is based on the idea that if a purely factual situation has to be regarded, at the same time, as a norm in respect of the behaviour of a human being, it will be possible to demand obedience to a tyrannical authority, because this latter represents a fact existence of which is undeniable and this fact must be “respected”.⁶⁴

It is only the first argument which is relevant to this scientific project as the problem concerns an alleged possibility that a *de facto* situation can enter the world of ought (*Sollen*) after leaving the world of is (*Sein*). It is crucial to answer the question, whether this transformation is possible or not, and if the answer is “yes”, an exact mode of the change under discussion has to be introduced. Even at a theoretical level, the normative power of facts seems to be a controversial issue. This assertion has been confirmed by Radbruch:

“»Normativität des Faktischen« ist ein Paradoxon, aus einem Sein allein kann nie ein Sollen entspringen, ein Faktum wie die Anschauung einer bestimmten Zeitepoche kann nur normativ werden, wenn eine Norm ihm diese Normativität beigelegt hat.”⁶⁵

It is evident from this statement that the validation of facts is a function of law, and a fact alone, cannot validate itself. Furthermore, an assertion has been made in respect of an inescapable consequence connected with the scientific examination of the normative force of factual situations: “Jede Analyse des Problems einer „Normativität des Faktischen“ hat – will sie zu wissenschaftlich sinnvollen Aussagen führen – von dieser logischen Unableitbarkeit eines Sollenssatzes aus einer Seinsaussage auszugehen.”⁶⁶

Boldt stresses that it would be a mistake to regard Jellinek’s conception of legality as a purely authoritarian one.⁶⁷ According to him, Jellinek demands that a legal norm, in order to acquire validity, should also possess a

⁶⁴ *See Ibid.*

⁶⁵ G. Radbruch, *Rechtsphilosophie*, 4. Aufl., (E. Wolf (Hrsg.)), Stuttgart, 1950, p. 288

⁶⁶ K. Grimmer, *Die Rechtsfiguren einer „Normativität des Faktischen“*, *Untersuchungen zum Verhältnis von Norm und Faktum und zur Funktion der Rechtsgestaltungsorgane*, *Schriften zur Rechtstheorie*, Heft 24, Berlin, 1971, p. 41

⁶⁷ H. Boldt, *Staat, Recht und Politik bei Georg Jellinek*, in: A. Anter (Hrsg.), *Die normative Kraft des Faktischen, Das Staatsverständnis Georg Jellineks, Staatsverständnisse*, (R. Voigt (Hrsg.)), Bd. 6, 1. Aufl., Baden-Baden, 2004, p. 24

motivating force aiming at the will of an addressee of that norm.⁶⁸ It follows that law is based on a conviction of those addressees that the law is valid as such, i.e. the law or respective legislative authority has to be recognized. This recognition does not need to be acquired immediately, but can be developed on the basis of habituation:

“Jellinek spricht in diesem Zusammenhang von der „normativen Kraft des Faktischen“ [...] Gemeint ist damit indessen nicht, daß bloße Faktizität, daß reine Machtausübung Recht hervorbringe oder schon Recht sei, sondern daß das sich wiederholend Faktische, die Gewöhnung daran, als normal Empfundenes zum Normativen werden kann.”⁶⁹

This statement denotes that Jellinek did not regard *normative Kraft des Faktischen* as an isolated concept that could serve as an autonomous source of legal rights, i.e. the law-creating influence of facts on the basis of their mere existence has been rejected. Thus, to assert that Jellinek based his concept of law solely on the notion of power is to obscure the fact that this writer deemed the concept of legitimacy as a necessary component or criterion of the validity of law. This latter assertion with regard to the requirement of legitimacy has been confirmed by Anter:

“Die Rechtsordnung ist für Jellinek also keineswegs einfach nur ein bloßes Abbild der „faktischen Machtverhältnisse“. Dies ist nur die Hälfte der Wahrheit. Nicht weniger ausschlaggebend für den Bestand des Rechts ist die Überzeugung von seiner Rechtmäßigkeit: Um Bestand zu haben, müsse die Rechtsordnung als legitim empfunden werden.”⁷⁰

It is important to note that there is no self-evident normative force of factual situations inherent in the theory of *normative Kraft des Faktischen*. Such a transformation from a factual to a normative dimension requires a sudden qualitative change. The word “qualitative” is of decisive importance in this respect. As Kersten puts it: “Jellinek sieht sehr wohl, daß der Übergang von Fakten zu Normen kein psychologisch automatisiertes Folgenverhältnis

⁶⁸ *Ibid.*

⁶⁹ *Ibid.*

⁷⁰ A. Anter, *Modernität und Ambivalenz in Georg Jellineks Staatsdenken*, in: *Ibid.*, p. 52

darstellt, sondern einen Qualitätssprung von der Faktizität in die Normativität bedeutet.”⁷¹

The conclusion has to be drawn on the basis of those considerations mentioned above that the possibility of self-evident, or automatic law-creating influence of facts, has been rejected by Jellinek. The notion described as *normative Kraft des Faktischen* does not regard facts as sources of law on the basis of their mere existence. This assertion has been confirmed by Kersten: “[...] *Jellinek* geht keinesfalls davon aus, daß Fakten »von sich aus« die Kraft haben, Normen zu schaffen.”⁷²

The result is that there is no need to overestimate the meaning of the concept in question, but the fact remains that *normative Kraft des Faktischen* has entered the world of science with a high degree of compellingness as a controversial issue. The reason is the very essence of the concept described as *normative Kraft des Faktischen*: “[...] Sie bestimmt nicht den Rechts- und Unrechtsgehalt der Tat selbst, sondern die weiteren Wirkungen.”⁷³ It is not the real content of *normative Kraft des Faktischen*, as attached to it by Jellinek, which induced the controversy mentioned above. Rather, it is the possible consequence of the normative force of a factual situation that represents the issue which attracts the interest of different scholars. This is precisely the issue of decisive importance in the context of emergence and existence of the *de facto state* as such. This is the point which denotes the relevance of *normative Kraft des Faktischen* to the territorial units of this kind in general. This is the way in which the concept in question acquires its particular significance within the realm of public international law.

⁷¹ J. Kersten, *Georg Jellinek und die klassische Staatslehre*, 1. Aufl., Tübingen, 2000, p. 370 (italics in original)

⁷² *Ibid.*, p. 371 (italics and emphasis in original)

⁷³ F. Münch, *Die normative Kraft des Faktischen*, in: E. Kroker / T. Veiter (Hrsg.), *Rechtspositivismus, Menschenrechte und Souveränitätslehre in verschiedenen Rechtskreisen*, Forschungsgesellschaft für das Weltflüchtlingsproblem, *Abhandlungen zu Flüchtlingsfragen*, Bd. IX, Wien, 1976, p. 53

1.3 Conceptual accommodation of the notion of “normative Kraft des Faktischen” within the realm of public international law

To establish a link between the concept of *normative Kraft des Faktischen* and public international law means to introduce that concept into the realm of the latter. The introduction mentioned above requires precise determination of the relevance of the notion in question to the international legal system as such. The idea of *normative Kraft des Faktischen* is relevant to public international law if it can produce legal effects on the international plane. Again, the issue of consequences of an alleged normative force of factual situations is decisive with respect to the importance of those situations in the international legal order.

It is the issue of validation of facts which is of decisive importance with regard to the notion of the *de facto state*. Menzel’s approach to that crucial issue is meaningful in the sense that this writer examines the concept of *normative Kraft des Faktischen* and its relevance to public international law on the basis of different concrete examples and this attitude sheds some light on the content of the *normative Kraft des Faktischen* within the realm of the international legal order.

Menzel considers the example of unlawful use of force and emphasizes the fact that international law guarantees that even the military forces of an aggressor will enjoy a minimum of humanitarian protection, i.e. international law guarantees respective status solely on the basis of the factual situation which is connected with an armed conflict.⁷⁴ It follows that this mere fact is regarded as lawfully sufficient to attach to it certain legal consequences:

“Man könnte hier von der assimilierenden Funktion des Faktischen sprechen. [...] In zahlreichen Situationen verzichtet die zwischenstaatliche

⁷⁴ E. Menzel, Die „normative Kraft des Faktischen“ in völkerrechtlicher Betrachtung, in: Universitas, Jg. 14, Bd. 1, Heft 1-6, 1959, p. 636

Ordnung auf Recht/Unrecht-Wertungen und macht um der Rechtssicherheit willen Zugeständnisse an die „Wirklichkeit“.”⁷⁵

Menzel also refers to the issue of unlawful territorial changes as an example of the application of *normative Kraft des Faktischen* and considers the role of recognition in this context, asserting that in some cases, the latter can serve as an effective instrument of validation.⁷⁶ It has been acknowledged that the transformation of unlawful territorial changes into legitimate situations does not occur in those instances, but the relinquishment of an assertion of illegality is possible. This possibility is stronger if there is not much prospect that the alteration of an established state of affairs will take place within a reasonable period of time.⁷⁷

The notion of *fait accompli* has been introduced as a manifestation or an expression of the factual situation mentioned above, as the author asserts that the recognition of *fait accompli*, of an accomplished fact, creates the danger that this act will be regarded as a validation of illegality, and specific features of one particular situation are decisive in this context.⁷⁸ It is evident that the assimilative function of the concept described as *normative Kraft des Faktischen* is informative and, at the same time, decisive with regard to the notion of the *de facto state*. The function mentioned above leads us to the problem of *fait accompli*. Jellinek considered the concept of *fait accompli* in his theory regarding the normative force of factual situations, but he examined the issue in question in the light of a state's internal order, although reference has also been made by this eminent scholar to public international law as such.⁷⁹ Münch expressed Jellinek's attitude in a following way: “Es sieht so aus, als verbreitere Jellinek mit der normativen Kraft des Faktischen den Anwendungsbereich des Gedankens von der

⁷⁵ *Ibid.* (emphasis in original)

⁷⁶ *Ibid.*, p. 637

⁷⁷ *See Ibid.*

⁷⁸ *Ibid.*

⁷⁹ *See* G. Jellinek, *Allgemeine Staatslehre*, 3. Aufl., 6. Neudruck, Bad Homburg vor der Höhe / Darmstadt, 1959, pp. 340-341

Vollendeten Tatsache; sein Ausgangspunkt ist gleichfalls das Problem der Staatenbildung.”⁸⁰

It is important at this stage to note that the assimilative function of the concept of *normative Kraft des Faktischen* leads us to the notion of *fait accompli*. It follows that *fait accompli* serves as a link between the concept of the *normative Kraft des Faktischen* and public international law.⁸¹ This is precisely the significance of Jellinek’s theory of the normative force of factual situations on the international plane. The notion of *fait accompli* plays the role of a “mediator” between the concept described as *normative Kraft des Faktischen* and public international law.

Preliminary remarks

The emergence of the theory described as *normative Kraft des Faktischen* is connected with Jellinek’s attempt to clarify the issue of the internal legal order of a state, the question of constitutional law in particular. Even at this internal level, Jellinek did not consider the concept of *normative Kraft des Faktischen* as an overriding notion: “Denn er selbst hat das Wort nur als Hinweis gebraucht und kein Prinzip der Rechtsanwendung aus ihm entwickelt, [...] Die normative Kraft des Faktischen ist kein allgemeiner Rechtssatz [...]”⁸²

Nevertheless, the concept caused a lot of controversy among scholars as it represents a notion pregnant with the possibility of misleading explanations. The significance of the concept of *normative Kraft des Faktischen* within

⁸⁰ F. Münch, Die normative Kraft des Faktischen, in: E. Kroker / T. Veiter (Hrsg.), Rechtspositivismus, Menschenrechte und Souveränitätslehre in verschiedenen Rechtskreisen, Forschungsgesellschaft für das Weltflüchtlingsproblem, Abhandlungen zu Flüchtlingsfragen, Bd. IX, Wien, 1976, p. 49

⁸¹ “In der Tat bot und bietet die Jellineksche These von der „normativen Kraft des Faktischen“ der Rechtspraxis eine hinreichende Erklärung um revolutionäre Rechtssetzungsakte als „faktisch legitimiert“ und rechtlich verbindlich zu betrachten. Im Völkerrecht entspricht dem die allgemein anerkannte Theorie der vollendeten Tatsachen, welche nicht nur für das de facto-Regime bei einer Staatsumwälzung, sondern auch im Besatzungsrecht nach der Haager Landkriegsordnung gilt.”, K. Grimmer, Die Rechtsfiguren einer „Normativität des Faktischen“, Untersuchungen zum Verhältnis von Norm und Faktum und zur Funktion der Rechtsgestaltungsorgane, Schriften zur Rechtstheorie, Heft 24, Berlin, 1971, p. 14

⁸² F. Münch, Brauch und Missbrauch der normativen Kraft des Faktischen, in: Jahrbuch der Albertus-Universität zu Königsberg / Pr., Bd. XV, 1965, p. 44

the realm of public international law rests on the notion of *fait accompli*, the latter having the meaning of a firmly established factual situation and being in a relationship of tension with requirements of legality. The concept of *normative Kraft des Faktischen* acquires its importance, in this context, on the basis of its assimilative function. The notion of *fait accompli* plays the role of a “mediator” between the concept described as *normative Kraft des Faktischen* and public international law. Again, it is not the content of the *normative Kraft des Faktischen* which backed the concept in question to receive the attention mentioned above, but the alleged consequences of the normative force of factual situations, i.e. assimilation of law to facts, and Verzijl’s precautionary statement remains of paramount importance in this respect:

“I do not believe in the “normative Kraft des Faktischen” as a valid general axiom of the international legal system, and I feel very strongly that it is inadmissible to try to incorporate such an axiom – which is more often than not a straightforward denial of the law – into the very texture of its legal structure.”⁸³

It is important to stress that the notion described as *normative Kraft des Faktischen* does not entail self-evident normative force of an effective situation. For the purposes of the present study this means that the *de facto state* does not acquire the status of a “state”, as such, on the basis of its mere effective existence. Accordingly, the *de facto state* does not enter the realm of public international law solely on the ground of the theory considered in this chapter.

⁸³ J. H. W. Verzijl, *International Law in Historical Perspective*, Vol. I, General Subjects, Publications of the Institute for International Law of the University of Utrecht, (M. Bos (ed.)), Series A, Modern International Law, No. 4, Leiden, 1968, p. 297 (emphasis in original)

Chapter 2: Ex factis jus oritur

2.1 Content of the notion and its dimensions

The second “face” of the principle of effectiveness which is important in the context of the law-fact interaction is the notion of *ex factis jus oritur*. This concept denotes the alleged law-creating influence of facts, i.e. a factual situation is regarded as a source of law. *Ex factis jus oritur* becomes relevant in the context of a firmly established factual situation on the basis of which respective facts acquire normative force and serve as a sound foundation of the “newly emerged” law.

Balekjian asserts that the source of the notion of *ex factis jus oritur* itself, i.e. the question of why it is relevant to the international legal order in general, has to be found in the *sui generis* nature of public international law.⁸⁴ It has been stressed that public international law functions as a regulatory mechanism in the international community of states, but it does not govern the whole range of problems concerning respective developments and manifestations within that community *ab initio* by normative means.⁸⁵ This is precisely the reason why the notion of *ex factis jus oritur* has “acquired distinction” on the international plane. The significance of the concept in question is connected with the issue of alleged law-creating influence of facts illegal in origin:

“Der damit verbundene Fragenkomplex [...] kreist um den Satz *ex factis ius oritur*. Hier steht der Ausdruck ‘Faktum’ sowohl für völkerrechtsgemäße Tatsachen als auch für solche, die unabhängig von der normativen Kraft der Völkerrechtsordnung, oder trotz einer möglichen Verletzung derselben entstehen, sich dauerhaft erweisen und mit der Zeit zu einem Bestandteil der Ordnung werden.”⁸⁶

This definition of the notion of *ex factis jus oritur* is based on the assertion that facts can serve as sources of law on the basis of their mere existence and the issue of a self-evident normative force of facts is again under

⁸⁴ See W. H. Balekjian, *Die Effektivität und die Stellung nichtanerkannter Staaten im Völkerrecht*, Den Haag, 1970, p. 9

⁸⁵ See *Ibid.*

⁸⁶ *Ibid.*, pp. 8-9 (italics and emphasis in original)

discussion. The definition mentioned above encompasses two dimensions of *ex factis jus oritur*: the first one is positive and describes the situation in which respective facts exist in accordance with the rules of public international law, the second dimension is negative and refers to the factual situation which is illegal in origin.

In the context of the emergence and existence of a *de facto state* the notion of *ex factis jus oritur* means the following: the *de facto state* is a fact, moreover, it is a firmly established fact and its goal is to gain a place in the international community of states. The latter conclusion can be drawn on the basis of an assertion that a *de facto state's* aim is sovereignty as constitutional independence. The *de facto state* tries to represent itself as a state, it does not try to represent itself as a challenger to the states system.⁸⁷ The emergence of a *de facto state* is sometimes connected with grievous wrongs and breaches of fundamental norms of public international law. The definition of the notion of *ex factis jus oritur* mentioned above, denotes in the meaning of its negative dimension an alleged possibility that, despite the illegality of origin, the *de facto* situation which is firmly established can become a normative one.

2.2 Theoretical considerations

As is evident from the considerations explored above, the law-fact interaction is again an issue of decisive importance with regard to the concept of *ex factis jus oritur*, as Kreijen puts it: “[...] the principle *ex factis jus oritur* is based on the simple notion that certain legal consequences attach to particular facts.”⁸⁸ It is the notion of factual situations illegal in origin, which causes special interest in the context of those “particular facts” and this question has to be examined thoroughly in my project. It has to be noted at this stage that the significance of the “anomaly”, which denotes the alleged law-creating influence of facts illegal in origin, has been linked with the concept of *ex factis jus oritur*. Marek refers to the “normal and healthy

⁸⁷ See S. Pegg, *International Society and the De Facto State*, Aldershot / Brookfield, 1998, p. 231

⁸⁸ G. Kreijen, *State Failure, Sovereignty and Effectiveness, Legal Lessons from the Decolonization of Sub-Saharan Africa*, Leiden, 2004, p. 175 (italics in original)

meaning of the requirement of effectiveness for a normative system”⁸⁹ and, after that, proceeds to its “[...] pathological meaning: not in the sense of the effectiveness of law, but of the effectiveness of law-creating illegal facts as against the norm. This is precisely the current meaning of the principle *ex factis ius oritur*.”⁹⁰

Chen examines the notion depicted as *ex factis jus oritur* in the light of the recognition of new states and governments and the acts or situations illegal in origin.⁹¹ This author asserts that, in the first instance, the principle *ex factis jus oritur* has to be regarded as the only criterion of legality.⁹² Chen proceeds to the issue of factual situations illegal in origin, representing the manifestation of the “pathological meaning” of the principle of effectiveness, i.e. *ex factis jus oritur*:

“In the case of illegal acts or situations, the principle only sets a lower limit, leaving the injured State discretion to accord recognition, *even when the possession of the wrongdoer may still be precarious*. The waiver of a right or the changing of law through quasi-legislation is a free act. When done prior to the legislation through other means, such as prescription, it confers rights on the wrongdoer, and is therefore constitutive in effect.”⁹³

As is evident from Chen’s statements, *ex factis jus oritur* governs the process of recognition of new states and governments and is applicable to the state of affairs which is illegal in origin. It follows that a link has been established between the concept in question and public international law on the basis of these problematic issues. The introduction of the notion of prescription is of great importance with regard to the problem of law-fact interaction and is relevant to the present project. The concept of *ex factis jus oritur* will be considered in the light of criteria for statehood and the issue of acquisitive prescription (in the context of Abkhazia’s claim to statehood).

⁸⁹ See K. Marek, *Identity and Continuity of States in Public International Law*, Geneva, 1968, p. 564

⁹⁰ *Ibid.* (italics in original)

⁹¹ See T. - C. Chen, *The International Law of Recognition, With Special Reference to Practice in Great Britain and the United States*, (L. C. Green (ed.)), London, 1951, p. 413

⁹² “[...] legal quality should not be denied to the actual possessor, as soon as his possession is secured, *but no sooner*.”, *Ibid.*, (italics in original)

⁹³ *Ibid.*, (italics in original)

Lauterpacht explains the significance of the concept of *ex factis jus oritur* on the basis of the nature of law, as such: “Law is a product of social reality. It cannot lag for long behind facts.”⁹⁴ This eminent scholar refers to the notions of consent and power, and asserts that the social realities of these manifestations determine the sociological basis of a legal system, and the validity of particular rules of that system largely depends on the realities mentioned above.⁹⁵ Lauterpacht clarifies the meaning of the concept of *ex factis jus oritur* in the following way: “[...] while law, so long as it is valid, is unaffected by a violation of its rules, its continuous breach, when allowed to remain triumphant, ultimately affects the validity of the law.”⁹⁶ It is again an alleged law-creating influence of facts illegal in origin, which is in question, and which denotes the negative dimension of *ex factis jus oritur*. Kelsen considers the issue of effectiveness and its relevance to public international law and mentions the notion of *ex injuria jus oritur* in this regard:

“The admission, then, that states may, and do, “recognize” that illegal acts once effecting a firmly established situation give rise to new legal rights and duties is the admission of *ex injuria jus oritur* in international law, and it is the principle of effectiveness that is applied.”⁹⁷

The problematic issue of factual situations illegal in origin rests on the idea of *ex injuria jus oritur* and it can be asserted that the latter represents the expression, or manifestation of the negative dimension of the concept described as *ex factis jus oritur*. The reason why the notion of *ex injuria jus oritur* is relevant to public international law has to be found again in the nature of the international legal system and its distinguishing features. Kelsen refers to the issue of the creation of new rights and obligations on the basis of illegal acts. He concludes that the extent, to which the acts mentioned above, are allowed to produce legal effects within the realm of a particular legal order “[...] must largely depend upon the stage of

⁹⁴ H. Lauterpacht, *Recognition in International Law*, Cambridge, 1948, pp. 426-427

⁹⁵ *See Ibid.*, p. 427

⁹⁶ *Ibid.*

⁹⁷ H. Kelsen, *Principles of International Law*, 2nd ed., Revised and Edited by R. W. Tucker, New York et al., 1966, p. 425 (emphasis and italics in original)

procedural development reached by this order.”⁹⁸ If the respective legal system is a highly developed one, the notion of effectiveness in the sense of *ex injuria jus oritur* is of less importance.⁹⁹ The situation is different with regard to a decentralized legal order which lacks effective collective procedures and functions on the basis of self-help:

“Here there is a high degree of uncertainty that the law will be effectively applied and enforced, particularly in the event of serious breaches. In this situation, the principle of effectiveness, so far as this principle admits the operation of *ex injuria jus oritur*, may have a very considerable scope.”¹⁰⁰

It follows that the decentralized nature of the international legal order has been regarded as decisive in the context of a law-creating influence of facts. The notion of *ex injuria jus oritur*, representing the negative dimension of the concept of *ex factis jus oritur*, denotes the alleged law-creating influence, or normative force of facts and factual situations illegal in origin. In the context of the emergence and existence of a *de facto state* it means that, it does not matter, whether the creation of this entity is connected with the breach of an international legal rule or not. In any case, if a respective *de facto state* exists in the form of a firmly established factual situation, and demonstrates “a reasonable assurance of permanence”¹⁰¹, according to the notions of *ex factis jus oritur* and *ex injuria jus oritur*, the territorial entity in question becomes part of the international legal system, its mere existence validates flaws connected with its emergence. The question, whether this assertion is an expression of truth, has to be considered in the present study.

2.3 Ex factis jus oritur and the criteria for statehood

The issue of the criteria for statehood is of overwhelming importance in the context of the emergence and existence of a *de facto state*. This significance of the criteria mentioned above rests on the characteristic features of the

⁹⁸ *Ibid.*

⁹⁹ *See Ibid.*, pp. 425-426

¹⁰⁰ *Ibid.*, p. 426 (italics in original)

¹⁰¹ *See* T. - C. Chen, *The International Law of Recognition, With Special Reference to Practice in Great Britain and the United States*, (L. C. Green (ed.)), London, 1951, p. 413

territorial unit in question. First of all, the *de facto state* strives for success in trying to gain its place in the international community, as Pegg puts it:

“[...] the *de facto state* tries to follow the same basic logic as the sovereign state. Entities like Somaliland and the TRNC do not seek to challenge or overthrow the states system. Rather, they want to join that system and become members of the club. [...] *De facto state* challengers seek to alter the boundaries within such a system; they do not seek to alter the system itself.”¹⁰²

It follows that a *de facto state* tries to demonstrate the capacities of a “normal” state which is accepted as a “member of the club”, i.e. is widely recognized on the international plane. In doing so, the *de facto state* has to display the fulfilment of the criteria for statehood. It is evident, that the *de facto state* tries to enter the realm of the international legal order through the notion of statehood, as its aim is to be treated like a state and to possess sovereignty as constitutional independence. This is the reason, why the criteria for statehood become relevant to the notion of the *de facto state*.

The issue of criteria for statehood is connected with respective developments within the realm of public international law. The “traditional” or “empirical” criteria for statehood, based on the principle of effectiveness, are of particular importance with regard to the notion of *ex factis jus oritur*. The content of the requirement of effectiveness in the context of statehood can be expressed in the following way: on the basis of effectiveness, an entity in question becomes the addressee of legal rights and obligations, which are connected with statehood. This entity must demonstrate the fulfilment of certain requirements to satisfy the traditional criteria for statehood. The principle of effectiveness, as such, denotes the existence of empirical statehood, the statehood in the empirical sense, and regards the issue of statehood essentially as a matter of fact.

¹⁰² S. Pegg, *International Society and the De Facto State*, Aldershot / Brookfield, 1998, p. 231

2.4 The traditional criteria for statehood

Jellinek's ideas become important once again, this time in the context of the issue of statehood. This eminent scholar has formulated the theory of the essential elements of statehood:

“Danach ist ein politisch und rechtlich organisierter Gebiets- und Personenverband dann ein Staat, wenn eine – nach außen nur an das Völkerrecht gebundene, nach innen autonome – *Gewalt* gegeben ist, die einem *Volk* und einem abgegrenzten *Gebiet* zugeordnet ist. Staatsgewalt, Staatsvolk und Staatsgebiet stellen somit die drei unabdingbaren Elemente des Staates dar.”¹⁰³

This theory is known as the “Drei-Elementen-Lehre”¹⁰⁴ and its central argument is again the notion of effectiveness: if those elements are present, or requirements are satisfied in a particular case, the respective entity has to be regarded as a state. It has to be noted that this assertion has been confirmed on the international plane. The “Convention on Rights and Duties of States” (the so-called “Montevideo Convention”) has been concluded at the Seventh International Conference of American States and Art. 1 of this document reads as follows:

“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.”¹⁰⁵

As is evident from these considerations, the traditional criteria for statehood are based on the existence of a permanent population, a defined territory and an effective government. Bearing in mind the fact that the Montevideo Convention also refers to the “capacity to enter into relations with the other states”, it has to be noted that the latter requirement is not of the same importance with regard to the empirical foundation of statehood, as the first three criteria. But it is relevant to the notion of the *de facto state* as such.

¹⁰³ V. Epping, *Völkerrechtssubjekte*, in: K. Ipsen (Hrsg.), *Völkerrecht*, 5. Aufl., 2004, pp. 59-60 (italics in original)

¹⁰⁴ *See Ibid.*, p. 59; *See also* S. Hobe / O. Kimminich, *Einführung in das Völkerrecht*, 8. Aufl., 2004, p. 67

¹⁰⁵ Article 1 of the Convention on Rights and Duties of States, Montevideo, 26 December 1933, reprinted in: *AJIL*, Vol. 28, 1934 (with Supplement), Official Documents, p. 75

The significance of this requirement rests on the fact that *de facto states* maintain relations with members of the international community. The notion of intercourse is important in the context of *de facto states*, because even in the absence of a clear juridical status, business is done with them. The TRNC and Taiwan are good examples in this regard. Of course, not all *de facto* territorial units are successful in this sense, but the maintenance of such relations is an essential attribute of these entities.

It is important at this stage to note that the principle of effectiveness is applicable to the “Montevideo criteria”, moreover, the principle of effectiveness represents the basis of the requirements mentioned above. Krieger refers to the Montevideo Convention as the sole attempt aimed at introducing the normative definition of the concept of a state.¹⁰⁶ It has to be mentioned that the criteria enshrined in this document have attained significance on the international plane. Moreover, these requirements became identical to the notion of statehood.

2.4.1 Permanent population

This criterion requires the presence of a permanent population as a state represents “an organization of individual human beings.”¹⁰⁷ It has to be noted that the application of this requirement does not depend on the notion of ethnicity, as such, and is essentially connected with a sum of nationals, the population possessing the citizenship of a respective state. The following considerations are relevant with regard to the requirement of permanency: “First, the population must have the intention to inhabit the territory on a permanent basis. [...] Secondly, the territory claimed has to be habitable.”¹⁰⁸

2.4.2 Defined territory

Statehood is also connected with the notion of territory as “States are territorially defined institutions of authority.”¹⁰⁹ It has to be noted that there is no rule of public international law which would prescribe “the minimum

¹⁰⁶ H. Krieger, *Das Effektivitätsprinzip im Völkerrecht*, Schriften zum Völkerrecht, Bd. 137, Berlin, 2000, p. 82

¹⁰⁷ See D. Raič, *Statehood and the Law of Self-Determination*, *Developments in International Law*, Vol. 43, The Hague et al., 2002, p. 58

¹⁰⁸ *Ibid.*, pp. 58-59

¹⁰⁹ *Ibid.*, p. 59

area of that territory.”¹¹⁰ The same can be asserted with regard to the contiguity of the territory of a respective state.¹¹¹ The notion of territory acquires its significance in connection with the concept of state sovereignty, because “State sovereignty has been traditionally defined in reference to the principle of territoriality.”¹¹²

2.4.3 Government

This requirement refers to the notion of an effective government. The latter stands as an authority within the boundaries of a respective state and, at the same time, represents the state in its international relations. It can be asserted that the notion of government encompasses internal and external dimensions. Crawford considers the requirement in question “as the most important single criterion of statehood, since all the others depend upon it.”¹¹³ The effectiveness of a government encompasses the following aspects: general control of the territory of a respective state to the exclusion of other entities, this control including the establishment of respective institutions, and a certain degree of maintenance of law and order.¹¹⁴ Following conclusions have been drawn by Crawford with regard to the legal effects of the requirement in question:

“Positively, the existence of a system of government in and of a specific territory indicates a certain legal status, and is in general a precondition for statehood. [...] Negatively, the lack of a coherent form of government in a given territory militates against that territory being a State, in the absence of other factors such as the grant of independence to that territory by a former sovereign.”¹¹⁵

It has to be noted that in 1929 the Germano-Polish Mixed Arbitral Tribunal (in the case of *Deutsche Continental Gas-Gesellschaft v. Polish State*) acknowledged the significance of the requirements of statehood which later

¹¹⁰ J. Crawford, *The Creation of States in International Law*, 2nd ed., Oxford, 2006, p. 46

¹¹¹ See V. Epping / C. Gloria, *Das Staatsgebiet*, in: K. Ipsen (Hrsg.), *Völkerrecht*, 5. Aufl., 2004, p. 280

¹¹² A. van Staden / H. Vollaard, *The Erosion of State Sovereignty: Towards a Post-territorial World?*, in: G. Kreijen et al. (eds.), *State, Sovereignty, and International Governance*, Oxford UP, 2002, p. 166

¹¹³ J. Crawford, *The Creation of States in International Law*, 2nd ed., Oxford, 2006, p. 56

¹¹⁴ See *Ibid.*, p. 59

¹¹⁵ *Ibid.*, p. 60

appeared in the text of the Montevideo Convention.¹¹⁶ It is evident that the notion of effective government is a *conditio sine qua non* of statehood, of course, together with the requirements of permanent population and defined territory. It is important at this stage to clarify the content of the fourth criterion enshrined in the Montevideo Convention, namely the capacity to enter into relations with other entities.

2.4.4 Capacity to enter into relations with other states

Uibopuu partitions components of the criterion regarding the capacity of states to enter into relations with other territorial entities. An important implication is that a respective aspirant, which wishes to become a member of the community of states, has to demonstrate that its internal legal order comprehends the issues of international relevance: “Diesen Bestandteil der Fähigkeit, internationale Beziehungen zu haben, könnte man Materienkompetenz nennen.”¹¹⁷ The possession of organs, which would be authorized to represent, and to bind a respective territorial entity in its international relations, is an additional requirement as it denotes that certain persons are given legitimacy to represent the entity on the international plane.¹¹⁸ It has been asserted that this kind of authority is a component of the guarantee, that a respective territorial unit has obliged itself in a binding manner. Another constituent part of that guarantee is the effective control exercised by the respective elite within the boundaries of a particular territorial entity.¹¹⁹ These are the components of the fourth criterion of statehood as enshrined in the Montevideo Convention and these elements are of subjective nature: “Materienkompetenz, Vertretungsbefugnis, Autorität und effektive Kontrolle sind gewissermaßen die „subjektive“ Seite der Fähigkeit internationale Beziehungen zu unterhalten.”¹²⁰

¹¹⁶ Deutsche Continental Gas-Gesellschaft v. Polish State, Germano-Polish Mixed Arbitral Tribunal, 1929, in: H. Lauterpacht (ed.), Annual Digest of Public International Law Cases, Being a Selection from the Decisions of International and National Courts and Tribunals given during the Years 1929 and 1930, Department of International Studies of the London School of Economics and Political Science (University of London), London, 1935, p. 13

¹¹⁷ H. - J. Uibopuu, Gedanken zu einem völkerrechtlichen Staatsbegriff, in: C. Schreuer (Hrsg.), Autorität und internationale Ordnung, Aufsätze zum Völkerrecht, Berlin, 1979, pp. 105-106

¹¹⁸ See *Ibid.*, p. 106

¹¹⁹ See *Ibid.*

¹²⁰ *Ibid.*

2.4.5 Fulfillment of the traditional criteria for statehood: an aspiration of the *de facto* state

Indeed, a *de facto state* tries to demonstrate that it satisfies the requirements enshrined in the Montevideo Convention, i.e. traditional or empirical criteria for statehood. This situation denotes the subjective attitude of the territorial unit mentioned above. The *de facto state* also tries to enter into relations with members of the international community and this is again the expression of its subjective will. One crucial question has to be answered in my project: if the *de facto state* fulfils these requirements based on effectiveness, does it automatically mean that it has to be regarded as an established state, i.e. the state in a legal sense? One can assert that there is no universal definition of statehood which would refer to the legal criteria (as has been shown above, even the Montevideo Convention refers to the requirements based on a factual situation) and statehood is an issue of fact, not of the law. It is one of the objectives of this study, to examine whether this assertion is an expression of truth or not.

It is important at this stage to refer to the conclusion drawn by Brownlie with regard to the criteria of statehood enshrined in the text of the Montevideo Convention: “This brief enumeration of criteria is often adopted in substance by jurists, but it is no more than a basis for further investigation.”¹²¹ It has to be noted that this “further investigation” is precisely the objective of the present study, and it encompasses the examination of respective shifts and developments concerning the issue of statehood within the realm of public international law. The “message” of my project is that the criteria of statehood adopted in the Montevideo Convention have to be regarded “as a sort of minimum”¹²² and this situation denotes the necessity of subsequent examination of the question in the light of respective developments within the realm of public international law.

¹²¹ I. Brownlie, *Principles of Public International Law*, 6th ed., Oxford UP, 2003, p. 70

¹²² See C. N. Okeke, *Controversial subjects of contemporary international law, An examination of the new entities of international law and their treaty-making capacity*, Rotterdam UP, 1974, p. 87

2.5 The issue of independence and the criteria for statehood

The notion of independence plays an important role as it serves as a vehicle in furtherance of the claim to statehood. The classical formula or definition of the term “independence” has been given by Judge Anzilotti in the case concerning “Customs Régime between Austria and Germany” (the so-called “Austro-German Customs Union Case”). Anzilotti addressed the meaning of the terms “independence” and “inalienable” in the light of Art. 88 of the Treaty of Saint-Germain (1919), the issue in question was Austria’s status. The following statement has been made by this eminent scholar with regard to the concepts mentioned above:

“With regard to the former, I think the foregoing observations show that the independence of Austria within the meaning of Article 88 is nothing else but the existence of Austria, within the frontiers laid down by the Treaty of Saint-Germain, as a separate State and not subject to the authority of any other State or group of States. Independence as thus understood is really no more than the normal condition of States according to international law; it may also be described as *sovereignty (suprema potestas)*, or *external sovereignty*, by which is meant that the State has over it no other authority than that of international law.”¹²³

As is evident from this definition, a link has been established between independence and sovereignty, moreover, these two notions have been equated with each other. Following important elements of the concept of independence have been emphasized: “existence as a separate state” which is connected with the fulfillment of empirical criteria of statehood and “the absence of subjection to the authority of another State or States.”¹²⁴ This latter requirement denotes that a respective territorial entity is subject to the rule of public international law and there is no other authority over it. Marek has summarized these requirements in the following way: “The two cannot indeed be separated. For only a “separate” State can be directly

¹²³ Customs Régime between Austria and Germany, Advisory Opinion [No. 20], 1931, Individual Opinion by M. Anzilotti, in: M. O. Hudson (ed.), World Court Reports, A Collection of the Judgments, Orders and Opinions of the Permanent Court of International Justice, Vol. II, 1927-1932, Washington, 1935, p. 726 (italics in original)

¹²⁴ See J. Crawford, The Creation of States in International Law, 2nd ed., Oxford, 2006, p. 66

subordinated to international law and, conversely, only a State directly subordinated to international law can be “separate”.¹²⁵

The fact that independence represents an important component of statehood has been confirmed on the international plane. The Åland Islands Case is significant in the context of statehood and it is informative with regard to the notion of the self-determination of peoples. The commissions were entrusted by the Council of the League of Nations to deal with the issue of the status of islands situated in the Baltic Sea. The International Committee of Jurists examined the internal situation of Finland in the light of the question of its statehood. It is worth noting that Finland itself was achieving independence from Russia, it was in *statu nascendi*. The Committee of Jurists referred to the revolutionary situation and stressed the lack of essential components of statehood caused by anarchy.¹²⁶ The following conclusion has been drawn by the Committee with regard to the issue of Finland’s statehood:

“It is, therefore, difficult to say at what exact date the Finnish Republic, in the legal sense of the term, actually became a definitely constituted sovereign State. This certainly did not take place until a stable political organisation had been created, and until the public authorities had become strong enough to assert themselves throughout the territories of the State without the assistance of foreign troops.”¹²⁷

This statement emphasizes the importance of the notion of independence and links it with the *legal* content of the concept described as “a definitely constituted sovereign State”. It has to be stressed that the notion of independence of states has been regarded as “a fundamental principle of international law.”¹²⁸ This view has been confirmed by eminent scholars in the field of public international law. Crawford, for example, depicts the

¹²⁵ K. Marek, *Identity and Continuity of States in Public International Law*, Geneva, 1968, p. 166 (emphases in original)

¹²⁶ See Report of the International Committee of Jurists entrusted by the Council of the League of Nations with the task of giving an advisory opinion upon the legal aspects of the Åland Islands question, in: LNOJ, Special Supplement No. 3., 1920, p. 8

¹²⁷ *Ibid.*, p. 9

¹²⁸ Status of Eastern Carelia, Advisory Opinion, 1923, in: Publications of the Permanent Court of International Justice, Ser. B. No. 5., Collection of Advisory Opinions, Leyden, 1923, p. 27

notion of independence as “the central criterion for statehood.”¹²⁹ Marek explains the significance of the concept of independence on the basis of a reference to the nature of public international law: “Thus, the independence of States forms the necessary prerequisite of international law, a condition which the latter could not renounce, without at the same time renouncing its own *raison d’être*.”¹³⁰

As is evident from these considerations, the requirement of independence is regarded as an essential component of statehood. It has to be noted that the requirement mentioned above is also significant in the context of the emergence and existence of a *de facto state*, as the latter tries to demonstrate that it is a state in the plain meaning of this word. It is important at this stage to introduce a notion which is of overwhelming importance with regard to the *de facto state* and its status, namely the notion of “actual independence”.

2.5.1 The requirement of actual independence

Lauterpacht links the concept of independence with the notion of government and asserts the following: “The first condition of statehood is that there must exist a government actually independent of that of any other State, including the parent State.”¹³¹ Indeed, the notion of independence of a state encompasses two dimensions: the first one denotes formal independence which “exists where the powers of government of a territory (in internal and external affairs) are vested in the separate authorities of the putative State.”¹³² This situation is not as problematic in the context of the existence of the *de facto state* as is the issue of actual independence. Most of the *de facto states* possess respective governmental authorities and organs which do really function as governmental agencies of a state. The second dimension of the concept in question refers to the actual independence and “[...] may be defined as the minimum degree of real governmental power at the disposal of the authorities of the putative State that is necessary for it to

¹²⁹ J. Crawford, *The Creation of States in International Law*, 2nd ed., Oxford, 2006, p. 62

¹³⁰ K. Marek, *Identity and Continuity of States in Public International Law*, Geneva, 1968, p. 163 (italics in original)

¹³¹ H. Lauterpacht, *Recognition in International Law*, Cambridge, 1948, p. 26

¹³² See J. Crawford, *The Creation of States in International Law*, 2nd ed., Oxford, 2006, p. 67

qualify as ‘independent’.”¹³³ Crawford mentions three cases which must be regarded as derogating from actual independence: substantial illegality of origin, entities formed under belligerent occupation and substantial external control of a state.¹³⁴

Substantial illegality of origin is connected with a violation of a fundamental rule of public international law and is thus linked with the negative dimension of the notion of *ex factis jus oritur*, as the latter describes factual situations illegal in origin. It follows that the *de facto state* is a fact and if its emergence is connected with the breach of a basic rule of public international law, the issue of derogation from actual independence comes into play in the context of the question of statehood. As respective aspirant has to demonstrate the presence of both, formal and actual dimensions of independence¹³⁵, an important question arises as to whether that entity can be regarded as a state under public international law.

Substantial external control of a state is also important in the context of the existence of a *de facto* territorial entity. Crawford explains the essence of this situation in the following way: “An entity, even one possessing formal marks of independence, which is subject to foreign domination and control on a permanent or long-term basis is not ‘independent’ for the purposes of statehood in international law.”¹³⁶ It is important at this stage to note that as the substantial external control of a state denotes the derogation from actual independence, the statehood of a respective territorial unit raises doubts, because the requirement of independence has its normative content:

“The legal meaning of independence can, therefore, be defined as follows: a State is independent when it derives its reason of validity directly from international law, and not from the legal order of any other State, that is to say, when it possesses a basic norm of its own which is neither derived from, nor shared with, any other State.”¹³⁷

¹³³ See *Ibid.*, p. 72 (emphasis in original)

¹³⁴ *Ibid.*, pp. 74-76

¹³⁵ See *Ibid.*, p. 63

¹³⁶ *Ibid.*, p. 76 (emphasis in original)

¹³⁷ K. Marek, *Identity and Continuity of States in Public International Law*, Geneva, 1968, p. 168

2.5.2 Significance of the notion of sovereignty

Thus, an independent state is directly subordinated to public international law and obtains its validity directly from the latter. A modern state is modern sovereign and independence is its *conditio sine qua non* as sovereignty, as such, denotes independence. Judge Huber delivered the definition which sums up the importance of the notions of independence and sovereignty:

“Sovereignty in the relations between States signifies independence. Independence in regard to a portion of the globe is the right to exercise therein, to the exclusion of any other State, the functions of a State.”¹³⁸

It is true that most *de facto states* do exercise the functions of a state with regard to respective territories. They act formally as sovereigns, but does it mean that they are sovereigns within the realm of public international law? The answer would be in the affirmative if it were to refer solely to the traditional meaning of the notion of sovereignty which signified “the collection of functions exercised by a state.”¹³⁹ It has to be noted in this context that the modern notion of sovereignty encompasses internal and external dimensions. A sovereign state represents an authority “in regard to a portion of the globe” and it is directly subordinated to public international law:

“Souveränität wird [...] als Völkerrechtsunmittelbarkeit verstanden, es gibt keine Zwischeninstanz zwischen dem Völkerrecht und dem Staat. Ein Teil des Prinzips der Souveränität ist die Verfassungsautonomie, die nur Staaten zusteht.”¹⁴⁰

It follows that this statement confirms the existence of two dimensions of the notion of sovereignty, namely those of “*Verfassungsautonomie*” and “*Völkerrechtsunmittelbarkeit*”. The notion of sovereignty has undergone respective shifts as the developments on the international plane have deeply

¹³⁸ Island of Palmas Case, 1928, in: RIAA, Vol. II, p. 838

¹³⁹ I. Delupis, *International Law and the Independent State*, Epping, Essex, 1974, p. 3

¹⁴⁰ A. Singer, *Nationalstaat und Souveränität, Zum Wandel des europäischen Staatensystems*, Europäische Hochschulschriften, Reihe XXXI, Politikwissenschaft, Bd. 232, Frankfurt am Main, 1993, p. 28

affected its content and significance: from Bodin to the Peace of Westphalia, from the Westphalian order to recent times.

Krasner stresses that the term “sovereignty” has obtained four different meanings during the development of the concept: international legal sovereignty, Westphalian sovereignty, domestic sovereignty and interdependence sovereignty.¹⁴¹ Domestic sovereignty concerns the state authority, its organization within the boundaries of the state territory and the level of effective control exercised by respective elites.¹⁴² With regard to the interdependence sovereignty Krasner notes that the latter refers to the necessity of the control of transboundary movements and the effectiveness of governmental authorities in this respect.¹⁴³ The international legal sovereignty and Westphalian sovereignty have also caused intense interest: “international legal sovereignty, referring to the mutual recognition of states or other entities; and Westphalian sovereignty, referring to the exclusion of external actors from domestic authority configurations.”¹⁴⁴

It follows that internal and external dimensions of sovereignty have to be regarded as its essential components and, although it has been asserted that the notion of sovereignty represents “a highly ambiguous term”¹⁴⁵, it is also true that there is clarity with regard to this concept in the context of independence, i.e. sovereignty, as such, denotes independence. The *de facto state* striving for statehood must demonstrate that it is sovereign, that it is independent (both, formally and actually). Sovereignty is not a “myth”¹⁴⁶, it is an instrument which can be applied if the issue of statehood is in question and this notion can play an important role with regard to the status of the *de facto state*. This is exactly the significance of the concept which denotes its relevance to my project. Carty has summarized the meaning of sovereignty within the realm of contemporary international law:

¹⁴¹ S. D. Krasner, *Sovereignty, Organized Hypocrisy*, Princeton, 1999, p. 3

¹⁴² *See Ibid.*, p. 9

¹⁴³ *Ibid.*

¹⁴⁴ *Ibid.*

¹⁴⁵ J. Hoffman, *Is it Time to Detach Sovereignty from the State?*, in: L. Brace / J. Hoffman (eds.), *Reclaiming Sovereignty*, London, 1997, p. 9

¹⁴⁶ *See* R. Jennings, *Sovereignty and International Law*, in: G. Kreijen et al. (eds.), *State, Sovereignty, and International Governance*, Oxford UP, 2002, p. 31

“For the international lawyer, then, sovereignty equals independence and consists of the bundle of competences which have not already been transferred through the exercise of independent consent to an international legal order. [...] For the lawyer, sovereignty has come to mean simply that the entity to which the label is attributed has become a full subject of international law.”¹⁴⁷

Sovereignty, independence and the notion introduced by this statement, namely the international legal personality, are interrelated manifestations: sovereignty is independence, independence of a state rests on the notions of “*Verfassungsautonomie*” and “*Völkerrechtsunmittelbarkeit*”. A modern sovereign independent state should possess formal and actual independence, “In other words, a State must be genuine and not a puppet.”¹⁴⁸ A modern sovereign should be regarded as a full subject of public international law. Bearing in mind these considerations, it has to be mentioned that the objective of my project is to examine and clarify the overall effect of this situation on the status of the *de facto state*, i.e. to introduce the status of an entity which strives for statehood and asserts that it is a “normal” state.

It is again the alleged law-creating influence of facts that makes the issue in question worthy of examination. Vorster makes an interesting statement with regard to the status of “nasciturus states”:

“[...] these entities do not arise out of nothing: their origin and existence must necessarily be founded on the basic requirements of statehood. They should, therefore, be accorded international legal personality as soon as they comply with the necessary requirements and possess a substantial measure of self-government operating with centrifugal force.”¹⁴⁹

This is precisely the classical meaning of the law-creating influence of facts in the context of the criteria for statehood, it is asserted once again that a factual situation has to be regarded as a legal one: *ex factis jus oritur*.

¹⁴⁷ A. Carty, *Sovereignty in International Law: A Concept of Eternal Return*, in: L. Brace / J. Hoffman (eds.), *Reclaiming Sovereignty*, London, 1997, p. 101

¹⁴⁸ K. Marek, *Identity and Continuity of States in Public International Law*, Geneva, 1968, p. 169

¹⁴⁹ M. P. Vorster, *The International Legal Personality of Nasciturus States*, in: SAYIL, Vol. 4, 1978, p. 9

It has to be noted with regard to other alleged criteria of statehood that they are not essentially based on the principle of effectiveness. Following notions have been suggested in this context: self-determination of peoples, democracy, minority rights, constitutional legitimacy.¹⁵⁰ But the right of peoples to self-determination plays an important role in respect of the legal status of the *de facto state* within the realm of public international law, and it will be considered in this study in the context of its external dimension, namely the notion of secession.

It is important at this stage to refer to the situations in which the notion of effectiveness was disregarded and respective territorial units were not able to acquire the status of sovereign independent states.

2.6 Statehood denied

2.6.1 Katanga

In 1960, shortly after the attainment of independence by the Republic of Congo, Katanga, Congo's province, made a secessionist attempt.¹⁵¹ Hallmarks of this case are active opposition of the UN to secessionist aspirations and foreign intervention on the side of the secessionist entity, namely Belgian troops intervened and supported Katanga. It has to be noted that the province in question was very rich in contrast to other parts of the Congo, so Belgium had its own interests there and the secessionist bid was supported by the Belgian mining company and troops.¹⁵² The role of the UN was crucial with regard to the outcome of this conflict. In Resolution 169 (1961) of 24 November 1961, the Security Council:

“[...] *completely rejecting* the claim that Katanga is “a sovereign independent nation”, [...]

¹⁵⁰ See T. D. Grant, *The Recognition of States, Law and Practice in Debate and Evolution*, Westport, 1999, pp. 84-106

¹⁵¹ P. Englebort, *State Legitimacy and Development in Africa*, Boulder / London, 2000, p. 109

¹⁵² M. Rafiqul Islam, *Secessionist Self-Determination: Some Lessons from Katanga, Biafra and Bangladesh*, in: *Journal of Peace Research*, Vol. 22, 1985, p. 213

8. *Declares* that all secessionist activities against the Republic of the Congo are contrary to the *Loi fondamentale* and Security Council decisions and specifically *demands* that such activities which are now taking place in Katanga shall cease forthwith;”¹⁵³

It has been stressed with regard to this resolution that it represented an official refusal to grant the right of self-determination to respective provincial authorities of Katanga.¹⁵⁴ It has also been mentioned that while official recognition was denied to the newly emerged Katangese Republic even by Belgium, the latter nevertheless “acknowledged” the independence of the province in question.¹⁵⁵ It follows that opposition to Katanga’s claim to independence was backed by the judgment that respective declaration did not represent the true wishes of the majority of the Katangese, i.e. the claim was not a genuine one.¹⁵⁶ As a consequence of this state of affairs, Katanga abandoned its secessionist bid in 1963.

2.6.2 Biafra

Eastern region of Nigeria, with the population of 14 million, seceded from the federation in 1967 and the creation of the independent republic of Biafra was declared.¹⁵⁷ It has been argued that the Ibo community could indeed claim to be viable as a separate, progressive nation¹⁵⁸ but the Nigerian civil war demonstrated that the vast majority of the members of the international community did not support Biafra. As a consequence of this state of affairs,

¹⁵³ UNSC Res. 169 (1961) of 24 November 1961, [S/5002], preambular para. and para. 8, available on the official website of the UN, at:

<http://www.un.org/documents/sc/res/1961/scres61.htm> (italics in original), [accessed: 11.05.2008]

¹⁵⁴ See R. Lemarchand, *The Limits of Self-Determination: The Case of the Katanga Secession*, in: *The American Political Science Review*, Vol. LVI, 1962, p. 404

¹⁵⁵ *Ibid.*, p. 415

¹⁵⁶ See M. Rafiqul Islam, *Secessionist Self-Determination: Some Lessons from Katanga, Biafra and Bangladesh*, in: *Journal of Peace Research*, Vol. 22, 1985, p. 213

¹⁵⁷ See S. Diamond, *Who Killed Biafra?*, in: *Dialectical Anthropology*, Vol. 31, 2007, p. 350

¹⁵⁸ See T. M. Franck / N. S. Rodley, *After Bangladesh: The Law of Humanitarian Intervention by Military Force*, in: *AJIL*, Vol. 67, 1973, p. 296

Biafra was forced to abandon its secessionist attempt in 1970 as respective leaders surrendered to the federal forces of Nigeria.¹⁵⁹

It has to be noted that Biafra was recognized as a state by five members of the international community: Tanzania, Gabon, Ivory Coast, Zambia and Haiti.¹⁶⁰ Ijalaye has summarized the following important considerations regarding the issue of Biafra: a) despite the fact that five countries recognized Biafra, none of them established formal diplomatic relations with the newly emerged entity; b) those five grants of recognition which were *de jure* in their very essence, were not preceded by *de facto* recognition; c) no country, including the states which recognized Biafra, formally granted the status of belligerency to either side in the Nigerian civil war; d) apart from humanitarian considerations expressed in the grants of recognition by the four African countries, no other reasons were given by the recognizing states; e) the OAU reaffirmed the respect for the principle of territorial integrity of member states and backed Nigeria; f) the position of the UN during the conflict was that it regarded the issue as being within the domestic jurisdiction of Nigeria and the organization did not, at any time, consider the issue of the Nigerian civil war or the question of Biafra's statehood.¹⁶¹

Ijalaye has examined the case in question on the basis of the declaratory and constitutive theories of recognition: with regard to the former it has been argued that recognition of Biafra by the five countries mentioned above was premature, because at the time of recognition the struggle was still going on and it was not clear that the "mother state" had abandoned all efforts to reassert its domination.¹⁶² In respect of the constitutive view it has been stressed that, it is difficult to conclude that Biafra, as a consequence of the recognition by only five small states, attained the status of an independent nation.¹⁶³ The assertion has been made by the author that, although Biafra had a government, it was difficult to say that it had a permanent population

¹⁵⁹ See D. A. Ijalaye, Was "Biafra" at any Time a State in International Law?, in: AJIL, Vol. 65, 1971, p. 551

¹⁶⁰ *Ibid.*, pp. 553-554

¹⁶¹ *Ibid.*, pp. 555-556

¹⁶² *Ibid.*, pp. 558-559

¹⁶³ *Ibid.*, p. 559

or a defined territory, because these were the matters which the civil war, as such, had to decide.¹⁶⁴

It has to be stressed that in the case of Biafra the attempt at secession was made in furtherance of a strong moral claim of the Ibo community to self-determination, because the easterners were subjected to grievous wrongs at the hands of the federal government.¹⁶⁵ Furthermore, it has been emphasized that the declaration of independence of Biafra was made by the recognized government of what had been a political community of Nigeria for a long period of time, from the government which had effectively governed the territory in question since July 1966 and the declaration came at the behest of the Consultative Assembly which virtually reflected the will of the people.¹⁶⁶ It is also true that the unilateral declaration of independence was made after fruitless negotiations with Lagos.¹⁶⁷ Nevertheless, the claim of the Ibo community did not gain recognition by the overwhelming majority of the international society. An assessment of the respective claim is expressed in a statement, according to which the present case:

“[...] serves as a tragic reminder that the concept of self-determination must be understood, not as a principle for unilateral implementation, but as a principle guiding the adjustment of competing claims for national recognition in a system of international order.”¹⁶⁸

2.6.3 Southern Rhodesia

It is important at this point to refer to the territory, formerly known as Rhodesia, the history of which began with the founding of the British South Africa Company by Cecil Rhodes in 1889.¹⁶⁹ In 1923 Britain extended self-rule to Southern Rhodesia as a self-governing colony within the British

¹⁶⁴ *Ibid.*, p. 553

¹⁶⁵ See C. R. Nixon, Self-Determination: The Nigeria/Biafra Case, in: World Politics, Vol. 24, 1972, p. 491

¹⁶⁶ *Ibid.*, p. 482

¹⁶⁷ See S. Diamond, Who Killed Biafra?, in: Dialectical Anthropology, Vol. 31, 2007, p. 350

¹⁶⁸ C. R. Nixon, Self-Determination: The Nigeria/Biafra Case, in: World Politics, Vol. 24, 1972, p. 494

¹⁶⁹ See R. M. Cummings, The Rhodesian Unilateral Declaration of Independence and the Position of the International Community, in: New York University Journal of International Law and Politics, Vol. 6, 1973, p. 59

Commonwealth, but without granting total independence to the territory in question: white settlers had complete control of the internal affairs of the colony while Britain controlled external relations through a Governor General appointed by the Crown and stationed in Salisbury, a major city of Southern Rhodesia.¹⁷⁰

In 1953 Southern Rhodesia joined, together with Northern Rhodesia and Nyasaland, a federation established by the UK but the entity was terminated in 1963.¹⁷¹ By 1965 Nyasaland had become independent under the name of Malawi and Northern Rhodesia was transformed into the independent republic of Zambia in 1964.¹⁷² It is important to note that in granting independence to Zambia and Malawi, Britain expressed its approval of the constitutional guarantees providing for African majority rule as the UK was committed to the policy, according to which, respective political entities (after becoming independent) should be governed by the African majority.¹⁷³ Moreover, this commitment of the UK has been correctly described as “Britain’s historic task of delivering Rhodesia to internationally recognised sovereign statehood under majority rule”¹⁷⁴.

Bearing in mind these considerations, it has to be asserted that the unilateral declaration of independence (UDI) of Southern Rhodesia made by the white regime of the Prime Minister Ian Smith on 11 November 1965 factually on behalf of the 6% white population¹⁷⁵, in furtherance of secession from the UK, did not represent an expression of majority rule. Indeed, it has been stressed by Doxey that by initiating the UDI, Ian Smith and his supporters tried to avoid sharing power with their fellow Africans.¹⁷⁶ As a consequence of this state of affairs, Britain opposed the declaration of independence by

¹⁷⁰ *Ibid.*

¹⁷¹ M. S. McDougal / W. Michael Reisman, Rhodesia and the United Nations: The Lawfulness of International Concern, in: AJIL, Vol. 62, 1968, p. 1

¹⁷² R. M. Cummings, The Rhodesian Unilateral Declaration of Independence and the Position of the International Community, in: New York University Journal of International Law and Politics, Vol. 6, 1973, p. 60

¹⁷³ *Ibid.*, p. 61

¹⁷⁴ Rt Hon Lord Soames, From Rhodesia to Zimbabwe, in: International Affairs, Vol. 56, 1980, p. 405

¹⁷⁵ See M. S. McDougal / W. Michael Reisman, Rhodesia and the United Nations: The Lawfulness of International Concern, in: AJIL, Vol. 62, 1968, pp. 2-3

¹⁷⁶ M. Doxey, International Sanctions: A Framework for Analysis with Special Reference to the UN and Southern Africa, in: International Organization, Vol. 26, 1972, p. 541

the white Rhodesian minority, this act was considered illegal because it contravened the principles of equal rights and self-determination of the population of the territory in whole.¹⁷⁷ Moreover, the UDI represented the official proclamation of rebellion against the British government.¹⁷⁸ Further development with regard to the status of the territory in question was the referendum of 1969, in which the Rhodesian electorate decided to turn the “country” into a republic.¹⁷⁹

It has to be emphasized that the attitude of the UN towards the problem was expressed in an assertion made in 1962 implying that the territory in question was not self-governing, and ever since, the organization has criticized the UK’s administration and preparation for independence of a non-self-governing territory.¹⁸⁰ In 1965 the UN Security Council determined that the situation resulting from the proclamation of independence by “illegal authorities” in Southern Rhodesia was extremely grave, and its continuance in time constituted a threat to international peace and security.¹⁸¹

In its Resolution 232 (1966) the principal organ of the world organization called for mandatory sanctions against Southern Rhodesia and determined once again, that the situation constituted a threat to international peace and security.¹⁸² It has to be noted at this point that the latter document was a significant one, because it represented the first instance of mandatory measures in the history of the UN.¹⁸³ It has to be stressed that sanctions had their momentous political impact as they contributed to the majority rule by

¹⁷⁷ G. V. Stephenson, *The Impact of International Economic Sanctions on the Internal Viability of Rhodesia*, in: *The Geographical Review*, Vol. 65, 1975, footnote 1, p. 377

¹⁷⁸ S. Onslow, *A Question of Timing: South Africa and Rhodesia’s Unilateral Declaration of Independence, 1964-65*, in: *Cold War History*, Vol. 5, 2005, p. 129

¹⁷⁹ See W. P. Kirkman, *The Rhodesian Referendum, the Significance of June 20, 1969*, in: *International Affairs*, Vol. 45, 1969, p. 648

¹⁸⁰ See G. A. Mudge, *Domestic Policies and UN Activities: The Cases of Rhodesia and the Republic of South Africa*, in: *International Organization*, Vol. XXI, 1967, p. 58

¹⁸¹ UNSC Res. 217 (1965) of 20 November 1965, para. 1, available on the official website of the UN, at: <http://www.un.org/documents/sc/res/1965/scres65.htm> [accessed: 15.05.2008]

¹⁸² See J. L. Cefkin, *The Rhodesian Question at the United Nations*, in: *International Organization*, Vol. XXII, 1968, pp. 661-662

¹⁸³ J. W. Halderman, *Some Legal Aspects of Sanctions in the Rhodesian Case*, in: *ICLQ*, Vol. 17, 1968, p. 686

encouraging African opponents of the white minority regime in Southern Rhodesia.¹⁸⁴ In 1970 the UN Security Council declared that it:

“Acting under Chapter VII of the Charter,

1. *Condemns* the illegal proclamation of republican status of the Territory by the illegal régime in Southern Rhodesia;

2. *Decides* that Member States shall refrain from recognizing this illegal régime or from rendering any assistance to it; [...]

9. *Decides*, in accordance with Article 41 of the Charter and in furthering the objective of ending the rebellion, that Member States shall:

(a) Immediately sever all diplomatic, consular, trade, military and other relations that they may have with the illegal régime in Southern Rhodesia, and terminate any representation that they may maintain in the Territory;”¹⁸⁵

It has to be mentioned that, although in the wording of the Security Council, reference is made to “régime”, as such, it is the status as a state, which was denied, emphasis was made on the fact that there was no valid claim to statehood. This state of affairs was the consequence of the denial of the right to self-determination of the black population of the territory in question, as the non-white majority was given limited representation and civil rights in accordance with the constitution of respective political entity.¹⁸⁶

Thus, the condemnation of the UDI was reiterated in the UN Security Council Resolution 288 (1970) and the latter referred to Article 25 of the UN Charter as the basis of its compulsory nature.¹⁸⁷ It is evident from resolutions 277 (1970) and 288 (1970) that they are mandatory, they denote the obligation of Member States of the UN not to recognize Southern

¹⁸⁴ W. Minter / E. Schmidt, When Sanctions Worked: The Case of Rhodesia Reexamined, in: African Affairs, Vol. 87, 1988, p. 231

¹⁸⁵ UNSC Res. 277 (1970) of 18 March 1970, paras. 1, 2, 9 (a), available on the official website of the UN, at: <http://www.un.org/documents/sc/res/1970/scres70.htm> (italics in original), [accessed: 15.05.2008]

¹⁸⁶ See C. G. Fenwick, When is there a Threat to the Peace? – Rhodesia, in: AJIL, Vol. 61, 1967, p. 753

¹⁸⁷ See UNSC Res. 288 (1970) of 17 November 1970, para. 4, available on the official website of the UN, at: <http://www.un.org/documents/sc/res/1970/scres70.htm> [accessed: 16.05.2008]

Rhodesia as a state, or its government as a legitimate representative of the Rhodesian people. The binding character of these resolutions can be deduced from the reference to the Chapter VII of the UN Charter in the first document, and to the Article 25 of the UN Charter in the second one. The legal basis of the denial of statehood to Southern Rhodesia can be described in the following way: the UDI made by respective authorities, and subsequent domestic legislation, violated the right to self-determination in relation to the majority of the Rhodesian population, as well as British sovereignty.¹⁸⁸

It has to be stressed that Southern Rhodesia met the requirements based on the principle of effectiveness, i.e. the empirical criteria for statehood were satisfied. This assertion was confirmed by Devine, as this author addressed the issue of the attitude of the General Assembly of the UN to the entity in question. Devine emphasizes that, in the view of the General Assembly, it was theoretically possible that the UK might grant independence to Rhodesia, and it was also probable that other states might recognize Rhodesian independence. So, bearing in mind these considerations, it has to be concluded that the entity in question was regarded as a state by the General Assembly, otherwise there could be no contemplation of the recognition.¹⁸⁹

It follows that the condemnatory votes in the General Assembly have to be interpreted in a manner, that the overwhelming majority, which voted against Southern Rhodesia's independence, declared that respective members of the international community rejected to recognize the entity in question as a sovereign state, and subsequently denied the international personality to Southern Rhodesia: "Since there has been a universal failure to recognise, Rhodesia is devoid of international personality as an independent state."¹⁹⁰ The author proceeds by applying the declaratory view of recognition and empirical or traditional criteria for statehood to the Rhodesian case, and arrives at the conclusion that Southern Rhodesia

¹⁸⁸ See M. S. McDougal / W. Michael Reisman, Rhodesia and the United Nations: The Lawfulness of International Concern, in: AJIL, Vol. 62, 1968, p. 12

¹⁸⁹ D. J. Devine, The Requirements of Statehood Re-examined, in: The Modern Law Review, Vol. 34, 1971, p. 412

¹⁹⁰ *Ibid.*, p. 413

satisfied the requirements of permanent population, defined territory and independent government.¹⁹¹ At the same time, it has been stressed that, on the ground of application of the constitutive theory of recognition to the case in question, the overwhelming majority of states could simply deny Southern Rhodesia an effective international personality by refusing to recognize the entity as a state.¹⁹²

The white population of Southern Rhodesia asserted the claim that, whether a country is independent or not depends on whether the “mother state” can enforce its position or not. So as the UK had renounced its responsibility and refused to use force to regain the ruling position, independence was accomplished by the effective governance of white settlers and their will to be independent.¹⁹³ The response of the international community was its commitment to the legal argument that independent Southern Rhodesia did not exist.¹⁹⁴ It has been emphasized that, if a country stands alone, factually unrecognized, its *de jure* as well as *de facto* existence must be questioned, despite the presence of the notion of effectiveness. The reason is that the isolation and the total refusal by the members of the international community, to admit an entity to the club of states, prevents the unrecognized state from exercising a common attribute of independence, the ability to enter into relations with other countries.¹⁹⁵ The following conclusion has been drawn in respect of the Rhodesian case:

“[...] Rhodesia is opposed by the United Nations as a body and its independence is unrecognized. [...] It may be destined to an existence in a kind of limbo, not recognized, but functioning internally in a continually embattled state, able to deal with other nations to some extent but always as an outsider.”¹⁹⁶

¹⁹¹ *Ibid.*, pp. 415-416

¹⁹² *Ibid.*, p. 416

¹⁹³ R. M. Cummings, The Rhodesian Unilateral Declaration of Independence and the Position of the International Community, in: New York University Journal of International Law and Politics, Vol. 6, 1973, p. 66

¹⁹⁴ *Ibid.*, p. 79

¹⁹⁵ *Ibid.*, p. 80

¹⁹⁶ *Ibid.*, p. 81

In 1980 Southern Rhodesia became independent as Zimbabwe.¹⁹⁷ Majority rule was finally realized on the basis of free elections.

2.6.4 South African homelands

Further important examples are the South African homeland territories, or Bantustans¹⁹⁸ which were granted independence by the government of South Africa. It has to be noted that this process was an integral part of the separate development policy maintained by respective government, aimed at allocating to the constituent racial groups of the republic their own states, or homelands, in which they could develop along their own lines.¹⁹⁹ The consequence of this policy practiced unilaterally by the whites was that the white population of the republic remained coherent, whereas black citizens were to be split into eight “nations”.²⁰⁰ In sum, this policy was the policy of racial segregation, aimed at excluding the black population from the republic and securing a position of supremacy by the white minority in the country. The black population had to be resettled in homelands, which should be economically dependent on South Africa, and the separation of those territories from the “mother state” was accompanied by the loss of South African citizenship by the black population.²⁰¹

The policy mentioned above is known under the designation of “apartheid” and the mode of granting independence to respective homelands can be described in the following manner: the South African legislative organ passed the statute providing for the independence of the territory in question, and the legislative body of the territory involved enacted a

¹⁹⁷ Information available on the official website of the CIA, at: <https://www.cia.gov/library/publications/the-world-factbook/geos/zi.html> [accessed: 18.05.2008]

¹⁹⁸ “A bantustan is an area designated by the South African government as the native country of a given tribe of blacks, usually austere and far from employment. Through forcible removal of blacks, the government is reducing their presence in white areas and around urban centers;”, J. Hunter, Israel and the Bantustans, in: *Journal of Palestine Studies, A Quarterly on Palestinian Affairs and the Arab-Israeli Conflict*, Vol. XV, 1986, p. 53

¹⁹⁹ See M. Lipton, Independent Bantustans?, in: *International Affairs*, Vol. 48, 1972, p. 1

²⁰⁰ *Ibid.*, p. 3

²⁰¹ W. B. van Lengerich, Das Staatsbürgerschaftsrecht Südafrikas unter besonderer Berücksichtigung der ehemaligen Homelands, in: *VRÜ*, Jg. 34, 2001, p. 365

constitution which became effective on the date of independence.²⁰² It is interesting to note that none of the independence-conferring enactments provided expressly for denationalization on the ground of race, but by implication they were designed to apply only to the black population.²⁰³

Transkei, which was declared independent in 1976, was not recognized by any state other than South Africa.²⁰⁴ Furthermore, the “independence” of the territory in question caused harsh international reaction. In its Resolution 31/6 (A) the UN General Assembly:

“*Taking note* that the racist régime of South Africa declared the sham “independence” of the Transkei on 26 October 1976, [...]

1. *Strongly condemns* the establishment of bantustans as designed to consolidate the inhuman policies of *apartheid*, to destroy the territorial integrity of the country, to perpetuate white minority domination and to dispossess the African people of South Africa of their inalienable rights;”²⁰⁵

The UN Security Council has also referred to the question of Transkei’s alleged independence, and in its resolution passed in 1976, the Security Council:

“1. *Endorses* General Assembly resolution 31/6 A, which, *inter alia*, calls upon all Governments to deny any form of recognition to the so-called independent Transkei and to refrain from having any dealings with the so-called independent Transkei or other bantustans;”²⁰⁶

The policy of non-recognition was also applied by the OAU in the resolution adopted in 1976 in which the organization depicted the politics maintained by Pretoria as “Bantustanization, the cornerstone of Apartheid

²⁰² J. Dugard, South Africa’s “Independent” Homelands: An Exercise in Denationalization, in: Denver Journal of International Law and Policy, Vol. 10, 1980, p. 19

²⁰³ *Ibid.*, p. 27

²⁰⁴ *See Ibid.*, pp. 15-16

²⁰⁵ UNGA Res. 31/6 (A) of 26 October 1976, preambular para. and para. 1, available on the official website of the UN, at: <http://www.un.org/documents/ga/res/31/ares31.htm> (italics in original), [accessed: 19.05.2008]

²⁰⁶ UNSC Res. 402 (1976) of 22 December 1976, para. 1, in: Resolutions and Decisions of the Security Council (1976), SCOR 31, United Nations, New York, 1977, p. 13 (italics in original)

designed to ensure the balkanization, [...] in South Africa to the benefit of white supremacy”²⁰⁷.

According to Dugard, the refusal of states to recognize Transkei can be interpreted in two ways: first of all, it can denote that Transkei did not meet the criteria for statehood, although the author draws the conclusion that the traditional requirements for statehood, enshrined in the Montevideo Convention, were met in this particular case.²⁰⁸ On the other hand, non-recognition has also been regarded as a sanction for violation of an international legal norm, and the following conclusion has been drawn: as Transkei was considered by the states as a product of apartheid, and the independence of the entity in question as the consolidation of the policy of separate development, members of the international community may have applied the sanction of non-recognition based on the maxim *ex injuria jus non oritur* in order to deny legal consequences to the situation, which they regarded as one being contrary to international law.²⁰⁹

The legal assessment of the policy of apartheid was made by the ICJ in 1971, as the Court observed that the establishment and enforcement of distinctions, exclusions, restrictions and limitations exclusively on the basis of race, colour, descent or national or ethnic origin, representing the denial of fundamental human rights, is a flagrant violation of the purposes and principles of the UN Charter.²¹⁰

Witkin stresses that the circumstances surrounding the creation of the entity in question denote two areas of possible illegality, and the reasons for the justification for the duty of non-recognition: South Africa’s questionable invocation of the right to self-determination and the connotation of

²⁰⁷ Organization of African Unity: Resolution on Non-Recognition of South African Bantustans (adopted at the Twenty-Seventh Ordinary Session of the O.A.U. Council of Ministers, held at Port Louis, Mauritius, June 24-July 3, 1976), reproduced in: ILM, Vol. XV, 1976, p. 1221

²⁰⁸ J. Dugard, A International Law and Foreign Relations, Transkei Becomes Independent, in: Annual Survey of South African Law, 1976, p. 33

²⁰⁹ *Ibid.*, p. 34

²¹⁰ Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276 (1970), Advisory Opinion, I.C.J. Reports 1971, p. 16 (para. 131, p. 57)

apartheid in the creation of Transkei.²¹¹ It has also been emphasized that the initial organization of the black population of South Africa into bantustans was imposed without the participation of the respective racial group.²¹² Furthermore, the UN has characterized the practices of apartheid as a threat to international peace and security, and if the creation of the state of Transkei is viewed as a consequence of the policy of apartheid, this can be regarded as the basis under the Charter of the UN for denying the legality of the independent existence of the entity in question.²¹³ Moreover, the proscription against apartheid can be regarded *jus cogens* norm, and as the Status of Transkei Act and respective arrangements between South Africa and the entity involved furthered the policy of apartheid, they contravene the peremptory norm of international law and are void within the realm of the latter. It follows that if other states were to recognize the “newly emerged state”, their action would also contravene the *jus cogens* norm and violate international law.²¹⁴

Thus, in the case of Transkei, the doctrine of collective non-recognition was applied on the basis of the determination that secession by the entity in question furthered South Africa’s racist policies and, as a consequence, the right to self-determination could not be employed. So, states were duty bound to deny recognition on grounds of obligations stemming from the UN Charter and customary international law prohibiting apartheid (in addition to obligations of individual state parties to certain human rights instruments).²¹⁵

In sum, following homelands were granted independence: Transkei (1976), Bophuthatswana (1977), Venda (1979) and Ciskei (1981).²¹⁶ In 1994 the “independent” homelands were abolished and integrated into the South

²¹¹ M. F. Witkin, *Transkei: An Analysis of the Practice of Recognition – Political or Legal?*, in: *Harvard International Law Journal*, Vol. 18, 1977, p. 617

²¹² *Ibid.*, p. 621

²¹³ *Ibid.*, p. 623

²¹⁴ *Ibid.*, p. 626

²¹⁵ *Ibid.*, p. 627

²¹⁶ *See* W. B. van Lengerich, *Das Staatsbürgerschaftsrecht Südafrikas unter besonderer Berücksichtigung der ehemaligen Homelands*, in: *VRÜ*, Jg. 34, 2001, p. 366

African state.²¹⁷ The following conclusion has to be drawn with regard to the legal assessment of the case of Bantustans:

“Der rechtliche Makel der von Südafrika in die Unabhängigkeit entlassenen *homelands* wird gesehen in dem Verstoß gegen das Selbstbestimmungsrecht der schwarzen Mehrheitsbevölkerung, das durch das Erfordernis der Erhaltung der territorialen Integrität des Landes qualifiziert wird, und in dem Verstoß gegen das gleichfalls gewohnheitsrechtliche Verbot der Apartheid als einer Form der rassistischen Diskriminierung.”²¹⁸

These cases are important for the assessment of *ex factis jus oritur* / *ex injuria jus oritur* in the context of *de facto* statehood and respective evaluation will be made in the next section.

Preliminary remarks

It can be asserted that the fulfillment of traditional criteria for statehood based on the principle of effectiveness does not inevitably mean that a respective territorial entity should be considered as a “state” for the purposes of contemporary public international law. Thus, the notion of *ex factis jus oritur* does not guarantee acquisition of statehood within the realm of the international legal order. The same assertion holds true in respect of the notion of *ex injuria jus oritur*. The emergence of an effective territorial entity illegal in origin does not lead to the attainment of the status of a “state” if collective non-recognition is applied by the international community: *ex injuria jus non oritur*.

Bearing in mind the features of the cases considered above, it has to be stressed that there were instances in which the international community has “overruled” the existence of effective situations on the basis of the application of non-recognition. It is important to emphasize that if a respective factual situation represents the violation of the right of peoples to self-determination, this circumstance can be regarded as a legal basis for the

²¹⁷ *Ibid.*, p. 384

²¹⁸ E. Klein, Die Nichtanerkennungspolitik der Vereinten Nationen gegenüber den in die Unabhängigkeit entlassenen südafrikanischen *homelands*, in: *ZaöRV*, Bd. 39, 1979, p. 485 (italics in original)

non-recognition of the entity in question. In the case of Biafra, where the Ibo community suffered grievous wrongs at the hands of the federal Nigerian government and had a solid claim to secession, the international community did not recognize Biafra as a state and adhered to the principle of territorial integrity. As with regard to Katanga, Southern Rhodesia and the South African homelands it can be asserted that the international community maintained a legal position, according to which, the denial of the right to self-determination renders the fulfillment of traditional criteria irrelevant, and effectiveness is overridden by the non-recognition of the political entity with aspiration for statehood.

The fact that there were *de facto* situations, as such, is confirmed by de Smith as this author, with reference to the case of Southern Rhodesia, stresses that by 1966 the UK government was exercising legal authority without effective power in relation to the territory in question, whereas the Smith regime was wielding effective power without legal authority.²¹⁹ It is thus evident that *de facto* control was insufficient at the end of the day for the acquisition of the status of a sovereign independent state. The *de facto* existence could not be transformed into *de jure* status because of non-recognition by the international community. The attitude of the international community was based on the legal argument, and the right of peoples to self-determination assumed the leading role in this environment.

²¹⁹ S. A. de Smith, Southern Rhodesia Act 1965, in: The Modern Law Review, Vol. 29, 1966, p. 304

Chapter 3: *Fait accompli* as a final expression of the alleged law-creating influence of facts

3.1 The content of the notion of *fait accompli*

The notion of *fait accompli*, or the accomplished fact, represents the culmination of considerations regarding the alleged normative force of factual situations. This manifestation denotes that facts can serve as sources of law on the basis of their mere existence, and the law must be brought into line with requirements of factual situations. According to the essence or the content of the concept, even if respective factual situation violates law, the latter has to be adapted to facts illegal in origin. It has to be noted that the meaning of the notion of *fait accompli* is twofold: it expresses the realization of the principle of effectiveness and, at the same time, it denotes the limits of the principle. This second function of *fait accompli* represents its negative dimension in respect of factual situations:

“Das *fait accompli* wird somit als ein dem Recht widersprechender tatsächlicher Zustand verstanden, der jedoch die Möglichkeit der “Versteinerung” in sich trägt, da die Gefahr besteht, dass ein Rechtssatz oder ein Rechtsanspruch, der sich auf die Dauer nicht durchsetzen kann, nicht mehr für rechtsverbindlich gehalten wird und statt dessen die durch widerrechtliche Massnahmen herbeigeführten faktischen Situationen entweder nach Ablauf einer gewissen Zeit oder auf Grund internationaler Anerkennung als Quelle von Rechten betrachtet werden.”²²⁰

As it is evident from this definition, *fait accompli* represents the situation with illegal origin²²¹ and this is precisely the issue of decisive importance with regard to the limits of the application of effectiveness and its consequences. The concept in question rests on the long-lasting illegality in the form of a factual situation, and it is supposed that this illegality will, on the basis of non-application of respective legal rules, override the latter. In this way, after a period of time, or on the ground of international

²²⁰ U. Ziehen, *Vollendete Tatsachen bei Verletzungen der territorialen Unversehrtheit*, Eine völkerrechtliche Untersuchung, Beihefte zum Jahrbuch der Albertus-Universität Königsberg / Pr., XX, Würzburg, 1962, pp. 1-2

²²¹ See C. Bilfinger, *Vollendete Tatsache und Völkerrecht*, Eine Studie, in: *ZaöRV*, Bd. 15 (1953/54), p. 456

recognition, facts enter the realm of public international law, despite their initial illegality.

3.2 Dimensions of the concept of *fait accompli*

Another meaningful feature of the concept of *fait accompli* is its political dimension. To say precisely, it is used in pursuance of political intentions, the concept is instrumental to the promotion of respective goals of a political nature. This means that political considerations are introduced into the realm of public international law and the very nature of the latter seems to be backing this introduction: “Der politische Charakter des Völkerrechts folgt aus der Tatsache, daß das dem Völkerrecht zugeordnete Lebensgebiet vorwiegend ein politisches ist.”²²² It follows that the international legal order is familiar with the notion of politics, and *fait accompli* strengthens the role of the latter by establishing factual situations illegal in origin as the sources of law. With regard to the emergence and existence of the *de facto state* this overall situation means that, according to the implications of the concept of *fait accompli*, this territorial unit representing an established fact, enters the sphere of public international law even if its creation is connected with breaches of the rules of the latter.

It has been asserted in this respect that *fait accompli* politics, maintained at an international level, causes the alienation of interstate relations from the legal sphere. The task of public international law has been acknowledged in this respect: it should guarantee the return to the normal status.²²³ The notion of *fait accompli* politics has been regarded as a danger to the international legal order: “Die *fait accompli*-Politik bedroht Ordnung, Sicherheit und Freiheit, sie erschüttert den Glauben an das Recht überhaupt.”²²⁴

²²² E. Blenk-Knocke, Zu den soziologischen Bedingungen völkerrechtlicher Normenbefolgung, Die Kommunikation von Normen, Ebelsbach am Main, 1979, p. 67

²²³ See C. Bilfinger, Vollendete Tatsache und Völkerrecht, Eine Studie, in: ZaöRV, Bd. 15 (1953/54), p. 454

²²⁴ *Ibid.*, p. 455 (italics in original)

3.3 Law, power and the notion of *fait accompli*

It follows that the concept of *fait accompli* and the politics based on this concept can endanger the very essence of law. This assertion is confirmed by the fact that political considerations are sometimes maintained on the basis of power, the latter also representing a guarantee of the enforcement of legal rules. But the notion of power can have negative impact on the law, especially, if the validation of situations illegal in origin is the issue in question. This constellation is linked with the concept of effectiveness in the form of *fait accompli*, and affects each and every single case in which facts are considered to possess an alleged law-creating influence. With respect to the relationship of the notion of effectiveness and the notion of power, it has to be stressed that there seems to be no problem in considering them as interrelated concepts: “Das Problem der Effektivität ist ein Problem der Macht.”²²⁵

It seems reasonable at this point to introduce some considerations concerning the role of politics and the significance of power in public international law. It has been asserted in this respect that the international legal order fulfils a social function, in that it transforms the application of power into a legal obligation, it converts the world of *is* into the world of *ought*.²²⁶ This role of the international legal system expresses the political dimension of public international law. The dimension mentioned above denotes the existence of international legal rules which reflect “underlying social forces, most notably the prevailing balance of power and configuration of states’ interests.”²²⁷

It is evident from this statement that the notion of power and respective interests of particular states are central problems in the context of political international law. The notion of politics endangers the international legal system, if power becomes an overriding factor on the international plane in

²²⁵ F. A. Frhr. von der Heydte, Ein Beitrag zum Problem der Macht im „klassischen“ und im „neuen“ Völkerrecht, in: W. Schätzel / H. - J. Schlochauer (Hrsg.), Rechtsfragen der internationalen Organisation, FS für H. Wehberg, Frankfurt am Main, 1956, p. 193

²²⁶ See M. Byers, Custom, Power and the Power of Rules, International Relations and Customary International Law, Cambridge UP, 1999, p. 6

²²⁷ See C. Reus-Smit, Society, power, and ethics, in: C. Reus-Smit (ed.), The Politics of International Law, Cambridge Studies in International Relations: 96, Cambridge UP, 2004, p. 272

the sense that legal considerations are ignored on the basis of power politics. This situation can turn into an acute crisis of the international legal order, if the validation of factual situations illegal in origin is the issue in question. One important aspect of the problem is that law, as such, functions within the realm of the political environment:

“Law exists, and legal institutions operate, only in particular political contexts. Contexts vary through time and space, and are influenced by many social, economic and cultural factors. We can and do legitimately separate “law” from “politics” in particular contexts for particular purposes.”²²⁸

Bearing in mind the fact that “underlying political realities invariably shape the law”²²⁹, it has to be examined, whether the international legal system can be “alienated” from the world of politics in certain situations. This question is connected with the issue of the ability of public international law to cope with the emergence and existence of factual situations which deviate from the requirements of the international legal order.

At the initial stage of the examination there seems to be good reason to assume a pessimistic attitude towards public international law, as the longest influence of political philosophy on the latter and the political basis of the international legal system has been acknowledged.²³⁰ Moreover, it has been asserted that the process of law-making on the international plane is essentially the political process.²³¹ At the same time, the existence of a link between politics and the notion of *fait accompli* is confirmed on the basis of the fact that politics, as such, “has its roots in reality”²³² and as the concept of *fait accompli* is an expression of reality, these two notions are interwoven.

²²⁸ M. A. Kaplan / N. deB. Katzenbach, *The Political Foundations of International Law*, New York / London, 1961, p. 3

²²⁹ J. Martin Rochester, *Between Peril and Promise: The Politics of International Law*, Washington, D.C., 2006, p. 51

²³⁰ See D. M. Johnston, *The Heritage of Political Thought In International Law*, in: R. St. J. Macdonald / D. M. Johnston (eds.), *The Structure and Process of International Law: Essays in Legal Philosophy Doctrine and Theory*, Developments in International Law, The Hague, 1983, p. 179

²³¹ See *Ibid.*, p. 203

²³² J. L. L. Aranguren, *Openness to the World: An Approach to World Peace*, in: S. Hoffmann (ed.), *Conditions of World Order*, Boston, 1968, p. 193

Thus, the alleged function of the international legal order as a system, which “provides somewhat a political legislative technique”²³³, is crucial in the context of the validation of *fait accompli* in a particular case. Cassese makes a statement of overwhelming importance in this regard:

“International law is a realistic legal system. It takes account of existing power relationships and endeavours to translate them into legal rules. It is largely based on the principle of effectiveness, that is to say, it provides that only those claims and situations which are effective can produce legal effects. A situation is effective if it is solidly implanted in real life.”²³⁴

It has been stressed by this eminent scholar that there is no place for legal fictions on the international plane, and as a result of this situation, a decisive significance is attached to the notion of effectiveness: “Force is the principal source of legitimation in the international community. The formal ‘endorsement’ of power tends to legalize and crystallize it.”²³⁵ With regard to the reason, why the concept of effectiveness has acquired such an overriding role within the realm of the international legal system, Cassese asserts that power is diffused, and there is no superior authority which would legitimize new factual situations, nor have the states adopted the principles which would serve this purpose: “as a consequence, legal rules must of necessity rely upon force as the sole standard by which new facts and events are to be legally appraised.”²³⁶ But it has to be noted that, according to this author, the situation described above with regard to the overriding role of effectiveness and force (and respective considerations), refer principally to the traditional setting of the international community.²³⁷ Thus, it can be asserted that the notions of effectiveness, power and politics try to integrate respective *fait accompli* in the form of a *de facto state* into the realm of public international law. But there seems to be an insurmountable difficulty in this regard:

²³³ G. L. Maris, *International Law, An Introduction*, Lanham et al., 1984, p. 368

²³⁴ A. Cassese, *International Law in a Divided World*, Oxford, 1986, p. 26

²³⁵ *Ibid.*, p. 27 (emphasis in original)

²³⁶ *Ibid.*

²³⁷ *Ibid.*

“To assimilate completely *de facto* regimes of control into a conception of the international legal order, [...] would endanger a confusion of law and power such that it would no longer be meaningful to distinguish the standards of international law from the patterns of international politics.”²³⁸

The possibility of such accommodation rests on the assumption that political considerations can be transformed into the legal foundation of adapting law to facts. It has to be mentioned at this stage that the “automatic accommodation” of *fait accompli* to international law denotes the existence of the interstate society “ultimately governed by the rule of force.”²³⁹ Bearing in mind the considerations submitted above, it can be asserted that the automatic insertion of politics into the realm of public international law, signifying the accommodation of *fait accompli* to the latter, runs a danger of adapting the law to facts and to the manifestation described as *Realpolitik*, or power politics:

“Eine politische Gefährdung des Rechts liegt [...] erst vor, wenn das Spannungsverhältnis zwischen Recht und Politik zugunsten des Politischen aufgelöst und die rechtliche Bindung zugunsten einer freien Politik abgebaut wird.”²⁴⁰

Thus, it follows that *fait accompli* represents a danger of a political character and, at the same time, it is acknowledged that the notions of force and *fait accompli* “play an extremely important and often preponderant rôle in international relations.”²⁴¹ The politics of *fait accompli* is essentially the politics of creating facts with the hope that the world will come to terms

²³⁸ R. A. Falk, The Interplay of Westphalia and Charter Conceptions of International Legal Order, in: R. A. Falk / C. E. Black (eds.), The Future of the International Legal Order, Vol. I, Trends and Patterns, Princeton, 1969, p. 34 (italics in original)

²³⁹ See G. W. Keeton / G. Schwarzenberger, Making International Law Work, 2nd ed., in: G. W. Keeton / G. Schwarzenberger (eds.), The Library of World Affairs, No. 1, London, 1946, p. 28

²⁴⁰ W. Schaumann, Die politische Gefährdung des Völkerrechts in der Gegenwart, in: H. Wehberg et al. (Hrsg.), FW, Blätter für internationale Verständigung und zwischenstaatliche Organisation, Bd. 53, 1955/56, p. 350

²⁴¹ See J. H. W. Verzijl, International Law in Historical Perspective, Part VI, Juridical Facts as Sources of International Rights and Obligations, Publications of the Institute for International Law of the University of Utrecht, Series A, Modern International Law, No. 10, Leiden, 1973, p. 52

with them, and the law will accept and recognize the factual political power.²⁴²

3.4 The politics of international law and the notion of *fait accompli*

The notion of *fait accompli* illustrates the alleged law-creating influence of factual situations, the normative force of facts, as such, and the question is, whether public international law can overcome “biased effects” of this concept. The following statement seems to be informative in this respect:

“[...] Das Völkerrecht weiß, daß es der Macht seinen Tribut zahlen muß, und seine Sätze sind nüchtern und realistisch. Das Völkerrecht beugt sich der Macht der Tatsache – nicht in dem Sinn, daß es dem Faktischen schon normative Kraft verleiht, wohl aber in dem Sinn, daß es nicht selten eine bestimmte Faktizität voraussetzt, um an sie rechtliche Wirkungen zu knüpfen.”²⁴³

It must be noted at this stage that the concept of *fait accompli* encompasses consequences of a negative dimension of *ex factis jus oritur*, it represents the expression of the notion described as *ex injuria jus oritur*, and this aspect of the concept is decisive in the context of clarifying the legal status of *de facto states*, if the illegality of origin is the issue in question. The notion of *fait accompli* validates the factual situation illegal in origin and creates a “new legality”. In doing so, the concept in question transforms the established state of things from a factual dimension into a legal one and adapts the law to facts.

The reason why the notion of *fait accompli* became so important under the international legal system has to be found again in the nature of public international law, namely in its decentralized character, i.e. the absence of a central legislative organ and the lack of a central law-enforcement authority. Thus, the notion of *fait accompli* serves as a vehicle on the basis of which an effective situation tends to enter the realm of international law. If the

²⁴² See W. Schätzel, Die Annexion im Völkerrecht, in: AVR, Bd. 2, 1950, pp. 10-11

²⁴³ F. A. Frhr. von der Heydte, Völkerrecht, Ein Lehrbuch, Bd. I, Köln, 1958, p. 26

illegality of that situation is the issue in question, *fait accompli* functions as a factor of validation, and it is supposed that the factual state of affairs is transformed into a legal one. These are the modes of functioning of the notion of *fait accompli* within the realm of the international legal system, and the question remains, whether public international law allows the *fait accompli* in the form of a *de facto state* to accommodate itself to the international legal order.

It has to be stressed that the most frequent manifestation of *fait accompli*, as far as the latter represents the result of a violation of international law, is a consequence of the disruption of the territorial integrity of a respective state.²⁴⁴ A *de facto state*, as such, can be regarded as the expression of that disruption from the point of view of the “mother state”. At the same time, *fait accompli* represents the mediator between the notion of *normative Kraft des Faktischen* and public international law. It is important at this point to introduce the statement which explains the functioning of the *fait accompli* in situations where the use of force is involved and links it with *ex injuria jus oritur* and *normative Kraft des Faktischen*:

“Hält der durch die vollendete Tatsache geschaffene Zustand an, knüpfen sich an ihn rechtliche Folgen, so entsteht ein rechtlicher Schwebezustand. Dieser saniert nach Ablauf einer Ersitzungszeit, die etwa mit dreißig Jahren, also einer Generation, anzusetzen ist, den Rechtsbruch und begründet einen neuen legalen Status. Nur in diesen rechtlichen Grenzen gibt es [...] Fälle, daß aus Unrecht infolge Heilung durch Zeitablauf Recht entsteht (ex iniuria jus oritur), nur in diesem Ausmaß hat das Faktische – die vollendete (rechtswidrige) Tatsache – normative Kraft. Keineswegs lösen aber rechtswidrige Tatsachen, [...] automatisch und sofort Rechtsfolgen aus.”²⁴⁵

This statement confirms the fact that the notions: *normative Kraft des Faktischen*, *ex factis jus oritur* and *fait accompli* are interrelated matters, and they essentially denote the existence of the alleged law-creating

²⁴⁴ U. Ziehen, *Vollendete Tatsachen bei Verletzungen der territorialen Unversehrtheit, Eine völkerrechtliche Untersuchung*, Beihefte zum Jahrbuch der Albertus-Universität Königsberg / Pr., XX, Würzburg, 1962, p. 10

²⁴⁵ S. Verosta, *Die Politik der vollendeten Tatsachen und ihre rechtlichen Grenzen*, in: *Wissenschaft und Weltbild, Zeitschrift für alle Gebiete der Forschung*, Jg. 7, 1954, p. 341

influence of facts. The decisive question is, whether facts can enter the realm of law on the basis of their mere existence, i.e. whether a factual situation can be transformed into a legal one, because it represents a firmly established state of things. In the context of the emergence of a *de facto state* it means following: can this kind of territorial unit acquire its own place within the realm of public international law on the basis of the fact that it truly exists? An affirmative answer to this question would denote the presence of an automatic law-creating force of facts, it would mean that the *de facto state* is a part of the international legal order, because it represents a firmly established factual situation. If we answer the question mentioned above in the negative, we must nevertheless clarify the role of facts. The following state of affairs has to be borne in mind at this stage:

“[...] das Faktische ist noch nicht Norm, ihm wohnt zunächst nur normbildende Kraft inne. Daß die Kraft wirken, aus dem Faktischen die Norm bilden, das tatsächlich Gegebene in die Sphäre der rechtlichen Ordnung heben kann, hat eines zur Voraussetzung: nämlich die auf Grund der Wahrnehmung des Geschehens erfolgende Anerkennung der Betroffenen und ihre sich bildende Überzeugung, daß das, was geschieht, rechtens sei.”²⁴⁶

Thus, it follows from this statement that the self-evident or automatic law-creating influence of facts has to be rejected even in the form of *fait accompli*. It has been asserted that facts cannot serve as the source of law on the basis of their mere existence, something more is needed in order to transform a factual situation into the legal one. This “something more” is considered to be the recognition of a respective state of affairs as legal, the conviction of men that the maintenance of a factual situation is a right thing.

²⁴⁶ OLG Frankfurt a. M., Strafsenat, Urteil v. 12. 8. 1947 – Ss 92/47, in: H. Kleine et al. (Hrsg.), HEST, Sammlung von Entscheidungen der Oberlandesgerichte und der Obersten Gerichte in Strafsachen, Bd. 1, Heidelberg, 1948-1950, p. 73

Preliminary remarks

It can be asserted that the “faces” of the notion of effectiveness which were considered above, serve as vehicles promoting the inclusion of the *de facto state* in the realm of the international legal system. The situation concerning the self-evident conversion of facts into law is based on the idea, that the international legal order cannot ignore the existence of firmly established factual situations. At the same time, in the context of factual situations illegal in origin, the logic of the self-evident normative ascendancy of facts denotes the presence of the force which is supposed to validate breaches of international law. This is another function of the principle of effectiveness.

But, as it has been demonstrated in the theoretical part of the present study, those three “faces” of the principle of effectiveness do not “guarantee” that the *de facto state* enters the realm of contemporary international law (via statehood) solely on the basis of its effective existence. Such self-evident normative force of facts has to be rejected. Menzel’s statement must be introduced at this stage, in order to confirm the existence of the danger connected with the misinterpretation and misuse of the essence and consequences of facts:

“Eine falsch verstandene „Faktizität“ könnte [...] zu jenen Mißverständnissen führen, die eine mißbräuchliche Verwendung der Formel von der „normativen Kraft des Faktischen“ im staatlichen Recht zu gewissen Zeiten bereits ausgelöst hat.”²⁴⁷

One of the “faces” of the principle of effectiveness, namely the notion of *fait accompli* is the issue of special importance as it represents the political peril facing the international legal order. The problem is that the maintenance of the politics of *fait accompli* is essentially the realization of the discretion of states. It has to be borne in mind that “it is the subjects of international law who are the sole law-creating agents.”²⁴⁸ States create the norms of public international law and they also pursue their political

²⁴⁷ E. Menzel, Grundprobleme der Ermittlung, Anwendung und Geltung von Normen des Völkerrechts, Vom gegenwärtigen Stand der Völkerrechtstheorie, in: JuS, Zeitschrift für Studium und Ausbildung, Jg. 3, Heft 2, 1963, p. 50

²⁴⁸ G. Schwarzenberger, The Inductive Approach to International Law, London, 1965, p. 19

interests, and the materialization of this situation is sometimes expressed through the emergence of a *fait accompli* in the form of a *de facto state*. It follows that the actors which legislate on the international plane implement, at the same time, the policy which endangers the very essence of international law.

It has been suggested that the solution to the problem must inevitably be based on the consideration of both, legal and political elements.²⁴⁹ The problem connected with the notion of *fait accompli* denotes the existence of a situation in which politics override the law. At the international level, this state of things denotes the adaptation of public international law to factual situations. It has to be stressed that the state of things described above endangers the international legal order, as it introduces external factors into the realm of this system: “Das normative Selbstverständnis kann durch soziale Tatsachen, die von außen ins Rechtssystem eingreifen, dementiert werden.”²⁵⁰

Thus, it is evident that in certain cases, facts can jeopardize the essence of law and normative values connected with it. The question remains, whether public international law is really so weak that it cannot cope with the existence of firmly established factual situations, especially if they represent consequences of violations of its norms. It is true, that a domestic legal system can overcome effects of the existence of a situation which contradicts the requirements of law. This is true because of the presence of a respective enforcement authority, acting on the basis of compulsion, or constraint, within the frontiers of one particular state: “Das VR, dem im allgemeinen diese Möglichkeit fehlt, muß sich [...] auch in die schlechte Wirklichkeit fügen.”²⁵¹ This pessimistic approach to the international legal order denotes the preponderance of facts over the law.

With regard to the emergence and existence of a *de facto state*, the state of things described above means the inclusion of this kind of territorial unit in

²⁴⁹ See E. Menzel, Grundprobleme der Ermittlung, Anwendung und Geltung von Normen des Völkerrechts, Vom gegenwärtigen Stand der Völkerrechtstheorie, in: JuS, Zeitschrift für Studium und Ausbildung, Jg. 3, Heft 2, 1963, p. 51

²⁵⁰ J. Habermas, Faktizität und Geltung, Beiträge zur Diskurstheorie des Rechts und des demokratischen Rechtsstaats, Frankfurt am Main, 1992, p. 52

²⁵¹ G. Dahm, Völkerrecht, Bd. 1, Stuttgart, 1958, p. 19

the realm of public international law. The inclusion mentioned above is aimed at the alteration of boundaries of the established states system, as the *de facto state* tries to obtain the status of a state and to acquire the international legal personality. It has to be borne in mind that the notion of secession frequently appears in the form of a mode of creation of the *de facto state*, and the process of acquisition of the international legal personality is essentially of a legal character:

“Eine Veränderung des Status quo hinsichtlich der Anzahl der Völkerrechtssubjekte tritt nur bei völkerrechtlichen Tatbeständen ein, die Entstehung von Neustaaten (durch Sezession oder Dismembration) oder Untergang alter Staaten [...] genannt werden.”²⁵²

The problem is to clarify, whether public international law allows the *de facto state* to enter its realm. It is important to note in respect of the latter possibility, that the assertion has been made, according to which, the norms of international law attach legal effects and consequences to factual situations.²⁵³ This is the expression of the “functioning” of the principle of effectiveness, it serves as a vehicle attributing legal effects to factual situations.

The assertion concerning a self-evident normative force of facts denotes the existence of a “weak” international legal system, but the *de facto state* must represent itself an entity with legal dimensions, in order to become part of the international legal system. Whether this status can be guaranteed solely on the basis of the effectiveness of a particular territorial unit, remains the issue to be clarified in this study. If effective control is not sufficient in this respect, the factors must be introduced, the lack of which hinders the *de facto state* in establishing itself as an international legal person. But before addressing these issues, it is important to refer to the notion of secession which represents the common “mode of emergence” of the *de facto state*.

²⁵² S. Verosta, *Rechtsgeschichte und Reine Rechtslehre: Zugleich ein Beitrag zum Problem der Beziehung zwischen Faktizität und Normativität*, in: S. Engel / R. A. Métall (eds.), *Law, State, and International Legal Order, Essays in Honor of Hans Kelsen*, Knoxville, 1964, p. 359

²⁵³ See J. L. Kunz, *Statisches und dynamisches Völkerrecht*, in: A. Verdross et al. (Hrsg.), *Gesellschaft, Staat und Recht, Untersuchungen zur Reinen Rechtslehre*, Frankfurt am Main, 1967, p. 230

Chapter 4: Secession

4.1 Content of the notion of secession and its dimensions

Secession is that problematic manifestation which links the right of peoples to self-determination with a *de facto state*. One can regard it as being inherent in the notion of self-determination and others can assert that secession is only an unintended by-product of this right. But most important is that secession functions as a “shadow” of self-determination in cases where ethnic tension takes place and exacerbates interethnic tensions in those situations. It is important at this point to introduce the definition of the subject in question:

“By its very nature a secessionist endeavor involves an attempt by a segment of a State’s population to withdraw both itself and the territory it inhabits from the ambit of the governing State’s political authority. To put the matter into the framework of a “rights” terminology, the secessionists seek to assert their right to an independent, self-governing existence against the State’s right to exercise political control over its citizens.”²⁵⁴

It is thus clear that secession denotes the termination of competence of respective political and legal institutions over the territory involved and the establishment of new bodies with the same capacities.²⁵⁵ The primary aim of the secessionist movements, namely the establishment of an independent state as a result of the withdrawal mentioned above, has internal and external dimensions. The former denotes that the political entity functions as a “normal state” within its borders and exercises control over its population, whereas according to the external dimension, a respective territorial unit seeks international recognition: it wishes to be treated as a sovereign independent state and to receive the rights and privileges enjoyed by sovereign nations.²⁵⁶ It can be concluded that the scope of a secessionist bid encompasses territory and its population. First of all, the issue of secession is problematic because of its territorial concern. For the purposes of the

²⁵⁴ L. C. Buchheit, *Secession: The Legitimacy of Self-Determination*, Yale UP, 1978, p. 47

²⁵⁵ See A. Pavković, *Secession, Majority Rule and Equal Rights: A Few Questions*, in: *Macquarie Law Journal*, Vol. 3, 2003, p. 75

²⁵⁶ L. M. Frankel, *International Law of Secession: New Rules for a New Era*, in: *Houston Journal of International Law*, Vol. 14, 1992, pp. 527-528

present study secession has to be understood as a unilateral act aimed at partial (or total) disruption of a respective “mother state”.

The problem is that secession offends territorial integrity of a respective state. The principle of territorial integrity is considered to be of primary importance in respect of achieving international security and preserving stability in the world.²⁵⁷ So, the issue becomes more problematic when bearing in mind the fact that the international community promotes two principles that are difficult to reconcile with one another, namely the territorial integrity of states and the self-determination of peoples.²⁵⁸ It is also true that the principle of territorial integrity represents the basis of the contemporary international system which is state oriented.²⁵⁹ The interrelation between the notion of self-determination of peoples and the principle of territorial integrity is expressed through the fact that, a claim aimed at realizing external self-determination covers a claim to the territory, and in doing so, this claim brings the concepts of secession and territorial integrity to a state of interaction.²⁶⁰

Secession represents an expression of the external dimension of the right of peoples to self-determination, and is activated if respective “self” is denied the internal dimension of the right in question: the denial of internal self-determination leads to the revival of the external right to self-determination.²⁶¹ Secession has its own impact on the international political and legal system. There is no compelling reason for arguing that this impact will be positive in most situations. This fear was confirmed by the Secretary-General of the UN during a press conference in which the stance of the world organization on the issue of secession was expressed. Respective passage reads as follows: “As an international organization, the United Nations has never accepted and does not accept and I do not believe

²⁵⁷ See V. Gudelevičiūtė, Does the Principle of Self-Determination Prevail Over the Principle of Territorial Integrity?, in: *IJBL*, Vol. 2, 2005, p. 50

²⁵⁸ M. Griffiths, Self-Determination, International Society and World Order, in: *Macquarie Law Journal*, Vol. 3, 2003, p. 48

²⁵⁹ See V. P. Nanda, Self-Determination Under International Law: Validity of Claims to Secede, in: *Case Western Reserve Journal of International Law*, Vol. 13, 1981, p. 264

²⁶⁰ V. Gudelevičiūtė, Does the Principle of Self-Determination Prevail Over the Principle of Territorial Integrity?, in: *IJBL*, Vol. 2, 2005, p. 54

²⁶¹ A. J. Carroll / B. Rajagopal, The Case for the Independent Statehood of Somaliland, in: *The American University Journal of International Law and Policy*, Vol. 8, 1993, p. 673

it will ever accept the principle of secession of a part of its Member State.”²⁶²

The process of secession can be described as gradual or rapid. The former entails specific arrangements between a seceding entity and the remainder of a respective state during the transition period. It is of crucial importance that an agreement is reached between the two entities in question and the chance to reach this agreement is better, when the process has a gradual character. Rapid secessions, on the contrary, increase the likelihood of war due to frustrations caused by unsettled questions.²⁶³

Three constellations have to be examined which are relevant with regard to the notion of secession. In the first one, a constitution of a state provides for the right to secede. For example, the 1977 constitution of the Soviet Union can be mentioned. If there is no such right in the constitution, it can be derived from the consent of a central government. A typical case is the secession of Eritrea from Ethiopia in 1993. The last and the most problematic is the situation, where there is a claim to unilateral secession and the central government resists that claim, there is no approval of it. This latter constellation is critical because “It is only when there is disagreement about whether the group should be allowed to secede that it matters whether there is a right to secede.”²⁶⁴ One possible result of this process is the emergence of a *de facto state*, and this constellation has to be examined thoroughly in the present thesis.

4.2 The just-cause theory of secession

The theory of secession is of great importance, as it can clarify the question, which secessionist attempt has to be regarded as valid within the realm of the self-determination of peoples. The national self-determination and

²⁶² The Transcript of the Press Conference of the Secretary-General of the United Nations, U Thant, held in Dakar, Senegal (4 January 1970), in: UN Monthly Chronicle, Vol. VII, 1970, p. 36

²⁶³ J. Duursma, Preventing and Solving Wars of Secession: Recent Unorthodox Views on the Use of Force, in: G. Kreijen et al. (eds.), *State, Sovereignty, and International Governance*, Oxford UP, 2002, p. 370

²⁶⁴ R. E. Ewin, Can There Be a Right to Secede?, in: *Philosophy*, Vol. 70, 1995, p. 349

choice theories of secession are both unsustainable, because they acknowledge an unconditional right of secession. The only “condition” is the wish of a respective population, a matter which is of a purely subjective nature. It is simply impossible to assert that such a difficult and dangerous concept of secession can be based solely on the wish of the population, even if this wish is expressed through the majority view. At the same time, those theories do not provide for objective criteria to distinguish valid claims from invalid ones. It is impossible to differentiate between just and unjust, valid and invalid claims on the basis of the theories in question. Of course, it cannot be asserted that every “minority nation” has the right to secede from multiethnic states. If this proposition were guaranteed at the international level, it would undermine the states system, it would lead to terrible results in the end.²⁶⁵

Thus, it is only the just-cause theory of secession which can be maintained on the international plane. In contrast to the first two theoretical approaches which are, by their very nature, utopian, the just-cause theory is realistic. It does not provide for unconditional right of secession, it is not faced with all those dangers which are inherent in two other assertions. It is exactly the just-cause theory of secession which is crucial to my study. This theory acknowledges only remedial, conditional or qualified right of secession, and ascertains special criteria to determine which claim is valid and which is not.

4.2.1 The criteria inherent in the just-cause theory of secession

It has to be stressed that unilateral secession presupposes the existence of an eligible “self”, as the secessionist bid represents the realization of the right of peoples to self-determination. Following criteria have been suggested in order to justify the unilateral act of secession, assuming the existence of a

²⁶⁵ “The existing regime has held its ground for a number of good reasons and most of all because giving free reign to secession may lead to self-determination *ad absurdum*. Other valid concerns include indefinite divisibility (internal as well as regional), otherwise known as the domino effect; the issue of stranded majorities or trapped minorities; the non-viability of the rump state; the danger of giving birth to non-viable entities which would be a burden internationally; the damage done to the will of the majority; and the ability of a minority to constantly blackmail the majority with secession.”, A. Heraclides, *Ethnicity, secessionist conflict and the international society: towards normative paradigm shift*, in: *Nations and Nationalism*, Vol. 3, 1997, p. 504 (italics in original)

competent “self”: a) systematic and egregious injustices have been committed by the “parent state” denoting that respective people are misgoverned by the central government; b) the values protected by secession are proportionate to the direct and foreseeable harms it causes; c) the means of securing secession are moral.²⁶⁶ The following quotation expresses the very essence of the just cause for secession: “Secession is a remedy, not a right: specifically, secession is a means to rectify past injustices, to escape systematic and egregious discrimination, and to defend against aggression.”²⁶⁷

With respect to the requirement of proportionality, it has been emphasized that the weighing of the benefits of seceding against foreseeable and direct harms associated with secession leaves practically no space for secessionists, who concentrate solely on their right to self-determination, without taking into consideration moral responsibilities vis-à-vis their own people and wider common values.²⁶⁸ With regard to the morality of remedial secession, it has been argued that the initial presumption is to respect the sovereignty and territorial integrity of existing states. Respective peoples have the responsibility to make all reasonable efforts aimed at realizing the right to self-determination short of secession, i.e. “less-than-sovereign alternatives”²⁶⁹. Only after the exhaustion of those efforts, and the demonstration of the will and capacity to establish a legitimate state, can respective people be regarded as a “self” for the purposes of secession. But even so, secession represents a remedy only if: a) there is a just cause on the part of the people concerned: a historic territorial grievance, unjust discrimination or self-defence; b) the benefits of secession outweigh the foreseeable harm; c) primarily political dialogue and nonviolence, and only as a last resort armed force, are used in pursuance of secession.²⁷⁰

According to Hannum, there are two instances in which secession should be supported by the international community. The first one denotes the

²⁶⁶ J. - F. Lisée / L. Bissonnette, Quebec’s Urge: Autonomy or Independence?, in: The Fletcher Forum of World Affairs, Vol. 16, 1992, p. 44

²⁶⁷ *Ibid.*

²⁶⁸ *Ibid.*, p. 46

²⁶⁹ *Ibid.*, p. 47

²⁷⁰ *Ibid.*

existence of massive and discriminatory human rights violations, approaching the level of genocide. Thus, if there is no likelihood of a change in the policy of central government, or if the majority of the population supports respective policies, secession can be considered the only effective remedy. Such exceptions are made in order to lessen human suffering and they do not denote the acceptance of the “impossible equation of one nation to one state.”²⁷¹ In the second case, a central government arbitrarily rejects reasonable demands for local self-government or minority rights. This kind of exception can take place only if minimal demands are rejected.²⁷²

Heraclides enunciates four pivotal conditions (nos 1-4) and two supplementary factors (nos 5-6) backing the realization of unilateral remedial secession: 1) a considerable self-defined community having a solid territorial base, representing the large majority in a respective region and overwhelmingly supporting the breakaway; 2) systematic discrimination, exploitation and injustice; 3) cultural domination over the community which seeks separate existence; 4) rejection of peace talks by the “parent state”, no accommodation on the basis of meaningful autonomous rule, repression or *manu militare*; 5) conflict settlement and regional peace following the separation; 6) respect for human rights of minorities living in the new state.²⁷³

Raič has summarized particular requirements for unilateral remedial secession:

“Within the framework of the qualified secession doctrine, there is general agreement on the constitutive parameters for a right of unilateral secession which may be summarized as follows:

(a) there must be a people which, though forming a numerical minority in relation to the rest of the population of the parent State, forms a majority within an identifiable part of the territory of that State;

²⁷¹ H. Hannum, *The Specter of Secession, Responding to Claims for Ethnic Self-Determination*, in: *Foreign Affairs*, Vol. 77, 1998, p. 16

²⁷² *Ibid.*, pp. 16-17

²⁷³ A. Heraclides, *Ethnicity, secessionist conflict and the international society: towards normative paradigm shift*, in: *Nations and Nationalism*, Vol. 3, 1997, p. 509

(b) the people in question must have suffered grievous wrongs at the hand of the parent State from which it wishes to secede [...], consisting of either

- (i) a serious violation or denial of the right of internal self-determination of the people concerned (through, for instance, a pattern of discrimination), and/or
- (ii) serious and widespread violations of the fundamental human rights of the members of that people; and

(c) there must be no (further) realistic and effective remedies for the peaceful settlement of the conflict.”²⁷⁴

According to Nanda, even if we assume that the right to secession is permissible and represents a legitimate manifestation within the realm of public international law, the application and implementation of this right would be connected with some intrinsic difficulties, as the establishment of the minimum standards of legitimacy requires the identification of: a) the group that is claiming the right of self-determination; b) the nature and the scope of the claim; c) the underlying reasons for the claim; d) the degree of the deprivation of basic human rights.²⁷⁵

The Supreme Court of Canada addressed the issue of secession in the case referred to as the *Quebec Secession Reference*. The court rejected the validity of unilateral secession under domestic and international law, and enunciated following principles in its ruling: the right of peoples to self-determination represents an acknowledged principle of international law, but this right is usually realized by means of internal self-determination aimed at accommodating a respective community within the borders of an existing state. An exception arises when colonial or oppressed peoples are involved (this exception was not applicable to Quebec).²⁷⁶ The role of the international community has been regarded as the issue having decisive importance with regard to the problem of legitimization of a secessionist claim. It has been stressed that, although Quebec might secede unlawfully,

²⁷⁴ D. Raič, *Statehood and the Law of Self-Determination*, Developments in International Law, Vol. 43, The Hague et al., 2002, p. 332

²⁷⁵ V. P. Nanda, *Self-Determination Under International Law: Validity of Claims to Secede*, in: *Case Western Reserve Journal of International Law*, Vol. 13, 1981, p. 275

²⁷⁶ P. Leslie, *Canada: The Supreme Court Sets Rules for the Secession of Quebec*, in: *Publius: The Journal of Federalism*, Vol. 29, 1999, p. 146

its independence might eventually be accorded legal status through foreign recognition (including by Canada). Such action, taken in accordance with the principle of effectiveness, represents the adaptation to “empirical fact”, but does not confer legality retroactively.²⁷⁷

4.2.2 Content of the just-cause theory of secession

Thus, only conditional, qualified or remedial right of unilateral secession can be maintained on the international plane. This remedial right to secede unilaterally is directly linked with the self-determination of peoples. To say precisely, the transition from an internal dimension of self-determination to the external one denotes that there is the entitlement to unilateral secession, when internal self-determination is beyond reach. Secession is in this case the mode of implementation of external self-determination. It follows that the holder of the right to secede must be a “people”, as it was in the case of self-determination, because “What secedes is not simply a bunch of human beings, a multitude, but a people. And, consequently, what needs a *right* to secede is a people.”²⁷⁸ But the term “people” is modified in the sense of unilateral remedial secession, it is different from that general notion.

Raič describes the holder of the right of unilateral remedial secession as a “minority-people”, as he refers to the criteria of unilateral secession, and stresses that, since the notion of secession denotes the separation of a part of the territory of a state, a “people” must constitute a numerical minority in relation to the rest of the population of the state in question, but a numerical majority within the borders of a certain coherent territory.²⁷⁹ Bartkus refers to a “distinct community” as a holder of the right to unilateral secession and mentions objective characteristics (language, religion, ethnicity etc) as features of a respective “self”.²⁸⁰ An important conclusion has to be made with regard to the holder of the right of secession. Terminology can be different, but the decisive criterion is that the group, which claims to secede,

²⁷⁷ *Ibid.*

²⁷⁸ R. E. Ewin, Can There Be a Right to Secede?, in: *Philosophy*, Vol. 70, 1995, p. 351 (italics in original)

²⁷⁹ D. Raič, *Statehood and the Law of Self-Determination*, Developments in International Law, Vol. 43, The Hague et al., 2002, p. 366

²⁸⁰ V. O. Bartkus, *The Dynamic of Secession*, Cambridge UP, 1999, p. 14

must constitute the majority within a defined territory it inhabits, otherwise the claim in question is invalid.

The next criterion for the legitimacy of secession refers to the violation of the right of internal self-determination. The first question concerns the issue, as when it can be asserted that there is such a violation in general. The second one regards the amount of violation, which must be reached for the transition of internal self-determination into the external dimension of this right. Raič has summarized following requirements (bearing in mind the circumstances of the cases of Bangladesh and Croatia), establishing in combination or otherwise the violation of internal self-determination:

“(a) governmental conduct constituting a formal denial of a people’s right to internal self-determination (Bangladesh after the suspension of the first session of the National Assembly and Croatia after the coup d’état), or
(b) a policy of indirect discrimination denoting a situation in which a people is formally granted the right of internal self-determination, but is denied (the exercise of) this right in practice [...], or
(c) a widespread and serious violation of fundamental human rights, most notably the right to life (Bangladesh, Croatia) which would certainly include the practice of genocide (arguably Bangladesh) and the practice of ‘ethnic cleansing’ (Croatia).”²⁸¹

It has been stressed by another author that the test, to determine severe deprivation of human rights for the purposes of secession, involves the examination of the extent, to which a respective group is subjected to subjugation, domination and exploitation, and the corresponding extent, to which its individual members are deprived of participatory rights. It follows that once this test is met, along with the requirement of legitimacy attached to the claim of territorial separation on the basis of the evaluation in respective contextual setting, the international community should recognize the claim in question.²⁸²

²⁸¹ D. Raič, *Statehood and the Law of Self-Determination*, Developments in International Law, Vol. 43, The Hague et al., 2002, p. 368 (emphasis in original)

²⁸² V. P. Nanda, *Self-Determination Under International Law: Validity of Claims to Secede*, in: *Case Western Reserve Journal of International Law*, Vol. 13, 1981, p. 278

After this comprehensive description, the amount of violation has to be examined. Reference has been made to the threat of a respective group's existence, and it has been stated that secession must be considered as a remedy if, for example, it seems impossible to save the existence of a people which is entitled to self-determination and which inhabits a defined territory.²⁸³ Of course, there are no definite criteria in this regard. It cannot be asserted that, in each and every single case, the level of suffering must be equal to the results of the situation in Bangladesh. Rather, the amount of suffering can be different in various constellations, but it does not mean that every group is entitled to claim secession just as it likes, also when the degree is lower. Each situation should be treated by the international community as an individual case, and respective decisions should be made in accordance with this attitude.

The next requirement with regard to the right of unilateral remedial secession is the exhaustion of peaceful remedies, of all other solutions short of secession. It has to be mentioned that juridical remedies, as well as political arrangements, have to be exhausted to validate the claim to unilateral remedial secession. This criterion also requires the exhaustion of both, local and international peaceful solutions. Again, negotiations between respective entities are of great importance in this regard.

The result of non-exhaustion of these solutions has to be examined. It follows that in such case, respective claim to unilateral remedial secession is regarded as invalid under international law, because it represents an abuse of the right of self-determination. This requirement is obligatory and has thus to be met, there is no discretion left for a secessionist entity.²⁸⁴ It has to be asserted that if those reasonable arrangements, proposed by secessionists for a peaceful solution, have been deliberately rejected by the respective majority of a state, this situation is equal to the exhaustion of peaceful solutions short of secession which were mentioned above.

²⁸³ D. Murswiek, *The Issue of a Right of Secession-Reconsidered*, in: C. Tomuschat (ed.), *Modern Law of Self-Determination*, Dordrecht, 1993, p. 27

²⁸⁴ *See* D. Raič, *Statehood and the Law of Self-Determination*, *Developments in International Law*, Vol. 43, The Hague et al., 2002, pp. 370-371

4.3 Assessment of the concept of secession within the realm of public international law

Secession does not represent a clear-cut manifestation within the realm of public international law. It is true that this claim is mostly made in furtherance of the right of peoples to self-determination, and respective secessionist leaders assert that their claim is based on this right, as such, but maybe some of them forget one “detail” which seems to be decisive: “It is necessary to distinguish between secession in pursuance of, and in violation of, self-determination.”²⁸⁵ If secession violates the right to self-determination, the secessionist claim cannot be regarded as valid under international law.

As with regard to the guiding principles in the context of the international community’s response to secessionist claims, it has been emphasized that the critical questions denote, whether the subgroup’s loss of identity is real, and whether its demands are compatible with basic community policies. Thus, the response to the claim made in furtherance of self-determination implies the application of the test of reasonableness, under the consideration of the total context of such a claim (potential effects of grant or denial of self-determination on the communities involved, neighbouring regions and the international community).²⁸⁶

Despite the fact that the “general bias against secession has collapsed”²⁸⁷, it has been emphasized that the recognition of self-determination as a principle of customary international law has not been accompanied by the recognition of a right of substate groups to secede, and the territorial integrity of states generally prevails over the right of secessionist self-determination.²⁸⁸ Further flaw connected with the notion of secession is that the concept in question is imprecise, and there are neither objective standards, nor viable machinery, in order to apply respective standards even

²⁸⁵ J. Crawford, *The Creation of States in International Law*, Oxford, 1979, p. 258

²⁸⁶ E. Suzuki, *Self-Determination and World Public Order: Community Response to Territorial Separation*, in: *Virginia Journal of International Law*, Vol. 16, 1976, p. 784

²⁸⁷ E. W. Bortrager, *Borders, Ethnicity and National Self-determination*, *Ethnos*; 52, Wien, 1999, p. 76

²⁸⁸ P. J. Monahan, *The Law and Politics of Quebec Secession*, in: *Osgoode Hall Law Journal*, Vol. 33, 1995, p. 20

if the consensus is reached.²⁸⁹ Moreover, following shortcomings of the notion of secession have been summarized by Horowitz:

- 1) There are always ethnic minorities in secessionist regions and secession does not create homogeneous successor states championed by its proponents. Nor does secession reduce conflict, violence or minority oppression after the establishment of a successor state, and guarantees of minority protection in such a state are likely to be illusory;
- 2) Secession is an ineffective solution to the problem because it only proliferates the arenas in which the problematic issue of intergroup political accommodation must be addressed;
- 3) Secession enables the former minority, which now represents the majority, to cleanse the new state of its own minorities and impels the former “parent state” to do the same with members of the secessionist community who are left on the wrong side of a newly emerged international boundary;
- 4) Secession or partition converts a domestic ethnic dispute into a more problematic international one, and the prospect of international warfare becomes a real danger;
- 5) The right to secession will undermine the attempts to achieve interethnic accommodation within states. It is important that the main reason, why states are reluctant to devolve power to territorially concentrated minorities on the basis of regional autonomy, or federalism, is their fear that it will encourage secessionist sentiments;
- 6) The secession of one region upsets ethnic balances and compels groups in other regions to push for the reconsideration of the issue, whether to remain in the existing arrangement, i.e. the “domino effect” takes place;
- 7) A right to secession effectively advantages militant members of respective ethnic groups at the expense of conciliators;

²⁸⁹ V. P. Nanda, *Self-Determination Under International Law: Validity of Claims to Secede*, in: *Case Western Reserve Journal of International Law*, Vol. 13, 1981, p. 265

8) The position of some proponents of the right to secession that this right is justified only if other solutions are unalterably opposed, or minorities have been victimized, does not work out moderately in practice because it is an incentive to ethnic polarization;

9) Secession is, by its very nature, an anti-state movement and the international law that forgets that states are its main subjects risks its own survival.²⁹⁰

Bearing in mind these considerations, it has to be stressed that secession is a concept that should be approached with certain precaution. An important issue with regard to secession is its international regulation, the attitude of the international community towards a secessionist bid. State practice can be regarded as a meaningful source, if one decides to draw conclusions in different cases concerning the validity of the claim to secede. If we turn to history, it becomes clear that territorial boundaries remained relatively stable (with the exception of decolonization) for a half century, after the Second World War till the end of the Cold War, but the nineties brought such developments which have altered this state of affairs: the reunification of Germany, the dissolution of the USSR, the SFRY and Czechoslovakia, secession of Eritrea from Ethiopia, and of Somaliland from Somalia, and the detachment of Kosovo from Serbia.²⁹¹

It is important to note that the international practice concerning the claims to secession is problematic in terms of providing a clear-cut answer with regard to the status of the claim in question within the realm of public international law. This assertion is confirmed by the developments which took place in the former Soviet Union and Yugoslavia. For example, in the case of the Baltic states, it has been emphasized that there was no international recognition accorded to them until Russian President Boris Yeltsin approved Latvian and Estonian independence in August 1991.²⁹² It follows that the international community did not recognize new states until

²⁹⁰ D. L. Horowitz, *The Cracked Foundations of the Right to Secede*, in: *Journal of Democracy*, Vol. 14, 2003, pp. 5-14

²⁹¹ *Ibid.*, pp. 6-7

²⁹² P. J. Monahan, *The Law and Politics of Quebec Secession*, in: *Osgoode Hall Law Journal*, Vol. 33, 1995, p. 22

they had already achieved “*de facto* sovereignty”, and this case cannot be regarded as an argument supporting the recognition of the right to secession within the realm of customary international law.²⁹³ With respect to the situation in the former Yugoslavia, it has been stressed that this was not a case of secession, but of the dissolution of an existing state, so as that state no longer possessed the legal personality, individual republics of the federation could be recognized without addressing the issue of secession and calling into question the principle of territorial integrity.²⁹⁴

4.4 The case of Chechnya: a challenge to international law

It has to be noted at this point that examples of successful secessionist attempts do not provide a compelling argument in favour of secessionist self-determination on the international plane, because these cases are “accompanied” with examples of unsuccessful campaigns. It is thus important at this stage to introduce the case of Chechnya as an example confirming the complexity of the problem in question.

4.4.1 Historical context

On 1 November 1991, retired Soviet General Jokhar Dudayev, former commander of an air force division in the Estonian city of Tartu, issued his first decree in the capacity of the President of Chechnya, declaring his homeland an independent state.²⁹⁵ Chechens have experienced an uneasy relationship with Russia for a long period of time. The first encounter between the regular Russian army and this mountain people is considered to have been in 1722 and is connected with the expansion of the Russian Empire under Peter the Great.²⁹⁶ During the subsequent advance of Russia to the south in the years that followed, the Chechens and other peoples of the North Caucasus responded with strong resistance. The most important and prominent leaders of the resistance movement were Sheikh Mansur and

²⁹³ *Ibid.*

²⁹⁴ *Ibid.*, pp. 22-23

²⁹⁵ C. Gall / T. de Waal, *Chechnya, Calamity in the Caucasus*, New York / London, 1998, p. 99

²⁹⁶ *Ibid.*, p. 37

Imam Shamil. Despite this uncompromising struggle, Russian forces finally defeated the Chechens and other mountain peoples in the Caucasus War (1817-64).²⁹⁷ Thus, as a consequence of an imperial conquest, Chechnya was incorporated into the Russian Empire in 1864.²⁹⁸

After the establishment of the Soviet rule in the Caucasus, the region of Chechen-Ingushetia was granted the status of an “autonomous republic” on 5 December 1936.²⁹⁹ After the insurrection of 1940, the Chechens were deported en masse to Central Asia by Stalin (in 1944), as he claimed that all Chechens were traitors and had supported the Nazis.³⁰⁰ The territory of the Chechen-Ingush Autonomous Soviet Socialist Republic (ASSR) was distributed to neighboring entities, the property was given to ethnic Russian settlers (including Terek Cossacks, North Ossetians and ethnic groups residing in Dagestan) relocated to the territory in question, but on the basis of Khrushchev’s rehabilitation decree of 1957, the Chechen-Ingush ASSR was eventually restored (although with different boundaries), and the Chechens were allowed to return to their homeland.³⁰¹

Gorbachev’s campaign of “*glasnost*” and “*perestroika*”, eventually leading to the disintegration of the Soviet Union, served as a vehicle in furtherance of the idea of the Chechen independence, as the state of affairs was somehow similar to the developments of 1918 when the people of the North Caucasus had first asserted independence. Thus, there was again confusion in the central government exacerbated by the power struggle between the USSR and the Russian Soviet Federative Socialist Republic (RSFSR, later the Russian Federation), so the Chechens tried to take advantage and in

²⁹⁷ C. Brandt Ahrens, Chechnya and the Right of Self-Determination, in: Columbia Journal of Transnational Law, Vol. 42, 2004, p. 595

²⁹⁸ T. N. Tappe, Chechnya and the State of Self-Determination in a Breakaway Region of the Former Soviet Union: Evaluating the Legitimacy of Secessionist Claims, in: Columbia Journal of Transnational Law, Vol. 34, 1995, p. 273

²⁹⁹ C. Gall / T. de Waal, Chechnya, Calamity in the Caucasus, New York / London, 1998, p. 55

³⁰⁰ C. Brandt Ahrens, Chechnya and the Right of Self-Determination, in: Columbia Journal of Transnational Law, Vol. 42, 2004, p. 596

³⁰¹ See W. Hayden, Seeds of Unrest: The Political Genesis of the Conflict in Chechnya (1990-1994), in: The Fletcher Forum of World Affairs, Vol. 24, 2000, pp. 52-53

November 1990 the Chechen National Congress declared the sovereignty of the Chechen-Ingush Republic.³⁰²

It has to be mentioned at this stage that, according to the intention of the Congress, the entity would sign the union and federal treaties of the USSR on equal footing with the union republics, and on 17 March 1991, the majority of voters of the newly emerged political unit voted in favour of preserving the USSR.³⁰³ It follows that the declaration made by the Congress did not necessarily imply outright independence as a state. Indeed, as it has been stressed, Yeltsin's famous phrase (addressed to respective subjects of the federation) -"take as much sovereignty as you can swallow"- and subsequent development described as the "parade of sovereignties", demonstrated that after the declaration of Russian sovereignty in 1990, it was fashionable to talk loosely about the notions of "sovereignty" and "independence".³⁰⁴ Thus, it has to be concluded that the proclamation of the Congress mentioned above "was in this spirit, a declaration of intent to lay claim to more economic and political power as the hold of Moscow over the regions dwindled."³⁰⁵

This state of affairs changed after Dudayev's election and his declaration of independent Chechnya. As the Soviet Union collapsed, and Russia was accorded international recognition in December 1991, President Yeltsin tried to preserve the federal structure of the state on the basis of the arrangement, which would grant constituent republics the power over their own foreign and economic affairs, with the exception of budgetary, defense and currency issues, but Chechnya-Ingushetia and Tatarstan refused to sign the Federation Treaty.³⁰⁶ In 1992 Ingushetia broke off from Chechnya in order to remain in the Russian Federation.³⁰⁷ The Russian Federation supported the Chechen opposition to Dudayev by military means, and tried

³⁰² C. Brandt Ahrens, Chechnya and the Right of Self-Determination, in: Columbia Journal of Transnational Law, Vol. 42, 2004, p. 597

³⁰³ *Ibid.*

³⁰⁴ C. Gall / T. de Waal, Chechnya, Calamity in the Caucasus, New York / London, 1998, p. 83

³⁰⁵ *Ibid.*

³⁰⁶ L. P. Bellocchi, Recent Developments: Self-Determination in the Case of Chechnya, in: The Buffalo Journal of International Law, Vol. II, 1995, p. 186

³⁰⁷ *Ibid.*, p. 187

to get him overthrown, but all those efforts were unsuccessful and the situation deteriorated to the extent that Russia invaded the republic in December 1994.³⁰⁸

It was not the “small victorious war” hoped for by the Russian Defense Minister Grachev, moreover, the outcome of the war was disastrous for the Russian Federation. Russia was defeated and, as a consequence of this war, the peace treaty, the Khasavyurt agreement, was signed on 31 August 1996 by a new Chechen leader, Aslan Maskhadov and the Russian Security Council Secretary, Lt. General Alexander Lebed.³⁰⁹ This document postponed the solution of the status of Chechnya for five years (until 31 December 2001), and the parties were obliged to avoid the use or threat of force and respect the right to self-determination.³¹⁰ In the “Treaty on Peace and the Principles of Joint Relations between the Russian Federation and the Chechen Republic Ichkeria” of May 12, 1997, parties agreed to refrain from using force or the threat of force and to build their relations on the ground of international law.³¹¹ It has to be noted at this point that the arrangement described above was interpreted by the parties differently: Maskhadov considered his republic as a sovereign independent state, as a subject of international law, whereas the Kremlin regarded Chechnya as part of the Russian Federation, albeit with a higher degree of independence than Tatarstan.³¹²

The fact is that the newly emerged Chechen Republic of Ichkeria, which enjoyed *de facto* independence from Russia, was not accorded widespread and substantive recognition by the members of the international community. The attitude of western powers towards the problem of Chechnya during the war was mostly guided by the assertion that what was happening there was Russia’s “internal affair”:

³⁰⁸ J. G. Mathers, The Lessons of Chechnya: Russia’s Forgotten War?, in: Civil Wars, Vol. 2, 1999, p. 100

³⁰⁹ *Ibid.*

³¹⁰ C. Gall / T. de Waal, Chechnya, Calamity in the Caucasus, New York / London, 1998, p. 359

³¹¹ T. A. Frommeyer, Power Sharing Treaties in Russia’s Federal System, in: Loyola of Los Angeles International and Comparative Law Journal, Vol. 21, 1999, p. 46

³¹² A. Frenkin, Lehren aus dem Tschetschenienkrieg, in: Europäische Sicherheit, 46. Jg., 1997, p. 40

“[...] Western leaders wanted to give credit to the leader in Moscow for all good things, while absolving him of responsibility for bad things by claiming that his powers were limited. And then as now, most Western leaders failed to see what the stakes were and how their approach, [...] was contributing to the very things that the Western elites said they did not want.”³¹³

Indeed, it was clear that the priority of the West was to see Yeltsin re-elected and they were prepared to overlook what was going on in Chechnya.³¹⁴ It has been stressed that “The issue was really one of freedom and human rights of a long-oppressed people.”³¹⁵ Thus, the right of peoples to self-determination was applicable to the case of Chechnya, but the response of the international community did not support the claim aimed at realizing the external self-determination, i.e. secession.

At the same time, the problem had its internal dimension, the situation inside Chechnya was chaotic, and it can be asserted that Chechens failed to build a modern viable state. After the election of Aslan Maskhadov as the President of the Chechen Republic of Ichkeria in 1997, government posts were handed out to radical Islamists, including one of the most prominent warlords Shamil Basaev, who became deputy Prime Minister. Later Basaev resigned in order to lead the opposition together with a radical Islamist known as Ibn-ul Khattab.³¹⁶ Shortly after Maskhadov’s election, the warlords formed a council they called Majlis-ul Shura (People’s Council) which was presided over by Basaev.³¹⁷ It follows that parallel institutions emerged within Chechnya itself, and warlords acquired their “spheres of influence”.

A series of events altered the *status quo* drastically: in August 1999 Basaev and Khattab led a group of mujahedeen into Dagestan, in support of an

³¹³ P. A. Goble, Chechnya and Its Consequences: A Preliminary Report, in: Post-Soviet Affairs, Vol. 11, 1995, p. 26

³¹⁴ C. Gall / T. de Waal, Chechnya, Calamity in the Caucasus, New York / London, 1998, p. 316

³¹⁵ *Ibid.*, p. 370

³¹⁶ See M. Bowker, Russia and Chechnya: the issue of secession, in: Nations and Nationalism, Vol. 10, 2004, pp. 469-470

³¹⁷ N. Abdullaev, Chechnya Ten Years Later, in: Current History, A Journal of Contemporary World Affairs, Vol. 103, 2004, p. 333

Islamist uprising, and seized certain mountain districts. But the local government, with the support of Russian troops, expelled the rebels, albeit with significant losses. A month after that raid, the Chechens were blamed by Moscow for explosions of apartment buildings in Russia, despite the fact that no decisive evidence was found which would prove respective assertions.³¹⁸ As a consequence of this state of things, “In the early days of October 1999, Russian tanks rolled into Chechnya for the second time.”³¹⁹

Russia’s new leader, Vladimir Putin, declared victory in April 2000 but rebels still fought a guerilla warfare and terrorist attacks were also carried out. Moscow has responded with “*zachistki*”, which too often were indiscriminate by their very essence, and many innocent Chechens were affected by them and were taken to the “filtration centres”.³²⁰ These circumstances demonstrate that the second Chechen campaign was an extremely brutal one. In March 2003 a referendum was conducted in Chechnya which certified the status of Chechnya as part of the Russian Federation, and later in October Akhmad Kadyrov was elected as president of Chechnya.³²¹ Thus, the status of the Chechen Republic today is that of a constituent entity of the Russian Federation.³²²

4.4.2 Assessment of the Chechen secessionist claim

As it is evident from these considerations, the international community has not recognized secessionist self-determination in the case of Chechnya. The case in question has been examined by Bellocchi in connection with EC guidelines for the diplomatic recognition of former Soviet republics. It has been stressed in respect of the period preceding the first military campaign that democratic elections were held in Chechnya, and the peaceful principles

³¹⁸ M. Bowker, Russia and Chechnya: the issue of secession, in: Nations and Nationalism, Vol. 10, 2004, p. 470

³¹⁹ N. Abdullaev, Chechnya Ten Years Later, in: Current History, A Journal of Contemporary World Affairs, Vol. 103, 2004, p. 333

³²⁰ M. Bowker, Russia and Chechnya: the issue of secession, in: Nations and Nationalism, Vol. 10, 2004, p. 471

³²¹ C. Brandt Ahrens, Chechnya and the Right of Self-Determination, in: Columbia Journal of Transnational Law, Vol. 42, 2004, p. 599

³²² See Article 65 (1) of the Constitution of the Russian Federation, available on the official web portal of the President of Russia, at: <http://www.kremlin.ru/eng/articles/ConstEng3.shtml> [accessed: 20.07.2008]

of the UN Charter were observed. On the other side, Russia violated those principles by its aggression. As there was a requirement concerning the respect for the rights of ethnic groups in those guidelines, it has been noted that Chechnya allowed Ingushetia to secede peacefully, whereas Russia reacted violently to Chechnya's claim from the beginning, as it first tried to send troops into the territory in question at the end of 1991. Furthermore, the character of the war fought by Chechnya has been described as defensive, Grozny was defended against an aggressor.

Regarding the requirement to settle questions of secession by agreement and arbitration, it has been emphasized that Russia chose the use of armed force instead of peaceful efforts.³²³ Moreover, it has also been submitted that Chechnya satisfied the traditional or empirical criteria for statehood: a) the long history and distinct culture of the Chechens, along with the autonomy they enjoyed, denote the distinctness of the people and respective right to self-determination under the subjective test; b) the Chechen government of Jokhar Dudayev has claimed the territory of the Chechen-Ingushetia minus the territory that the Ingush people had ceded from it, it contained a population of approximately 750, 000 people, mainly of Chechen decent.³²⁴ Moreover, the Chechen claim to secession has been backed by a lack of representativeness of the central government (in respect of the people in question) and the notion of people's choice: the Chechens have evidently spoken on the issue of secession through the election of a secessionist government under Dudayev, and through the wave of volunteers willing to defend their homeland.³²⁵

Indeed, the degree of the lack of representativeness has been emphasized by Charney, as he refers to the parallels which bear the cases of Chechnya and Kosovo. This author notes that, in both instances, ethnic minorities sought autonomy or independence from relatively non-democratic and dictatorial regimes.³²⁶ At the same time, the Chechen claim to secessionist self-

³²³ L. P. Bellocchi, *Recent Developments: Self-Determination in the Case of Chechnya*, in: *The Buffalo Journal of International Law*, Vol. II, 1995, pp. 187-188

³²⁴ *Ibid.*, p. 189

³²⁵ *Ibid.*, p. 190

³²⁶ J. I. Charney, *Self-Determination: Chechnya, Kosovo, and East Timor*, in: *Vanderbilt Journal of Transnational Law*, Vol. 34, 2001, p. 456

determination has been criticized by asserting that Chechnya's path to declaration of independence was a unilateral process devoid of efforts of negotiated accommodation. It has been alleged that Chechnya managed to secede, *de facto*, without a major use of force within the period of the collapse of the USSR and the emergence of a relatively stable Russian government two years later. But during the period of *de facto* independence, the Chechens failed to build a viable state. At the same time, there was no solid support accorded to the claim of Chechen self-determination, it follows that the international community accepted the view that Chechnya should remain a constituent part of Russia.³²⁷

It has been stressed by another author that Chechnya had no right in domestic law to claim independence, as an autonomous republic, it had no right to secede from the RSFSR or from its successor, the Russian Federation. Furthermore, it has been noted that Chechnya rejected the Federation Treaty and turned down participation in the referendum of December 1993 (which created the Russian Federation), but the Russian Constitutional Court in 1995 confirmed that Chechnya remained a constituent part of the Russian Federation.³²⁸

The problem of the democratic deficit in Chechnya has also been regarded as an impediment to the realization of external self-determination: even if we accept that the majority wanted independence of Chechnya, it was clear that a substantial minority did not. So, there was the problem of "trapped minorities" which fled the republic after Dudayev assumed power, while Ingushetia seceded from Chechnya to rejoin the Russian Federation.³²⁹ At the same time, it has been emphasized by the author that this did not mean, that Yeltsin had no choice but to resort to force. Reference has been made to the statement of the former Prime Minister, Sergei Stepashin, who later acknowledged that the war was a mistake, and the former Nationalities Minister, Galina Starovoitova, also stated in an interview that it would have

³²⁷ *Ibid.*, pp. 462-463

³²⁸ M. Bowker, Russia and Chechnya: the issue of secession, in: Nations and Nationalism, Vol. 10, 2004, pp. 472-473

³²⁹ *Ibid.*, p. 473

been possible for Yeltsin to achieve a compromise if he had made more effort to meet with Dudayev directly.³³⁰

Doubts were raised, whether the decision to use force was in accordance with the domestic legal order of the Russian Federation. In 1999 Yeltsin faced impeachment charges on this issue and survived, despite the fact that the majority in the State Duma voted in favour of impeachment, because the constitution required an absolute two-thirds majority in such cases.³³¹

Last but not least, it has been argued that independence would not necessarily have saved Chechnya from Russian interference, this was demonstrated by reference to Moscow's military involvement in Georgia, Moldova and Tajikistan. It has been stressed that, there is no reason to submit the argument that independence would have brought peace and stability to Chechnya: during the period of *de facto* independence, chaos overwhelmed Chechnya and Moscow faced a security threat in Chechnya before Yeltsin resorted to force. Furthermore, the governments of other political entities in the region wanted Moscow to remain in the Caucasus, because they feared that Chechnya's instability could spread.³³²

With respect to the judgment of the Russian Constitutional Court, it has to be stated that this judicial body applied the Friendly Relations Declaration of 1970 (together with the constitutional law of the Russian Federation), in order to prove the compatibility with the right of peoples to self-determination of the constitutional goal of preserving the territorial integrity of the Russian Federation.³³³ But as it has been stressed, the Court misinterpreted the very essence of the saving clause enshrined in that document: the Court failed to mention the last part of the saving clause, according to which, only the state having a "representative government" (i.e. the government making no distinction as to race, creed or color) can claim that its right to territorial integrity supersedes the claims made in furtherance of the secessionist self-determination.

³³⁰ *Ibid.*, pp. 473-474

³³¹ *Ibid.*, p. 474

³³² *Ibid.*, p. 475

³³³ P. Gaeta, *The Armed Conflict in Chechnya before the Russian Constitutional Court*, in: *EJIL*, Vol. 7, 1996, p. 565

Thus, the Court avoided the central question raised by the clause in question: was the Russian government sufficiently representative and not discriminating?³³⁴ It has been stressed that the determination of the Court, emphasizing the compatibility with general international law of the constitutional principle of Russia's territorial integrity, could not be made on the basis of the Friendly Relations Declaration without some examination of the representativeness of the Russian government under the test envisaged by that document:

“In other words, it appears that the Court jumped to a conclusion and simply took it for granted that, under the 1970 Declaration and its saving clause, the Chechen Republic was not entitled to the right to secession on the grounds of the principle of self-determination.”³³⁵

Following flaws of the Chechen claim to external self-determination have been considered by another author: a) Chechnya has never attained the level of independence enjoyed by the Baltic States before their forcible incorporation into the Soviet Union. In 1918 the Chechens were merely a constituent part of the North Caucasus state which, despite obtaining limited international recognition, collapsed after short period of time; b) Russia never consented to Chechen independence and the latter has not been recognized by the international community; c) the Soviet authorities grossly and systematically violated fundamental rights of the Chechen people when they were forcibly deported. But it can hardly be concluded that their treatment by the Soviets, from the time of rehabilitation to the declaration of independence by Dudayev, should be characterized as such. According to this reasoning, it has been concluded that a given people's right to secession disappears, once the central government has corrected its behavior.³³⁶

At the same time, it has been noted that although Chechnya should not have declared outright independence in 1991, the Russian invasion of 1994 and subsequent behavior within the territory in question arguably violated the

³³⁴ *Ibid.*, p. 566

³³⁵ *Ibid.*

³³⁶ C. Brandt Ahrens, Chechnya and the Right of Self-Determination, in: Columbia Journal of Transnational Law, Vol. 42, 2004, pp. 600-602

right of the Chechens to internal self-determination.³³⁷ The assertion has been made that, if Russia did not make a serious attempt to negotiate a peaceful solution, the military intervention was clearly a violation of Chechnya's right to self-determination, but international law does not support the view that violations of the right to self-determination cannot be remedied.³³⁸

Tappe has suggested arguments backing the right of Chechnya to secession: a) the Chechens are a distinct people, not an *ad hoc* group trying to gain momentum and making off with an unfair share of the country's wealth. The distinctiveness of the Chechens from many other conquered territories is expressed through the mere fact that the resistance to Russian rule continued throughout the period of domination by the Soviet empire; b) Chechnya is part of Russia only by the right of conquest. Despite the fact that yesterday's conquest cannot always be considered illegitimate today, it can be considered suspect if the people have continuously rejected new rulers. The Chechens have never accepted their forcible incorporation into Russia; c) the Chechen claim contains historical factors, i.e. distinctiveness of the people which maintained a strong sense of national identity, the claim to respective territory, and the claim to independence confirmed by the persistent rejection of their rulers.³³⁹

With regard to the behaviour of the secessionist elite it has been stressed that contrary to certain reports, Dudayev was the spokesman of his people, and not a dictator who would be overthrown at the first possible occasion. Furthermore, although ethnic Russians made up over a fifth of Chechnya's population, it cannot be said that they had been subjected to mistreatment.³⁴⁰ The question concerning the absence of Chechnya's constitutional right to secession has been answered in the following way: the union republics of the USSR were in reality no more independent than the provinces within the Russian Empire, so, prior to the events leading to the dissolution of the

³³⁷ *Ibid.*, p. 605

³³⁸ *Ibid.*, p. 606

³³⁹ T. N. Tappe, Chechnya and the State of Self-Determination in a Breakaway Region of the Former Soviet Union: Evaluating the Legitimacy of Secessionist Claims, in: Columbia Journal of Transnational Law, Vol. 34, 1995, pp. 279-281

³⁴⁰ *Ibid.*, p. 283

Soviet Union, there was no possibility even for Russia to realize its textual right to secede. The USSR simply would not have allowed it. It follows that there seems to be little difference between the textual right mentioned above, with no practical application, and no right at all. It follows that this state of affairs cannot serve as a basis for the assessment of legality or illegitimacy of secessionist claims.³⁴¹

Thus, it has been stressed that, for the purpose of external self-determination, the Chechen cause satisfied respective criteria which are decisive in order to legitimately apply the notion of secession: “The case for recognition based on a principled assessment of the Chechen situation clearly reveals a “people” deserving international recognition of its legally legitimate right to secede.”³⁴²

Despite this, the outcome of the Chechen case demonstrates that the international community did not “legitimize” the claim of Chechnya aimed at the realization of external self-determination, i.e. secession.

Preliminary remarks

The notion of secession cannot be regarded as an established right within the realm of public international law. There is no right to secession explicitly embodied and clearly defined in the treaty law, which could be employed *erga omnes*. Even if we assume that certain instruments, such as the Friendly Relations Declaration, express the *opinio juris* in regard to the secessionist self-determination outside the colonial context and non-self-governing territories (a highly questionable assertion in itself), the rule of customary international law, concerning secession, cannot be regarded as granted because of the lack of uniform practice, which is the second inevitable component of this source of international law.

Thus, according to the established state of affairs, the *erga omnes* right of peoples to self-determination does not imply that secession is also of *erga*

³⁴¹ *Ibid.*, p. 284

³⁴² *Ibid.*, p. 295 (emphasis in original)

omnes application. The point here is that “the act of secession itself is not one that is recognized directly in modern international law.”³⁴³ The Supreme Court of Canada stressed that international law contains neither a right of unilateral secession nor the explicit denial of such a right, although this kind of denial has (to some extent) been considered implicit in exceptional circumstances required for the application of secessionist self-determination.³⁴⁴

Secession, as a form of the realization of external self-determination, is a remedy which is activated in certain situations. But the outcome of a secessionist struggle has to be legitimized by the international community on the basis of recognition, in order to lead to the creation of an independent state, as a member of the club of sovereign nations. This was done in the cases of Bangladesh and Eritrea, but was rejected in other instances, for example, in Biafra or Chechnya, although there was apparent evidence that respective communities suffered grievous wrongs at the hands of central governments.

Each and every single situation represents a unique case, and the validity of the claim to secede has to be assessed on the ground of the consideration of circumstances surrounding the instance in question. But the problem is that the international community is not always guided by legal principles. It is not rare that political reflections play a decisive role with regard to the attitude of the international community towards secessionist conflicts. This is demonstrated by the notorious example of Chechnya: while considering NATO’s air campaign against Belgrade and its impact on the conflict in Chechnya, Caplan draws following conclusion:

“The renewed Russian assault on Chechnya has perhaps been one of the first instances of NATO’s wider impact [...] Russia, a nuclear power, has

³⁴³ J. Castellino / S. Allen, *Title to Territory in International Law, A Temporal Analysis*, Aldershot / Burlington, 2003, p. 161

³⁴⁴ Reference Re Secession of Quebec, Canada, Supreme Court, 20 August 1998, in: Sir E. Lauterpacht et al., (eds.), *ILR*, Vol. 115, 1999, p. 580

been less worried in this case about NATO's humanitarian instincts than it has been interested in the Atlantic Alliance's military tactics."³⁴⁵

This quotation shows that some (powerful) states are not as "vulnerable" vis-à-vis the international community as others, and the international community approaches the states in question with a certain degree of precaution. This situation has its impact on the status of secessionist claims.

4.5 Secession and the principle of effectiveness

The emergence of a secessionist entity, and its success on the way to the realization of the objectives of its political elite, depends on the ability of the secessionists to establish effective control over the claimed territory. This requirement is again connected with the goals which are inherent in the phenomenon of secession, namely internal and external objectives. The entity in question must assert itself on the internal plane and at the same time, if it succeeds, this will back its quest for the international recognition, as it has been asserted: "recognition is based on what already *is* rather than on *what should be*."³⁴⁶ Thus, we are led to the question, whether the secessionist movement has been able to resist the imposition of force by the "mother state" and to maintain effective control over the territory it claims.³⁴⁷ The question is thus linked with the issue of the fulfilment of the traditional or empirical criteria for statehood. These requirements serve as guidelines for evaluating the merits of a secessionist claim, because if independence is to be a realistic option, a government exercising effective control over a definable territory and respective population is a must.³⁴⁸

The notion of effectiveness bears overwhelming importance for a secessionist entity. The "attractiveness" of this manifestation is based on the consideration that an entity that manages to secede, and to maintain effective control over the territory in question, can after a period of time

³⁴⁵ R. Caplan, Humanitarian Intervention: Which Way Forward?, in: Ethics & International Affairs, Vol. 14, 2000, p. 35

³⁴⁶ L. M. Frankel, International Law of Secession: New Rules for a New Era, in: Houston Journal of International Law, Vol. 14, 1992, p. 534 (italics in original)

³⁴⁷ *Ibid.*

³⁴⁸ *Ibid.*, p. 550

acquire statehood, and even if the central government rejects the secession, the entity in question can be accorded international recognition. But the problem for this territorial unit is that it is not legally privileged in its attempts, as it does not represent a subject of international law and the central government will certainly maintain its claim to a respective territory:

“This entitlement would persist until the time when the entity had demonstrated its effectiveness to the extent necessary for statehood. However, in the absence of external recognition, it is difficult to identify this point in time.”³⁴⁹

It is important to note that two concepts have been introduced in this regard: an “effective entity” and a “self-determination entity”. It has been stressed that the latter is internationally privileged long before it obtains effective independence, whereas the entity which enjoys no such privilege and lacks international legal protection of its position, has to face the threat or attempt of forcible reincorporation and will only acquire the standing of a state “if it wins decisively and with a prospect of permanence in its new status.”³⁵⁰ On the other hand, the notion of secession, as a mode of the realization of the right to self-determination, is closely connected with the latter. In order to make an assessment of the claim to separation, it is necessary to define eligible “self” in each and every single case and to determine the proper entitlement. Thus, the following conclusion seems to be applicable to the claims of secession:

“The best hope for the future of self-determination is to ask *what* is being determined as well as *who* determines it, and not to assume that nationalists can provide the best answer.”³⁵¹

The problem is that there are still peoples “waiting” for the realization of their right to self-determination. For example, it has been stressed with regard to the case of Tibet that: a) historically it had the attributes of statehood until it was forcibly incorporated into the PRC in 1951; b)

³⁴⁹ M. Weller, *The Self-determination Trap*, in: *Ethnopolitics*, Vol. 4, 2005, p. 9

³⁵⁰ *Ibid.*

³⁵¹ M. Griffiths, *Self-Determination, International Society and World Order*, in: *Macquarie Law Journal*, Vol. 3, 2003, p. 49 (italics in original)

because of their distinctive culture, their history as an independent nation and the involuntary loss of the sovereignty, Tibetans are entitled to self-determination; c) credible evidence exists that Tibetans have been subjected to serious human rights violations at the hands of the Chinese.³⁵² Despite this, the 1989 Nobel Peace Prize awarded to the Dalai Lama has been described as “the most significant measure of international support he has received since 1950.”³⁵³ Bearing in mind these circumstances, it becomes evident how complicated the right of peoples to self-determination really is. This difficulty is confirmed by the next part of the present dissertation dedicated to the case studies.

³⁵² H. K. Josephs et al., Independence for Tibet: An International Law Analysis, in: China Law Reporter, Vol. VIII, 1994, p. 22

³⁵³ *Ibid.*, p. 40

Part II

Case Studies

The second part of the present dissertation is aimed at demonstrating the attitude of the international community towards *de facto states* and to the principle of effectiveness respectively, as *de facto states* have to be regarded as different manifestations of the principle in question. It is the objective of this second part to show all the peculiarities which these distinct territorial units bear. In doing so, I would like to illustrate how different they are.

This part of the thesis encompasses five *de facto states*: the “Republic of China on Taiwan”, the “Turkish Republic of Northern Cyprus”, the “Republic of Kosovo”, the “Republic of Abkhazia” and the “Republic of South Ossetia”. Each and every single case will be considered as a particular manifestation of the principle of effectiveness on the basis of its distinctive features. Thus, after the theoretical examination of the principle of effectiveness in the first part, the practical treatment of *de facto states* by the international community has to be explored at this stage.

Chapter 5: The “Republic of China on Taiwan”

5.1 Political context

5.1.1 Designation of the territorial entity

I would like to begin my case study with the *de facto* territorial entity known as Taiwan, or “formerly known as Ilha Formosa (“beautiful island”).”³⁵⁴ It is important to emphasize the terminological diversity that has been employed for the designation of the territory in question.³⁵⁵ The present author will apply the terms “Taiwan”, the “Republic of China” (ROC), or the “Republic of China on Taiwan” (ROCOT) throughout the study. Even on the basis of this variety of terms, it becomes clear that the status of Taiwan is a problematic issue. This problem has its own characteristic features, which make the case in question a unique one.

5.1.2 History: 1895 – 1971

In 1895, as China was defeated by Japan in the Sino-Japanese War, Taiwan, from 1886 a province of China, was ceded by the latter to Japan on the basis of the Treaty of Peace signed by respective parties in Shimonoseki.³⁵⁶ Thus, on the ground of the instrument of cession which brought about the shift in sovereignty, Taiwan became part of the Japanese empire. Japan acquired the status of a sovereign with regard to the territory in question.³⁵⁷ During the

³⁵⁴ D. G. Palmer Jr., *Taiwan: De Jure or Not De Jure? That is the Question. An Analysis of Taiwan’s Legal Status Within the International Community*, in: John F. Kennedy University Law Review, Vol. 7, 1996, p. 71 (emphasis in original)

³⁵⁵ “[...] the “Republic of China” (the official term in Taipei, used by some states that have full diplomatic relations with the ROC), the “Republic of China on Taiwan” (or “ROCOT”, in many ROC officials’ statements and draft resolutions for Taiwan’s “return” to the United Nations), the “Republic of Taiwan” (in the most radical iteration of the platform of Taiwan’s Democratic Progressive Party [DPP]), “China Taiwan” (the International Cotton Advisory Committee and Interpol), “Chinese Taipei” (Asia-Pacific Economic Cooperation [APEC] and the Olympics), “Customs Territory of Taiwan, Penghu, Kinmen, and Matsu” (applications to the General Agreement on Tariffs and Trade, and the World Trade Organization [GATT/WTO]), “Taipei, China” (Asian Development Bank), “Taipei” (in “Taipei Economic and Cultural Offices,” the surrogate embassy and quasi consulates in the United States), and “China (Taiwan)” (U.S. official listing of agreements).”, J. deLisle, *The Chinese Puzzle of Taiwan’s Status*, in: *Orbis, A Journal of World Affairs*, Vol. 44, 2000, p. 37 (emphases in original)

³⁵⁶ See H. Chiu, *The International Legal Status of Taiwan*, in: J. - M. Henckaerts (ed.), *The International Status of Taiwan in the New World Order, Legal and Political Considerations*, London et al., 1996, p. 3

³⁵⁷ See J. F. Copper, *Taiwan: Nation-State or Province?*, Boulder et al., 1990, p. 95

Second World War the Chinese government, i.e. the government of the ROC, formally declared war against Japan and, at the same time, “proclaimed to abrogate all treaties, conventions, agreements, and contracts regarding relations between China and Japan, including the Treaty of Shimonoseki.”³⁵⁸ In 1943 Generalissimo Chiang Kai-shek, President Roosevelt and Prime Minister Churchill issued the Cairo Declaration, according to which, Formosa (among other territories) should be restored to the ROC and this stipulation was confirmed by the Potsdam Declaration of 1945.³⁵⁹

According to the Instrument of Surrender which Japan signed in 1945, General Order No. 1 was issued by the Office of the Supreme Commander for the Allied Powers, ordaining the surrender of Japanese forces to Generalissimo Chiang Kai-shek.³⁶⁰ In the same year, the government of the ROC acquired control over Taiwan and announced that the latter had obtained the status of a Chinese province.³⁶¹ Thus, Taiwan became part of the ROC ruled by the Chinese Nationalist Party, the Kuomintang (KMT), but this state of affairs changed dramatically in 1949, when the government of the ROC was defeated by the communists under the leadership of Mao Zedong and was removed from power: “remnants of the government and armies of the Republic of China (ROC) made their way to Taiwan.”³⁶²

In October 1949 Mao Zedong proclaimed the People’s Republic of China (PRC) and, as a result of this state of things, “there were two Chinas.”³⁶³ This problem of “two Chinas” is a characteristic feature of the case of Taiwan, the problematic issue of the Chinese identity is a hallmark of the

³⁵⁸ J. Shen, Sovereignty, Statehood, Self-determination, and the Issue of Taiwan, in: American University International Law Review, Vol. 15, 2000, p. 1108

³⁵⁹ P. Dai, Recognition of States and Governments under International Law with Special Reference to Canadian Postwar Practice and the Legal Status of Taiwan (Formosa), in: *The Canadian Yearbook of International Law*, Vol. III, 1965, pp. 302-303

³⁶⁰ H. Chiu, The International Legal Status of Taiwan, in: J. - M. Henckaerts (ed.), *The International Status of Taiwan in the New World Order, Legal and Political Considerations*, London et al., 1996, p. 4

³⁶¹ *Ibid.*

³⁶² R. H. Myers, Introduction: *A Unique Relationship*, in: R. H. Myers (ed.), *A Unique Relationship*, The United States and the Republic of China Under the Taiwan Relations Act, Stanford, 1989, p. 1

³⁶³ H. Kuijper, Is Taiwan a Part of China?, in: J. - M. Henckaerts (ed.), *The International Status of Taiwan in the New World Order, Legal and Political Considerations*, London et al., 1996, p. 13

case in question. This conundrum had its immediate practical impact upon the resolution concerning the question of Formosa. As the Treaty of Peace was signed with Japan in 1951 (The Treaty of San Francisco), it was done without any Chinese participation, and the document entailed a clause, on the basis of which, Japan renounced its rights, claims or titles with regard to Formosa “without making any provision for the power or powers which were to succeed Japan in the possession of and sovereignty over the ceded territories.”³⁶⁴ The problem was that both, the Kuomintang and the Chinese communists, claimed separately that they were sole representatives of the Chinese people. For the Kuomintang, Mao’s supporters were “communist bandits”³⁶⁵, and for the new masters of the Chinese mainland, every adherent of the government which fled to Formosa was an enemy. Thus, at the time of the conclusion of the Treaty of Peace in San Francisco, neither representatives of the ROCOT, nor delegates of the PRC were invited to the conference because of this “confusion” which prevailed among various states concerning the issue of a legitimate representative of China.³⁶⁶

It has to be noted that later, in 1952, Japan signed the bilateral peace treaty with the ROCOT and this treaty contained the renunciation clause which was similar to that of the Treaty of San Francisco. Moreover, on the basis of the instrument signed in 1952, Japan had renounced its rights and titles regarding Taiwan “in accordance with Article 2 of the San Francisco Peace Treaty.”³⁶⁷ At the same time, on the ground of this “new” document, all treaties between China and Japan which were concluded before December 9, 1941, including the Treaty of Shimonoseki, became null and void.³⁶⁸

The question of Chinese identity hangs as the sword of Damocles over the territory known as Taiwan. A tense relationship between the ROCOT and

³⁶⁴ P. Dai, Recognition of States and Governments under International Law with Special Reference to Canadian Postwar Practice and the Legal Status of Taiwan (Formosa), in: *The Canadian Yearbook of International Law*, Vol. III, 1965, p. 303

³⁶⁵ See K. Möller, A New Role for the ROC on Taiwan in the Post-Cold War Era, in: *Issues & Studies, A Journal of Chinese Studies and International Affairs*, Vol. 31, 1995, p. 68

³⁶⁶ See H. Chiu, The International Legal Status of Taiwan, in: J. - M. Henckaerts (ed.), *The International Status of Taiwan in the New World Order, Legal and Political Considerations*, London et al., 1996, pp. 4-5

³⁶⁷ *Ibid.*, p. 5

³⁶⁸ *Ibid.*

the PRC concerning the issue of a legitimate representative of China lasted for a long period of time. In 1954 the United States and the ROC signed a mutual security treaty, on the basis of which the US acquired the right to station forces in Taiwan.³⁶⁹ The first major setback for the ROCOT on the international plane came in 1971, when the United Nations General Assembly (UNGA) decided:

“[...] to restore all its rights to the People’s Republic of China and to recognize the representatives of its Government as the only legitimate representatives of China to the United Nations, and to expel forthwith the representatives of Chiang Kai-shek from the place which they unlawfully occupy at the United Nations and in all the organizations related to it.”³⁷⁰

Thus, the ROC, which was a founding member of the United Nations³⁷¹, was ousted from this organization.

5.1.3 The ROC’s “derecognition” and the Taiwan Relations Act

Expulsion from the UN was a bad sign for the ROC, because the US was going to normalize relations with the PRC. As a result of this situation, the US and the PRC issued the Joint Communiqué in 1972 (known as the “Shanghai Communiqué”), in which the government of the PRC reaffirmed its position that it was the sole legitimate government of China and Taiwan was a province of China, and its liberation was China’s internal affair.³⁷² As the culmination of this normalization of relations between the US and the PRC, the Carter administration established diplomatic relations with the PRC on January 1, 1979, and severed official ties with the ROCOT.³⁷³ It has

³⁶⁹ See R. Clough, *The People’s Republic of China and the Taiwan Relations Act*, in: R. H. Myers (ed.), *A Unique Relationship*, The United States and the Republic of China Under the Taiwan Relations Act, Stanford, 1989, p. 120

³⁷⁰ UNGA Res. 2758 (XXVI), Restoration of the lawful rights of the People’s Republic of China in the United Nations (25. 10. 1971), available on the official website of the UN, at: <http://www.un.org/documents/ga/res/26/ares26.htm> [accessed: 18.09.2008]

³⁷¹ See Y. Shaw, *Taiwan: A View from Taipei*, in: *Foreign Affairs*, Vol. 63, 1985, p. 1050

³⁷² Information regarding the Sino-US Joint Communiqué of 1972 available on the official website of the Ministry of Foreign Affairs of the People’s Republic of China, at: <http://www.fmprc.gov.cn/eng/ziliao/3602/3604/t18006.htm> [accessed: 18.09.2008]

³⁷³ See S. Lee, *American Policy toward Taiwan: The Issue of the de facto and de jure Status of Taiwan and Sovereignty*, in: *The Buffalo Journal of International Law*, Vol. 2, 1995-96, p. 323

to be stressed that the document establishing formal diplomatic relations between the US and the PRC recognized the government of the latter as the sole legitimate government of China “but it did not confirm the PRC’s legal claim to Taiwan.”³⁷⁴

Thus, it can be asserted that Taiwan suffered a diplomatic setback at a critical stage of its development. But, at the same time, the US made a decision to balance the situation regarding the ROCOT. This decision denoted the enactment of an instrument with a compensatory character, which would somehow reduce the negative effects of the calamity experienced by Taiwan. This document is known as the “Taiwan Relations Act” (TRA) and represents the law enacted by the Congress of the US, i.e. it is not a treaty, as such, (the TRA came into force in 1979).³⁷⁵

It has to be mentioned that the enactment refers to the “people on Taiwan”³⁷⁶ and entails important provisions which stipulate that the adoption of the statute in question was important for “the continuation of commercial, cultural and other relations between the people of the United States and the people on Taiwan.”³⁷⁷ The reason, why the authorities in the US decided to pass such an act, leads us to the principle of effectiveness. Despite the fact that the US switched recognition from Taipei to Beijing, it was an established fact that “the authorities in Taipei were clearly the real or *de facto* government on Taiwan.”³⁷⁸ It follows that *de facto* control of the ROC over Taiwan was an accomplished fact, a *fait accompli* which had to be taken into consideration.

5.1.4 Content of the Taiwan Relations Act

The TRA provides for following important clauses among others: a) the fact of derecognition of the ROC does not affect the application of the US laws

³⁷⁴ N. E. Bell, “Recognition” and the Taiwan Relations Act: An Analysis of U.S.-Taiwan Relations within the Realm of “Low” Politics, in: China Information, Vol. X, 1995, p. 23

³⁷⁵ See Public Law 96-8, 96th Congress, Taiwan Relations Act [April 10, 1979], in: ILM, Vol. XVIII, 1979, p. 873

³⁷⁶ *Ibid.*

³⁷⁷ *Ibid.*, Sec. 2. (a)-2

³⁷⁸ J. K. Javits, Congress and Foreign Relations: The Taiwan Relations Act, in: Foreign Affairs, Vol. 60, 1981, p. 57

with respect to Taiwan; b) whenever the laws of the US refer to foreign states, such laws shall also apply to Taiwan; c) the capacity of Taiwan to sue and to be sued in courts of the US according to the laws of the latter has been confirmed, i.e. the absence of recognition has no negative impact in this context; d) the continuation in force of all treaties and other agreements, including multilateral conventions entered into by the US and the authorities of the ROC and effective between them on December 31, 1978 (unless they were terminated in accordance with law), has been approved.³⁷⁹

Thus, it can be asserted that the TRA introduced a *sui generis* regime of relations between the US and the ROC on Taiwan. It is also of overwhelming importance that according to the TRA, the US gives meaningful security guarantees to Taiwan as the document stipulates that it is the policy of the US:

“(4) to consider any effort to determine the future of Taiwan by other than peaceful means, including by boycotts or embargoes, a threat to the peace and security of the Western Pacific area and of grave concern to the United States;”³⁸⁰

As it becomes evident from these considerations, the decision made by the authorities of the US with regard to Taiwan was the issue bearing important legal and political consequences. The relations between the US and the ROCOT were considered to be “too complex not to have a legal basis”³⁸¹, but it has to be noted that the document in question has been criticized as “an intensely political and ambiguous piece of legislation”³⁸². Despite this criticism, the TRA has to be considered as an important development for the ROCOT. On the basis of this enactment, the Taiwanese representatives essentially enjoy the same privileges in the US as the diplomats from

³⁷⁹ Sec. 4. (a); (b)-1,7;(c) of the Public Law 96-8, 96th Congress, Taiwan Relations Act [April 10, 1979], in: ILM, Vol. XVIII, 1979, p. 874

³⁸⁰ Sec. 2. (b) – 4 of the Public Law 96-8, 96th Congress, Taiwan Relations Act [April 10, 1979], in: *Ibid.*, p. 873

³⁸¹ H. Feldman, A New Kind of Relationship: *Ten Years of the Taiwan Relations Act*, in: R. H. Myers (ed.), *A Unique Relationship, The United States and the Republic of China Under the Taiwan Relations Act*, Stanford, 1989, p. 31

³⁸² S. M. Goldstein / R. Schriver, An Uncertain Relationship: The United States, Taiwan and the Taiwan Relations Act, in: *The China Quarterly, an international journal for the study of China*, number 165, 2001, p. 170

recognized states (except for the use of diplomatic license plates and passports).³⁸³ Furthermore, a private non-profit corporation has been established on the ground of the TRA called the “American Institute in Taiwan” (AIT). According to the document, this body is “incorporated under the laws of the District of Columbia”³⁸⁴ and its counterpart is the “Coordination Council for North American Affairs” (CCNAA).

It has to be stated that the AIT has a contract with the US State Department and in absence of diplomatic recognition, relations between the US and Taiwan are maintained through the bodies mentioned above. This state of affairs is described as “privatization of diplomatic relations.”³⁸⁵ Thus, it can be asserted that the TRA has “lifted” the status of Taiwan after the US derecognized the ROC. The impact of the TRA on the standing of the entity in question has been summarized by Bell in a following manner:

“In spite of the “unrecognized” label, the TRA and supplemental agreements have, to some extent, reestablished the United States’ recognition of Taiwan as a sovereign nation-state. The TRA establishes a policy of *functional equality*, notwithstanding Taiwan’s formal difference from recognized states [...]”³⁸⁶

Thus, the TRA can be considered as significant “compensation” for the ROC’s derecognition by the US.

5.1.5 From “one China” policy to “total diplomacy”

After the diplomatic setback suffered by the ROCOT, Taiwan had to reappraise its policy with regard to the PRC. It was the politics of “one China” which had been practiced by the authorities on Formosa, denoting that China, as such, is the ROC. This posture had its basis in the claim of the ROC government that it was the sole legitimate ruler of China, it was the

³⁸³ See S. Pegg, *International Society and the De Facto State*, Aldershot / Brookfield, 1998, p. 185

³⁸⁴ Sec. 6. (a)-1 of the Public Law 96-8, 96th Congress, Taiwan Relations Act [April 10, 1979], in: ILM, Vol. XVIII, 1979, p. 875

³⁸⁵ S. Pegg, *International Society and the De Facto State*, Aldershot / Brookfield, 1998, p. 185

³⁸⁶ N. E. Bell, “Recognition” and the Taiwan Relations Act: An Analysis of U.S.-Taiwan Relations within the Realm of “Low” Politics, in: *China Information*, Vol. X, 1995, p. 25 (emphasis and italics in original)

philosophy and ideology based on Sun Yat-sen's ideals and the struggle against communist rivals.³⁸⁷

Indeed, as the authorities of the ROCOT regarded themselves as the sole legitimate representatives of the whole of China, their attitude towards the members of the international community of states was somewhat cautious, if the issue of Chinese identity was in question. Bearing in mind this circumstance, Möller asserts that the Taiwanese authorities pursued the policy which was similar to the Hallstein Doctrine, i.e. the governing elites of the ROCOT made their external relations with different states dependent upon the stance of those partners towards Beijing.³⁸⁸ This was also “a policy of “three nos”- no contact, no negotiation, no compromise”³⁸⁹ with Beijing, but it had to be modified since there were new realities and new challenges for Taiwan.

It was the reality that after the “derecognition” of the ROC by the UN and the US, it was the government in Beijing which assumed a leading role with regard to the question of Chinese identity. Subsequently, according to Deng Xiaoping's unification formula of “one state, two systems” (1984), Taipei was allowed “to maintain its social and economic system, its armed forces and its unofficial ties with foreign countries.”³⁹⁰ This statement expresses the shift which took place in the context of the Chinese identity, now it was the PRC which acquired dominance in respect of the issue in question, and Taiwan became Beijing's “next “territorial ambition.””³⁹¹

It has to be noted that Beijing's overture was an additional factor, which backed Taipei's decision in the mid-1980s to change its diplomatic strategy and to turn to “total diplomacy” or “pragmatic diplomacy” (sometimes this policy is also described as “flexible diplomacy”). This was a new posture adopted by respective authorities which, among other elements, included

³⁸⁷ See C. Chao, Taiwan's Identity Crisis and Cross-Strait Exchanges, in: *Issues & Studies, A Journal of Chinese Studies and International Affairs*, Vol. 30, 1994, p. 5

³⁸⁸ K. Möller, A New Role for the ROC on Taiwan in the Post-Cold War Era, in: *Ibid.*, Vol. 31, 1995, p. 70

³⁸⁹ C. Chao, Taiwan's Identity Crisis and Cross-Strait Exchanges, in: *Ibid.*, Vol. 30, 1994, p. 6 (emphasis in original)

³⁹⁰ See G. Huan, Taiwan: A View from Beijing, in: *Foreign Affairs*, Vol. 63, 1985, p. 1065

³⁹¹ D. Duncanson, What Is Taiwan to China?, in: *Asian Affairs*, Vol. XVII (Old Series Volume 73), 1986, p. 288 (emphasis in original)

“the expansion of substantive relations with non-communist and anti-communist countries.”³⁹² The policy mentioned above was aimed at strengthening the presence of Taiwan on the international plane, for example, by the means of promoting the ROCOT’s membership in different institutions. This attitude inevitably entailed important compromises on the part of the Taiwanese authorities as, for instance, they accepted the designation “Taipei, China” used by the International Olympic Committee (IOC) and the Asian Development Bank (ADB).³⁹³

In 1987 ordinary residents of Taiwan were allowed to visit mainland China, as the respective ban had been lifted by the authorities of the ROCOT.³⁹⁴ One of the most important events in the cross-strait relationship came four years later: “with the termination of the “Period of Mobilization for the Suppression of Communist Rebellion” in 1991, Taiwan ended its official “state of war” with the mainland.”³⁹⁵

5.1.6 Cross-strait relations and Beijing’s “Anti-Secession Law”

It has to be stressed that “unofficial” links have been developed between the ROCOT and Beijing through private bodies such as the Straits Exchange Foundation (SEF) on Taiwan and the Association for Relations Across the Taiwan Straits (ARATS) on mainland China. It has been emphasized that, although these institutions are officially private, they are not entirely civilian organizations as, for example, the SEF is financed two-thirds by the government and one-third by the private sector.³⁹⁶ One important aspect of these relations is that the SEF and the ARATS have the competence to hold negotiations on the establishment of direct links, i.e. they do have

³⁹² B. S. J. Weng, Taiwan’s International Status Today, in: *The China Quarterly*, an international journal for the study of China, No. 99, 1984, p. 465

³⁹³ See S. Pegg, *International Society and the De Facto State*, Aldershot / Brookfield, 1998, p. 184

³⁹⁴ See C. Lo / J. Lin, Between Sovereignty and Security: A Mixed Strategy Analysis of Current Cross-strait Interaction, in: *Issues & Studies, A Journal of Chinese Studies and International Affairs*, Vol. 31, 1995, p. 66

³⁹⁵ *Ibid.*, (emphasis in original)

³⁹⁶ L. Wu, Limitations and Prospects of Taiwan’s Informal Diplomacy, in: J. - M. Henckaerts (ed.), *The International Status of Taiwan in the New World Order, Legal and Political Considerations*, London et al., 1996, p. 49

responsibilities reaching far beyond the sphere of arranging technical matters.³⁹⁷

In the same year that the SEF and the ARATS were set up, namely in 1991, the ROCOT adopted the Guidelines for National Unification. Two main principles were enshrined in the document: according to the first one, there is one Chinese territory but two political entities do exist, and in accordance with the second approach, the question of unification has to be decided in the future, after the requirements of the process of unification, which encompasses three phases, are met.³⁹⁸ There have been different answers from the side of the PRC, including “the Eight Points of President Jiang Zemin” (1994)³⁹⁹, but the most important and impressive response to the authorities of the ROCOT came in 2005 when the PRC’s legislature passed the Anti-Secession Law “which codified Beijing’s threat to go to war if Taiwan declared independence”⁴⁰⁰. Thus, by adopting the Anti-Secession Law, Beijing gave an unequivocal answer to the governing elites of the ROCOT. This response is enshrined in Art. 8 of the enactment which reads as follows:

“In the event that the “Taiwan independence” secessionist forces should act under any name or by any means to cause the fact of Taiwan’s secession from China, or that major incidents entailing Taiwan’s secession from China should occur, or that possibilities for a peaceful reunification should be completely exhausted, the state shall employ non-peaceful means and other necessary measures to protect China’s sovereignty and territorial integrity.”⁴⁰¹

³⁹⁷ *Ibid.*, p. 50

³⁹⁸ See J. - P. Cabestan, The Cross-Strait Relationship in the Post-Cold War Era: Neither Reunification Nor “Win-Win” Game, in: *Issues & Studies, A Journal of Chinese Studies and International Affairs*, Vol. 31, 1995, p. 31

³⁹⁹ See C. Tsai, The Development of Cross-Strait Policies in China and Taiwan, in: J. - M. Henckaerts (ed.), *The International Status of Taiwan in the New World Order, Legal and Political Considerations*, London et al., 1996, pp. 225-226

⁴⁰⁰ R. S. Ross, Taiwan’s Fading Independence Movement, in: *Foreign Affairs*, Vol. 85, 2006, p. 145

⁴⁰¹ Article 8 of the Anti-Secession Law (Adopted at the Third Session of the 10th National People’s Congress on March 14, 2005), available on the official website of the National People’s Congress of the People’s Republic of China, at: http://www.npc.gov.cn/englishnpc/Law/2007-12/13/content_1384099.htm [accessed: 22.09.2008]

It is important to note that the enactment was designed to reiterate the principles of the Constitution of the PRC. The Anti-Secession Law confirms and emphasizes Beijing's following posture toward the question of Taiwan: there is one China in the world and both, the mainland and Taiwan belong to one China, furthermore, it is stated in the same provision that "Taiwan is part of China."⁴⁰²

Bearing in mind the importance attached by the PRC to the issue of Taiwan, it becomes clear that the law in question belongs to the high level within the hierarchy of normative acts of the PRC. Indeed, according to Keyuan, the rank of the Anti-Secession Law is equivalent to the category of the Basic Laws of Hong Kong and Macao.⁴⁰³

Of course, Art. 8 of the Anti-Secession Law is a warning issued by the authorities of the PRC to respective actors on the island, if they were to declare statehood and try to transform "a de facto reality - Taiwan's independence - into a legal one."⁴⁰⁴ This new challenge to Beijing was a product of a new reality within the realm of the cross-Strait relations, and as during the rule of Chiang Kai-shek there was no "danger" that Taiwan would declare independence from the mainland China⁴⁰⁵, this situation was changed later with the strengthening of the Democratic Progressive Party (DPP). According to one author, Chen Shui-bian has waived the "privilege" of declaring independence (demanded by the DPP) merely because he believed that Taiwan was already sovereign.⁴⁰⁶

Thus, the Anti-Secession Law was a response to the aspirations of certain actors on Taiwan's political stage. The PRC expressed its will, not to renounce the possibility of the use of force against the island, if non-peaceful means are needed, in order to guard China's sovereignty and territorial integrity from the possible infringement.

⁴⁰² See Article 2 of the Anti-Secession Law, in: *Ibid.*

⁴⁰³ Z. Keyuan, Governing the Taiwan Issue in Accordance with Law: An Essay on China's Anti-Secession Law, in: *Chinese JIL*, Vol. 4, 2005, p. 458

⁴⁰⁴ T. J. Christensen, Chinese Realpolitik, in: *Foreign Affairs*, Vol. 75, 1996, p. 50

⁴⁰⁵ See A. J. Nathan, What's Wrong with American Taiwan Policy, in: *The Washington Quarterly*, Vol. 23, 2000, p. 94

⁴⁰⁶ See M. O'Hanlon, Why China Cannot Conquer Taiwan, in: *International Security*, Vol. 25, 2000, p. 51

5.2 International legal context

5.2.1 Taipei and Beijing: the normative shift from “one China” to the “special state to state relationship”

Taiwan’s effectiveness, or to say precisely, the effectiveness of the Republic of China on Taiwan (ROCOT) involves different international legal aspects and the existence of the entity in question has to be considered in relation to these manifestations. It is important to note that the emergence of this territorial unit is connected with the struggle between the Chinese Nationalists and the People’s Liberation Army of the Chinese Communists, i.e. the forces led by the Chinese Communist Party. It follows that the ROCOT is a product of a civil war fought by respective parties.

At the same time, the revolutionary change of the Chinese government is the issue related to the present problem. Bearing in mind the fact that, for a long period of time, there were claims of both sides asserting that each one was a legitimate representative of China, it has to be concluded that during this period, as a consequence of “one China” policy, the ROCOT regarded itself as an entity having the legal title to the whole Chinese territory (i.e. including the mainland China governed by the communist government). The same can be said with regard to the authorities in Beijing, as they asserted their claim to the island. Thus, in that period of time, there was no question of Taiwan’s separate existence, the problem was Chinese identity.

As the authorities of the ROCOT changed their diplomatic strategy due to the setback suffered in the field of international relations, the issue of Taiwan’s independence became a problem. This change represented a normative shift in the situation, because respective political elites tried to drift towards the status of a sovereign independent state. An attempt which underscores the assertion stated above was the ROC’s unsuccessful UN campaign of 1994/95, aimed at regaining its seat in the world

organization.⁴⁰⁷ Furthermore, the Taiwanese President Lee Teng-hui made the following statement in an interview given in 1999:

“Seit der Verfassungsänderung von 1991 befinden sich die Beziehungen über die Taiwan-Straße auf einer zwischenstaatlichen Ebene, zumindest ist es ein besonderes zwischenstaatliches Verhältnis.”⁴⁰⁸

Moreover, in the same interview the President referred to the issue of sovereignty stressing that “die Republik China ist ein souveräner und unabhängiger Staat”⁴⁰⁹, emphasizing the result of political developments which occurred within the realm of relations between Beijing and Taipei. Thus, the alleged statehood of the political entity became a problem. The fact is that so far, Taiwan has not declared statehood, as such, and its national holiday is still the Republic Day, anniversary of the Chinese Revolution, 10 October 1911.⁴¹⁰ By the declaration of statehood I mean the assertion of the claim to independent existence in the form of a separate state, and the announcement of the fact of establishment of a sovereign state, i.e. independent from the Chinese mainland. Of course, the ROC has been a sovereign independent state since 1912, and after the civil war and the subsequent retreat of the Nationalist government from mainland China to the island in 1949, the ROCOT maintained its claim of being the sole legitimate representative of China. It follows that the ROCOT regarded itself as a state in the plain meaning of this word.

In the 1970s Taiwan suffered a period of major diplomatic setbacks, and the latter has modified its policy since then, made it more practical and adaptable to its pragmatic interests. This period of time has to be regarded as a watershed in respect of the Taiwanese claim to separate existence. After the developments mentioned above, the authorities of the ROCOT drifted

⁴⁰⁷ See D. G. Palmer Jr., Taiwan: *De Jure* or Not *De Jure*? That is the Question. An Analysis of Taiwan’s Legal Status Within the International Community, in: John F. Kennedy University Law Review, Vol. 7, 1996, pp. 76-77

⁴⁰⁸ Interview des Präsidenten der Republik China, Lee Teng-hui, mit der Deutschen Welle am 9. Juli 1999, available on the website of the Journal *Internationale Politik* (IP), at: <http://www.internationalepolitik.de/archiv/jahrgang1999/september99/> [accessed: 24.09.2008]

⁴⁰⁹ *Ibid.*

⁴¹⁰ Information available on the official website of the CIA, at: <https://www.cia.gov/library/publications/the-world-factbook/geos/tw.html> [accessed: 24.09.2008]

towards the possible declaration of statehood on many occasions. The culmination was the period of rule of the pro-independence movement personified in Chen Shui-bian and the DPP.

Thus, Taiwan experienced the following transformation: after the claim to represent the whole Chinese people, i.e. the single Chinese identity (“one China” policy), the demand for separate existence from mainland China was born. This development denoted the appearance of the problem of the double Chinese identity, or to say precisely, the issue of one China and one Taiwan as distinct sovereigns. The state of affairs described above was a product of the ROCOT’s derecognition by the UN and the US and subsequent developments in this respect.

5.2.2 Significance of the declaration of statehood

Despite this qualitative shift with regard to the character of the problem, there was no formal declaration of statehood on the part of the authorities in Taipei. As with regard to the interview of the President Lee Teng-hui it has been stressed that his statement concerning the “special state to state relationship” across the Taiwan Strait cannot be regarded as a declaration of statehood for following reasons: a) the declaration of statehood is a solemn statement which, according to the modern custom, has to be made officially in the governmental document and not in a casual manner in an interview; b) the content of the statement made by Lee Teng-hui does not indicate that it can be considered as a declaration of statehood; c) subsequent statements by the President denote that he had no intention of declaring statehood.⁴¹¹ It follows that in making the statement concerning the notion of “special state to state relations”, the Taiwanese President “was just seeking an equal footing in negotiation with the PRC government.”⁴¹²

The adoption by the PRC of the Anti-Secession Law in 2005 clearly reduced the “risk” of declaring statehood by the Taiwanese political elite.

⁴¹¹ See Y. F. Chiang, *State, Sovereignty, and Taiwan*, in: *Fordham International Law Journal*, Vol. 23, 2000, p. 985

⁴¹² *Ibid.*

What legal impact does the non-declaration of statehood have on the status of the ROCOT? The question has to be answered at this point.

According to Chiang, the practice of establishing a state by making a respective declaration represented an international custom in the twentieth century and now it has acquired the character of a legal rule.⁴¹³ Furthermore, the declaration of statehood encompasses two important aspects: it denotes the existence of the claim to statehood and, at the same time, it is an announcement to the international society that the political entity in question is a state (from the time of the respective declaration).⁴¹⁴ Thus, the formal assertion of the claim to statehood is an important manifestation:

“The declaration implies that it is the common will of the people to establish a state. Unless otherwise indicated, the declaration takes effect instantly, so that the political entity that has the other qualifications acquires statehood at the time of the declaration. Because the declaration is, by definition, the beginning of the state’s existence, it does not have retroactive effect.”⁴¹⁵

Thus, the ROCOT has not declared statehood, as such, i.e. independent existence as a state, independent from the Chinese mainland.

5.2.3 Acceptance enjoyed by Taiwan on the international plane and “legal metamorphosis” of the status of this territorial entity

Taiwan maintains extensive relations with different members of the international community on the basis of a sophisticated system of contacts at the official and semi-official levels. There are states which officially recognize the ROCOT and the relations between them are conducted on the basis of formal diplomatic channels. It has to be stressed that Taiwan has its embassies in 23 countries and 92 representative and branch offices which fulfil the functions of embassies in 59 countries.⁴¹⁶ At the same time, 48 states which do not maintain formal diplomatic ties with Taiwan, have

⁴¹³ *Ibid.*, p. 972

⁴¹⁴ *Ibid.*, p. 973

⁴¹⁵ *Ibid.*

⁴¹⁶ Information available on the official website of the Government Information Office, Republic of China, at: <http://www.gio.gov.tw/ct.asp?xItem=35621&ctNode=2588> (Published: 2008/1/14), [accessed: 27.09.2008]

established their representative or visa-issuing offices.⁴¹⁷ Taiwan applied for the new membership of the UN in 2007 but the application was rejected by the Secretariat of the organization.⁴¹⁸

Bearing in mind these considerations, and the fact that despite its derecognition by the US, Taiwan is actually treated by the latter as an independent state on the basis of the TRA, it has to be asserted that if the status of a territorial entity can be depicted as a *sui generis* one, it is first of all the ROCOT, to which this description is applicable. The entity in question was a sovereign independent state which, after the Communist revolution of 1949 and subsequent expulsion of its authorities to the island, was transformed into a *de facto* local government (at least at the moment when the members of the international community and the UN began to recognize the PRC as the sole representative of the Chinese nation). This *de facto* local government consolidated its power and, after nearly sixty years of firmly established factual and independent existence, became a fully-fledged *de facto state*. This political entity has not declared statehood, as such, but it maintains diplomatic relations with certain states and with those countries, which do not recognize it formally, the entity in question conducts practically the same relations on the basis of semi-official representative offices. Thus, Taiwan is treated as a state despite the fact that it has not declared statehood.

5.2.4 Ex factis jus oritur: traditional criteria for statehood and Taiwan

The issue of the traditional criteria for statehood has to be analyzed in two directions: according to the first one, which is the pro-PRC version, Taiwan is a province of China, i.e. the constituent part of the PRC, because it does not satisfy even the empirical criteria for statehood. The second argument is a pro-ROCOT one, emphasizing Taiwan's independent existence and its readiness to achieve the ultimate goal of becoming a sovereign state. It is important at this point to summarize respective arguments.

⁴¹⁷ *See Ibid.*

⁴¹⁸ Information available on the official website of the Government Information Office, Republic of China, at: <http://www.gio.gov.tw/ct.asp?xItem=35619&ctNode=2588> [accessed: 27.09.2008]

Let us begin with the pro-PRC reasoning. Shen asserts that 97 percent of the Taiwanese people are ethnic *Han* Chinese and there is no difference in this sense between them and the permanent population of any other province of mainland China. Thus, as a consequence of this state of things, the permanent population of Taiwan has to be regarded as a part of the permanent population of the Chinese state, as such, regardless of its designation.⁴¹⁹ As with regard to the requirement of the defined territory, this author stresses that to claim statehood, an entity in question must own the territory which is free from claims by any other entity, but the territory of Taiwan can be owned solely by the Chinese state, as such, and although the authorities of the ROCOT exercise factual control over the territory in question, they do not possess a legal title to that territory. Consequently, they do not have the capacity to legally detach the territory controlled by them from the mainland China, until the latter abandons its sovereignty over the Taiwan Island.⁴²⁰ It follows that the ROCOT does not possess the territory of its own and the sovereign authority over such a territory, and this fact is a legal impediment on the way of acquisition of statehood.⁴²¹

With regard to the notion of government, the author emphasizes the fact that this manifestation encompasses both, factual and legal dimensions, i.e. effectiveness of the governing authority and the legal title, the government's exclusive sovereign right to control the territory in question.⁴²² Bearing in mind these considerations, Shen concludes that the authorities of the ROCOT represent a special local government, because they do not meet the cumulative requirements of effectiveness and the legal title (they satisfy solely the criterion of effectiveness) in order to validly claim the status of the government for the purposes of statehood.⁴²³

The author proceeds further to the examination of the criterion concerning the capacity to enter into relations with other states. After stating that the notion of sovereignty is an inherent part of the criterion in question,

⁴¹⁹ J. Shen, *Sovereignty, Statehood, Self-determination, and the Issue of Taiwan*, in: *American University International Law Review*, Vol. 15, 2000, p. 1127

⁴²⁰ *Ibid.*, p. 1129

⁴²¹ *See Ibid.*, p. 1130

⁴²² *Ibid.*, p. 1132

⁴²³ *Ibid.*, p. 1133

denoting the legal competence of a respective entity to participate in international relations, Shen arrives at the conclusion that it is solely the government of the PRC, which is in possession of the sovereignty over Taiwan (and, as a consequence of this state of affairs, the PRC has the authority to enter into relations with other states on behalf of the entire Chinese state, including Taiwan).⁴²⁴

Thus, Shen's argumentation is quite interesting as this author concludes that the ROCOT fails to satisfy even the "Montevideo criteria" of statehood. It can be asserted at this point that the reasoning with regard to the requirement of the permanent population is based on the ethnic affinity between the people living on both sides of the Taiwan Strait. With respect to the requirements concerning the defined territory and the government, the absence of a territorial title has been considered as a decisive matter. The lack of sovereignty has been regarded as an obstacle for the ROCOT on the way of meeting the requirement concerning the capacity to enter into relations with other states. The argument regarding the last criterion has been based by Shen on the position of "China" (to say precisely, the PRC) that Taiwan is an inalienable part of China, given that this attitude was shared by the authorities of the ROCOT at least until the 1990s, and the fact that the international community recognizes this in addition to the circumstance that the government of the PRC is the sole legitimate representative of the entire China.⁴²⁵

It is meaningful at this stage to refer to the pro-ROCOT version in the context of the traditional criteria for statehood. According to Palmer, the essence of the requirement of permanent population is the quality of stability, and despite the fact that the majority of the population of the territory in question is of Chinese descent, they consider themselves as possessing "Taiwanese" nationality, and they do not regard themselves as citizens of China separated from the motherland. Moreover, nationality, as

⁴²⁴ See *Ibid.*, pp. 1134-1139

⁴²⁵ *Ibid.*, p. 1139

such, has no relevance to the notion of permanent population.⁴²⁶ After reference to the fact that the population of Taiwan has been stable and permanent since the establishment of the ROCOT in 1949, and bearing in mind the circumstance that the population in question has been represented solely by the government of the ROCOT which later initiated democratic reforms, the author concludes that Taiwan meets the requirement of the permanent population.⁴²⁷

As with regard to the criterion of the defined territory, it has been stressed that the territory of Taiwan has been under the exclusive control of the ROC since 1945. So, it follows that respective authorities have established effective control over a stable political community in that defined area without interruption for a significant period of time, and the fact that the PRC also claims the territory in question has no relevance to the issue of Taiwan's effective control over the area.⁴²⁸

Concerning the requirement of an effective government, Palmer asserts that since 1945 the ROC has exercised exclusive control over domestic and international affairs. It has maintained its own legislative, executive and judicial functions, has controlled its own military forces and, for a long period of time, the ROC exercised full control over the territory and the population in all spheres of the government to the exclusion of all other political entities.⁴²⁹

With respect to the capacity to enter into relations with other states, it has been stressed that although the ROCOT has been forced to conduct its relations with foreign states on the basis of "unofficial" channels, it actually maintained its foreign relations in an exclusive manner and, as a consequence of this state of things, Taiwan satisfies the criterion in question.⁴³⁰ Palmer draws the conclusion that Taiwan satisfies the traditional criteria for statehood. Moreover, according to this author, in the

⁴²⁶ D. G. Palmer Jr., Taiwan: *De Jure* or Not *De Jure*? That is the Question. An Analysis of Taiwan's Legal Status Within the International Community, in: John F. Kennedy University Law Review, Vol. 7, 1996, p. 85

⁴²⁷ *Ibid.*, p. 86

⁴²⁸ *See Ibid.*

⁴²⁹ *Ibid.*, pp. 87-88

⁴³⁰ *Ibid.*, p. 90

context of the traditional criteria for statehood, and under the declaratory view of statehood which excludes the notion of international recognition as a criterion of a state's existence, "Taiwan has also established a strong case of *de jure* statehood as a matter of law."⁴³¹

These are different views concerning Taiwan's status in the context of the traditional or empirical criteria for statehood. The considerations mentioned above demonstrate that the standing of the entity in question varies from the status of a province within the Chinese state to independent existence and an already established "strong case of *de jure* statehood".

5.2.5 The de facto state option for the Republic of China on Taiwan

In an article published in 1992, Qin argued that Taiwan can only be considered as a non-state territorial entity, because respective authorities in Beijing and Taipei agree that Taiwan is a province of China, not a sovereign state.⁴³² This author stresses that Taiwan has independently conducted foreign relations and despite the fact that it has used specific designations in this context, Taiwan, as a non-state territorial entity, enjoys certain international personality.⁴³³ In respect of different agreements concluded between the ROCOT and foreign states, it has been stressed that on the basis of entering into those agreements with Taiwan, respective states "have recognized de facto Taiwan's international personality for certain specific purposes other than political and diplomatic relations."⁴³⁴

According to Yahuda, by the end of the 1980s Taiwan had all the advantages of independence: it was a self-governing entity with its own military forces and a *de facto* security alliance with the US, it maintained diplomatic ties with certain countries and extensive economic relations with the majority of states, the entity in question lacked only the formalities of an

⁴³¹ *Ibid.*, (italics in original)

⁴³² Y. Qin, GATT Membership for Taiwan: An Analysis in International Law, in: New York University Journal of International Law and Politics, Vol. 24, 1992, p. 1082

⁴³³ *Ibid.*, p. 1085

⁴³⁴ *Ibid.*

internationally recognized sovereignty.⁴³⁵ Yahuda points out that the problem of Taiwan is essentially connected with the PRC, because the ROCOT's international standing cannot be taken for granted as it is relative to the status of the PRC.⁴³⁶

These considerations denote that the designation “*de facto state*” is the most appropriate one in the case of Taiwan. It follows that the ROCOT satisfies the traditional criteria for statehood but it lacks substantive recognition as a state. Despite the fact that 23 countries recognize it, and those which do not recognize it officially, treat Taiwan as an independent state on the basis of a sophisticated system designed for the maintenance of foreign relations, the ROCOT lacks substantive recognition as a state. On the basis of the criteria of substantive recognition enunciated by Pegg, it can be stressed that Taiwan is not recognized as a state by any major power of the day.⁴³⁷ It is not recognized by the entity which can be regarded as a “mother state” in this context, namely the PRC. Moreover, as was demonstrated on the basis of the politics maintained by the PRC and the Anti-Secession Law adopted by Beijing, the latter will certainly have objections, if other countries decide to recognize the ROCOT as a state. Furthermore, it cannot be said that Taiwan is recognized by neighboring countries.

Taiwan is not recognized as a state by the majority of members of the UN General Assembly. As with regard to the fifth requirement concerning the participation in global and regional international organizations, it can be stressed that Taiwan enjoys membership in certain international organizations⁴³⁸ but it failed to rejoin the UN. In sum, it can be asserted that

⁴³⁵ M. Yahuda, *The International Standing of the Republic of China on Taiwan*, in: *The China Quarterly, an international journal for the study of China*, No. 148, 1996, p. 1319

⁴³⁶ *Ibid.*, p. 1339

⁴³⁷ Following political entities maintain diplomatic relations with Taiwan: Belize, Burkina Faso, Dominican Republic, El Salvador, The Gambia, Guatemala, Haiti, Holy See, Honduras, Kiribati, Saint Lucia, Marshall Islands, Nauru, Nicaragua, Palau, Panama, Paraguay, Saint Kitts and Nevis, Saint Vincent and the Grenadines, São Tomé and Príncipe, Solomon Islands, Swaziland, Tuvalu. Information available on the official website of the Government Information Office, Republic of China, at: <http://www.gio.gov.tw/ct.asp?xItem=35621&ctNode=2588> (Published: 2008/1/14), [accessed: 02.10.2008]

⁴³⁸ Among them are: ADB, APEC, IOC, WTO. See Information available on the official website of the CIA, at: <https://www.cia.gov/library/publications/the-world-factbook/geos/tw.html> [accessed: 03.10.2008]

Taiwan does not meet the majority of the five requirements considered above and, as a result of this state of things, it lacks substantive recognition. It follows that the ROCOT satisfies the traditional criteria for statehood and the lack of substantive recognition is its hallmark.

Further argument backing my assertion that Taiwan is the *de facto state* concerns another aspect of the definition of *de facto* statehood introduced by Pegg, namely the presence of organized political leadership receiving popular support and providing governmental services to the population in a respective territorial area. In an article published in 1979, Li discussed the possible attitude of the US towards the ROCOT after severing diplomatic relations with it:

“Although the ROC is no longer regarded by the United States as a *de jure* government or state, it continues to control a population and territory while carrying out the usual functions of a government.”⁴³⁹

This author made an interesting prognosis with regard to the status of Taiwan stating the following:

“The use of the *de facto* entity approach by the United States would provide the best means to assist Taiwan in making the transition from a state representing all of China to an entity with some new and still undefined status.”⁴⁴⁰

This is exactly what happened to Taiwan. From the local *de facto* government the ROCOT was transformed into an entity operating in a legal limbo, to say precisely, Taiwan became a fully-fledged *de facto state*. Thus, Taiwan represents the *de facto state* and this designation is applicable to the subject of examination of my thesis. The following statement seems to be correct as a conclusion with regard to Taiwan’s status: “Until Taiwan asserts

⁴³⁹ V. H. Li, The Law of Non-Recognition: The Case of Taiwan, in: *Northwestern Journal of International Law & Business*, Vol. 1, 1979, pp. 135-136 (italics in original)

⁴⁴⁰ *Ibid.*, p. 145 (italics in original)

its independence, it cannot be a state. In all other respects Taiwan is ready for statehood.”⁴⁴¹

At the same time, Taiwan has not made a formal declaration of independence. This circumstance has to be regarded as an impediment to the progress regarding the acquisition of the status of a state, as such, because “lawful proclamation of a state is *conditio sine qua non* for the *de iure* emergence of a state.”⁴⁴² This state of things is also problematic in respect of the definition of *de facto* statehood applied in the present study. One important feature of the *de facto state* is that it seeks full constitutional independence and widespread international recognition as a sovereign independent state. It is true that the authorities of the ROCOT strive for recognition of the political entity in question, but they have not officially declared full constitutional independence from the mainland China, despite the fact that the governing elites of Taiwan consider this entity as already being sovereign. But it is also a fact that effective control is maintained by the ROCOT over the territory it claims to be its own, and this effectiveness lasts for a significant period of time. Thus, it can be asserted that Taiwan is the *de facto state* and this designation is an appropriate one, also for the purposes of the present thesis.

⁴⁴¹ N. L. Wallace-Bruce, Taiwan and Somalia: International Legal Curiosities, in: Queen’s Law Journal, Vol. 22, 1997, p. 467

⁴⁴² R. Lefeber / D. Raič, Frontiers of International Law, Part One: The Chechen People, in: LJIL, Vol. 9, 1996, p. 1 (italics in original)

Chapter 6: The “Turkish Republic of Northern Cyprus”

6.1 Political context

6.1.1 History: 1878 – 1960

Cyprus, an island in the Mediterranean which was part of the Ottoman Empire from 1571, was assigned by the imperial Sultan of Turkey in 1878 “to be temporarily occupied and administered by Britain.”⁴⁴³ Thus, the United Kingdom acquired *de facto* sovereignty over the island, whereas *de jure* sovereignty was still that of Turkey.⁴⁴⁴ Cyprus was annexed by the United Kingdom in 1914 when the Ottoman Empire entered the First World War, and this annexation was “legalized” in 1923 under the Treaty of Lausanne in which the British sovereignty over Cyprus carried the consent of Turkey and Greece.⁴⁴⁵

It has to be noted at this point that the ethnic composition of the island is its important characteristic feature. The majority of the population is represented by the Greek Cypriots which, after the establishment of Greece as a nation state in 1831, pursued the policy of *Enosis* (unification of Cyprus with Greece) which was part of the wider Panhellenic movement.⁴⁴⁶ As a result of this situation, from the moment when Cyprus became the British colony in 1925⁴⁴⁷, anti-colonial sentiments among the Greek Cypriots were quite strong, because Britain was regarded as the main obstacle on the way to the realization of *Enosis*. After an unsuccessful attempt in 1931 made in furtherance of unification with Greece, the Greek Cypriots intensified the struggle for *Enosis* since the end of the Second World War.⁴⁴⁸ This time it was the anti-colonial partisan organization EOKA (“Ellenikos Organismos Kypriakon Agoniston – Hellenic Organization for the Struggle for

⁴⁴³ N. M. Ertekün, *The Cyprus Dispute and the Birth of the Turkish Republic of Northern Cyprus*, Nicosia North, 1984, p. 1

⁴⁴⁴ S. K. N. Blay, *Self-Determination in Cyprus: The New Dimensions of an Old Conflict*, in: *The Australian Year Book of International Law*, Vol. 10, 1981-1983, p. 68

⁴⁴⁵ N. M. Ertekün, *The Cyprus Dispute and the Birth of the Turkish Republic of Northern Cyprus*, Nicosia North, 1984, p. 1

⁴⁴⁶ See O. P. Richmond, *Decolonisation and Post-Independence Causes of Conflict: The Case of Cyprus*, in: *Civil Wars*, Vol. 5, 2002, pp. 172-173

⁴⁴⁷ S. K. N. Blay, *Self-Determination in Cyprus: The New Dimensions of an Old Conflict*, in: *The Australian Year Book of International Law*, Vol. 10, 1981-1983, p. 69

⁴⁴⁸ See N. M. Ertekün, *The Cyprus Dispute and the Birth of the Turkish Republic of Northern Cyprus*, Nicosia North, 1984, p. 2

Cyprus”)⁴⁴⁹ which gained momentum and established itself as the fighter for the cause of *Enosis*. The Turkish Cypriot response to the latter policy was *Taksim* which meant “a division of the island between Greece and Turkey in a dual exercise of self-determination.”⁴⁵⁰

In the 1950s Greece attempted to internationalize the claims of the Greek Cypriot community through the appeals to the UN General Assembly.⁴⁵¹ By 1955 Britain agreed to accept the realization of self-determination “by the territory (rather than by its people) sometime in the future.”⁴⁵² As it turned out, this “future” was not too distant, and the necessity to solve the problem became obvious, as of 1957 Turkey adhered to the idea of double self-determination on the island (i.e. the partition of Cyprus).⁴⁵³ Thus, the United Kingdom was willing to settle the problematic issue of Cyprus.

6.1.2 The birth of the Republic of Cyprus and its breakup

After the tripartite negotiations conducted between Britain, Greece and Turkey, an agreement was reached in Zurich in 1959 regarding the structure of the government of Cyprus.⁴⁵⁴ The establishment of the Republic of Cyprus was regarded as a solution to the problem. In the same year, an agreement was concluded in London between Turkey, Greece and the United Kingdom (representatives of two Cypriot communities, Archbishop Makarios and Dr Fazil Küçük attended the London Conference as observers) about the Basic Structure of the Republic of Cyprus.⁴⁵⁵

The Treaty of Establishment of the Republic of Cyprus was concluded in 1960 between Cyprus, Greece, Turkey and the United Kingdom, together

⁴⁴⁹ *Ibid.*, p. 10

⁴⁵⁰ O. P. Richmond, *Decolonisation and Post-Independence Causes of Conflict: The Case of Cyprus*, in: *Civil Wars*, Vol. 5, 2002, p. 174

⁴⁵¹ *See Ibid.*

⁴⁵² *Ibid.*, p. 175

⁴⁵³ S. K. N. Blay, *Self-Determination in Cyprus: The New Dimensions of an Old Conflict*, in: *The Australian Year Book of International Law*, Vol. 10, 1981-1983, p. 72

⁴⁵⁴ *See S. Palmer, The Turkish Republic of Northern Cyprus: Should the United States Recognize It as an Independent State?*, in: *Boston University International Law Journal*, Vol. 4, 1986, p. 430

⁴⁵⁵ *See S. Talmon, Kollektive Nichtanerkennung illegaler Staaten, Grundlagen und Rechtsfolgen einer international koordinierten Sanktion, dargestellt am Beispiel der Türkischen Republik Nord-Zypern*, *Jus Publicum, Beiträge zum Öffentlichen Recht*, Bd. 154, Tübingen, 2006, p. 12

with the Treaty of Guarantee, and the Treaty of Alliance between the newly established Republic of Cyprus, on the one hand, and Greece and Turkey, on the other.⁴⁵⁶ One important consequence of this process was that the Treaty of Guarantee prohibited all actions aimed at the achievement of political or the economic form of *Enosis* or *Taksim*.⁴⁵⁷

The compromise achieved on the basis of the Zurich and London Agreements provided for: “(a) a bi-national independence; (b) resting on the political equality and administrative partnership of the two communities; (c) who were given full autonomy in what were strictly defined as communal affairs; [...]”⁴⁵⁸.

Thus, as the most important outcome of these developments, the Republic of Cyprus came into existence in 1960. But, after a period of time, it became clear that the statehood in that form would not be regarded as a lasting solution. The events which took place in 1963 can be regarded as the beginning of the end of the Republic of Cyprus in the form designed in 1960. After the constitutional crisis of 1963 which was caused by the Turkish Cypriot veto on certain legislative acts, and the subsequent response of President Makarios who introduced constitutional amendments which were rejected by the Turkish partner, violence broke out between the two communities of the island.⁴⁵⁹ It was the outbreak of civil war, and this whole confrontation was escalated by the fact that the armed forces of both Greece and Turkey, which were stationed on the island in accordance with the provisions of the Treaty of Alliance, got involved in the conflict.⁴⁶⁰

In 1965 the United Nations Force in Cyprus (UNFICYP) was dispatched into the country, the two communities were divided in Nicosia by the “Green Line”.⁴⁶¹ After another crisis in 1967, and the subsequent attempt to reach a reasonable solution by means of negotiations between the two communities, the situation was beyond control in 1974 when the Greek

⁴⁵⁶ *Ibid.*, p. 13

⁴⁵⁷ *Ibid.*

⁴⁵⁸ N. M. Ertekün, *The Cyprus Dispute and the Birth of the Turkish Republic of Northern Cyprus*, Nicosia North, 1984, p. 7

⁴⁵⁹ See S. K. N. Blay, *Self-Determination in Cyprus: The New Dimensions of an Old Conflict*, in: *The Australian Year Book of International Law*, Vol. 10, 1981-1983, pp. 74-75

⁴⁶⁰ *Ibid.*, p. 75

⁴⁶¹ *Ibid.*, p. 76

Cypriot National Guard, under the command of Greek officers, put into effect a planned *coup d'etat*. After they overthrew the Makarios government, Nikos Sampson, a leader backing *Enosis* was installed as president.⁴⁶² As a result of this situation, Turkey invaded the island in the same year and justified its action on the basis of the Treaty of Guarantee.⁴⁶³ These events were followed by the proclamation of the Autonomous Turkish Cypriot Administration in 1974 and, as the next step, the Turkish Federated State of Cyprus was proclaimed in 1975.⁴⁶⁴

Thus, it was a tragic reality that the Republic of Cyprus, designed to settle the problems of ethnic communities on the island, failed to achieve that goal. In 1963 the Turkish Cypriots left the government of the Republic of Cyprus and formed their own political structures within the borders of self-administered enclaves, “leaving” the Greek Cypriots in full control of the government which also formally represented the Turkish community, but this was not the case in practice.⁴⁶⁵ It was thus the beginning of separation, instead of initiating the realization of “unity in diversity” in the Cypriot context:

“The 1960 Republic of Cyprus was a brief three-year experiment that did not meet the nervous expectations of its Turkish Cypriot constituency and, consequently, also failed the aspirations of its Greek Cypriot majority in whose image the Republic functioned.”⁴⁶⁶

6.1.3 The emergence of the TRNC and subsequent developments

On 15 November 1983, the Legislative Assembly of the Turkish Federated State of Cyprus declared the establishment of the Turkish Republic of

⁴⁶² S. Palmer, The Turkish Republic of Northern Cyprus: Should the United States Recognize It as an Independent State?, in: Boston University International Law Journal, Vol. 4, 1986, p. 437

⁴⁶³ *Ibid.*, p. 438

⁴⁶⁴ See M. Soysal, A Solution for Cyprus Through Statehood, in: Perceptions, Journal of International Affairs, Vol. IV, 1999, p. 59

⁴⁶⁵ See E. Berg, Pooling Sovereignty, Losing Territoriality? Making Peace in Cyprus and Moldova, in: TESSG, Vol. 97, 2006, pp. 225-226

⁴⁶⁶ B. Bartmann, Facing New Realities: The Turkish Republic of Northern Cyprus and Unrecognised States in the International System, in: Perceptions, Journal of International Affairs, Vol. IV, 1999, pp. 51-52

Northern Cyprus (TRNC).⁴⁶⁷ It was stated in the proclamation mentioned above that the creation of the TRNC was the realization of the Turkish Cypriot community's right to self-determination. The newly established republic would fulfill its obligations stemming from the treaties binding it, including the Treaty of Guarantee, it would seek the establishment of a bi-zonal and bi-communal federal republic of two communities and, according to the declaration, the newly emerged republic rejected unification with any other state, except for the southern part of the island.⁴⁶⁸ Turkey recognized the republic immediately.⁴⁶⁹

But in contrast to Turkey, the proclamation of the TRNC was not welcomed by the international community. There was an immediate response from the UN, namely the Security Council. The latter passed the Resolution 541 (1983) in which it:

- “1. *Deplores* the declaration of the Turkish Cypriot authorities of the purported secession of part of the Republic of Cyprus;
2. *Considers* the declaration referred to above as legally invalid and calls for its withdrawal; [...]
6. *Calls upon* all States to respect the sovereignty, independence, territorial integrity and non-alignment of the Republic of Cyprus;
7. *Calls upon* all States not to recognize any Cypriot State other than the Republic of Cyprus; [...]⁴⁷⁰

It has to be stressed at this point that an attempt aimed at creating the TRNC was regarded as invalid, because respective declaration was considered to be incompatible with the 1960 Treaty of Establishment and the Treaty of Guarantee concluded in the same year.⁴⁷¹

⁴⁶⁷ See Z. M. Necatigil, *The Cyprus Question and the Turkish Position in International Law*, Oxford, 1989 (reprinted in 1990), p. 174

⁴⁶⁸ See *Ibid.*

⁴⁶⁹ *Ibid.*, p. 175

⁴⁷⁰ UNSC Res. 541 (1983) of 18 November 1983, paras. 1, 2, 6, 7, in: *Resolutions and Decisions of the Security Council (1983)*, SCOR 38, United Nations, New York, 1984, pp. 15-16 (italics in original)

⁴⁷¹ See *Ibid.*, p. 15

Another important resolution regarding the issue of Cyprus was adopted by the UN Security Council in 1984 and the TRNC was considered as an entity being “legally invalid”.⁴⁷²

It has to be mentioned that the documents cited above, namely the Resolution 541 of the Security Council and the Resolution 550 are both important, as they reflect the attitude of the world organization through its principal organ, but neither of them is binding “because they were not adopted under Chapter VII and did not contain a reference to Article 25 of the Charter. Nor did their terms imply that the resolutions were intended to be binding.”⁴⁷³ In sum, the attitude of the Security Council of the UN towards the TRNC, the position expressed in the resolutions mentioned above, denotes that the view of the Turkish Cypriot community, which regarded the establishment of a new state as the realization of its right to self-determination, was considered to be causeless.⁴⁷⁴

On 24 April 2004, in a referendum concerning the reorganization of the model of a Cypriot state and the accession of the latter to the EU, the Greek Cypriots voted against the respective plan elaborated by Kofi Annan, the Secretary-General of the UN.⁴⁷⁵ This plan foresaw the establishment of the United Cyprus Republic as a bi-communal federal state, i.e. with two communities which would enjoy equal rights within constitutive parts of that entity, these parts being the Greek Cypriot State and the Turkish Cypriot State.⁴⁷⁶ Another feature of that state was its bi-zonal character, according to which, both communities would live in separated territories and they would determine the political system of each territorial unit independently in every way possible.⁴⁷⁷ But as it was mentioned above, the Greek Cypriots disapproved the plan. It has to be noted at this point that, as

⁴⁷² UNSC Res. 550 (1984) of 11 May 1984, in: Resolutions and Decisions of the Security Council (1984), SCOR 39, United Nations, New York, 1985, p. 12

⁴⁷³ D. Raič, Statehood and the Law of Self-Determination, Developments in International Law, Vol. 43, The Hague et al., 2002, p. 124

⁴⁷⁴ See R. White, Recognition of States and Diplomatic Relations, in: ICLQ, Vol. 37, 1988, p. 983

⁴⁷⁵ See S. Talmon, Luftverkehr mit nicht anerkannten Staaten: Der Fall Nordzypern, in: AVR, Bd. 43, 2005, p. 1

⁴⁷⁶ H. - J. Axt, Zypern: der Annan-Friedensplan und sein Scheitern, in: Südosteuropa Mitteilungen, Jg. 44, 2004, p. 50

⁴⁷⁷ *Ibid.*

a result of this development, only the Greek part of the island acceded to the EU.⁴⁷⁸

6.2 International legal context

6.2.1 The essence of a problem

It can be asserted that the most important hallmark of the TRNC is regarded to be the invasion of the Turkish military forces. This fact is also considered as a “point of origin” of the entity in question. But it has to be stressed that there are other important circumstances surrounding the issue of the separate existence of the Turkish Cypriot community.

Talmon points out that the problem of recognition became problematic in 1964, as the government of the Republic of Cyprus consisted only of the Greek Cypriot members, i.e. the problem existed before the proclamation of the TRNC.⁴⁷⁹ According to the author, one of the major obstacles on the way to the solution of the Cypriot problem is, from the point of view of the Turkish Cypriot community, the fact that, in 1964, the UN recognized the government which was comprised solely of the Greek Cypriots, as the government of the entire republic.⁴⁸⁰ Thus, not only the military intervention by Turkey, but also the fact of establishment of the Republic of Cyprus (in the treaty-based form) has to be considered. The developments after that establishment are important as well. Other meaningful aspects of the assessment mentioned above are the resolutions of the UN Security Council.

6.2.2 Content of the 1960 arrangement and the problem of its validity

The most important provisions of the Treaty of Guarantee refer to the very essence of the new Cypriot state. According to the first article of the document:

⁴⁷⁸ *Ibid.*, p. 49

⁴⁷⁹ See S. Talmon, Kollektive Nichtanerkennung illegaler Staaten, Grundlagen und Rechtsfolgen einer international koordinierten Sanktion, dargestellt am Beispiel der Türkischen Republik Nord-Zypern, *Jus Publicum*, Beiträge zum Öffentlichen Recht, Bd. 154, Tübingen, 2006, p. 41

⁴⁸⁰ *Ibid.*

“The Republic of Cyprus undertakes to ensure the maintenance of its independence, territorial integrity and security, as well as respect for its Constitution.

It accordingly declares prohibited any activity likely to promote, directly or indirectly, either union with any other State or partition of the Island.”⁴⁸¹

Further provisions of the treaty concern common responsibilities of all the parties to the agreement in question:

“*Article II.* Greece, Turkey and the United Kingdom, taking note of the undertakings of the Republic of Cyprus set out in Article I of the present Treaty, recognise and guarantee the independence, territorial integrity and security of the Republic of Cyprus, and also the state of affairs established by the Basic Articles of its Constitution.

Greece, Turkey and the United Kingdom likewise undertake to prohibit, so far as concerns them, any activity aimed at promoting, directly or indirectly, either union of Cyprus with any other State or partition of the Island.”⁴⁸²

The most important stipulation of the document in question has its direct relevance to the problem of Turkish military intervention in 1974, as this article deals with the procedure which must be followed, if concerted or individual action by the guarantors is needed, in order to ensure the restoration of the legal situation provided for by the treaty:

“*Article IV.* In the event of a breach of the provisions of the present Treaty, Greece, Turkey and the United Kingdom undertake to consult together with respect to the representations or measures necessary to ensure observance of those provisions.

In so far as common or concerted action may not prove possible, each of the three guaranteeing Powers reserves the right to take action with the sole aim of re-establishing the state of affairs created by the present Treaty.”⁴⁸³

⁴⁸¹ Article I of the Treaty of Guarantee signed at Nicosia, on 16 August 1960, UNTS, Vol. 382, No. 5475, p. 4, available on the official website of the UN, at: http://untreaty.un.org/unts/1_60000/11/17/00020815.pdf [accessed: 12.10.2008]

⁴⁸² Article II of the Treaty of Guarantee signed at Nicosia, on 16 August 1960, in: *Ibid.*

⁴⁸³ *Ibid.*, p. 6

Thus, bearing in mind the tensions between the two communities on the island which represented the constituent parts of the newly emerged republic, it has to be asserted that these provisions represented the very foundation of that entity, because they symbolized the framework of the Republic of Cyprus.

It has to be stressed at this point that the validity of the 1960 treaties has been challenged, because the representatives of two Cypriot communities were not present when the draft treaties and the constitution were prepared.⁴⁸⁴ Thus, the question arises, whether those treaties were imposed on the population of the island. According to Palmer, despite the fact that the treaties were entered into from positions of unequal bargaining power, this state of things cannot be regarded as coercion and such treaties have to be considered valid.⁴⁸⁵ It has to be noted that Art. IV has been criticized as contravening the *jus cogens* norms of non-intervention in a state's internal affairs and state sovereignty.⁴⁸⁶ Moreover, the General Assembly of the UN passed the resolution concerning the 1960 arrangement enshrined in the Treaty of Guarantee, in which, one of the main bodies of the world organization made the following statement in respect of the issue of Cyprus:

“1. [...] the Republic of Cyprus, as an equal Member of the United Nations, is, in accordance with the Charter of the United Nations, entitled to enjoy, and should enjoy, full sovereignty and complete independence without any foreign intervention or interference;”⁴⁸⁷

It can be asserted that this was a warning issued by the UN General Assembly denoting that the situation in the republic was a problematic one. Furthermore, in the same document the Assembly:

“2. *Calls upon* all States, in conformity with their obligations under the Charter, and in particular Article 2, paragraphs 1 and 4, to respect the

⁴⁸⁴ See S. Palmer, *The Turkish Republic of Northern Cyprus: Should the United States Recognize It as an Independent State?*, in: *Boston University International Law Journal*, Vol. 4, 1986, p. 431

⁴⁸⁵ *Ibid.*, p. 432

⁴⁸⁶ *Ibid.*

⁴⁸⁷ UNGA Res. 2077 (XX) of 1965, para. 1, available on the official website of the UN, at: <http://www.un.org/documents/ga/res/20/ares20.htm> [accessed: 12.10.2008]

sovereignty, unity, independence and territorial integrity of the Republic of Cyprus and to refrain from any intervention directed against it;”⁴⁸⁸

Thus, the world organization expressed its concern about the application of Art. 2 (1, 4) of the Charter of the UN. These provisions represent the norms of fundamental character, they can be regarded as the basis of the contemporary international legal system, and the reference to these legal rules demonstrates how acute the problem really was. But this state of affairs does not affect the validity of the Treaty of Guarantee by 1960. According to Blay, despite the fact that it is accepted that the treaty in question was a limitation of the sovereignty of Cyprus, and subsequently inconsistent with the notion of sovereign equality of states, the validity of the treaty has never been seriously questioned. The limitations of sovereignty mentioned above did not have any negative impact on the validity of the treaty, public international law is familiar with such cases.⁴⁸⁹ This author correctly asserts that with the admission of Cyprus in 1960, the UN “impliedly conceded that whatever the provisions of the treaty were, they were consistent with the Charter in so far as the sovereignty of the territory was concerned.”⁴⁹⁰ Thus, the Treaty of Guarantee was valid in 1960 and it is important to clarify the issue of the unilateral declaration of independence (UDI) in the context of that agreement.

6.2.3 The UN Security Council Resolution 541 (1983) and the binding character of the 1960 arrangement

The resolutions passed by the UN Security Council are important components of the legal aspect of the Cypriot problem. It is true that these documents were not formally binding, but they are nevertheless significant in the context of implications of the UDI made by the Turkish Cypriot community. Thus, in the preamble of the Resolution 541 (1983), the UN Security Council, concerned about the declaration of the Turkish Cypriot

⁴⁸⁸ See para. 2 of the UNGA Res. 2077 (XX) of 1965, in: *Ibid.* (italics in original)

⁴⁸⁹ S. K. N. Blay, Self-Determination in Cyprus: The New Dimensions of an Old Conflict, in: *The Australian Year Book of International Law*, Vol. 10, 1981-1983, pp. 80-81

⁴⁹⁰ *Ibid.*, p. 81

authorities aimed at creating an independent state in the northern part of the island, deplored the proclamation:

“*Considering* that this declaration is incompatible with the 1960 Treaty concerning the establishment of the Republic of Cyprus and the 1960 Treaty of Guarantee,

Considering, therefore, that the attempt to create a “Turkish Republic of Northern Cyprus” is invalid, and will contribute to a worsening of the situation in Cyprus, [...]”⁴⁹¹

According to Talmon, the invalidity of the UDI was based by the Security Council on its incompatibility with respective treaties of 1960, but how can the invalidity of the declaration of independence be deduced from the incompatibility with the treaty provisions, is explained neither in the document itself, nor in the debates held before its adoption.⁴⁹² The author asserts that the Turkish Cypriot community was not party to the treaties mentioned in the text of the resolution and, even if it had been the party to those agreements, the declaration of independence would have amounted to a breach of the treaty provisions, not the invalidity of the declaration in question.⁴⁹³

The issue, whether respective communities of the island were bound by the treaties mentioned above, is an interesting one. Krieger points out that, in accordance with Art. I of the Treaty of Guarantee, the Republic of Cyprus obliged itself to maintain its independence, territorial integrity and security and not to pursue union with any state or partition of the island. It follows that although the addressee of that legal obligation is the Republic of Cyprus in its entirety, it is also true that the leaders of two communities signed the

⁴⁹¹ UNSC Res. 541 (1983) of 18 November 1983, in: Resolutions and Decisions of the Security Council (1983), SCOR 38, United Nations, New York, 1984, p. 15 (italics in original)

⁴⁹² S. Talmon, Kollektive Nichtanerkennung illegaler Staaten, Grundlagen und Rechtsfolgen einer international koordinierten Sanktion, dargestellt am Beispiel der Türkischen Republik Nord-Zypern, Jus Publicum, Beiträge zum Öffentlichen Recht, Bd. 154, Tübingen, 2006, p. 49

⁴⁹³ *Ibid.*

document on behalf of the Republic of Cyprus, as such, so this could be regarded as the basis of the obligation of ethnic communities.⁴⁹⁴

Thus, the Republic of Cyprus, as such, consisted of the communities mentioned above and the Turkish Cypriots, as well as the Greek Cypriots, were parties to the treaty mentioned above, the parties with their clearly defined duties, because the agreement in question can be significant only if it binds respective communities of the island.⁴⁹⁵ This circumstance leads us to a further problematic issue, namely whether the regulation of a relationship between communities of one particular state, i.e. the question of domestic character, can validly be the subject of an international legal arrangement. As international law is primarily concerned with relations between states, the problem of its application to a state's internal sphere arises. According to Blay, the possibility of this kind of application does exist in the present context and the cases like this are regarded as *sui generis* by their very nature: "Thus after the signing of the 1960 Treaty of Guarantee the general legal position was that each community was legally bound by the treaty provisions."⁴⁹⁶ Indeed, as Krieger puts it:

"[...] der Garantievertrag ist dahingehend zu verstehen, daß er als Garantie gegen das Verhalten einer der Vertragsparteien gerichtet ist. Die Einhaltung gewisser interner Strukturen bedeutet die Einlösung völkerrechtlicher Rechte und Pflichten."⁴⁹⁷

According to this author, the assertion regarding the application of treaty provisions to both communities is backed by the text of the UN Security Council Resolution 367 (1975)⁴⁹⁸ in which the principal organ of the world organization made following statements with respect to the status of constituent ethnic communities of the island:

"2. [...] representatives of the two communities on an equal footing, [...]"

⁴⁹⁴ H. Krieger, *Das Effektivitätsprinzip im Völkerrecht*, Schriften zum Völkerrecht, Bd. 137, Berlin, 2000, p. 242

⁴⁹⁵ *Ibid.*

⁴⁹⁶ S. K. N. Blay, *Self-Determination in Cyprus: The New Dimensions of an Old Conflict*, in: *The Australian Year Book of International Law*, Vol. 10, 1981-1983, p. 82

⁴⁹⁷ H. Krieger, *Das Effektivitätsprinzip im Völkerrecht*, Schriften zum Völkerrecht, Bd. 137, Berlin, 2000, p. 242

⁴⁹⁸ *Ibid.*

6. [...] to convene the parties under new agreed procedures [...]

7. *Calls upon* the representatives of the two communities to co-operate closely with the Secretary-General [...]"⁴⁹⁹

Furthermore, as it has been stressed in another authoritative source of public international law, in its Resolution 541 (1983) the UN Security Council, on the basis of the reference to the "Turkish Cypriot authorities", perhaps accorded them "some undefined degree of recognition"⁵⁰⁰. Bearing in mind these considerations, it has to be concluded that the two communities of the island, as such, were legally bound by the provisions of the Treaty of Guarantee.

But it is also true that the Resolution 541 (1983) did not invalidate the UDI of the Turkish Cypriots. According to Talmon, the Security Council considered the declaration as legally invalid, it did not abrogate that proclamation but expressed its legal position:

"Der Sicherheitsrat gab seine Rechtsansicht wieder; insoweit scheint er lediglich eine Feststellungsfunktion zu erfüllen. Ein gewisser Widerspruch besteht darin, daß die Zurücknahme [...] einer ungültigen Erklärung gefordert wird – was ungültig ist, braucht logischerweise nicht zurückgenommen werden."⁵⁰¹

This author asserts that the reactions to the proclamation of the TRNC suggest that the declaration made by the Turkish Cypriot community was not simply a fact having no legal effect. So, the concern expressed with regard to the possibility of establishing an independent state in the northern part of the island and the demand, not to recognize any Cypriot state other

⁴⁹⁹ UNSC Res. 367 (1975) of 12 March 1975, paras. 2, 6, 7, in: Resolutions and Decisions of the Security Council (1975), SCOR 30, United Nations, New York, 1976, pp. 1-2 (italics in original)

⁵⁰⁰ Sir R. Jennings / Sir A. Watts (eds.), Oppenheim's International Law, 9th ed., Vol. I (Peace), Harlow, 1992, p. 190

⁵⁰¹ S. Talmon, Kollektive Nichtanerkennung illegaler Staaten, Grundlagen und Rechtsfolgen einer international koordinierten Sanktion, dargestellt am Beispiel der Türkischen Republik Nord-Zypern, Jus Publicum, Beiträge zum Öffentlichen Recht, Bd. 154, Tübingen, 2006, p. 50

than the Republic of Cyprus, demonstrate that the Security Council wished to avoid the recognition of the TRNC as an independent state.⁵⁰²

6.2.4 The UN Security Council Resolution 550 (1984)

Further important document of the UN Security Council concerning the problem of Cyprus was the Resolution 550 (1984). In this resolution the principal organ of the world organization:

“2. *Condemns* all secessionist actions, including the purported exchange of ambassadors between Turkey and the Turkish Cypriot leadership, declares them illegal and invalid and calls for their immediate withdrawal;

3. *Reiterates* the call upon all States not to recognize the purported State of the “Turkish Republic of Northern Cyprus” set up by secessionist acts and calls upon them not to facilitate or in any way assist the aforesaid secessionist entity;”⁵⁰³

Thus, the UN Security Council described the TRNC as a “secessionist entity” but at the same time, it referred to the notion of occupation as this authoritative body expressed the concern “about the further secessionist acts in the occupied part of the Republic of Cyprus”⁵⁰⁴. This reference denotes that the Security Council regarded the territory in question as being under foreign occupation. It is important to note that the designation “secessionist entity” has been considered as a demonstration of a certain degree of independence of the TRNC:

“Die Bezeichnung der TRNZ als »secessionistisches Gebilde« spricht, wie bereits die Bezugnahme auf die »türkisch-zyprischen Behörden« in Resolution 541 (1983), für die Anerkennung einer gewissen Eigenständigkeit und Rechtsfähigkeit der TRNZ.”⁵⁰⁵

⁵⁰² *Ibid.*

⁵⁰³ UNSC Res. 550 (1984) of 11 May 1984, paras. 2, 3, in: Resolutions and Decisions of the Security Council (1984), SCOR 39, United Nations, New York, 1985, p. 13 (italics in original)

⁵⁰⁴ *Ibid.*, p. 12

⁵⁰⁵ S. Talmon, Kollektive Nichtanerkennung illegaler Staaten, Grundlagen und Rechtsfolgen einer international koordinierten Sanktion, dargestellt am Beispiel der

Bearing in mind the fact that both Cypriot communities were legally bound by the Treaty of Guarantee at the time of its conclusion, it is important at this stage to examine whether the UDI made by the Turkish Cypriot leadership was in conformity with that agreement.

6.2.5 The Turkish Cypriot UDI in the context of the Treaty of Guarantee

It is a historical fact that, as a consequence of the Greek-sponsored *coup d'état* of 1974, the Greek Cypriot National Guard overthrew the government of the Republic of Cyprus. It has to be stressed at this point that this act was aimed at realizing *Enosis* because the pro-*Enosis* leader, namely Nikos Sampson, was installed as president. According to Blay, the *coup* amounted to the *de facto* realization of *Enosis* in violation of Greece's obligations under the treaty.⁵⁰⁶

With regard to Turkish military intervention, it has to be noted that according to Art. IV of the Treaty of Guarantee, the action taken by an individual guaranteeing state must necessarily be aimed at re-establishing the state of affairs created on the basis of the treaty, i.e. the "sole aim" of such an action is restricted to the maintenance of independence, territorial integrity and security of the Republic of Cyprus.⁵⁰⁷ But as subsequent developments have demonstrated, the invasion by Turkish military forces did not cause the return to the *status quo*. Moreover, on the basis of that intervention Turkey occupied the territory of the island and consolidated its exclusive control over 32% of that territory on behalf of the Turkish Cypriots, thus leading to the *de facto* partition in violation of stipulations of the Treaty of Guarantee.⁵⁰⁸

Türkischen Republik Nord-Zypern, Jus Publicum, Beiträge zum Öffentlichen Recht, Bd. 154, Tübingen, 2006, p. 52

⁵⁰⁶ S. K. N. Blay, Self-Determination in Cyprus: The New Dimensions of an Old Conflict, in: The Australian Year Book of International Law, Vol. 10, 1981-1983, p. 82

⁵⁰⁷ See Articles I, IV of the Treaty of Guarantee signed at Nicosia, on 16 August 1960, UNTS, Vol. 382, No. 5475, p. 4, 6, available on the official website of the UN, at: http://untreaty.un.org/unts/1_60000/11/17/00020815.pdf [accessed: 16.10.2008]

⁵⁰⁸ S. K. N. Blay, Self-Determination in Cyprus: The New Dimensions of an Old Conflict, in: The Australian Year Book of International Law, Vol. 10, 1981-1983, p. 82

Furthermore, in accordance with Art. IV of the Treaty of Guarantee, the UK was obliged to conduct consultations with Turkey and Greece in respect of measures necessary to ensure the observance of treaty provisions, if the breach of those stipulations was the issue in question.⁵⁰⁹ At the same time, the UK possessed the right to act individually in order to re-establish the state of affairs provided for by the treaty. But Britain assumed the position of a passive guarantor in 1974. As the Turkish delegation visited London in seeking the cooperation with the UK under the Treaty of Guarantee after the *coup d'état*, the Turkish Premier, Bülent Ecevit, urged joint action and made it clear that if Britain was unwilling to act, Turkey would intervene on her own.⁵¹⁰ As a result of these negotiations, the UK declined the Turkish offer, arguably because Ecevit's proposal entailed the use of the British bases for the purpose of landing troops, and the UK preferred a solution which would not jeopardize its interests on the island.⁵¹¹ As a consequence of this situation, Turkey intervened militarily. Thus, after the *de facto* realization of *Enosis* and *Taksim* following the *coup d'état* in 1974, and the Turkish military intervention of the same year, the third guarantor power failed to meet its obligations enshrined in the Treaty of Guarantee.

In 1974 all guaranteeing powers met to elaborate the solution on the Cyprus question. The objective was not the re-establishment of the state of things provided for in the 1960 agreements, but the reorganization of Cyprus on a bizonal basis and, accordingly, the three guarantors acted *ultra vires*.⁵¹² It follows that all the developments mentioned above, i.e. the failure of the parties to the agreement to meet their obligations or to restore the state of affairs envisaged by the agreement, represent material breaches of the Treaty of Guarantee. Bearing in mind this consideration, the following conclusion has been made with regard to the proclamation of the TRNC and the validity of the treaty in question:

⁵⁰⁹ See Article IV of the Treaty of Guarantee signed at Nicosia, on 16 August 1960, UNTS, Vol. 382, No. 5475, p. 6, available on the official website of the UN, at: http://untreaty.un.org/unts/1_60000/11/17/00020815.pdf [accessed: 16.10.2008]

⁵¹⁰ See Z. M. Necatigil, *The Cyprus Question and the Turkish Position in International Law*, Oxford, 1989 (reprinted in 1990), p. 79

⁵¹¹ *Ibid.*

⁵¹² S. K. N. Blay, *Self-Determination in Cyprus: The New Dimensions of an Old Conflict*, in: *The Australian Year Book of International Law*, Vol. 10, 1981-1983, pp. 82-83

“It could be argued that after 1974, the provisions of the treaty became null and void. The continued *de facto* partition of Cyprus up to the day of the UDI, contrary to the terms of the treaty, was in itself an eloquent testimony to the fact that the treaty had become a dead letter. Given the invalidity of the Treaty of Guarantee, the UDI of November 1983, could not be a breach of its terms or of any other international obligations.”⁵¹³

Thus, reasons for the invalidity of the Treaty of Guarantee were its continued material breaches. According to Art. 60 of the Vienna Convention on the Law of Treaties:

“2. A material breach of a multilateral treaty by one of the parties entitles:

[...] (c) Any party other than the defaulting State to invoke the breach as a ground for suspending the operation of the treaty in whole or in part with respect to itself if the treaty is of such a character that a material breach of its provisions by one party radically changes the position of every party with respect to the further performance of its obligations under the treaty.

3. A material breach of a treaty, for the purposes of this article, consists in:

[...] (b) The violation of a provision essential to the accomplishment of the object or purpose of the treaty.”⁵¹⁴

Although the notion of suspension is used in the passage quoted above, it has to be stressed that the same provision of the treaty also applies the word “termination” in the context of the material breach of an agreement.⁵¹⁵ Bearing in mind these considerations, it has to be examined, whether the convention is applicable to the Treaty of Guarantee at all. It is true that the latter was concluded in 1960 and the Vienna Convention was signed in 1969 and, according to Art. 4 of this document, it does not have a retroactive effect: “Without prejudice to the application of any rules set forth in the present Convention to which treaties would be subject under international

⁵¹³ *Ibid.*, p. 83 (italics in original)

⁵¹⁴ Article 60 (2. (c), 3. (b)) of the Vienna Convention on the Law of Treaties (1969), UNTS, Vol. 1155, No. 18232, p. 346

⁵¹⁵ See Article 60 (1., 2. (a)) of the Vienna Convention on the Law of Treaties (1969), in: *Ibid.*

law independently of the Convention [...]”⁵¹⁶. This means that, despite the fact of non-retroactivity of the agreement in question, it contains the rules of customary international law and those rules can be employed irrespective of the possibility of application of the Vienna Convention.

Thus, the provision concerning a material breach of a treaty is applicable to the Treaty of Guarantee despite the fact that the latter was signed before the conclusion of the Vienna Convention. This state of things is a consequence of the existence of customary international law. But, according to Blay, in the present case the application mentioned above is the result of another manifestation, namely the notion of general principles of law which, in accordance with the Statute of the ICJ, represents the source of public international law.⁵¹⁷

At the same time, it can be asserted that what happened in Cyprus, especially in 1974, undermined the very essence of the republic. This circumstance leads us to the conclusion that the provisions of the Treaty of Guarantee and the whole arrangement of 1960 were violated and, as these stipulations were “essential to the accomplishment of the object or purpose of the treaty”, the violations in question must be regarded as material breaches of those agreements. The violations had radically changed the position of every single party with regard to the further performance of its obligations under the document: the action was required by the Treaty of Guarantee in the case of the violation of respective provisions, i.e. in order to meet their obligations, the guaranteeing powers had to take measures aimed at the re-establishment of the state of things provided for in the agreement. This was exactly their “new standing” within the framework of the treaty. Turkey acted, but the result of this action was the *de facto* partition of the island.

⁵¹⁶ See Article 4 of the Vienna Convention on the Law of Treaties (1969), in: *Ibid.*, p. 334

⁵¹⁷ “A generally accepted principle of law is that a party to any agreement may be discharged from any obligation thereof if one or more parties to the same agreement commits a material breach of its terms.”, S. K. N. Blay, *Self-Determination in Cyprus: The New Dimensions of an Old Conflict*, in: *The Australian Year Book of International Law*, Vol. 10, 1981-1983, p. 82; See also Article 38, 1.(c) of the Statute of the International Court of Justice, in: I. Brownlie (ed.), *Basic Documents in International Law*, 4th ed., Oxford, 1995, p. 448

An interesting question is, whether Turkey was authorized to use its military force in the form of an individual action and this question will be answered below. It is important at this stage to stress that the Turkish Cypriot community did not violate the provisions of the Treaty of Guarantee when it declared the TRNC in 1983. The reason is that by 1983, as a consequence of material breaches, there were no legal obligations of the Turkish Cypriots left under the Treaty of Guarantee. The issue of Turkish invasion of the island has to be examined at this point.

6.2.6 Turkish invasion of Cyprus and its impact on the “birth” of the TRNC

In order to make a correct assessment of Turkish military intervention, it is necessary to recall the circumstances surrounding the agreements of 1960 and respective developments thereafter. It is a fact that, despite some restrictions imposed on the sovereignty of the Republic of Cyprus, the 1960 arrangement was a valid one, and Cyprus was admitted to membership of the UN. It is also true that the arrangement in question was based on the compromise between two constituent parts, the Greek and the Turkish communities of the island, and the principles of that compromise were undermined during the crises which took place in the republic itself. Despite this fact, the argument has to be rejected, according to which, at the time of the Turkish intervention the Republic of Cyprus did not exist any more. Temporary ineffectiveness of a government does not amount to the fall or elimination of a state.⁵¹⁸

Krieger asserts that the interpretation of Art. IV of the Treaty of Guarantee which permits military intervention, could represent the violation of Art. 2 (4) of the Charter of the UN:

“Seit dem Beitritt Zyperns in die Vereinten Nationen wird daher Art. IV des Garantievertrages nach der Regel *ut res magis valeat quam pereat* derart auszulegen sein, daß ein Recht zur militärischen Intervention nur dann

⁵¹⁸ H. Krieger, *Das Effektivitätsprinzip im Völkerrecht*, Schriften zum Völkerrecht, Bd. 137, Berlin, 2000, p. 238

zusteht, wenn es im Einklang mit Art. 2 Ziff. IV und 51 SVN ausgeübt wird.”⁵¹⁹

Bearing in mind this important assessment of the situation concerning the competence to intervene militarily, it has to be concluded that Turkey acted *ultra vires* for following reasons: according to the Treaty of Guarantee, Turkey could intervene with the sole aim of the re-establishment of the state of affairs provided for by that agreement, i.e. the purpose of every single act of intervention was restricted to the maintenance of independence, territorial integrity and security of the Republic of Cyprus. As a consequence of Turkish military intervention, the island was partitioned. This result is exactly what the drafters of the 1960 arrangement wished to avoid, the spirit of that agreement is the following: no *Enosis* aimed at uniting Cyprus with Greece and no *Taksim* aimed at the partition of the entity in question. Turkey’s intervention brought about exactly the *de facto* realization of *Taksim*. Furthermore, it has to be noted that Turkey occupied part of the island:

“Turkish armed forces of more than 30,000 personnel are stationed throughout the whole of the occupied area of northern Cyprus, which is constantly patrolled and has checkpoints on all main lines of communication.”⁵²⁰

It follows that the principle of proportionality was violated as a result of continuous occupation.⁵²¹ At the same time, it is also true that the UN did not designate the Turkish invasion of the island as an act of aggression in the international law sense⁵²², but this circumstance does not affect the

⁵¹⁹ *Ibid.*, p. 239 (italics in original)

⁵²⁰ Case of *Loizidou v. Turkey*, Appl. no. 15318/89, Judgment (Merits and just satisfaction), ECHR, judgment of 18 December 1996, available on the official website of the ECHR, at:

<http://cmiskp.echr.coe.int/tkp197/search.asp?sessionId=6710424&skin=hudoc-en> [accessed: 20.10.2008]

⁵²¹ H. Krieger, *Das Effektivitätsprinzip im Völkerrecht*, Schriften zum Völkerrecht, Bd. 137, Berlin, 2000, p. 240

⁵²² See Dissenting Opinion of Judge Pettiti, Case of *Loizidou v. Turkey*, Appl. no. 15318/89, Judgment (Merits and just satisfaction), ECHR, judgment of 18 December 1996, available on the official website of the ECHR, at:

<http://cmiskp.echr.coe.int/tkp197/search.asp?sessionId=6710424&skin=hudoc-en> [accessed: 20.10.2008]

relevance of the Turkish military intervention to the declaration of the TRNC:

“Die TRNC verdankt ihre Existenz im wesentlichen einem rechtswidrigen Akt, da sich 1974 der Türkische Bundesstaat Zypern von der Republik Zypern durch eine militärische Intervention der Türkei *de facto* trennte.”⁵²³

It is also true that the Security Council of the UN based its resolution concerning the invalidity of the UDI on the incompatibility of the proclamation of the TRNC with the arrangement of 1960. It follows that the principal organ of the world organization did not establish any direct link between the illegality of the UDI and the Turkish invasion. The Security Council made an indirect reference to the problem of intervention by reaffirming its resolutions 365 (1974) and 367 (1975).⁵²⁴ Nevertheless, the following statement entails a correct assessment of the situation concerning the issue in question:

“Zwar läßt sich die Verletzung des Gewaltverbots ausdrücklich nur den Debatten und nicht dem Text der Resolution entnehmen. Vor dem Hintergrund der objektiven Rechtslage kann aber die Errichtung des Herrschaftsverbandes unter Einsatz von Gewalt als ausschlaggebend für die Rechtswidrigkeit betrachtet werden.”⁵²⁵

Bearing in mind the considerations mentioned above, it becomes evident that the reason why the TRNC is regarded as an “illegal entity” is that it is the product of the Turkish military intervention. This assertion is backed by the fact that after the Greek-sponsored *coup d’etat*, the policy of Turkey was aimed at re-locating the Turkish Cypriots in a clearly defined territory under the protection of the Turkish army. This was considered as the only way to guarantee the security of the community, and after invading the island and securing virtually its entire northern section for the Turkish Cypriots, that relocation took place: by 1975 large numbers of the Greek Cypriots had fled their homes in the Turkish-held north and a considerable figure of the

⁵²³ H. Krieger, *Das Effektivitätsprinzip im Völkerrecht*, Schriften zum Völkerrecht, Bd. 137, Berlin, 2000, p. 237 (italics in original)

⁵²⁴ See *Ibid.*, p. 240

⁵²⁵ *Ibid.*, p. 241

Turkish Cypriots returned from the Greek-held part of the island to the northern section.⁵²⁶

Although voluntary regrouping of the population was agreed by respective parties at the Vienna intercommunal talks held in 1975 under the auspices of the Secretary-General of the UN⁵²⁷, this is another indication that the effect of the Turkish invasion was the partition of the island. As after the admission of the Republic of Cyprus to the UN the right of intervention, provided for by Art. IV of the Treaty of Guarantee, was subject to limitations by Art. 2 (4) and Art. 51 of the UN Charter, it follows that Turkish military intervention constituted a breach of Art. 2 (4) of that document. Turkish military intervention had the partition of the island as a result. This represented an encroachment on the territorial integrity of the Republic of Cyprus.

6.2.7 Ex factis jus oritur: traditional criteria for statehood and the TRNC

It has to be stressed with regard to the traditional or empirical criteria for statehood that the TRNC meets the requirements based on the principle of effectiveness enshrined in the Montevideo Convention.⁵²⁸ According to Blumenwitz, the TRNC governs *de facto* and *de jure* a specific territory which is separated from the Republic of Cyprus by an internationally recognized demarcation line operating as an actual border.⁵²⁹ Furthermore, this author states that there is a sovereign authority with democratic structures in the TRNC.⁵³⁰ At the same time, it has to be noted that by 1983, when the UDI was made by the Turkish Cypriot authorities, the island was

⁵²⁶ See S. K. N. Blay, Self-Determination in Cyprus: The New Dimensions of an Old Conflict, in: The Australian Year Book of International Law, Vol. 10, 1981-1983, p. 78

⁵²⁷ See Z. M. Necatigil, The Cyprus Question and the Turkish Position in International Law, Oxford, 1989 (reprinted in 1990), p. 90

⁵²⁸ See S. Palmer, The Turkish Republic of Northern Cyprus: Should the United States Recognize It as an Independent State?, in: Boston University International Law Journal, Vol. 4, 1986, p. 447

⁵²⁹ D. Blumenwitz, Cyprus: Political and Legal Realities, in: Perceptions, Journal of International Affairs, Vol. IV, 1999, p. 70

⁵³⁰ *Ibid.*

divided into two sectors and each of these territorial areas had its homogeneous population.⁵³¹

6.2.8 The TRNC and the issue of secession

It has to be noted that the attitude of the Turkish Cypriots towards the issue of their separate existence bears interesting peculiarities. The argument has been put forward that, as the Turkish Federated State of Cyprus was proclaimed in 1975, the Turkish Cypriot community left the door open to a federation with the southern part of the island, and there was no declaration of independent statehood and respective ethnic group had not sought international recognition as a sovereign state.⁵³² Moreover, it has to be noted that even the proclamation of the TRNC has left the door open to a federal arrangement with the southern part of Cyprus. President Rauf Denктаş wrote a letter to the UN Secretary-General on the same day as the UDI was made, in which he assured the addressee that:

“[...] the expression of the legitimate and irrepressible will of the Turkish Cypriot People concerning the exercise of the right to self-determination will not in the slightest way hinder the establishment of a genuine federation by two partners having equal political status;”⁵³³

Moreover, the following passage can be read in the UDI with regard to the proclamation of the TRNC and the possibility of achieving the agreement in respect of a federation with the Greek Cypriots:

“[...] such a proclamation can facilitate efforts in this direction by fulfilling the necessary requisites for the establishment of a federation. The Turkish Republic of northern Cyprus, determined to make every constructive effort in this direction, will not unite with any other State.”⁵³⁴

⁵³¹ Z. M. Necatigil, *The Cyprus Question and the Turkish Position in International Law*, Oxford, 1989 (reprinted in 1990), p. 286

⁵³² N. M. Ertekün, *The Cyprus Dispute and the Birth of the Turkish Republic of Northern Cyprus*, Nicosia North, 1984, p. 35

⁵³³ Letter dated 15 November 1983 from President Rauf Denктаş to the UN Secretary-General, in: *Ibid.*, Appendix A, p. 126

⁵³⁴ Declaration of establishment of the TRNC as an independent state (15 November 1983), para. 22 (b), in: *Ibid.*, Appendix B, p. 135

Thus, it is interesting that, on the one hand, there was the UDI and, at the same time, the possibility of the establishment of a federation together with the Greek Cypriots has not been excluded. Moreover, it can be asserted that according to the passage quoted above, the commitment to such an arrangement has been expressed by the authorities of the newly established TRNC.

It has been argued that the UDI made by the Turkish Cypriot community does not represent an act of secession. The reason is regarded to be the fact that as the Republic of Cyprus, based on the bi-communal partnership, was destroyed in 1963 by the Greek Cypriots, since then they have established an exclusively Greek Cypriot state which does not represent both ethnic groups living on the island. So, the Turkish Cypriots could not secede from the state which had no legal ties with the Turkish Cypriot community.⁵³⁵ It has to be stressed in this regard that, as the temporary ineffectiveness of the government does not amount to the extinction of a respective state, the Republic of Cyprus, as such, existed after 1963 and also after 1974, and it exists by now.

It is important at this point to consider the argument based on Kelsen's theory of *Grundnorm* and implying that after the Greek-sponsored *coup d'état* of 1974, the established order was destroyed as a result of the destruction of the *Grundnorm* (which, according to Kelsen, represents the legal effect of the *coup d'état*).⁵³⁶

According to Kunz, revolution denotes the discontinuity of a legal order.⁵³⁷ But this kind of "interruption" is problematic in the case of Cyprus. This assertion is confirmed in the evidence given by Baroness Young to the Foreign Affairs Committee in which the attitude of British authorities was depicted: "The UK government's position is that the 1960 Constitution remains in force, though parts of it are currently inoperative."⁵³⁸ Thus, the

⁵³⁵ *Ibid.*, p. 122

⁵³⁶ See Z. M. Necatigil, *The Cyprus Question and the Turkish Position in International Law*, Oxford, 1989 (reprinted in 1990), pp. 78-79

⁵³⁷ J. L. Kunz, *Revolutionary Creation of Norms of International Law*, in: *AJIL*, Vol. 41, 1947, pp. 120-121

⁵³⁸ See R. White, *Recognition of States and Diplomatic Relations*, in: *ICLQ*, Vol. 37, 1988, p. 984

Republic of Cyprus was not abolished by the “revolution” of 1974 and bearing in mind the short life the *coup d’etat* had, it has to be concluded that as the Turkish Cypriots issued the UDI, it was a secessionist act, the secession from the ambit of the authority of the Republic of Cyprus, i.e. the “mother state”, became the issue in question.

6.2.9 The TRNC as the “de facto state”

For the purposes of the present study the TRNC has to be designated as the “*de facto state*”. This assertion is backed by the attitude of states, the UN and other international organizations towards the Cyprus problem: this stance, taken by the international community, denotes that the island remains the territory of a single state, and the Greek Cypriot government is recognized as the sole legitimate authority over the territory in question.⁵³⁹ In her evidence mentioned above, Baroness Young stressed the fact that the UK government does not recognize the TRNC as a state and considers the Greek Cypriot administration as the sole legitimate government of the island of Cyprus in its entirety, but “low level” and “informal official” contacts are maintained with representatives of the TRNC.⁵⁴⁰

According to Talmon, the northern part of Cyprus is regarded by states either as the territory occupied by Turkey, or as the area being under the control of the Turkish Cypriot local *de facto* government.⁵⁴¹ At the same time, “Northern Cyprus was not a fabrication of the Turkish government. Ministers and government officials of the TRNC are not appointed by Ankara.”⁵⁴² Bearing in mind these considerations, it has to be concluded that the TRNC represents the *de facto state* for the purposes of my thesis.

The TRNC has its own organized political leadership, which receives popular support and provides governmental services to the population of the

⁵³⁹ C. Warbrick, Unrecognised States and Liability for Income Tax, in: ICLQ, Vol. 45, 1996, p. 955

⁵⁴⁰ See R. White, Recognition of States and Diplomatic Relations, in: ICLQ, Vol. 37, 1988, p. 984

⁵⁴¹ S. Talmon, Luftverkehr mit nicht anerkannten Staaten: Der Fall Nordzypern, in: AVR, Bd. 43, 2005, p. 2

⁵⁴² B. Bartmann, Political realities and legal anomalies: Revisiting the politics of international recognition, in: T. Bahcheli et al. (eds.), De Facto States, The quest for sovereignty, London / New York, 2004, p. 24

northern part of the island of Cyprus over which effective control is maintained for a significant period of time. The TRNC surely views itself as capable of entering into relations with states, but the lack of substantive recognition is its hallmark. Despite the immediate response by Turkey to the proclamation of the TRNC which was expressed in full recognition of the newly emerged political entity, no other country recognizes the TRNC as a state: a) Pakistan voted against the Security Council resolutions 541 (1983) and 550 (1984), but this state has not recognized the TRNC formally; b) Bangladesh accorded the TRNC full recognition on 15 November 1983, but under the pressure from the US it revoked the decision some days later; c) Azerbaijan considered the possibility of diplomatic recognition in 2004, making such recognition dependent upon the approval by the Turkish Cypriot community of the “Annan Plan” and the rejection of the document by the Greek Cypriots, but the recognition did not follow from Baku.⁵⁴³

The northern Cypriot authorities maintain, among other agencies, an embassy in Ankara, a consulate general in Istanbul, consulates in Izmir and Mersin, representative offices in Washington, New York, London, Brussels, Baku, Abu Dhabi, Islamabad, and an economy and tourism office in Bishkek.⁵⁴⁴ Thus, only Turkey accorded the TRNC full recognition and the latter “meets” all the criteria which are required in order to consider an entity as the one existing without substantive recognition, a feature which is inherent in the definition of the *de facto state*. Major powers of the day and existing juridical state, i.e. the “mother state” which is the Republic of Cyprus, do not recognize the TRNC as a state, neither do the countries situated in that area (except for Turkey). The TRNC does not enjoy the recognition as a state from a majority of countries in the UN General Assembly, and it cannot be asserted that the entity in question meets the requirement concerning the participation in global and regional international organizations.

⁵⁴³ See S. Talmon, *Kollektive Nichtanerkennung illegaler Staaten, Grundlagen und Rechtsfolgen einer international koordinierten Sanktion, dargestellt am Beispiel der Türkischen Republik Nord-Zypern*, *Jus Publicum, Beiträge zum Öffentlichen Recht*, Bd. 154, Tübingen, 2006, pp. 62-63

⁵⁴⁴ Information available on the website of the TRNC Public Information Office, at: <http://www.trncpio.org/index.asp?page=209> [accessed: 03.11.2008]

It follows that the TRNC lacks substantive recognition but it satisfies the traditional criteria for statehood based on the notion of effectiveness. The TRNC remains illegitimate in the eyes of the international community, because it is the product of the illegal use of force.

Chapter 7: The “Republic of Kosovo”

7.1 Political context

7.1.1 History: 1389 – 1986

Kosovo is the territory bearing overwhelming symbolic importance to the Serb nation and, at the same time, it has certain historical significance for the Albanians. For the Serb people, Kosovo is an inherent part of its identity because there are important Serb Orthodox sanctuaries in the area of Kosovo and symbols of Serb nationhood.⁵⁴⁵ At the same time, the Battle of the Kosovo Field (*Kosovo Polje*) in 1389, in which the Serbs were defeated by the Turks, is still “the most celebrated battle in Serb history”⁵⁴⁶. With regard to the significance of the territory in question for the Albanians, it can be stated that Kosovo is the place where the League of Prizren was established in 1878 which is considered to be a major contributing factor to the revival of Albanian national consciousness.⁵⁴⁷

The ethnic composition of Kosovo changed drastically after the migration of the Serbian population in 1690 and 1739, as a consequence of unsuccessful rebellions against the Turks in the aftermath of the wars fought.⁵⁴⁸ But, despite the substantial increase of the Albanian population in Kosovo, this territory did not become part of the Kingdom of Albania established in 1913.⁵⁴⁹ Thus, after the Balkan Wars of 1912-13 Kosovo was annexed to Serbia.⁵⁵⁰ It has to be noted that, during the Second World War, Kosovo became part of the Albanian puppet state under Italian occupation.⁵⁵¹

By the end of the World War II, the communists under the leadership of Josip Broz Tito assumed power in Kosovo and the latter was subjected to

⁵⁴⁵ O. Bennett-Jones, Albanians in Kosovo: Prospects for the Future, in: Refugee Survey Quarterly, Vol. 13, 1994, p. 10

⁵⁴⁶ *Ibid.*

⁵⁴⁷ F. Rauert, Das Kosovo: eine völkerrechtliche Studie, Ethnos, 55, Wien, 1999, p. 8

⁵⁴⁸ See *Ibid.*, pp. 6-7

⁵⁴⁹ S. Troebst, Appendix 1 C. The Kosovo conflict, in: SIPRI Yearbook, Armaments, Disarmament and International Security, 1999, p. 49

⁵⁵⁰ See M. - J. Calic, Kosovo: Krieg oder Konfliktlösung?, in: Südosteuropa Mitteilungen, Jg. 38, 1998, p. 112

⁵⁵¹ J. M. O. Sharp, Testfall Kosovo: die westliche Politik auf dem Prüfstand, in: Internationale Politik, Jg. 53, Bd. 1, 1998, p. 27

the military administration of Yugoslavia, the federal state based on the principle of nationalities and founded in accordance with concepts elaborated at the second meeting of the “Anti-fascist Council for Liberation of Yugoslavia” in Jajce, in 1943.⁵⁵² As a result of these developments, at the second conference of the National Liberation Committee in 1945 in Prizren, Tito brought about the decision, according to which, Kosovo became part of Serbia.⁵⁵³

It was the Constitution of the Socialist Federal Republic of Yugoslavia of 21 February 1974, which boosted Kosovo’s status and equipped the territory with meaningful guarantees in respect of its standing within the federal state. Kosovo was part of the Socialist Republic of Serbia:

“**Article 1.** The Socialist Federal Republic of Yugoslavia is a federal state having the form of a state community of voluntarily united nations and their Socialist Republics, and of the Socialist Autonomous Provinces of Vojvodina and Kosovo, which are constituent parts of the Socialist Republic of Serbia, [...]”⁵⁵⁴

It has to be noted that under the constitution of 1974, Kosovo enjoyed a substantial degree of autonomy. This assertion concerning prerogatives enjoyed by Kosovo under the 1974 constitution has been confirmed by Malešević: “From 1974 onwards Yugoslavia was a *de facto* confederal state. Serbia’s two provinces, Vojvodina and Kosovo, were also given semi-state status.”⁵⁵⁵

It has to be noted at this point that the Serbs were uneasy about the future of the territory in question, as the privileges enjoyed by Kosovo and the latter creature, as such, represented rather a headache for them. After some sporadic manifestations of violence which occurred in Kosovo in 1981 as a

⁵⁵² F. Rauert, *Das Kosovo: eine völkerrechtliche Studie*, Ethnos; 55, Wien, 1999, pp. 15-16

⁵⁵³ *Ibid.*, p. 16

⁵⁵⁴ Article 1 of the Constitution of the Socialist Federal Republic of Yugoslavia of 21 February 1974, in: W. B. Simons (ed.), *The Constitutions of the Communist World*, Alphen aan den Rijn et al., 1980, pp. 444-445

⁵⁵⁵ S. Malešević, *Ideology, Legitimacy and the New State: Yugoslavia, Serbia and Croatia*, Cass Series: Nationalism and Ethnicity, No. 4, (W. Safran (ed.)), London / Portland, 2002, p. 172 (*italics in original*)

result of a riot of ethnic Albanians⁵⁵⁶, it was the year 1986 which marked an extreme turn in the context of relations between the Serbs and the Kosovo Albanians. In that year, the Serbian Academy of Arts and Sciences issued a memorandum which expressed following considerations:

“Als einziger Nation Jugoslawiens sei den Serben ein eigener Staat verwehrt worden aufgrund der zwei autonomen Republiken Kosovo und Vojvodina. Dazu müßten erhebliche Teile der Serben in anderen Republiken (Kroatien und Bosnien) leben und seien in Gefahr, dort assimiliert zu werden. Im Kosovo bestünde sogar die Gefahr des Genozids an den Serben.”⁵⁵⁷

Thus, the Serb identity was regarded as a value being at stake, and this document was just one step made towards the consolidation of public opinion with regard to the “Serb question”. Another important development in 1986 backed this whole process initiated in furtherance of the Serb cause as Slobodan Milošević became President of the League of Communists of Serbia.⁵⁵⁸

7.1.2 Kosovo in the context of the policy implemented by Slobodan Milošević

From 1988 onward, an intensive campaign was launched by Milošević aimed at the abolition of the autonomy enjoyed by Kosovo. The first attempt made in 1988 at federal constitutional level was unsuccessful.⁵⁵⁹ The second step was taken within the framework of the Serb constitution itself. In 1989 amendments were adopted, which reduced the competence of the autonomous province of Kosovo in different fields of governmental

⁵⁵⁶ See O. Bennett-Jones, Albanians in Kosovo: Prospects for the Future, in: *Refugee Survey Quarterly*, Vol. 13, 1994, p. 12

⁵⁵⁷ H. - G. Justenhoven, Selbstbestimmungsrecht der Völker und Nichteinmischung in innere Angelegenheiten im Widerstreit, in: D. S. Lutz (Hrsg.), *Der Kosovo-Krieg, Rechtliche und rechtsethische Aspekte, Demokratie, Sicherheit, Frieden (DSF)*, Bd. 127, 1. Aufl., Baden-Baden, 1999 / 2000, pp. 190-191

⁵⁵⁸ See J. Williams, *Legitimacy in International Relations and the Rise and Fall of Yugoslavia*, London / New York, 1998, p. 78

⁵⁵⁹ See F. Rauert, *Das Kosovo: eine völkerrechtliche Studie*, Ethnos; 55, Wien, 1999, pp. 37-38

activity and expanded the jurisdiction of central authorities.⁵⁶⁰ As a consequence, violence broke out within the borders of the province and the situation achieved a high degree of intensity and brutality. Clashes between Albanians protesting against the new legislation and the Serbian police and military personnel acquired the features of a civil war.

In 1990, on the basis of another legislative act, the Serbian police blocked the parliament of the province, and later the government and the parliament of Kosovo were dissolved:

“Als Reaktion auf diese drastischen Maßnahmen der serbischen Führung proklamierten kosovarische Parlamentsabgeordnete am 2. Juli 1990 auf den Stufen des Parlaments die Unabhängigkeit Kosovos.”⁵⁶¹

After the formal abolition of legislative and executive organs of the province through the Serb authorities on the basis of the enactment of 13 July 1990⁵⁶², independence of Kosovo was once again declared by the members of the abolished parliament on 7 September 1990.⁵⁶³ As a response to that declaration, the Serbian parliament adopted a new constitution for the republic in 1990, on the basis of which, the Autonomous Province Vojvodina and the Autonomous Province of Kosovo and Metohija were deprived of their rights connected with the autonomous status.⁵⁶⁴ This action was not left without an answer from the side of the Kosovo Albanians. A referendum was held in 1991 (not recognized by the Serbian authorities) in which, the overwhelming majority of Albanians voted for independence.⁵⁶⁵

In 1992 elections were held in the self-proclaimed “Republic of Kosovo” in which the Kosovo Albanians voted for the Democratic League of Kosovo (Lidhja Demokratike e Kosovës - LDK) as the party possessing majority in the parliament and its leader, Ibrahim Rugova, became president of the

⁵⁶⁰ *Ibid.*, pp. 38-39

⁵⁶¹ *Ibid.*, p. 41

⁵⁶² *Ibid.*

⁵⁶³ O. Bennett-Jones, Albanians in Kosovo: Prospects for the Future, in: *Refugee Survey Quarterly*, Vol. 13, 1994, p. 12

⁵⁶⁴ See F. Rauert, *Das Kosovo: eine völkerrechtliche Studie*, Ethnos; 55, Wien, 1999, p. 42

⁵⁶⁵ J. Radoman, *Future Kosovo Status-Precedent or Universal Solution*, in: *Western Balkans Security Observer-English Edition*, Issue no. 3, 2006, p. 15

newly emerged republic (Rugova was re-elected in 1998).⁵⁶⁶ From that time onward, the Albanian authorities began to build parallel state institutions and Kosovo was transformed into an entity which can be described by reference to the term “*Schattenstaat*”.

It is important at this point to underscore the developments which took place at the federal level. Since 1991, when Slovenia and Croatia proclaimed their independence from Yugoslavia as a consequence of the controversy regarding the constitutional transformation of the federal state⁵⁶⁷, Bosnia and Herzegovina followed them in 1992 and, as a result of the war fought on respective territories, the Serbs in Croatia declared their own independent state of “Serbian Krajina”, whereas the Bosnian Serbs proclaimed the “Republika Srpska”.⁵⁶⁸ At the same time, the Federal Republic of Yugoslavia (FRY) was declared by Serbia and Montenegro in 1992.⁵⁶⁹

Further development which had an impact of overwhelming significance on the issue of Kosovo was the 1995 “General Framework Agreement for Peace in Bosnia and Herzegovina” (the so-called “Dayton Accords”), as in this instrument, despite its ambitious aim of achieving a wholesale solution to the problematic issues of post-Yugoslavian space, the question of Kosovo was not addressed at all.⁵⁷⁰ The result of the Dayton Accords was that the Bosnian Serbs were granted their autonomous Republika Srpska (within the overall framework, the complex system of governance designed for Bosnia and Herzegovina) as a consequence of the protracted armed struggle.⁵⁷¹ Moreover, according to the compromise based on the Dayton Accords, the Serbs kept 49% of Bosnia and the Republika Srpska could

⁵⁶⁶ See M. - J. Calic, Kosovo: Krieg oder Konfliktlösung?, in: Südosteuropa Mitteilungen, Jg. 38, 1998, p. 114

⁵⁶⁷ S. Malešević, Ideology, Legitimacy and the New State: Yugoslavia, Serbia and Croatia, Cass Series: Nationalism and Ethnicity, No. 4, (W. Safran (ed.)), London / Portland, 2002, p. 224

⁵⁶⁸ *Ibid.*, p. 174

⁵⁶⁹ *Ibid.*

⁵⁷⁰ M. - J. Calic, Kosovo: Krieg oder Konfliktlösung?, in: Südosteuropa Mitteilungen, Jg. 38, 1998, p. 115

⁵⁷¹ See J. M. O. Sharp, Testfall Kosovo: die westliche Politik auf dem Prüfstand, in: Internationale Politik, Jg. 53, Bd. 1, 1998, p. 28

maintain close political ties with Belgrade.⁵⁷² As it was stated above with regard to the issue of Kosovo, there was no solution found to the latter problem at Dayton:

“Das Dayton-Abkommen hatte somit zwei negative Auswirkungen auf Kosovo: es vermittelte den Eindruck, daß sich militärische Aggression für die Verfolgung politischer Ziele auszahle, und höhnte so die gewaltlose Kampagne *Rugovas* aus.”⁵⁷³

Thus, from 1997 onward, it was the Kosovo Liberation Army / KLA (Ushtria Çlirimtare e Kosovës - UÇK) that gained momentum and became the leading force in furtherance of the Kosovo Albanian cause.⁵⁷⁴ In March 1998 Milošević dispatched the Serbian armed forces to Kosovo and the inter-ethnic warfare acquired its new dimensions.⁵⁷⁵

7.1.3 The international community's response

The international community became increasingly concerned about the situation in Kosovo, and on 31 March 1998 the Security Council of the UN, acting under Chapter VII of the Charter of the UN, adopted the Resolution 1160 (1998). In this document, the Security Council confirmed the importance of the FRY's territorial integrity in the context of the solution to the Kosovo problem, expressed its support for a greater degree of autonomy for the entity in question, and furthermore, imposed the arms embargo on respective parties.⁵⁷⁶ As with regard to the issues connected with the political status of Kosovo, the resolution stressed the necessity of entering into a dialogue without any preconditions.⁵⁷⁷

⁵⁷² See M. Bowker, *The Wars in Yugoslavia: Russia and the International Community*, in: *Europe-Asia Studies*, Vol. 50, 1998, p. 1256

⁵⁷³ J. M. O. Sharp, *Testfall Kosovo: die westliche Politik auf dem Prüfstand*, in: *Internationale Politik*, Jg. 53, Bd. 1, 1998, p. 28 (italics in original)

⁵⁷⁴ See S. Troebst, Appendix 1 C. *The Kosovo conflict*, in: *SIPRI Yearbook, Armaments, Disarmament and International Security*, 1999, p. 50

⁵⁷⁵ See H. - G. Justenhoven, *Selbstbestimmungsrecht der Völker und Nichteinmischung in innere Angelegenheiten im Widerstreit*, in: D. S. Lutz (Hrsg.), *Der Kosovo-Krieg, Rechtliche und rechtsethische Aspekte, Demokratie, Sicherheit, Frieden (DSF)*, Bd. 127, 1. Aufl., Baden-Baden, 1999 / 2000, p. 192

⁵⁷⁶ UNSC Res. 1160 (1998) of 31 March 1998, paras. 5, 8, in: *Resolutions and Decisions of the Security Council (1998)*, SCOR 53, United Nations, New York, 2000, p. 11

⁵⁷⁷ UNSC Res. 1160 (1998) of 31 March 1998, para. 4, in: *Ibid.*

The UN Security Council Resolution 1199 (1998), which was adopted on 23 September 1998, referred to the “excessive and indiscriminate use of force by Serbian security forces and the Yugoslav Army”⁵⁷⁸. After reaffirming the commitment to the sovereignty and territorial integrity of the FRY, the Security Council stressed the following: “the deterioration of the situation in Kosovo, Federal Republic of Yugoslavia, constitutes a threat to peace and security in the region, [...]”⁵⁷⁹. Another important passage from the text refers to the case of the non-compliance with the provisions of the Resolution 1160 (1998) and the Resolution 1199 (1998). In this instance, the Security Council decided “to consider further action and additional measures to maintain or restore peace and stability in the region; [...]”⁵⁸⁰.

Thus, the UN Security Council expressed its posture toward the issue of Kosovo in the resolutions mentioned above, but these documents did not authorize the use of force against the FRY, despite the warning issued by the Security Council in the Resolution 1199 (1998). According to Hilpold, the texts of these resolutions “were half-hearted and ambiguous, thus permitting all the parties involved to safeguard their position”⁵⁸¹. It has to be noted at this point that as the Resolution 1199 (1998) was “unsuccessful” in persuading respective authorities to comply with its provisions, on 9 October 1998 NATO Secretary-General Javier Solana declared that the organization “saw sufficient factual and legal grounds to threaten the use of force and, if necessary, to use force.”⁵⁸²

In the Resolution 1203 (1998) of 24 October 1998 the UN Security Council welcomed the agreement signed in Belgrade between the FRY and the OSCE, on the basis of which, this organization could establish a verification mission in Kosovo and, at the same time, the FRY declared that it would comply with previous resolutions.⁵⁸³ Furthermore, the commitment

⁵⁷⁸ UNSC Res. 1199 (1998) of 23 September 1998, preambular para., in: *Ibid.*, p. 13

⁵⁷⁹ UNSC Res. 1199 (1998) of 23 September 1998, preambular para., in: *Ibid.*, p. 14

⁵⁸⁰ UNSC Res. 1199 (1998) of 23 September 1998, para. 16, in: *Ibid.*, p. 15

⁵⁸¹ P. Hilpold, Humanitarian Intervention: Is There a Need for a Legal Reappraisal?, in: *EJIL*, Vol. 12, 2001, p. 440

⁵⁸² *Ibid.*

⁵⁸³ UNSC Res. 1203 (1998) of 24 October 1998, in: Resolutions and Decisions of the Security Council (1998), SCOR 53, United Nations, New York, 2000, pp. 15-16

to the sovereignty and territorial integrity of the FRY was confirmed in that resolution. Acting under Chapter VII of the Charter of the UN, the Security Council stressed once again that “the unresolved situation in Kosovo, Federal Republic of Yugoslavia, constitutes a continuing threat to peace and security in the region, [...]”⁵⁸⁴.

Despite this positive development, further acts of violence occurred in Kosovo, followed by NATO’s new threat of air strikes and the attempt to find a solution to the problem through the negotiations held in Rambouillet, France.⁵⁸⁵ The KLA accepted the “Interim Agreement for Peace and Self-Government in Kosovo” (“Rambouillet Accords”) after some period of hesitation, but respective authorities of the FRY did not. The reason behind this refusal was, according to Patomäki, the Appendix B of the document which referred to the “Status of Multi-National Military Implementation Force”⁵⁸⁶. Indeed, as this author puts it, the FRY “could not accept foreign military troops - and the NATO troops in particular - and their far-reaching rights to operate freely and with immunity *anywhere in Yugoslavia*.”⁵⁸⁷ The response to the FRY’s refusal was NATO’s forcible action.

7.1.4 NATO’s military intervention and its aftermath

On 24 March 1999 NATO began the “Operation Allied Force”, an air campaign against the FRY which lasted for two and a half months.⁵⁸⁸ An aspect of overwhelming importance was in this context the fact that NATO acted without the authorization of the Security Council of the UN.⁵⁸⁹ The reason is considered to be Russia’s indication, tacitly backed by China, to use veto power with regard to any such resolution.⁵⁹⁰

⁵⁸⁴ *Ibid.*, p. 16

⁵⁸⁵ See H. Patomäki, Kosovo and the end of the United Nations?, in: P. van Ham / S. Medvedev (eds.), Mapping European security after Kosovo, Manchester / New York, 2002, p. 94

⁵⁸⁶ *Ibid.*

⁵⁸⁷ *Ibid.*, (italics in original)

⁵⁸⁸ See H. Charlesworth, International Law: A Discipline of Crisis, in: The Modern Law Review, Vol. 65, 2002, p. 378

⁵⁸⁹ See A. Pradetto, Die NATO, humanitäre Intervention und Völkerrecht, in: Aus Politik und Zeitgeschichte, Beilage zur Wochenzeitung Das Parlament, 49. Jg., 1999, p. 27

⁵⁹⁰ I. H. Daalder / M. E. O’Hanlon, Unlearning the Lessons of Kosovo, in: Foreign Policy, No. 116, 1999, p. 135

The air campaign was brought to an end by a complex of instruments which entailed different agreements. The first was the Proposal Presented by Martti Ahtisaari and Victor Chernomyrdin to President Slobodan Milošević on 2 June 1999, known as “Ahtisaari – Chernomyrdin – Milošević Agreement” or the “Kosovo Accords”⁵⁹¹. Further important document was the “Military Technical Agreement” of 9 June between the International Security Force (“KFOR”) and the FRY (“Kumanovo Agreement”).⁵⁹²

On 10 June 1999 the Security Council of the UN passed the Resolution 1244 (1999) in which, the principal organ of the world organization, acting under Chapter VII of the Charter of the UN: a) welcomed the adoption of general principles on the solution of the Kosovo problem and all those positive developments in this respect; b) reaffirmed the commitment of member states to the sovereignty and territorial integrity of the FRY; c) confirmed the need for granting substantial autonomy to Kosovo; d) determined that the situation in the region constituted a threat to international peace and security.⁵⁹³ Further important provisions enshrined in the document concern international administration of Kosovo. Thus, the Security Council:

“5. *Decides* on the deployment in Kosovo, under United Nations auspices, of international civil and security presences, with appropriate equipment and personnel as required, and welcomes the agreement of the Federal Republic of Yugoslavia to such presences; [...]

10. *Authorizes* the Secretary-General, with the assistance of relevant international organizations, to establish an international civil presence in Kosovo in order to provide an interim administration for Kosovo under

⁵⁹¹ See E. Herring, From Rambouillet to the Kosovo Accords: NATO’s War against Serbia and Its Aftermath, (K. Booth (ed.), The Kosovo Tragedy, The Human Rights Dimensions), in: The International Journal of Human Rights, Vol. 4, 2000, p. 232

⁵⁹² Military Technical Agreement between the International Security Force (“KFOR”) and the Governments of the Federal Republic of Yugoslavia and the Republic of Serbia (9 June 1999), available on the official website of the NATO, at:

<http://www.nato.int/kosovo/docu/a990609a.htm> [accessed: 17.11.2008]

⁵⁹³ UNSC Res. 1244 (1999) of 10 June 1999, in: Resolutions and Decisions of the Security Council (1999), SCOR 54, United Nations, New York, 2001, p. 33

which the people of Kosovo can enjoy substantial autonomy within the Federal Republic of Yugoslavia [...]”⁵⁹⁴

As with regard to the issue of Kosovo’s status, the resolution stipulated that among the main responsibilities of the international civil presence was “Facilitating a political process designed to determine the future status of Kosovo, taking into account the Rambouillet Accords; [...]”⁵⁹⁵.

Thus, as a consequence of the adoption of the documents mentioned above, the United Nations Interim Administration Mission in Kosovo (UNMIK) was established as an expression of international civil presence in the region.

7.1.5 The UNMIK and the “internationalization” of Kosovo’s status

The Regulation No. 1999/1, which refers to the issues connected with the authority of the interim administration, reads as follows:

“1.1 All legislative and executive authority with respect to Kosovo, including the administration of the judiciary, is vested in UNMIK and is exercised by the Special Representative of the Secretary-General.”⁵⁹⁶

The system of the UNMIK rests on four pillars: the Humanitarian Assistance aspect was under the auspices of the UN High Commissioner for Refugees (UNHCR), the UN itself had the responsibility to run the Civil Administration, the Democratisation and Institution Building component was led by the OSCE, the Reconstruction and Economic Development pillar was within the competence of the EU.⁵⁹⁷ According to the provisions of the Annex II of the Security Council Resolution 1244 (1999):

⁵⁹⁴ UNSC Res. 1244 (1999) of 10 June 1999, paras. 5, 10, in: *Ibid.*, p. 34 (italics in original)

⁵⁹⁵ UNSC Res. 1244 (1999) of 10 June 1999, para. 11(e), in: *Ibid.*, p. 35

⁵⁹⁶ Section 1 (1.1) of the Regulation No. 1999/1, UNMIK / REG / 1999/1 of 25 July 1999, On the Authority of the Interim Administration in Kosovo, available on the official website of the United Nations Interim Administration Mission in Kosovo, at: <http://www.unmikonline.org/regulations/unmikgazette/02english/e1999regs/e1999regs.htm> [accessed: 18.11. 2008]

⁵⁹⁷ See A. Yannis, Kosovo Under International Administration, in: *Survival*, The IISS Quarterly, Vol. 43, 2001, p. 32

“4. The international security presence with substantial North Atlantic Treaty Organization participation must be deployed under unified command and control and authorized to establish a safe environment for all people in Kosovo [...]”⁵⁹⁸

Thus, within the complex system of the administration, the security component is guaranteed by the NATO-led multinational force KFOR (Kosovo Force) acting under UN auspices. It has to be noted at this point that the KFOR derives its legitimacy not only from the Security Council Resolution 1244 (1999), but also from the Military Technical Agreement.⁵⁹⁹ Regarding these two documents, it can be stated that they are interrelated because “Security Council Resolution 1244, 10 June 1999, effectively ratified the Military-Technical Agreement.”⁶⁰⁰ Indeed, from the very beginning the UNMIK and the KFOR were designed as partners in a lengthy program of restoring Kosovo, and although the primary responsibility of the KFOR is to guarantee a secure environment, it is involved in various other fields of activities within the overall structure of the UNMIK.⁶⁰¹

The FRY’s sovereignty over Kosovo was further reduced on the basis of the Constitutional Framework for Provisional Self-Government adopted on the ground of the UNMIK/REG/2001/9 which declares the following:

“1.1 Kosovo is an entity under interim international administration [...]

1.2 Kosovo is an undivided territory throughout which the Provisional Institutions of Self-Government established by this Constitutional

⁵⁹⁸ UNSC Res. 1244 (1999) of 10 June 1999, Annex II, para. 4, in: Resolutions and Decisions of the Security Council (1999), SCOR 54, United Nations, New York, 2001, p. 36

⁵⁹⁹ See Article I (2) of the Military Technical Agreement between the International Security Force (“KFOR”) and the Governments of the Federal Republic of Yugoslavia and the Republic of Serbia (9 June 1999), available on the official website of the NATO, at: <http://www.nato.int/kosovo/docu/a990609a.htm> [accessed: 20.11.2008]

⁶⁰⁰ H. Charlesworth, International Law: A Discipline of Crisis, in: The Modern Law Review, Vol. 65, 2002, footnote 4, p. 378

⁶⁰¹ See KFOR Objectives / Mission, available on the official website of the NATO, at: <http://www.nato.int/kfor/docu/about/objectives.html> [accessed: 20.11.2008]

Framework for Provisional Self-Government (Constitutional Framework) shall exercise their responsibilities.”⁶⁰²

Thus, Kosovo has been administered by the UN after the adoption of the Security Council Resolution 1244 (1999). On 24 October 2005 the President of the Security Council of the UN issued a statement concerning the situation in Kosovo. This document refers to the report of the UN Secretary-General’s Standards Review envoy, Ambassador Eide, concerning the implementation of respective Standards in Kosovo (Serbia and Montenegro)⁶⁰³ and stipulates the need for initiating further development, i.e. the next phase of the political process in Kosovo.⁶⁰⁴

It is important at this stage to introduce the political developments which took place in the “mother state” itself. As the notion of “Serbia and Montenegro” was mentioned above, it is meaningful to clarify the status of that entity. On 4 February 2003, the “Constitutional Charter of the State Union of Serbia and Montenegro” was adopted by the National Assembly of the Republic of Serbia and the Assembly of the Republic of Montenegro on the basis of the “Proceeding Points for the Restructuring of Relations between Serbia and Montenegro” of 14 March 2002.⁶⁰⁵ Thus, on the ground of respective provisions of the Constitutional Charter, the FRY was transformed into a state union of two equal members, the state of Serbia and the state of Montenegro.⁶⁰⁶

⁶⁰² Chapter 1 (1.1, 1.2) of the Constitutional Framework for Provisional Self-Government UNMIK/REG/2001/9 – 15 May 2001, available on the official website of the United Nations Interim Administration Mission in Kosovo, at: <http://www.unmikonline.org/constframework.htm> [accessed: 22.11.2008]

⁶⁰³ According to the Constitutional Framework for Provisional Self-Government, the Provisional Institutions of Self-Government are responsible for aligning their practices and legislative activity with European and international standards and norms. See Chapter 5 (5.7) of the Constitutional Framework for Provisional Self-Government UNMIK/REG/2001/9 – 15 May 2001, in: *Ibid.*

⁶⁰⁴ UNSC, Statement by the President of the Security Council, S/PRST/2005/51, of 24 October 2005, available on the official website of the UN, at: http://www.un.org/Docs/sc/unsce_pres_statements05.htm [accessed: 22.11.2008]

⁶⁰⁵ See Constitutional Charter of the State Union of Serbia and Montenegro, 4 February 2003, available online in UNHCR Refworld, at: <http://www.unhcr.org/refworld/docid/43e7547d4.html> [accessed: 25.11.2008]

⁶⁰⁶ See Articles 1 and 2 of the Constitutional Charter of the State Union of Serbia and Montenegro, 4 February 2003, in: *Ibid.*

According to Art. 60 of the document in question, passage of a minimum period of three years was required before a member state could “initiate the proceedings for the change in its state status or for breaking away from the state union of Serbia and Montenegro.”⁶⁰⁷ Montenegro seized that opportunity by holding a referendum in May 2006 and declaring independence in June of the same year, and on 28 June 2006 it became a member state of the UN.⁶⁰⁸ Thus, as a result of these developments, Serbia became a “stand-alone sovereign republic”⁶⁰⁹.

Martti Ahtisaari, who was appointed as the Special Envoy of the UN Secretary-General for the future status process for Kosovo on 14 November 2005⁶¹⁰, submitted the “Comprehensive Proposal for the Kosovo Status Settlement” (the so-called “Ahtisaari Plan”).⁶¹¹ This plan envisaged that after a period of international supervision Kosovo would become independent. It was rejected by Serbia, whereas the Kosovo Albanian ruling elite approved the document.⁶¹²

In an effort aimed at breaking this deadlock, the “Troika” composed of the EU, the US and the Russian Federation conducted negotiations between respective parties and discussed different options in the context of a possible settlement on the problem in question. As a result, the negotiators arrived at the following conclusion:

“Throughout the negotiations both parties were fully engaged. After 120 days of intensive negotiations, however, the parties were unable to reach an

⁶⁰⁷ Article 60 of the Constitutional Charter of the State Union of Serbia and Montenegro, 4 February 2003, in: *Ibid.*

⁶⁰⁸ Information available on the official website of the UN, at:

<http://www.un.org/News/Press/docs/2006/org1469.doc.htm> [accessed: 25.11.2008]

⁶⁰⁹ See Country Profile: Serbia, available on the website of the BBC News, at:

http://news.bbc.co.uk/2/hi/europe/country_profiles/5050584.stm [accessed: 25.11.2008]

⁶¹⁰ Information available on the official website of the United Nations Office of the Special Envoy for Kosovo, at: <http://www.unosek.org/unosek/en/speenvoy.html> [accessed: 26.11.2008]

⁶¹¹ See Letter dated 26 March 2007 from the Secretary-General addressed to the President of the Security Council, Addendum: Comprehensive Proposal for the Kosovo Status Settlement, UNSC, S/2007/168/Add. 1, 26 March 2007, available on the official website of the United Nations Office of the Special Envoy for Kosovo, at:

http://www.unosek.org/docref/Comprehensive_proposal-english.pdf [accessed: 26.11.2008]

⁶¹² C. J. Borgen, Kosovo’s Declaration of Independence: Self-Determination, Secession and Recognition, in: ASIL Insights, Vol. 12, Issue 2, 2008, available on the website of the ASIL, at: <http://www.asil.org/search.cfm?displayPage=358> [accessed: 26.11.2008]

agreement on Kosovo's status. Neither side was willing to yield on the basic question of sovereignty.”⁶¹³

On 17 February 2008 Kosovo's parliament issued the declaration of independence from Serbia.⁶¹⁴

7.2 International legal context

7.2.1 NATO's military intervention – pros and cons

It has to be stressed with regard to NATO's involvement that the clarification of its legality or illegality does not represent the objective of the present study. I will only demonstrate the arguments favouring the air campaign of 1999 as an effective means against the humanitarian catastrophe in Kosovo and, on the other hand, I will refer to the assertions criticizing respective action of the alliance. It is important at this point to stress that, by its very essence, and according to the goal it pursued, the air campaign against the FRY has to be described as a “humanitarian intervention”.

With respect to the definition of humanitarian intervention, it has to be noted that this action implies the utilization of military force and other coercive means to intervene in conflicts without the consent of a state, which is either participating in grave human rights abuses, or is too weak to prevent them.⁶¹⁵ The European Parliament has defined the term “humanitarian intervention” as follows:

“[...] Schutz der Menschengrundrechte von Personen, die Staatsangehörige anderer Staaten und/oder dort ansässig sind, durch einen Staat oder eine

⁶¹³ Report of the EU/U.S./Russia Troika on Kosovo, December 4, 2007, para. 11, available on the official website of the International Civilian Office Kosovo, at: <http://www.ico-kos.org/?id=6> [accessed: 26.11.2008]

⁶¹⁴ Kosovo MPs proclaim independence, information available on the website of the BBC News, at: <http://news.bbc.co.uk/2/hi/europe/7249034.stm> [accessed: 26.11.2008]

⁶¹⁵ See I. Simonovic, Relative Sovereignty of the Twenty First Century, in: Hastings International and Comparative Law Review, Vol. 25, 2002, p. 373

Gruppe von Staaten, wobei dieser Schutz die Drohung mit Gewalt oder die Anwendung von Gewalt beinhaltet;”⁶¹⁶

It is thus evident that the objective of humanitarian intervention must necessarily be the protection of the fundamental human rights of a respective group within the borders of a particular state in which that group is subjected to flagrant violations of those rights. It is important at this stage to present the arguments which are in favour of NATO’s military intervention in 1999 and against it.

7.2.1 (i) Arguments in support of NATO’s “humanitarian intervention”

The major problem connected with NATO’s operation is that it was conducted without an explicit mandate of the Security Council of the UN. So, I will begin with an assertion concerning this “lacuna” and its possible justification.

According to Wilms, the decisions of the UN Security Council do not correspond to the requirements of the procedure founded in the rule of law, as one of the permanent members of this body can block important decisions on the basis of veto power.⁶¹⁷ The author asserts that effective protection of human rights is possible only if the procedure within the principal organ of the UN is not regarded as a sole guideline. It follows that the mere fact that the Security Council did not authorize respective action does not make the intervention in question automatically illegitimate.⁶¹⁸ Furthermore, it has been asserted that the right of self-defence (*Notwehr*) exists in the form of the general principle of law inherent in all legal systems, and humanitarian intervention is a kind of assistance in an emergency (*Nothilfe*): “Die humanitäre Intervention des nordatlantischen

⁶¹⁶ Europäisches Parlament, Entschließung zum Recht auf Intervention aus humanitären Gründen, Sitzungsperiode 1994-1995, Tagung vom 18. bis 22. April 1994, in: Amtsblatt der Europäischen Gemeinschaften, Teil C, 1994, Nr. 100-132, Nr. C 128/(p.) 226

⁶¹⁷ H. Wilms, Der Kosovo-Einsatz und das Völkerrecht, in: ZRP, Jg. 32, 1999, p. 228

⁶¹⁸ *Ibid.*

Verteidigungsbündnisses ist daher bereits auf der Ebene des positiv geltenden Völkerrechts rechtmäßig.⁶¹⁹

According to Thürer, the interpretation of the UN Charter denoting the acceptance of gross violations of fundamental human rights in the case of the Security Council's inactivity does not seem to be plausible nowadays. Atrocities conducted on the territory of a state cannot be tolerated when a respective friendly nation, enjoying the veto power, blocks the UN Security Council.⁶²⁰ It follows that the right to humanitarian intervention has to be recognized to a certain limited extent, though factual circumstances of every single case have to be thoroughly assessed.⁶²¹

Following criteria have been suggested for the justification of a humanitarian intervention: a) the military intervention is only justified if the fundamental values of the international community are at stake; b) the intervention may not violate the principle of proportionality and it must be appropriate to the protection of those fundamental values (in the case of Kosovo it was questionable whether solely an air campaign, without the utilization of ground forces, was suitable for the effective prevention of a humanitarian catastrophe). The exhaustion of all diplomatic and political means is also a necessary requirement as the military intervention should represent *ultima ratio* in its very essence. The values which have to be protected on the basis of the military action must outweigh those which can be endangered by that action; c) respective measures must be authorized by a legitimate organ, whereas *prima facie* collective action of states (then 19 members of NATO) does possess a higher degree of credibility than unilateral decision to resort to force, and decisions of politically representative organizations bear a higher degree of internal authority than actions of specialized organizations (for example, a military alliance); d) the measures taken without prior authorization of the UN must, as soon as

⁶¹⁹ *Ibid.*, p. 230

⁶²⁰ D. Thürer, Der Kosovo-Konflikt im Lichte des Völkerrechts: Von drei – echten und scheinbaren – Dilemmata, Grundsätze des Rechts der Gewaltanwendung und des humanitären Völkerrechts, in: AVR, Bd. 38, 2000, p. 7

⁶²¹ *Ibid.*

possible, be returned to the ordinary legal procedures within the system of the world organization.⁶²²

Steinkamm asserts that the resolutions of the UN Security Council (1160 (1998), 1199 (1998) and 1203 (1998)) laid the foundation of the political and legal solution to the conflict around the issue of Kosovo, but the FRY ignored them and in doing so, it acted contrary to international law.⁶²³ It follows that Russia and China, not acting in conformity with their Charter obligations, blocked the UN Security Council and forced NATO to intervene.⁶²⁴ The author proceeds by asserting that if the Security Council is blocked, respective vacuum in the international legal system is filled by the notion of humanitarian intervention, if gross violations of human rights are committed.⁶²⁵

Following justifying factors have been introduced in respect of NATO's involvement in the Kosovo conflict: the air campaign was backed by the EU and was not condemned by the UN. Furthermore, the operation gained subsequent political legitimation on the basis of Milošević's indictment by the ICTY, and this fact represented a partial compensation for the lack of the explicit mandate of the UN Security Council, in the sense of an internal aspect within the organization, as well as vis-à-vis Russia and China, as they supported the establishment of the tribunal.⁶²⁶

Ipsen stresses that ethnic cleansing through mass expulsion and mass killing does not fall under the scope of state sovereignty, as a mantle protecting respective states on the international plane.⁶²⁷ The author asserts that, as a consequence of progressive recognition of minorities as partial subjects of international law, the protection of such groups from the use of force by "parent states" will be brought into line with the guarantees enjoyed in this sphere by sovereign independence states, because the developments within

⁶²² *Ibid.*, p. 8

⁶²³ A. Steinkamm, *Völkerrecht, Humanitäre Intervention und Legitimation des Bundeswehr-Einsatzes, Völker- und wehrrechtliche Aspekte des Kosovo-Konflikts 1999*, in: *Südosteuropa, Zeitschrift für Gegenwartforschung*, Jg. 49, 2000, p. 234

⁶²⁴ *Ibid.*, p. 237

⁶²⁵ *Ibid.*, p. 238

⁶²⁶ *Ibid.*, p. 242

⁶²⁷ K. Ipsen, *Der Kosovo-Einsatz –Illegal? Gerechtfertigt? Entschuldigbar?*, in: K. Ipsen et al. (Hrsg.), *FW, Journal of International Peace and Organization*, Bd. 74, 1999, p. 21

the realm of public international law have demonstrated that flagrant violations of fundamental human rights, having the form of mass expulsions and mass killings, are considered as breaches of peace and international security.⁶²⁸ It follows that, according to the growing tendency in contemporary international law, the groups which were subjected to the use of force from the side of “mother states” can claim the right to collective self-defence enshrined in Art. 51 of the UN Charter. Respective substate groups should be protected on the basis of the same sanctions which are available in the cases of the use of force against independent states.⁶²⁹

According to Henkin, NATO’s intervention was a collective action because it was a result of the decision taken by a responsible body including three of five permanent members of the UN Security Council. Furthermore, NATO did not pursue narrow interests of certain states or the organization itself, it pursued recognized humanitarian purposes.⁶³⁰ It follows that the collective character of the organization provided safeguards against abuse by individual powers: NATO’s involvement could be monitored by the UN Security Council, which could order to terminate it, military intervention enjoyed the support of the principal organ of the world organization and this was confirmed when twelve members of the Council rejected the Russian draft resolution, thereby agreeing in effect that the intervention by the alliance should continue. Moreover, “on June 10, the Security Council, in Resolution 1244 approving the Kosovo settlement, effectively ratified the NATO action and gave it the Council’s support.”⁶³¹

Wedgwood refers to the cases of humanitarian interventions in different regions of the globe (for example, Vietnam’s displacement of the Khmer Rouge in Cambodia, India’s involvement in East Pakistan in support of the Bengali people, Tanzania’s overthrow of Idi Amin in Uganda) and asserts that, in contrast to the decisions taken unilaterally in furtherance of the right of humanitarian intervention, NATO’s action was based on the legitimacy of nineteen-nation decision process and respective normative commitments

⁶²⁸ *Ibid.*, p. 22

⁶²⁹ *Ibid.*

⁶³⁰ L. Henkin, Kosovo and the Law of “Humanitarian Intervention”, in: *AJIL*, Vol. 93, 1999, p. 826

⁶³¹ *Ibid.*

of the democratic Europe.⁶³² It has been emphasized that “NATO’s decision deserves greater deference than purely unilateral action.”⁶³³

It has been stressed by another author that Art. 2 (4) of the UN Charter is limited by means of Art. 2 (7) which removed from the *domaine réservé* of a sovereign independent state the situation in which it violates, in a grave fashion, human rights enjoyed by respective population.⁶³⁴ The exclusive competence of the UN Security Council to authorize the use of force has been regarded as a workable solution, if the responsibility of that body is restricted to the situations in which a threat to the peace, the breach of the latter, and an act of aggression are the issues in question. But this idea of the exclusiveness of the Security Council ceases to be workable if it is applied to the protection of human rights, the international control of means on the basis of which governments rule their people internally.⁶³⁵ The following conclusion has been made with regard to the notion of humanitarian intervention:

“When human rights enforcement by military means is required, it should, indeed, be the responsibility of the Security Council acting under the Charter. But when the Council cannot act, the legal requirement continues to be to save lives, however one can and as quickly as one can, [...]”⁶³⁶

These are some of the considerations backing NATO’s humanitarian war and it can be asserted that they are based on respective developments within the realm of public international law, as well as solid moral grounds and particular circumstances of the Kosovo case. But there are also important arguments against the military involvement of 1999.

7.2.1 (ii) Criticism of NATO’s military intervention

The first and the most important argument against NATO’s forcible action refers to the very foundation of the intervention and asserts that the notion

⁶³² R. Wedgwood, NATO’s Campaign in Yugoslavia, in: *Ibid.*, p. 833

⁶³³ *Ibid.*

⁶³⁴ W. Michael Reisman, Kosovo’s Antinomies, in: *Ibid.*, p. 861

⁶³⁵ *Ibid.*, pp. 861-862

⁶³⁶ *Ibid.*, p. 862

of moral cannot be applied by states in a binding manner, vis-à-vis their citizens, in order to legitimize such decisions. The source of a binding decision is only the law: “Der Krieg gegen Jugoslawien müßte nicht im Namen der Moral geführt werden, wenn er im Namen des Rechts geführt werden könnte.”⁶³⁷ It is important at this point to introduce other considerations in respect of the air campaign in question.

According to Valki, the argument that the purpose of NATO’s intervention was the enforcement of the Security Council resolutions 1160 (1998) and 1199 (1998) was unacceptable to Chinese and Russian delegates of the main body of the UN: it is true that the FRY violated law when it did not comply with the provisions of those resolutions, but this circumstance did not represent the legal basis of military intervention and Solana’s argument that, bearing in mind the possible veto the alliance had no other choice but to launch the air campaign, may be justified militarily and politically, but not legally. There is no “third” way in the case of rejection of a draft resolution mandating the use of force by some of the UN Security Council members.⁶³⁸ Moreover, it has been emphasized that during the debate concerning the Resolution 1199 (1998), the Russian delegate stressed that although the Security Council considered the implementation of further measures, it took no decision on the use of force at that stage.⁶³⁹

With regard to reactions to the NATO campaign, it has been stated that it is not true that the rejection of the draft resolution, condemning the NATO members, amounted to subsequent approval of the intervention. The only conclusion which can be drawn on the ground of such an action is that three of the permanent members of the UN Security Council (the US, the UK and France) and two non-permanent members (Canada and the Netherlands) did not wish to declare themselves aggressors, whereas seven of the eight other non-permanent members did not vote for subsequent approval of NATO’s actions, but did not wish to condemn them either.⁶⁴⁰

⁶³⁷ R. Zuck, Der Krieg gegen Jugoslawien, in: ZRP, Jg. 32, 1999, p. 226

⁶³⁸ L. Valki, The Kosovo Crisis and International Law, in: Südosteuropa, Zeitschrift für Gegenwartforschung, Jg. 49, 2000, p. 263

⁶³⁹ *Ibid.*

⁶⁴⁰ *Ibid.*, pp. 264-265

According to another author, NATO members justified the intervention mainly by reference to political considerations rather than international legal requirements. With respect to applying legal arguments they did not claim an unlimited right to intervene by force and without prior authorization in each and every single case of a humanitarian catastrophe.⁶⁴¹ Some NATO members argued before the ICJ in May 1999 that respective findings of the UN Security Council, on the basis of which the FRY was considered responsible for the excessive use of force, thereby causing the humanitarian catastrophe, represented a decisive factor for the justification for the involvement of the alliance.⁶⁴²

The NATO member states argued that they supported the realization of objectives of the international community, and they also applied such considerations which previously established the sole competence of the UN Security Council (for example, threat to the peace and refugee flows), but they rejected to assert legal considerations in this respect.⁶⁴³ Members of the alliance have not claimed that the military operation was based on the resolution of the UN Security Council. They have argued that the principal organ of the world organization had determined, by binding means, the existence of a situation which required effective measures in order to protect the most important values of the international community.⁶⁴⁴

According to Rytter, an authorization to humanitarian intervention exists only if the UN Security Council has explicitly mandated such involvement. Determination of the existence of a situation falling under the scope of the Chapter VII and denoting the threat to international peace and security is not sufficient, neither is any term short of “authorizes”, but in terms of legitimacy it makes a huge difference whether or not a certain degree of legal authority can be deduced from prior resolutions of the principal organ of the UN.⁶⁴⁵ Moreover, authorization by the Security Council must be

⁶⁴¹ See G. Nolte, Kosovo und Konstitutionalisierung: Zur humanitären Intervention der NATO-Staaten, in: ZaöRV, Bd. 59, 1999, p. 943

⁶⁴² *Ibid.*

⁶⁴³ *Ibid.*, pp. 943-944

⁶⁴⁴ *Ibid.*, p. 944

⁶⁴⁵ J. E. Rytter, Humanitarian Intervention without the Security Council: From San Francisco to Kosovo – and Beyond, in: Nordic Journal of International Law, Acta Scandinavica juris gentium, Vol. 70, 2001, p. 123

obtained prior to respective action and subsequent endorsement or *de facto* acceptance by that body does not have a retroactive effect legalizing otherwise unlawful intervention. However the legitimacy of such an action is strengthened if the Security Council “condones” the involvement later.⁶⁴⁶

With regard to the rules of customary international law, it has been concluded that there is no right of humanitarian intervention within the realm of this source of international law without the authorization of the Security Council, neither is there any clear evidence that such a right is emerging (*in statu nascidendi*) from state practice until 1999.⁶⁴⁷ It has been emphasized that the general attitude towards intervention within the alliance itself was that Kosovo should be treated as an exceptional case of a humanitarian war, which was “legitimized” but not “legalized” by the humanitarian catastrophe that took place on respective territory.⁶⁴⁸ Furthermore, it has been stressed that unauthorized humanitarian intervention may be morally legitimate in certain cases but even this state of affairs cannot render the use of force lawful, because such an intervention is incompatible with the norm concerning the prohibition of the use of force as enshrined in Art. 2 (4) of the UN Charter and recognized under customary international law.⁶⁴⁹

Chinkin argues that by indicating its support for European institutional responses, the UN Security Council perhaps implied an approval of military action as this body was itself paralyzed, and failure to agree on the text of the resolution, which would condemn NATO’s intervention, backed this assertion.⁶⁵⁰ But respective affirmations of efforts aimed at peaceful settlement and verification cannot conceal the fact that the monopoly enjoyed by the Security Council on the issue of the use of force was disregarded. The Secretary-General of the UN sought cooperation between regional organizations and the UN in the form of consultations and other

⁶⁴⁶ *Ibid.*

⁶⁴⁷ *Ibid.*, p. 144

⁶⁴⁸ *Ibid.*, p. 155

⁶⁴⁹ *Ibid.*, p. 158

⁶⁵⁰ C. M. Chinkin, Kosovo: A “Good” or “Bad” War?, in: AJIL, Vol. 93, 1999, p. 843

diplomatic efforts, not the abandonment of the established international order through ignoring the principal organ of the world organization.⁶⁵¹

It follows that as the air campaign of 1999 was outside the framework of the UN Charter and NATO's own constitutive treaty, the requirements based on customary international law, especially those of necessity and proportionality, become the issues of overwhelming importance.⁶⁵² The following conclusion has been made with regard to NATO's military intervention:

“The NATO bombing was disproportionate for being both excessive in its impact on the human rights of one civilian population and inadequate by dint of the absence of ground forces to protect the other population.”⁶⁵³

The most important assessment of the involvement of the alliance refers to public international law, as such, and reads as follows: “the Kosovo intervention shows that the West continues to script international law, even while it ignores the constitutional safeguards of the international legal order.”⁶⁵⁴

Hilpold stresses the fact that the collective character of NATO's intervention, based on the participation of several member states, some of which are, at the same time, members of the UN Security Council, has to be rejected, because the issue of distinction between collective and unilateral measures refers to the question, whether respective initiative has been mandated by the Security Council or not.⁶⁵⁵ It follows that such an authorization was not granted by the principal organ of the world organization in the Kosovo case and the intervention has to be qualified as a unilateral measure.⁶⁵⁶

As with regard to the notion of assistance in an emergency (*Nothilfe*), it has been emphasized that the argument, which implies analogous application of

⁶⁵¹ *Ibid.*

⁶⁵² *Ibid.*, p. 844

⁶⁵³ *Ibid.*, p. 845

⁶⁵⁴ *Ibid.*, p. 846

⁶⁵⁵ P. Hilpold, *Humanitarian Intervention: Is There a Need for a Legal Reappraisal?*, in: *EJIL*, Vol. 12, 2001, p. 448

⁶⁵⁶ *Ibid.*

the right of self-defense, enshrined in Art. 51 of the Charter, to a people as a victim of the oppression by its own government, is untenable because the article in question has to be interpreted restrictively and it is not suited for analogous application.⁶⁵⁷ The assertion, denoting the restoration of the freedom of each member state to take unilateral measures in the case of the inability of the Security Council to act, has been criticized for following reasons: the limited functioning of the Security Council was already expected at the time of drafting the UN Charter and it would have been utopian to think otherwise. Nevertheless, the UN Charter was accepted in its present form and the prohibition of the use of force was considered the norm of paramount importance in that system.⁶⁵⁸

With regard to the developments concerning the protection of human rights and their impact on the system established by the UN Charter, it has been stated that it is doubtful whether those developments had an influence on the significance and interpretation of Art. 2 (4) of the document (because of the lack of specific treaty law, customary international law or subsequent practice in this regard). Even the evolution of international criminal justice is of no specific relevance to this issue, as the statutes of respective tribunals do not refer to this matter and persecution of war criminals does not call into question the prohibition of the use of force.⁶⁵⁹

Further argument concerns the issue of collision between the principle of protection of state sovereignty and the maintenance of human rights and the assertion that the UN Charter system can never be used as a justification for flagrant violations of human rights. It has been stressed that the UN Charter prohibits the threat or use of force and in doing so, Art. 2 (4) of the document is aimed at protecting, at least indirectly, the same subjects as the human rights instruments.⁶⁶⁰

The argument that Kosovo intervention sets a precedent for the development of “new” international law has been regarded as unconvincing. In the Nicaragua Case the ICJ found that to challenge a rule of international law,

⁶⁵⁷ *Ibid.*, pp. 449-450

⁶⁵⁸ *Ibid.*, pp. 450-451

⁶⁵⁹ *Ibid.*, pp. 451-452

⁶⁶⁰ *Ibid.*, p. 452

the state practice, relied upon, must be based on an alternative rule of law. This requirement was not met in the present instance because NATO had not justified its involvement on the ground of a specific legal rule, throughout the campaign the alliance offered no legal justification for its action.⁶⁶¹

It has been emphasized that legal justifications have been articulated by respondents in the suits against the NATO members before the ICJ, but only Belgium mentioned humanitarian intervention, merely as a possible legal justification.⁶⁶² Furthermore, the rule prohibiting the use of force is derived from the UN Charter and the Charter law may very well not be subject to alteration by new general international law: the Charter overrides all inconsistent treaties and one would expect the same rule to apply to developments in general international law. Bearing in mind the fact that treaties supersede all but *jus cogens* norms and the Charter restrictions on the use of force are themselves *jus cogens* legal rules, the norm of that quality is needed which would override them.⁶⁶³

The argument that the doctrine of humanitarian intervention is merely a new and improved interpretation of the provisions concerning the protection of human rights already enshrined in the Charter, has been rejected by Charney because of the absence of an agreement among the members of the UN which would denote such an interpretation of respective stipulations of the treaty in question.⁶⁶⁴

Indeed, it has been stated with regard to the alteration of existing legal rules that one act, not in conformity with the established rules, does not eliminate the legal regime, as such, unless there is overwhelming support for the change, and in the case of Kosovo it was significant that even the governments participating in the bombing of the FRY have argued that this

⁶⁶¹ J. I. Charney, Anticipatory Humanitarian Intervention in Kosovo, in: AJIL, Vol. 93, 1999, p. 836

⁶⁶² *Ibid.*, pp. 836-837

⁶⁶³ *Ibid.*, p. 837

⁶⁶⁴ *Ibid.*

one event should not change the rules.⁶⁶⁵ It has thus been concluded that moral and political consensus denoting the importance of intervention as a means of preventing gross human rights violations “has not been formalised into a set of rules of international law.”⁶⁶⁶

Bearing in mind this circumstance, it has to be noted that a conclusion has been drawn by Tomuschat that the involvement of NATO in the Kosovo case led the alliance into a situation in which it is difficult to distinguish between legality and illegality.⁶⁶⁷ The skepticism concerning NATO’s military intervention is expressed in this statement:

“Die NATO-Aktionen in Jugoslawien stellen den Versuch dar, unter Berufung auf die Legitimität einer universalen Moral die Legalität der bestehenden völkerrechtlichen Ordnung zu relativieren; sie wird dadurch zumindest vorübergehend außer Kraft gesetzt.”⁶⁶⁸

But the problem seems to be the following: “Die Geltung der Legalität ist die Moral der internationalen Beziehungen. Der gerechte Krieg ist der legale Krieg.”⁶⁶⁹

According to Axt, NATO’s intervention represents a setback for the principle of the settlement of respective conflicts on a non-forcible basis, and in accordance with legal requirements, within the framework of international organizations (institutionalism). It implies the return to the principles of realism, applied not in furtherance of particular interests but for the protection of fundamental values and human rights.⁶⁷⁰ What can be stressed with certainty is that every single case of humanitarian intervention must be subjected to stringent criteria. Indeed, according to Zacklin, the

⁶⁶⁵ M. E. O’Connell, *The UN, NATO, and International Law After Kosovo*, in: *Human Rights Quarterly, A Comparative and International Journal of the Social Sciences, Humanities, and Law*, Vol. 22, 2000, pp. 82-83

⁶⁶⁶ C. Guicherd, *International Law and the War in Kosovo*, in: *Survival, The IISS Quarterly*, Vol. 41, 1999, p. 29

⁶⁶⁷ C. Tomuschat, *Völkerrechtliche Aspekte des Kosovo-Konflikts*, in: K. Ipsen et al. (Hrsg.), *FW, Journal of International Peace and Organization*, Bd. 74, 1999, p. 37

⁶⁶⁸ U. K. Preuß, *Zwischen Legalität und Gerechtigkeit, Der Kosovo-Krieg, das Völkerrecht und die Moral*, in: *Blätter für deutsche und internationale Politik*, Jg. 44, 1999, p. 828

⁶⁶⁹ *Ibid.*

⁶⁷⁰ H. - J. Axt, *Internationale Implikationen des Kosovo-Krieges: werteorientierte Realpolitik statt Konfliktbearbeitung in Institutionen*, in: *Südosteuropa, Zeitschrift für Gegenwartforschung*, Jg. 49, 2000, p. 68

adoption of certain requirements would become the basis on the ground of which it would be possible to overcome the attitude of the international community, as presently maintained towards the notion of humanitarian intervention, that it is “an instrument of dubious legality, inequitable in implementation, and represents a weakening of the foundations of organized international society.”⁶⁷¹

These considerations indicate that NATO’s military intervention was, at least, an “uneasy” one and it had its own impact on further developments concerning the issue of Kosovo’s status. It is important at this point to address the latter question.

7.2.2 Kosovo’s “constitutional status” and its implications

Kosovo represents a formidable challenge to the issue of statehood. This territorial entity, formerly being the Socialist Autonomous Province of Kosovo within the Socialist Republic of Serbia, exists now in the form of the “Republic of Kosovo”.⁶⁷² It has to be stressed at this point that the constitution of the SFRY embodied two legal notions as constituent parts of the territorial entities existing within the borders of the federation, namely nations (*narodī*) and nationalities (*narodnosti*).⁶⁷³ The introductory part of the document in question, referring to the nations of the federal state, reads as follows: “The nations of Yugoslavia, proceeding from the right of every nation to self-determination, including the right to secession, [...]”⁶⁷⁴. It can be deduced from Art. 1 of the constitution that nations had their Socialist Republics.⁶⁷⁵ According to Art. 2 of the document, the status of the Socialist

⁶⁷¹ R. Zacklin, *Beyond Kosovo: The United Nations and Humanitarian Intervention*, in: *Virginia Journal of International Law*, Vol. 41, 2001, p. 938

⁶⁷² Information available on the official governmental web portal of the Republic of Kosovo, at: <http://www.ks-gov.net/portal/eng.htm> [accessed: 11.12.2008]

⁶⁷³ See Article 1 of the Constitution of the Socialist Federal Republic of Yugoslavia of 21 February 1974, in: W. B. Simons (ed.), *The Constitutions of the Communist World*, Alphen aan den Rijn et al., 1980, pp. 444-445

⁶⁷⁴ Constitution of the Socialist Federal Republic of Yugoslavia of 21 February 1974, Introductory Part, Basic Principles, in: *Ibid.*, p. 428

⁶⁷⁵ Article 1 of the Constitution of the Socialist Federal Republic of Yugoslavia of 21 February 1974, in: *Ibid.*, pp. 444-445

Republic was granted to: Bosnia-Herzegovina, Croatia, Macedonia, Montenegro, Serbia and Slovenia.⁶⁷⁶

It can be asserted that the federal constitution guaranteed nations the right to secede, but it was not the case with regard to nationalities. As the Socialist Autonomous Province of Kosovo was a constituent part of the Socialist Republic of Serbia and nations, as such, had their own republics, it can be argued that Kosovo Albanians represented a nationality, not a nation, and they enjoyed no constitutional right to secession. This assertion was confirmed by the Arbitration Commission on the former Yugoslavia, also called the “Badinter Commission” after its French chairman. In its Opinion No. 3 the Arbitration Commission had to deal with the question, whether internal boundaries between Croatia and Serbia and between Bosnia-Herzegovina and Serbia could be regarded as frontiers within the realm of public international law.⁶⁷⁷ The Commission concluded the following:

“Except where otherwise agreed, the former boundaries become frontiers protected by international law. This conclusion follows from the principle of respect for the territorial status quo and, in particular, from the principle of *uti possidetis*.”⁶⁷⁸

Thus, borders between the SFRY republics became international frontiers. Furthermore, the Commission rejected the request of the Kosovo Albanian political elite for the recognition of Kosovo basing its response upon the status of Kosovo as an autonomous province within Serbia.⁶⁷⁹ According to Cvijic, the argument that the Commission should have recognized Kosovo’s administrative borders with Serbia as international boundaries is unsound for following reasons: the difference between republics and autonomous provinces, as enshrined in the constitution of the SFRY, had legal and political significance and, at the same time, no member of the NATO ever

⁶⁷⁶ Article 2 of the Constitution of the Socialist Federal Republic of Yugoslavia of 21 February 1974, in: *Ibid.*, p. 445

⁶⁷⁷ Conference on Yugoslavia Arbitration Commission: Opinions on Questions arising from the Dissolution of Yugoslavia [January 11 and July 4, 1992], Opinion No. 3, in: 31 ILM 1488 (1992), p. 1499

⁶⁷⁸ *Ibid.*, para. 2, p. 1500 (italics in original)

⁶⁷⁹ See S. Cvijic, Self-determination as a Challenge to the Legitimacy of Humanitarian Interventions: The Case of Kosovo, in: German Law Journal, Vol. 8, 2007, p. 72

seriously invoked this argument in order to justify the intervention or the independence of Kosovo.⁶⁸⁰

As it is evident from the statement quoted above, the Arbitration Commission invoked the principle of *uti possidetis*. In applying the principle of *uti possidetis* to the case in question, the Commission approved the possibility of secession of constituent *republics* of the federal state, as boundaries between them became international frontiers. The same cannot be said in respect of the autonomous province of Kosovo.

Thus, it can be asserted that Kosovo has taken a long road but this road was also a rough one. The impact of the Kosovo case on public international law is threefold: 1) The use of force by the NATO in 1999 without express authorization of the UN Security Council; 2) The UN territorial administration which followed the military intervention mentioned above; 3) The case of Kosovo calls into question the balance between the principles of territorial integrity and self-determination.⁶⁸¹ At the same time, the Kosovo problem constitutes a complex issue in the context of the notion of sovereignty and the latter question has to be addressed at this point.

7.2.3 Kosovo in the context of an “earned sovereignty approach”

The “Republic of Kosovo” can be regarded as an example of the manifestation known as “earned sovereignty”. Earned sovereignty is a mode of regulating the sovereignty-based conflicts. According to the definition of this notion, it: “[...] entails the conditional and progressive devolution of sovereign powers and authority from a state to a substate entity under international supervision.”⁶⁸² Earned sovereignty encompasses following elements:

⁶⁸⁰ *Ibid.*

⁶⁸¹ See M. Goodwin, From Province to Protectorate to State? Speculation on the Impact of Kosovo’s Genesis upon the Doctrines of International Law, in: German Law Journal, Vol. 8, 2007, p. 2

⁶⁸² P. R. Williams / F. Jannotti Pecci, Earned Sovereignty: Bridging the Gap Between Sovereignty and Self-Determination, in: Stanford Journal of International Law, Vol. 40, 2004, p. 350

Shared sovereignty – at the initial stage respective state and substate entity exercise sovereign authority over the territory in question. It is also possible that international institutions exercise sovereign functions in addition to the “mother state”, or replace the latter in respect of enjoying sovereign rights.⁶⁸³

Institution building – new institutions for self-government are constructed, or those already existent are modified, in the substate entity during the period of shared sovereignty and prior to the determination of the final status. The substate entity cooperates with the international community in order to develop its own institutional capacity for exercising sovereign authority over a respective territory.⁶⁸⁴

Determination of the final status of the substate entity – this stage is aimed at regulating the relationship between the “parent state” and the substate entity. The means of such a determination is generally a referendum but a negotiated settlement between the entities in question is also possible: “Invariably, the determination of final status for the substate entity is conditioned on the consent of the international community in the form of international recognition.”⁶⁸⁵

In addition to the manifestations mentioned above, there are also following optional elements within the concept of earned sovereignty:

Phased sovereignty – this requirement denotes the accumulation by a respective substate entity of sovereign authority over a specified period of time prior to the determination of the final status. The accumulation of the sovereign authority, as a core of the present element, is connected with the ability of the substate entity to assume those sovereign powers, or it may depend on the demonstration of responsible state behavior by the entity in question. The combination of these two factors is also possible.⁶⁸⁶

Conditional sovereignty – this criterion can be applied to the accumulation of sovereign authority by the substate entity, or it can be employed as a set

⁶⁸³ *Ibid.*, p. 355

⁶⁸⁴ *Ibid.*

⁶⁸⁵ *Ibid.*, pp. 355-356

⁶⁸⁶ *Ibid.*, p. 356

of standards to be achieved prior to the determination of the final status of that entity (these standards include the protection of human and minority rights, the development of democratic institutions etc). This element represents a guideline for international institutions which, in the status of a monitoring authority, after the evaluation of the situation in the entity in question and the degree of compliance by the latter with those requirements elaborated in the form of standards, determines, whether to proceed with the devolution of authority to the substate entity or not.⁶⁸⁷

Constrained sovereignty – this element is an expression of limitations on the sovereign authority of the new state and it can also be described as a guarantee for the “mother state” and the international community. The newly emerged entity may be placed under international administrative or military presence, or the restrictions may be imposed on its sovereign authority with regard to the right of achieving territorial association with other states.⁶⁸⁸

This is exactly the process applied to the case of Kosovo and the notion of earned sovereignty represents a legal framework of the solution of a respective problem. Interim UN administration of Kosovo was established on the basis of the UN Security Council Resolution 1244 (1999) and during this interim period, the UN was authorized to exercise extensive executive and legislative authority and, at the same time, it was necessary to form institutions that would later be responsible for the autonomous governance of Kosovo. The devolution of sovereign authority to the government of Kosovo was also an inherent part of this framework, and it was contingent on the capability of the institutions mentioned above to cope with the task of exercising sovereign functions over the territory in question.

The complete devolution of authority and the determination of the final status of Kosovo were made dependent on the compliance with respective standards. Thus, it follows that all the features of the earned sovereignty are present in the case of Kosovo. But if we assume that Kosovo has earned the sovereignty, we must necessarily conclude that Belgrade has lost that

⁶⁸⁷ *Ibid.*

⁶⁸⁸ *Ibid.*

sovereignty over the territory in question. Does the latter assertion hold? It is important at this point to examine this issue.

7.2.4 The UN Security Council Resolution 1244 (1999) and its impact on Kosovo's status

The UN Security Council Resolution 1244 (1999), which represents the legal basis of Kosovo's international administration, reaffirmed the commitment of member states to the sovereignty and territorial integrity of the FRY but, at the same time, this document entails the reference to the Rambouillet Accords in the context of facilitating the political process of determination of Kosovo's final status. To say precisely, the document in question emphasizes the necessity to "take into account" the Rambouillet Accords while determining the status mentioned above.⁶⁸⁹ According to Batt, this reference in the resolution to the Rambouillet Accords means that independence of Kosovo was not ruled out.⁶⁹⁰

It is important at this stage to clarify the content of the Rambouillet Accords in respect of the status of Kosovo. First of all, it has to be stressed that the document entailed the shared sovereignty among the FRY, Kosovo and the international community.⁶⁹¹ According to the agreement, the FRY retained the competence over such areas as territorial integrity, common market, monetary policy, defence, foreign policy, customs services, federal taxation, federal elections and other fields specified in the agreement.⁶⁹² Paragraph 6 of Art. I of the document stipulates that there shall be no alterations of the borders of Kosovo and it also determines Kosovo's authority to conduct foreign relations within its areas of responsibility, equivalent to the power

⁶⁸⁹ See UNSC Res. 1244 (1999) of 10 June 1999, para. 11(e), in: Resolutions and Decisions of the Security Council (1999), SCOR 54, United Nations, New York, 2001, p. 35

⁶⁹⁰ J. Batt, Kosovo and the Question of Serbia, in: Slovak Foreign Policy Affairs, Review for international politics, security and integration, Vol. VI, 2005, p. 11

⁶⁹¹ See P. R. Williams / F. Jannotti Pecci, Earned Sovereignty: Bridging the Gap Between Sovereignty and Self-Determination, in: Stanford Journal of International Law, Vol. 40, 2004, p. 375

⁶⁹² Letter dated 4 June 1999 from the Permanent Representative of France to the United Nations addressed to the Secretary-General, Annex: Rambouillet Accords, Interim Agreement for Peace and Self-Government in Kosovo of 23 February 1999, UNSC, S/1999/648 (7 June 1999), ch. 1, Article I (3), p. 10, available on the official website of the UN, at: http://un.org/peace/kosovo/99648_1.pdf [accessed: 14.12.2008]

enjoyed by republics under respective provisions of the constitution of the FR Yugoslavia.⁶⁹³ At the same time, the agreement foresaw the accumulation of certain sovereign functions by Kosovo and the establishment of institutions needed for the effective administration of those functions with the support of the international community.⁶⁹⁴

The most important provision of the Rambouillet Accords concerns the determination of Kosovo's final status and provides for an international meeting, three years after the entry into force of the document, to determine a mechanism for a final settlement for Kosovo "on the basis of the will of the people, opinions of relevant authorities, each Party's efforts regarding the implementation of this Agreement, and the Helsinki Final Act, [...]"⁶⁹⁵. Thus, it is evident that the Rambouillet Accords represented the application of the notion of earned sovereignty to the Kosovo case: the elements of shared sovereignty and institution building were inherent in the document and the criterion of phased sovereignty was also present. The determination of the final status of the entity in question on the basis of a referendum was dependent on the fulfilment of obligations regarding the protection of human and minority rights and the establishment of democratic institutions.⁶⁹⁶ It follows that the notion of conditional sovereignty was also a component of the agreement.

Thus, bearing in mind the considerations mentioned above, and the fact that the Rambouillet Accords represented an expression of the "procedure" of earned sovereignty, it has to be concluded that, according to this agreement, the independence of Kosovo, as a possible solution to the problem, was not excluded. But it is also true that Milošević refused to sign that document.

⁶⁹³ See ch. 1, Article I (6) (a, c) of the Rambouillet Accords, Interim Agreement for Peace and Self-Government in Kosovo of 23 February 1999, UNSC, S/1999/648 (7 June 1999), in: *Ibid.*

⁶⁹⁴ P. R. Williams / F. Jannotti Pecci, Earned Sovereignty: Bridging the Gap Between Sovereignty and Self-Determination, in: *Stanford Journal of International Law*, Vol. 40, 2004, p. 375

⁶⁹⁵ See ch. 8, Article I (3) of the Rambouillet Accords, Interim Agreement for Peace and Self-Government in Kosovo of 23 February 1999, available on the official website of the U.S. Department of State, at:

http://www.state.gov/www/regions/eur/ksvo_ambouillet_text.html [accessed: 15.12.2008]

⁶⁹⁶ P. R. Williams / F. Jannotti Pecci, Earned Sovereignty: Bridging the Gap Between Sovereignty and Self-Determination, in: *Stanford Journal of International Law*, Vol. 40, 2004, p. 376

Nevertheless, after the NATO air campaign the UN Security Council adopted the Resolution 1244 (1999) and created the legal basis of Kosovo's international administration. Moreover, this resolution retained the core elements of the earned sovereignty approach enshrined in the Rambouillet Accords.⁶⁹⁷

In sum, the Resolution 1244 (1999) had following legal impact on the status of Kosovo: a) the document displaced the FRY's sovereignty from Kosovo; b) replaced it with interim UN and NATO sovereign responsibilities; c) established substantial autonomy and democratic self-governance for the people of Kosovo; d) facilitated a political process designed to determine Kosovo's future status, taking into account the Rambouillet Accords; e) provided for the necessity of overseeing, at the final stage, the transfer of authority from Kosovo's provisional institutions to the institutions established under the political settlement.⁶⁹⁸ At the same time, the resolution in question introduced a substantial addition to the earned sovereignty approach as it, in contrast to the Rambouillet Agreement which provided for a transfer of sovereignty to the people of Kosovo, entrusted the UN with the task of exercising sovereign functions in Kosovo:

“Resolution 1244 provided that the United Nations initially would assume control of sovereign functions and negotiate a constitutional framework, and then begin the transfer of sovereign functions to Kosovar institutions. Simultaneously, the United Nations was mandated to pursue a resolution of the final status of Kosovo.”⁶⁹⁹

Thus, we have got the UN Security Council Resolution 1244 (1999) in which the principal organ of the world organization reaffirms the commitment of the international community to the sovereignty and territorial integrity of the FRY “as set out in the Final Act of the Conference on Security and Cooperation in Europe, signed at Helsinki 1 August 1975,

⁶⁹⁷ *Ibid.*

⁶⁹⁸ *Ibid.*, p. 377

⁶⁹⁹ *Ibid.*

and in annex II to the present resolution”⁷⁰⁰. Respective provision of the annex II of the document provides that an agreement should be reached on the following principle (among others) in order to move towards a resolution of the problem:

“8. A political process towards the establishment of an interim political framework agreement providing for substantial self-government for Kosovo, taking full account of the Rambouillet Accords and the principles of sovereignty and territorial integrity of the Federal Republic of Yugoslavia and the other countries of the region, [...]”⁷⁰¹

It is also emphasized in the resolution that the political solution to the Kosovo crisis shall be based on the principles enshrined in two annexes to the document in question.⁷⁰² As a result of this state of things, we have got the UN Security Council resolution which, on the one hand, embodies the very essence of the earned sovereignty provided for by the Rambouillet Agreement and, at the same time, declares the commitment to the FRY’s sovereignty and territorial integrity. The document envisions for Kosovo an interim political framework agreement on the basis of which the entity in question can enjoy “substantial self-government”. It is important at this point to clarify, whether the document in question entails the possibility of Kosovo’s secession.

7.2.5 The UN Security Council Resolution 1244 (1999) and the issue of Kosovo’s secession

According to Borgen, the resolution neither promotes nor prevents Kosovo’s secession: although it is stressed in the Resolution 1244 (1999) that the political solution shall be based on the principles adopted in two annexes to the document in question, those annexes are silent with regard to the governmental form of the final status, as they refer to the interim

⁷⁰⁰ UNSC Res. 1244 (1999) of 10 June 1999, preambular para., in: Resolutions and Decisions of the Security Council (1999), SCOR 54, United Nations, New York, 2001, p. 33

⁷⁰¹ UNSC Res. 1244 (1999) of 10 June 1999, Annex II, para. 8, in: *Ibid.*, p. 37

⁷⁰² See UNSC Res. 1244 (1999) of 10 June 1999, para. 1, in: *Ibid.*, p. 33

political framework.⁷⁰³ This author emphasizes the fact that the responsibility of the international civil presence is to promote the establishment, pending a final settlement, of substantial autonomy and self-government in Kosovo and this “substantial autonomy” language is applicable to the interim status of Kosovo.⁷⁰⁴ Furthermore, the author asserts that references to the territorial integrity of the FRY are solely “in the preambular language and not in the operational language. The document is therefore silent as to what form the final status of Kosovo takes.”⁷⁰⁵

According to another source, the reference in the preamble to the sovereignty and territorial integrity of the FRY was conditioned by utmost upholding of the Helsinki Final Act, which entails equal recognition of a state’s right to sovereignty and territorial integrity and the right to self-determination enjoyed by the minority people.⁷⁰⁶

Goodwin asserts that the Security Council Resolution 1244 (1999) does not provide a basis for an imposed solution as the necessity of a negotiated agreement has been emphasized in the document in question, and the resolution is at pains to affirm the FRY’s sovereignty and territorial integrity.⁷⁰⁷ The author stresses the fact that the Rambouillet Accords guaranteed Kosovo substantive autonomy through negotiations between the two parties and, at the same time, the agreement ruled out changes to the borders of the province regardless of rejection of its provisions by Serbia.⁷⁰⁸ It has been emphasized by Goodwin that within the plain meaning of the notion of “self-government”, as denoting merely the control over internal affairs: “the legal basis establishing the UN mission in Kosovo appears to

⁷⁰³ C. J. Borgen, Kosovo’s Declaration of Independence: Self-Determination, Secession and Recognition, in: ASIL Insights, Vol. 12, Issue 2, 2008, available on the website of the ASIL, at: <http://www.asil.org/search.cfm?displayPage=358> [accessed: 16.12.2008]

⁷⁰⁴ *Ibid.*

⁷⁰⁵ *Ibid.*

⁷⁰⁶ B. Grgić / P. Marusich, Interpreting Kosovo’s Independence, in: Slovak Foreign Policy Affairs, Review for international politics, security and integration, Vol. VI, 2005, p. 26

⁷⁰⁷ M. Goodwin, From Province to Protectorate to State? Speculation on the Impact of Kosovo’s Genesis upon the Doctrines of International Law, in: German Law Journal, Vol. 8, 2007, p. 11

⁷⁰⁸ *Ibid.*

rule out independence unless established via a consensual political process.”⁷⁰⁹

It has to be noted at this stage that, according to the Rambouillet Agreement, there shall be no changes to the borders of Kosovo. But it is also true that the same document provided for a necessity to convene a meeting after certain period of time, in order to determine a mechanism for a final settlement for Kosovo taking into account, among other things, the will of the respective people. In introducing this latter provision, the document has underscored the dimensions of the earned sovereignty approach. Thus, it cannot be said that the Rambouillet Accords ruled out Kosovo’s independence, as an option, at the end of the road.

As a consequence of the Security Council Resolution 1244 (1999), Kosovo was transformed into a UN protectorate, Serbia’s claims to Kosovo largely eroded and civil and military presence of Serbia was removed on the basis of introduction of the UN administration and the KFOR.⁷¹⁰ It has been stressed that the first legislative act of the UNMIK *de facto* suspended Serbia’s sovereignty over Kosovo and, while the UN claims no sovereignty over Kosovo, it is also true that the UNMIK has not administered the territory in question in the name of Serbia and Kosovo is in no manner governed by Serbia.⁷¹¹ The following conclusion has been made with regard to the legal context since 1999:

“[...] the UN has served as an enabler for Kosovo’s self-governance while Serbia has watched on the sidelines. The unsettled sovereignty of the region promotes the argument that Kosovo has *de jure* independence as a consequence of its *de facto* status.”⁷¹²

It follows that what Milošević did not accept earlier, was imposed on the FRY after the NATO military intervention. The legal basis of that imposition was the UN Security Council Resolution 1244 (1999). An

⁷⁰⁹ *Ibid.*

⁷¹⁰ See B. Grgić / P. Marusich, Interpreting Kosovo’s Independence, in: Slovak Foreign Policy Affairs, Review for international politics, security and integration, Vol. VI, 2005, p. 25

⁷¹¹ *Ibid.*

⁷¹² *Ibid.*, (italics in original)

important question in this respect reads as follows: could the UN Security Council impose Kosovo's independence on Serbia? The latter question has to be answered at this point.

7.2.6 Kosovo's independence imposed on Serbia?

7.2.6 (i) The UN Security Council and the issue of permanent alteration of state boundaries

According to Goodwin, Chapter VII of the UN Charter does not expressly grant the Security Council the authority to alter territorial borders of a state without the consent of that state, but this power can be inferred from the wording of Art. 41 of the Charter.⁷¹³ The latter provision of the document stipulates that the Security Council has the competence to decide about the measures (not involving the use of armed force) which have to be employed in order to give effect to its decisions.⁷¹⁴ The ICTY has stressed with regard to Articles 41 and 42 that they express a broad discretion of the Security Council in deciding on the course of action needed for the maintenance and restoration of international peace and security under Chapter VII of the Charter:

“The language of Article 39 is quite clear as to the channelling of the very broad and exceptional powers of the Security Council under Chapter VII through Articles 41 and 42.”⁷¹⁵

Furthermore, extensive powers of the UN Security Council can be deduced from the doctrine of implied powers elaborated by the ICJ:

“Under international law, the Organization must be deemed to have those powers which, though not expressly provided in the charter, are conferred

⁷¹³ M. Goodwin, *From Province to Protectorate to State? Speculation on the Impact of Kosovo's Genesis upon the Doctrines of International Law*, in: *German Law Journal*, Vol. 8, 2007, p. 12

⁷¹⁴ *See* Article 41 of the Charter of the United Nations, in: I. Brownlie (ed.), *Basic Documents in International Law*, 4th ed., Oxford, 1995, pp. 14-15

⁷¹⁵ *International Criminal Tribunal for the Former Yugoslavia: Decision in Prosecutor v. Duško Tadić*, Case No. IT-94-1-AR72, para. 31, in: 35 *ILM* 32 (1996), p. 43

upon it by necessary implication as being essential to the performance of its duties.”⁷¹⁶

Given those extensive powers of the UN Security Council, their impact on the case of Kosovo has to be addressed. Goodwin casts doubt on the applicability of Art. 39 to the “current” situation between Kosovo and Serbia.⁷¹⁷ It has to be stressed at this point that the article in question was published in 2007. So, Goodwin refers to “historical abuses” of the rights of Kosovo Albanians and questions, whether Art. 39 of the UN Charter can reasonably be activated by a situation which no longer exists. The following conclusion has been made in respect of Kosovo’s status:

“Despite the doubts raised, there remain strong arguments to support the suggestion that the Security Council is empowered under Chapter VII to grant Kosovo independence; at least, that such action would be in line with earlier expansions of Security Council powers.”⁷¹⁸

But before addressing the dimensions of the Kosovo case in this context, the possibility of the “internationally promoted” emergence of an independent state has to be examined.

7.2.6 (ii) Independence via “internationalization”: the case of East Timor

It is important at this stage to consider the example of East Timor, former Portuguese colony which enjoyed short period of independence lasting for a few days in 1975 and which was forcibly annexed by Indonesia, the latter transforming the territory in question into her 27th province.⁷¹⁹ It has to be noted that the annexation was not recognized by the UN which regarded East Timor as a non-self-governing territory, i.e. despite the fact that

⁷¹⁶ Reparation for injuries suffered in the service of the United Nations, Advisory Opinion: I.C.J. Reports 1949, p. 174 (p. 182)

⁷¹⁷ M. Goodwin, From Province to Protectorate to State? Speculation on the Impact of Kosovo’s Genesis upon the Doctrines of International Law, in: German Law Journal, Vol. 8, 2007, p. 15

⁷¹⁸ *Ibid.*, p. 16

⁷¹⁹ See M. Schlicher / A. Flor, Osttimor – Konfliktlösung durch die Vereinten Nationen, in: K. Ipsen et al. (Hrsg.), FW, Journal of International Peace and Organization, Bd. 78, Heft 1, 2003, p. 251

Indonesia had occupied the territory in question, this *de facto* situation was neglected and Portugal was still considered as a *de jure* administering power.⁷²⁰

In 1999, after the worsening of economic and political situation within the country, the Indonesian government expressed its intention to offer the people of East Timor a choice between autonomy and independence.⁷²¹ Moreover, in January 1999 Suharto's interim successor, President Habibie announced that if the East Timorese did not accept the offer concerning the autonomous status, he would recommend separation of the territory from Indonesia.⁷²² Further important developments with regard to the problem of East Timor took place on 5 May 1999 as the agreement was reached between Indonesia and Portugal on the question of East Timor and, at the same time, there were agreements between the UN and the governments of Indonesia and Portugal concerning the modalities for the popular consultation of the East Timorese through a direct ballot.⁷²³

The UN mandated the mission in East Timor (UNAMET) to conduct the self-determination ballot and, as pro-Indonesian militia and the Indonesian army responded to an overwhelming vote for independence on 30 August 1999 with violence, Indonesia was pressured to accede to an Australian-led, UN-mandated multinational force, the International Force for East Timor (INTERFET) which was entrusted with the task of restoring order.⁷²⁴

The UN Security Council passed the Resolution 1272 (1999) on the basis of which the principal organ of the world organization: a) welcomed the successful conduct of the popular consultation in East Timor; b) took note of the outcome expressing the will of the East Timorese people to begin the process of transition, under the authority of the UN, towards independence; c) reaffirmed respect for the sovereignty and territorial integrity of

⁷²⁰ *Ibid.*, p. 254

⁷²¹ See S. Nair, Human Rights, Sovereignty, and the East Timor "Question", in: *Global Society, Journal of Interdisciplinary International Relations*, Vol. 14, 2000, p. 115

⁷²² I. Martin / A. Mayer-Rieckh, *The United Nations and East Timor: From Self-Determination to State-Building*, in: *International Peacekeeping*, Vol. 12, 2005, p. 105

⁷²³ See UNSC Res. 1272 (1999) of 25 October 1999, in: *Resolutions and Decisions of the Security Council (1999)*, SCOR 54, United Nations, New York, 2001, p. 130

⁷²⁴ See I. Martin / A. Mayer-Rieckh, *The United Nations and East Timor: From Self-Determination to State-Building*, in: *International Peacekeeping*, Vol. 12, 2005, p. 104

Indonesia; d) determined that the continuing situation in East Timor constitutes a threat to peace and security; e) acting under Chapter VII of the UN Charter, decided to establish the United Nations Transitional Administration in East Timor (UNTAET).⁷²⁵

This resolution bears important peculiarities concerning the legal context of its application. According to Rothert, any threat to international peace and security was quelled by the INTERFET, it follows that the situation in East Timor did not constitute a threat to the international peace and security by the time when the Security Council adopted the resolution in question. But the strongest argument for the UN transitional administration was that the alternative was anarchy and, at that time, the anarchy in East Timor could pose a threat to international peace and security.⁷²⁶ Furthermore, the author stresses that the document introduced a kind of novelty within the international legal system: a threat to the exercise of the right to self-determination in a non-self-governing territory represents a threat to international peace and security, despite the fact that this precedent is limited to the transitional situations and the cases in which the UN assumes an active role in giving effect to the right of self-determination.⁷²⁷

Thus, East Timor became the territory governed by the international administration during the period of “transition”. It has to be noted at this stage that the UNTAET had extensive powers. According to Traub, the transitional administration “is not just helping the new country’s government – it *is* that government.”⁷²⁸ In May 2002 East Timor became an independent state, the Democratic Republic of Timor-Leste.⁷²⁹ On 27 September 2002 the newly emerged state was admitted to the UN.⁷³⁰

⁷²⁵ UNSC Res. 1272 (1999) of 25 October 1999, preambular paras. and para. 1, in: Resolutions and Decisions of the Security Council (1999), SCOR 54, United Nations, New York, 2001, pp. 130-131

⁷²⁶ M. Rothert, U.N. Intervention in East Timor, in: Columbia Journal of Transnational Law, Vol. 39, 2000, p. 281

⁷²⁷ *Ibid.*

⁷²⁸ J. Traub, Inventing East Timor, in: Foreign Affairs, Vol. 79, 2000, p. 74 (italics in original)

⁷²⁹ Information available on the official web portal of the Government of Timor-Leste, at: <http://www.timor-leste.gov.tl/index.asp> [accessed: 19.12.2008]

⁷³⁰ Information available on the official website of the UN, at: <http://www.un.org/News/Press/docs/2006/org1469.doc.htm> [accessed: 19.12.2008]

This is an example of a former non-self-governing territory, which became an independent state after the transitional international administration established by the UN Security Council. But there are essential differences between the two cases of Kosovo and East Timor. The latter represented a territory that was illegally annexed by Indonesia and the situation was a consequence of the illegal use of force, the state of affairs which was not recognized by the overwhelming majority of the international community.

It has to be noted as a “starting point” that Suharto’s Indonesia did not possess a valid territorial title, whereas Kosovo represented an autonomous province of Serbia. Furthermore, there were agreements achieved between Indonesia, Portugal and the UN regarding the right of the East Timorese people to self-determination. Indonesia had formally consented to the independent existence of East Timor by offering respective people the choice between autonomy and independence. But Serbia has not done that. Serbia considers Kosovo as its integral part. In his statement made at the 63rd session of the UN General Assembly, president of Serbia, Boris Tadić, referred to Kosovo’s declaration of independence emphasizing that this act represents “the unilateral, illegal and illegitimate declaration of independence by the ethnic Albanian authorities of our southern province of Kosovo and Metohija”⁷³¹. Thus, the question relevant to the purposes of the present study is, whether the UN Security Council could legally impose Kosovo’s independence on Serbia without the consent of the latter.

7.2.6 (iii) Kosovo’s status in the context of “international legislation”

Goodwin states that the UN Security Council has not altered state borders on a permanent basis without, at least, the fiction of consent of states involved and to do this in the case of Kosovo, would mean a new development in respect of its competence and the extent of its authority, describing the possibility of such an alteration as a “far-reaching assault on

⁷³¹ General Assembly, 63rd session, Statement by H.E. Mr. Boris Tadić, President of the Republic of Serbia, New York, 23 September 2008, p. 1, available on the official website of the UN, at: http://www.un.org/ga/63/generaldebate/pdf/serbia_en.pdf [accessed: 20.12.2008]

state sovereignty”⁷³². It has been argued that the state of things which envisions the alteration of boundaries of a sovereign state by the decision of a group of states, acting in the form of the Security Council, would have far-reaching impact on the doctrine of sovereign equality which represents a meaningful bulwark protecting the position of weaker states.⁷³³ Goodwin stresses that one of the fundamental functions of public international law is to provide formal equality to the members of the international community, and this aspect represents an essential distinction between international law and the notion of politics and bearing in mind this circumstance, the author concludes:

“[...] there is a strong sense in which support for an independent Kosovo is a political choice rather than a legal one, and thus undermines the wider goal of peace and security that the law is broadly intended to serve.”⁷³⁴

This is the point at which the relevance of NATO’s humanitarian intervention has to be emphasized. According to Cvijic, it is impossible to decide on the legality of Kosovo’s self-determination without linking this issue to the problem of legality of the 1999 humanitarian intervention, because the UN-mediated negotiating process on the status of the territory in question, and the legal basis of the UNMIK, represent a continuation of the military and political involvement of the NATO.⁷³⁵

It has been argued that humanitarian intervention, if carried out without the authorization of the UN Security Council, is illegal under public international law. But it can become legal after some period of time, if it does not go beyond its original limited scope, i.e. the prevention of a humanitarian catastrophe within a sovereign state.⁷³⁶ It follows that the imposition of self-determination of Kosovo on Serbia, without the mandate of the UN Security Council, as this latter state of affairs was caused by the

⁷³² M. Goodwin, From Province to Protectorate to State? Speculation on the Impact of Kosovo’s Genesis upon the Doctrines of International Law, in: German Law Journal, Vol. 8, 2007, p. 16

⁷³³ *Ibid.*, p. 17

⁷³⁴ *Ibid.*

⁷³⁵ S. Cvijic, Self-determination as a Challenge to the Legitimacy of Humanitarian Interventions: The Case of Kosovo, in: German Law Journal, Vol. 8, 2007, p. 60

⁷³⁶ *Ibid.*

fear of a potential Russian or Chinese veto, would de-legitimize the original intervention.⁷³⁷

If we recall the chain of events surrounding the case of Kosovo, the following state of things becomes evident: Milošević rejected to sign the Rambouillet Accords and after that refusal, on 24 March 1999, NATO launched an air campaign against Belgrade. There were five main objectives pursued during the campaign: a verifiable cessation of all combat activities and killings, withdrawal of Serb military, police and paramilitary forces from Kosovo, the deployment of an international military force, the return of refugees and unimpeded access to humanitarian aid, a political framework for Kosovo based on the Rambouillet Accords.⁷³⁸ NATO won securing an outcome which was an expression of the deal that was previously rejected by Milošević.⁷³⁹

On 3 June 1999 the Serbian leader accepted a joint EU-Russian peace proposal. The “Ahtisaari – Chernomyrdin – Milošević Agreement” (the “Kosovo Accords”) became an important document followed by the “Military Technical Agreement” of 9 June between the International Security Force (“KFOR”) and the FRY (“Kumanovo Agreement”) and the UN Security Council Resolution 1244 (1999) on 10 June 1999, which *de facto* suspended the FRY’s sovereignty over Kosovo. But it has to be stressed that the settlement of 3-10 June, as a consequence of protracted diplomatic efforts, included elements of compromise on the part of the NATO.⁷⁴⁰

Thus, it can be asserted that the military intervention by the NATO was a kind of watershed in this whole process. Moreover, the military involvement in question establishes a link between the Rambouillet Accords and the Security Council Resolution 1244 (1999). It can be argued that the

⁷³⁷ *Ibid.*

⁷³⁸ See A. Roberts, NATO’s “Humanitarian War” over Kosovo, in: *Survival, The IISS Quarterly*, Vol. 41, 1999, p. 103

⁷³⁹ I. H. Daalder / M. E. O’Hanlon, *Unlearning the Lessons of Kosovo*, in: *Foreign Policy*, No. 116, 1999, p. 130

⁷⁴⁰ A. Roberts, NATO’s “Humanitarian War” over Kosovo, in: *Survival, The IISS Quarterly*, Vol. 41, 1999, p. 116

intervention of 1999 represented a kind of “compulsory basis” of the further implementation of the Rambouillet Agreement.⁷⁴¹

Bearing in mind these considerations, it has to be concluded that the question, whether the UN Security Council could legally impose Kosovo’s independence on Serbia, is connected with NATO’s military intervention. It is important at this point to address the problem of the legislative capacity of the Security Council.

7.2.6 (iv) The UN Security Council and its legislative capacity

As it was clearly demonstrated by the case of East Timor and the Resolution 1272 (1999) of the UN Security Council, the latter has the discretion to invoke Chapter VII of the UN Charter, even if the factual situation does not constitute a threat to the peace and security. The Security Council determines the existence of this kind of situation on the basis of its extensive powers and, sometimes, political considerations serve as guidelines in that context:

“While the “act of aggression” is more amenable to a legal determination, the “threat to the peace” is more of a political concept. But the determination that there exists such a threat is not a totally unfettered discretion, as it has to remain, at the very least, within the limits of the Purposes and Principles of the Charter.”⁷⁴²

Invocation of Art. 39 of the Charter in the Kosovo case is not as problematic as are the consequences of the Security Council legislation. It has been stressed that the basic legal limitation on the legislative capacity of the Security Council is that its exercise must relate to the maintenance of international peace and security.⁷⁴³ According to Talmon, the Security Council enjoys powers which are conferred on it, or implied in the UN

⁷⁴¹ See M. - J. Calic, Die Jugoslawienpolitik des Westens seit Dayton, in: Aus Politik und Zeitgeschichte, Beilage zur Wochenzeitung Das Parlament, B 34/99, 1999, p. 28; See also B. Simma, NATO, the UN and the Use of Force: Legal Aspects, in: EJIL, Vol. 10, 1999, p. 9

⁷⁴² International Criminal Tribunal for the Former Yugoslavia: Decision in Prosecutor v. Duško Tadić, Case No. IT-94-1-AR72, para. 29, in: 35 ILM 32 (1996), p. 43 (emphases in original)

⁷⁴³ See P. C. Szasz, The Security Council Starts Legislating, in: AJIL, Vol. 96, 2002, p. 904

Charter, and its resolutions acquire binding force in terms of Art. 25 if those resolutions are *intra vires* the UN Charter, i.e. the legislative powers of the Council are limited by the jurisdiction of the UN and by the attribution and division of competences within the organization itself.⁷⁴⁴

As with regard to Art. 39 of the UN Charter, it has been emphasized that the basic restriction of the Council's legislative power is the requirement, according to which, the competence of the Security Council must be exercised "in a manner that is conducive to the maintenance of international peace and security. The Charter does not establish the Council as an omnipotent world legislator but, rather, as a single-issue legislator."⁷⁴⁵ It follows that, according to the provisions of the UN Charter, the Council's actions under Chapter VII are subject to the principle of proportionality:

"These provisions indicate that Council legislation must be *necessary* in order to maintain international peace and security, meaning that the usual ways to create obligations of an abstract and general character (the conclusion of treaties and the development of customary international law) must be inadequate to achieve that aim. Council legislation is always emergency legislation."⁷⁴⁶

Furthermore, the humanitarian intervention, as such, is subject to certain criteria justifying its accomplishment. According to Cassese, under following conditions, resort to armed force may gradually become justified even absent any authorization by the UN Security Council: a) gross breaches of human rights involving loss of life of hundreds or thousands of innocent people, and amounting to crimes against humanity, are committed on the territory of a sovereign state; b) if the crimes result from anarchy in a respective state, it has to be proved that central authorities are unable to bring those crimes to a halt. If those atrocities are the work of central authorities, it must be demonstrated that those authorities rejected the cooperation with international institutions or refused to comply with appeals, recommendations etc; c) the UN Security Council is unable to take

⁷⁴⁴ S. Talmon, *The Security Council as World Legislature*, in: *AJIL*, Vol. 99, 2005, p. 182

⁷⁴⁵ *Ibid.*

⁷⁴⁶ *Ibid.*, p. 184 (italics in original)

any coercive action to stop the atrocities; d) all peaceful means to achieve a solution have been exhausted; e) a group of states (not a single hegemonic power, nor such a power with the support of a client state or an ally) decides to try to put an end to the massacres with the support or non-opposition of the majority of the UN members.⁷⁴⁷ The sixth criterion is of direct relevance to the legislative capacity of the Security Council and it embodies the principle of proportionality in this context. The requirement in question reads as follows:

“(vi) armed force is exclusively used for the limited purpose of stopping the atrocities and restoring respect for human rights, not for any goal going beyond this limited purpose.”⁷⁴⁸

Bearing in mind that the legislation of the UN Security Council is always the emergency legislation limited to the objective of maintenance of the international peace and security, and the creation of obligations of an abstract and general character is considered to be inadequate to achieve that aim, it has to be concluded that the Security Council Resolution 1244 (1999) could not legally impose Kosovo’s independence on the FRY as this kind of imposition would represent the permanent alteration of borders of a sovereign independent state. This assertion is also backed by the fact that the document in question is linked with NATO’s humanitarian intervention, and the principle of proportionality is applicable to both of them. This state of things is also confirmed with reference to the mandate of the UNMIK which lacked a political resolution for the issue of Kosovo.⁷⁴⁹ Furthermore, the disruptive effect of such an imposition on the sovereign equality of states denotes that this solution would not contribute to the maintenance of the international peace and security, on the contrary, “the permanent alteration of Serbia’s borders without its consent would be manifestly

⁷⁴⁷ A. Cassese, *Ex iniuria ius oritur: Are We Moving towards International Legitimation of Forcible Humanitarian Countermeasures in the World Community?*, in: *EJIL*, Vol. 10, 1999, p. 27

⁷⁴⁸ *Ibid.*

⁷⁴⁹ See S. Chesterman, *East Timor in Transition: Self-determination, State-building and the United Nations*, in: *International Peacekeeping*, Vol. 9, 2002, p. 59

disproportionate to the task of maintaining international peace and security.”⁷⁵⁰

7.2.6 (v) The UN Security Council Resolution 1244 (1999) as the document legitimizing the new territorial status

The UN Security Council Resolution 1244 (1999) did not impose Kosovo’s independence, as such, on the FRY, the document in question is neutral with regard to the secession of Kosovo. Furthermore, this resolution did not legalize the intervention, but it “appears to have recognised the new state of affairs by legalising instantaneously the new territorial status.”⁷⁵¹ Thus, despite repeated protests against NATO’s intervention, Russia and China participated in the legitimization of the new territorial situation by not opposing the resolution.⁷⁵²

The problem is that, according to Chesterman, within the international administration established on the basis of the document in question, it was long an open secret that, at the end of the day, Kosovo would acquire the status of an independent state.⁷⁵³ The attitude of the UN Security Council towards the issue of Kosovo was stressed in the Statement of the President of the Security Council issued on 24 October 2005. Respective passage reads as follows:

“The Council therefore supports the Secretary-General’s intention to start a political process to determine Kosovo’s Future Status, as foreseen in Security Council resolution 1244 (1999).”⁷⁵⁴

⁷⁵⁰ See M. Goodwin, From Province to Protectorate to State? Speculation on the Impact of Kosovo’s Genesis upon the Doctrines of International Law, in: German Law Journal, Vol. 8, 2007, p. 16

⁷⁵¹ E. Milano, Unlawful Territorial Situations in International Law, Reconciling Effectiveness, Legality and Legitimacy, Developments in International Law, Vol. 55, Leiden / Boston, 2006, p. 15

⁷⁵² *Ibid.*, p. 16

⁷⁵³ S. Chesterman, East Timor in Transition: Self-determination, State-building and the United Nations, in: International Peacekeeping, Vol. 9, 2002, p. 59

⁷⁵⁴ UNSC, Statement by the President of the Security Council, S/PRST/2005/51, of 24 October 2005, available on the official website of the UN, at: http://www.un.org/Docs/sc/unsc_pres_statements05.htm [accessed: 26.12.2008]

Under the Security Council Resolution 1244 (1999) the question of Kosovo's final status, as such, was deferred.⁷⁵⁵ The resolution established the international administration with a comprehensive mandate encompassing responsibilities in all three branches of the government.⁷⁵⁶ It has been stressed that, during the interim period, the stance of the international community expressed by the Contact Group was determined by four basic principles: no to Belgrade's preference of *status quo ante*, no to Priština's choice implying immediate full independence, no to Serbia's plan concerning the division of Kosovo and no to Kosovo's striving for Greater Kosovo or Albania.⁷⁵⁷

Kovács asserted in 2003 that the "waiting game" over Kosovo could end with the recognition of independence and, in this case, the international community would be assisting in dismantling the normative orthodoxy which shaped its decisions concerning the recognition of former republics of the Yugoslav federation. So, Kosovo's independence would imply that, for the first time during the Balkan crisis, statehood would be granted to a territory which is smaller than a former federal republic.⁷⁵⁸ It follows that unless Serbia and Montenegro would agree to a negotiated divorce, the recognition of Kosovo's independence would override the rule of *uti possidetis* as applied to the case of the former Yugoslavia.⁷⁵⁹

7.2.7 Kosovo's "final" status settlement and its legal implications

In 2007 the Special Envoy of the UN Secretary-General for the future status process for Kosovo, Martti Ahtisaari, submitted the report on Kosovo's future status and the "Comprehensive Proposal for the Kosovo Status Settlement" (the so-called "Ahtisaari Plan"). Upon the consideration of Kosovo's history and existing reality and negotiations with respective

⁷⁵⁵ See S. Talbott, Self-Determination in an Interdependent World, in: Foreign Policy, No. 118, 2000, p. 156

⁷⁵⁶ See H. Strohmeier, Collapse and Reconstruction of a Judicial System: The United Nations Missions in Kosovo and East Timor, in: AJIL, Vol. 95, 2001, pp. 46-47

⁷⁵⁷ W. van Meurs / S. Weiss, Kosovo's Post-Status Status and the Status of EU Conditionality, in: Südosteuropa Mitteilungen, Jg. 46, 2006, p. 19

⁷⁵⁸ M. M. Kovács, Standards of self-determination and standards of minority-rights in the post-communist era: a historical perspective, in: Nations and Nationalism, Vol. 9, 2003, p. 446

⁷⁵⁹ *Ibid.*, pp. 446-447

parties, Ahtisaari arrived at the conclusion that the only viable solution to the problem was Kosovo's independence, supervised, for an initial period, by the international community.⁷⁶⁰ The conclusion of the document embodies the most important hallmark of the Kosovo case, namely its uniqueness:

“15. Kosovo is a unique case that demands a unique solution. It does not create a precedent for other unresolved conflicts. In unanimously adopting resolution 1244 (1999), the Security Council responded to Milosevic's actions in Kosovo by denying Serbia a role in its governance, placing Kosovo under temporary United Nations administration and envisaging a political process designed to determine Kosovo's future. The combination of these factors makes Kosovo's circumstances extraordinary.”⁷⁶¹

It is true that Serbia rejected the “Ahtisaari Plan”, but the Kosovo Albanian leadership endorsed the “Comprehensive Proposal for the Kosovo Status Settlement”. The Assembly of Kosovo accepted the Proposal in the declaration made in 2007 expressing its commitment to the implementation of the document in a legally binding manner, and in the declaration of independence of 17 February 2008 the Assembly reiterated its commitment to the implementation of the settlement.⁷⁶² Moreover, respective provisions of the settlement are enshrined in the Constitution of the Republic of Kosovo adopted by the Assembly on 9 April 2008 and in other domestic legal acts.⁷⁶³

These developments surrounding the Kosovo case are uncommon within the realm of public international law. It has been asserted that Ahtisaari's Comprehensive Proposal concerning Kosovo's final status represented a

⁷⁶⁰ Letter dated 26 March 2007 from the Secretary-General addressed to the President of the Security Council, Report of the Special Envoy of the Secretary-General on Kosovo's future status, UNSC, S/2007/168, 26 March 2007, para. 5, p. 2, available on the official website of the United Nations Office of the Special Envoy for Kosovo, at: <http://www.unosek.org/docref/report-english.pdf> [accessed: 27.12.2008]

⁷⁶¹ Report of the Special Envoy of the Secretary-General on Kosovo's future status, UNSC, S/2007/168, 26 March 2007, para. 15, in: *Ibid.*, p. 4

⁷⁶² Information available on the official website of the International Civilian Office Kosovo, at: <http://www.ico-kos.org/?id=4> [accessed: 27.12.2008]

⁷⁶³ *Ibid.*

“roadmap for independence”⁷⁶⁴. In the Statement of the President of the Security Council issued on 24 October 2005 and made on behalf of the main body of the organization, reference was made to the Security Council Resolution 1244 (1999) as the document envisaging the initiation of a process of the determination of Kosovo’s final status. But that resolution did not impose Kosovo’s independence on the FRY. Despite this fact, the resolution was applied as a legal basis for starting the political process of the final status settlement. A respective proposal, providing for Kosovo’s independence, was rejected by the Serb authorities and was, on the contrary, endorsed by the Kosovo Albanians.

This state of things was accompanied by negotiations between the parties involved, conducted by the “Troika” composed of the EU, the US and the Russian Federation. In December 2007 the negotiator concluded that parties were unable to reach an agreement as neither side was willing to yield to the demands of the other party concerning the core question, namely the issue of sovereignty. It can be thus said that Serbia did not agree to Kosovo’s independence. In February 2008 Kosovo was declared independent by respective authorities. Thus, the unilateral declaration of independence (UDI) took place, there was no negotiated divorce.

So, the question of overwhelming importance reads as follows: what has really happened to Kosovo? It has been asserted that the international community and Serbia, through the acquiescence to the progression of events, have created “self-determination by estoppel” steering the Kosovo Albanians into the expectation of unfettered independence following a referendum.⁷⁶⁵ This phrase, “self-determination by estoppel”, is an interesting manifestation of the right to self-determination and it is important at this point to examine its dimensions and the question of its applicability to the Kosovo case.

⁷⁶⁴ T. Loza, Kosovo: When Success Equals Failure [7 August 2007], in: Transitions Online (www.tol.org), Issue no. 08/14/2007, p. 1

⁷⁶⁵ B. Grgić / P. Marusich, Interpreting Kosovo’s Independence, in: Slovak Foreign Policy Affairs, Review for international politics, security and integration, Vol. VI, 2005, p. 26

7.2.8 Self-determination by estoppel?

7.2.8 (i) *The notion of acquiescence and its dimensions*

Acquiescence is an essential element of the acquisitive prescription, the latter representing a mode of the attainment of the title to territory:

“The doctrine of acquiescence represents the proposition of binding effect resulting from passivity and inaction with respect to foreign claims which, according to the general practice of States [...] usually call for protest in order to assert, preserve or safeguard rights.”⁷⁶⁶

Acquiescence is expressed through the following maxim: *qui tacet consentire videtur si loqui debuisset ac potuisset*, but the concept in question is not a simple toleration or silence in the context of a respective claim, the notion of acquiescence represents “a type of qualified inaction (*qualifiziertes Stillschweigen*).”⁷⁶⁷ It follows that the concept in question is an expression of silence, but silence does not amount to acquiescence in each and every single situation and the application of the doctrine of acquiescence depends on the circumstances of a particular case.⁷⁶⁸

Acquiescence is a significant manifestation in the context of the creation of prescriptive rights. Following dimensions of acquiescence are of overwhelming importance with regard to a *de facto* situation:

“(1) Acquiescence is equivalent to tacit or implied consent. It takes the form of silence or absence of protest in circumstances which, according to the practice of States and the weight of authority, demand a positive reaction in order to preserve a right.

(2) It may be said to constitute an admission or recognition of the legality of the practice in question, or to serve the purpose of validating a practice which was originally illegal.

⁷⁶⁶ J. P. Müller / T. Cottier, Acquiescence, in: R. Bernhardt (ed.), EPIL, Vol. 1 (1992), p. 14

⁷⁶⁷ *Ibid.*, (italics in original)

⁷⁶⁸ See I. C. MacGibbon, The Scope of Acquiescence in International Law, in: BYIL, Vol. 31, 1954, p. 170

(3) A consequence of acquiescence is to preclude an acquiescent State from denying or challenging the validity of a claim in which it has acquiesced.”⁷⁶⁹

As it is evident from these considerations, the notion of acquiescence represents the manifestation having different weighty dimensions. It must be noted that the notion of acquiescence played an important role in significant judgments of the ICJ. In the case concerning the Temple of Preah Vihear the difference in views between Cambodia and Thailand about the territorial sovereignty over the region of this ancient temple was the subject of the dispute. Until Cambodia became independent in 1953, it was a part of the French Indo-China and its foreign relations were conducted by France which concluded a boundary treaty with Thailand (the latter was then called Siam) in 1904. According to Art. 1 of this document, the line of the frontier in the eastern part of the Dangrek region followed the line of the true watershed, placing the Temple of Preah Vihear in Thailand. It has been agreed that the exact course of the frontier was to be delimited by a Mixed Commission of French and Siamese delegates.

The Siamese authorities requested that the French topographical officers should map the region. The French officers accomplished this task in 1907 and presented the map, according to which, the Temple of Preah Vihear was on the Cambodian side. This map was the central issue in the context of the case in question. Cambodia founded its claim to respective territory on this map, while Thailand argued that this map contained a mistake and asserted that she had taken a passive position and “a course of conduct, involving at most a failure to object, cannot suffice to render her a consenting party [...] so great as to affect the sovereignty over the Temple area.”⁷⁷⁰ The Court examined Thailand’s argument and made a statement of overwhelming importance with regard to the issue of acquiescence:

“[...] it is clear that the circumstances were such as called for some reaction, within a reasonable period, on the part of the Siamese authorities, if they

⁷⁶⁹ *Ibid.*, p. 182

⁷⁷⁰ Case concerning the Temple of Preah Vihear (Cambodia v. Thailand), Merits, Judgment of 15 June 1962: I.C.J. Reports 1962, p. 6 (p. 22)

wished to disagree with the map or had any serious question to raise in regard to it. They did not do so, either then or for many years, and thereby must be held to have acquiesced.”⁷⁷¹

As a result of this situation, the Court found that “the Temple of Preah Vihear is situated in territory under the sovereignty of Cambodia.”⁷⁷²

It follows that an effective protest is required to avoid legal consequences of acquiescence. It has been suggested that raising an objection in an indirect way does not amount to effective protest, a valid protest requires “a formal objection on the specific points”⁷⁷³ which should be followed by other permissible means such as enquiry, mediation, conciliation or bringing the issue before international organizations. If respective states have accepted the jurisdiction of the ICJ, the protesting state can approach the world court for the judicial settlement of the dispute.⁷⁷⁴

Thus, in order to prevent acquiescence from working, a state, confronted with a claim on the part of another state, should protest quickly, firmly and frequently and with regard to any possible implication that might arise out of the claim.⁷⁷⁵ It is important at this point to refer to the notion of estoppel, or preclusion, which is another significant manifestation in this overall context.

7.2.8 (ii) The concept of estoppel in international law

The concept in question means that the party relying on estoppel must have been impelled to undertake the action having legal consequences, or to abstain from it, on the basis of definite and unequivocal representations of another state and this reliance on the statements of that state must take place in good faith. It follows that the deviation from the initial representation

⁷⁷¹ *Ibid.*, p. 6 (p. 23)

⁷⁷² *Ibid.*, p. 6 (p. 36)

⁷⁷³ See P. K. Menon, Title to Territory: Traditional Modes of Acquisition by States, in: RDI, Vol. 72, 1994, p. 31

⁷⁷⁴ *Ibid.*, pp. 31-32

⁷⁷⁵ See D. H. N. Johnson, The Anglo-Norwegian Fisheries Case, in: ICLQ, Vol. 1, Pt. 2, 1952, pp. 165-166

must bring about damages to the relying state or advantages for the representing state.⁷⁷⁶

Essential requirements connected with the operation of estoppel can be summarized as follows: the meaning of the statement or representation must be clear and unambiguous, the representation or statement must be voluntary, unconditional and authorized, and a party must rely, in good faith, on the representation / the statement of the other state to its detriment, or to the advantage of the representing state or the party making a statement.⁷⁷⁷

It is important at this stage to introduce some meaningful considerations in respect of the concept in question. The Temple of Preah Vihear Case is informative with regard to the notion of estoppel. Judge Alfaro made a statement concerning the principle applied by the ICJ in this case. The statement explains the essence of the concept in question and, therefore, it may be quoted at some length:

“[...] a State must not be permitted to benefit by its own inconsistency to the prejudice of another State (*nemo potest mutare consilium suum in alterius injuriam*). *A fortiori*, the State must not be allowed to benefit by its inconsistency when it is through its own wrong or illegal act that the other party has been deprived of its right or prevented from exercising it. (*Nullus commodum capere de sua injuria propria*). [...] the party which by its recognition, its representation, its declaration, its conduct or its silence has maintained an attitude manifestly contrary to the right it is claiming before an international tribunal is precluded from claiming that right (*venire contra factum proprium non valet*).”⁷⁷⁸

It has been asserted by Judge Alfaro that the principle, according to which, the contradiction between previous acts and subsequent claims has to be condemned, is not a mere rule of evidence, it represents the rule of

⁷⁷⁶ J. P. Müller / T. Cottier, Estoppel, in: R. Bernhardt (ed.), EPIL, Vol. 2 (1995), p. 116

⁷⁷⁷ See D. W. Bowett, Estoppel before International Tribunals and its Relation to Acquiescence, in: BYIL, Vol. 33, 1957, pp. 188-193

⁷⁷⁸ Separate Opinion of Vice-President Alfaro, Case concerning the Temple of Preah Vihear (Cambodia v. Thailand), Merits, Judgment of 15 June 1962: I.C.J. Reports 1962, p. 6 (p. 40; italics in original)

“substantive character”.⁷⁷⁹ The primary foundation of the principle in question has been regarded to be the good faith that must predominate in international relations.⁷⁸⁰

As with regard to the status of the notion of estoppel within the realm of public international law, it has been asserted that it is doubtful, whether the concept in question has entered the corpus of customary international law, but it can be regarded as a general principle of law as it is common to most domestic legal systems.⁷⁸¹ It has to be noted that the PCIJ referred to “the principle of estoppel”.⁷⁸² Hence, the notion of estoppel enters the realm of public international law through Art. 38, 1.(c) of the Statute of the ICJ.⁷⁸³ The spatial dimension of the concept in question reads as follows:

“The doctrine of estoppel would mean that a State which had recognized another State’s title to a particular territory would be estopped from denying the other State’s title if that State had taken some action in reliance on the recognition.”⁷⁸⁴

Bearing in mind these considerations, it cannot be said that the notions of acquiescence and estoppel are applicable to the case of Kosovo.

7.2.8 (iii) There is no self-determination by estoppel in the case of Kosovo

There was no such passivity and inaction on the part of Serbia which can be regarded as a tacit or implied consent to the claims of the Kosovo Albanians. Serbia protests effectively and on the specific points against Kosovo’s independence, and the statement made by the president of Serbia at the 63rd session of the UN General Assembly demonstrates this objection

⁷⁷⁹ *Ibid.*, p. 6 (p. 41)

⁷⁸⁰ *Ibid.*, p. 6 (p. 42)

⁷⁸¹ See I. C. MacGibbon, Estoppel in International Law, in: ICLQ, Vol. 7, 1958, p. 470

⁷⁸² Case concerning the Payment of Various Serbian Loans Issued in France, in: Publications of the Permanent Court of International Justice, Ser. A. Nos. 20/21, Collection of Judgments, Leyden, 1929, p. 39

⁷⁸³ See Article 38, 1.(c) of the Statute of the International Court of Justice, in: I. Brownlie (ed.), Basic Documents in International Law, 4th ed., Oxford, 1995, p. 448

⁷⁸⁴ P. K. Menon, Title to Territory: Traditional Modes of Acquisition by States, in: RDI, Vol. 72, 1994, p. 33

quite clearly. Moreover, Serbia has brought the question of legality of Kosovo's UDI before the UN.⁷⁸⁵ On 8 October 2008 the UN General Assembly decided to request the ICJ to render an advisory opinion on the question of compatibility with international law of unilateral declaration of independence (UDI) made by the Provisional Institutions of Self-Government (PISG) of Kosovo.⁷⁸⁶

Thus, it cannot be said that Serbia failed to protest and recognized the title of the Kosovo Albanians to the territory in question. It follows that Serbia cannot be estopped from denying that title. In sum, the notions of acquiescence and estoppel are not applicable to Serbia, because it constantly uses every occasion for the assertion of her claim to Kosovo. Bearing in mind these considerations, the notion of "self-determination by estoppel" has to be rejected in the case of Kosovo.

7.2.9 The reasoning behind the Kosovo status settlement and the problem of precedential value of the Kosovo case

It has to be borne in mind that the international community regarded Serbian actions in the 1990s as the factor having profound impact on Kosovo's cause for independence, and the outcome of the process of respective settlement concerning the final status of the territory in question was influenced by those actions. On 31 January 2006 the Contact Group (made up of the US, the UK, France, Italy, Germany and the Russian Federation) issued the London Declaration. The following statement was made in this document:

⁷⁸⁵ Information available on the official website of the Serbian Government, at: <http://www.srbija.gov.rs/vesti/vest.php?id=48692> [accessed: 03.01.2009]

⁷⁸⁶ UNGA, A/RES/63/3, 63rd session, Agenda item 71, 8 October 2008, Resolution adopted by the General Assembly [without reference to a Main Committee (A/63/L.2)], 63/3. Request for an advisory opinion of the International Court of Justice on whether the unilateral declaration of independence of Kosovo is in accordance with international law, available on the official website of the UN, at: <http://www.un.org/ga/63/resolutions.shtml> [accessed: 03.01.2009]

“Ministers look to Belgrade to bear in mind that the settlement needs, *inter alia*, to be acceptable to the people of Kosovo. The disastrous policies of the past lie at the heart of the current problems.”⁷⁸⁷

Furthermore, in his report on Kosovo’s future status, the Special Envoy of the UN Secretary-General for the future status process for Kosovo stressed that the history of enmity and mistrust has antagonized the relationship between the Kosovo Albanians and the Serbs, this state of things was exacerbated by the actions of Milošević’s regime in the 1990s and the return of the Serbian rule would not be acceptable to the overwhelming majority of the population of Kosovo.⁷⁸⁸ It is thus evident that the international community considered the return to *status quo ante* impossible, the re-establishment of the Serbian rule over Kosovo was excluded, because the Kosovo Albanians would not tolerate such a solution.

But it can be asserted that all the soothing rhetoric about the uniqueness of the Kosovo case turned out erroneous. The problem is that, in terms of a purely legal approach, the Kosovo case cannot have any precedential value because it was a unique problem which demanded a unique solution. Indeed, it can be asserted that international response to the Kosovo crisis “was a *sui generis* incident at a particular point in international political and legal development.”⁷⁸⁹ But how can one persuade political elites in different *de facto states* not to refer to the example of Kosovo in furtherance of their claim to statehood? This is the point at which we enter the world of “political international law”, where the notion of *fait accompli* occupies a prominent place. Fawn has summarized elements of the impact of the Kosovo case on the claims of the post-Soviet *de facto states*:

⁷⁸⁷ Statement by The Contact Group on The Future of Kosovo – London 31 January 2006 (31/01/06), available on the official website of the United Nations Office of the Special Envoy for Kosovo, at: <http://www.unosek.org/unosek/en/docref.html> [accessed: 03.01.2009]

⁷⁸⁸ Letter dated 26 March 2007 from the Secretary-General addressed to the President of the Security Council, Report of the Special Envoy of the Secretary-General on Kosovo’s future status, UNSC, S/2007/168, 26 March 2007, paras. 6, 7, p. 3, available on the official website of the United Nations Office of the Special Envoy for Kosovo, at: <http://www.unosek.org/docref/report-english.pdf> [accessed: 03.01.2009]

⁷⁸⁹ H. McCoubrey, Kosovo, NATO and International Law, in: *International Relations*, Vol. XIV, 1999, pp. 35-36 (italics in original)

1. The first claim rests on the idea that Kosovo is the first subfederal unit of any of the communist federations which is considered for international recognition. The essence of the precedential value of the case in question is that Kosovo's independence will create a universal standard that has to be applied to other entities of the same kind;
2. The second claim is expressed by reference to the analogy. According to this demand, post-Soviet *de facto states* are similar to Kosovo, as they, like the entity in question, were subjected to violence and have fought defensive wars for independence;
3. The third assertion of the post-Soviet *de facto states* denotes that they have a better entitlement to statehood than Kosovo;
4. According to the fourth claim, if Kosovo secures independence, it is not only because it has earned that independence but it will also bring peace;
5. The fifth claim implies the assertion that post-Soviet *de facto states* have already created statehood;
6. According to the sixth claim, whatever happens to Kosovo, it is not the definitive model for the status of the post-Soviet *de facto states*. Thus, on the basis of such an approach, respective elites can keep all options open by using broad terminology with regard to the status they seek.⁷⁹⁰

Furthermore, at the press conference for the Russian and foreign media, the then President of Russia, Vladimir Putin, referring to the Kosovo problem, noted: "If someone thinks that Kosovo can be granted full independence as a state, then why should the Abkhaz or the South-Ossetian peoples not also have the right to statehood?"⁷⁹¹. Bearing in mind these considerations and the war fought on the Georgian soil in August 2008 between the Russian and the Georgian military forces (involving South Ossetia and Abkhazia), it cannot be asserted that non-independent Kosovo would represent a threat to

⁷⁹⁰ R. Fawn, *The Kosovo – and Montenegro – effect*, in: *International Affairs*, Vol. 84, 2008, pp. 280-283

⁷⁹¹ President of Russia, Transcript of the Press Conference for the Russian and Foreign Media, January 31, 2006, Circular Hall, The Kremlin, Moscow, available on the official web portal of the President of Russia, at: <http://www.kremlin.ru/eng/> [accessed: 12.01.2009]

the international peace and security of such a degree that would outweigh disruptive consequences of reactions to Kosovo's independence. Hence, if we accept that Kosovo's independence is a result achieved solely on the basis of the UN Security Council legislation, it becomes evident that such independence would be illegal because it would be disproportionate to the aim of maintaining international peace and security, the latter representing the legal framework of the Security Council's legislative capacity.

7.2.10 The “Republic of Kosovo” – uniqueness of the *de facto* state

The *sui generis* nature of the Kosovo case is that it denotes a kind of mixture of the Security Council's activity and the operation of the right of peoples to self-determination. The Kosovo Albanians made the UDI and, in doing so, they put into action their secessionist bid. What happened in Kosovo was an act of unilateral remedial secession. It does not mean that secession was an inevitable outcome in each and every single constellation, there could be various scenarios in this respect, for example, negotiated divorce or negotiated autonomous status. But parties to the conflict were unable to achieve an agreement, so the Kosovo Albanians acted unilaterally when they declared independence, it was the realization of unilateral remedial secession the requirements of which were met. The Kosovo Albanians, while representing a numerical minority in relation to the rest of the population of a “mother state”, formed an overwhelming majority in the identifiable part of the territory of Kosovo⁷⁹² and they had previously suffered grievous wrongs at the hand of the “parent state”.

It is true that Serbia of Vojislav Koštunica was not that of Milošević⁷⁹³ but the legitimacy of the secessionist claim has to be assessed by reference to the period when Milošević misgoverned Kosovo. That state of things resulted in the “ethnic cleansing” campaign waged against the Kosovo

⁷⁹² See J. Reuter, Die Entstehung des Kosovo-Problems, in: Aus Politik und Zeitgeschichte, Beilage zur Wochenzeitung Das Parlament, B 34/99, 1999, p. 3

⁷⁹³ See M. Goodwin, From Province to Protectorate to State? Speculation on the Impact of Kosovo's Genesis upon the Doctrines of International Law, in: German Law Journal, Vol. 8, 2007, p. 6

Albanians and the forcible expulsion from their homes.⁷⁹⁴ The Kosovo Albanians were deprived of their right to internal self-determination and serious and widespread violations of the fundamental human rights took place. Thus, those events have to be regarded as a kind of “critical date” denoting the existence of a certain period of time which determines the validity of the claim to external self-determination.

The special feature of the Kosovo case is that the international community *de facto* suspended the FRY’s sovereignty over the territory in question (the FRY was still a *de jure* sovereign) and, after a certain period of time, Serbia faced the fact that in declaring its independence, Kosovo transformed its internal self-determination into the external one, it was an act of secession. It was the act of secession from Serbia because, according to the Resolution 1244 (1999) which represented the legal basis of Kosovo’s international administration, the FRY retained the *de jure* sovereignty over Kosovo, it was still a “mother state”. The *sui generis* legal status of Kosovo rests on the legislative activity of the UN Security Council which “sidelined” Serbia and backed the Kosovo Albanians in converting an internal dimension of the right of peoples to self-determination into the external one. The legal basis of that transformation was the notion of unilateral remedial secession.

If we apply the “substantive recognition test” to the case of Kosovo, it becomes evident that Kosovo represents the *de facto state*. The “Republic of Kosovo” has been recognized by three permanent members of the UN Security Council and some other major powers of the day (for the time being, i.e. June 2009, the total number of recognitions accorded to Kosovo is 60).⁷⁹⁵ Serbia, the “mother state”, has not recognized the entity in question and, as it has already been demonstrated in the present study, it cannot be said that there were no objections from Serbia with regard to the recognition of Kosovo’s secession. Of four neighbouring countries with which it shares borders, the “Republic of Kosovo” is recognized by Albania, Macedonia and Montenegro, only Serbia does not recognize Kosovo as an

⁷⁹⁴ See E. Rosand, The Kosovo Crisis: Implications of the Right to Return, in: Berkeley Journal of International Law, Vol. 18, 2000, p. 231

⁷⁹⁵ Information available on the official website of the Ministry of Foreign Affairs of the Republic of Kosovo, at: <http://www.ks-gov.net/MPJ/Njohjet/tabid/93/Default.aspx> [accessed: 29.06.2009]

independent state.⁷⁹⁶ The “Republic of Kosovo” was admitted to the membership of the International Monetary Fund and the World Bank.⁷⁹⁷

⁷⁹⁶ *See Ibid.*

⁷⁹⁷ *See* the Statement by the Foreign Minister of the Republic of Kosovo H.E. Skender Hyseni to the United Nations Security Council, New York, 17 June 2009, available on the official website of the Ministry of Foreign Affairs of the Republic of Kosovo, at: <http://www.ks-gov.net/MPJ/Ministry/Minister/Speeches/tabid/149/ItemId/231/Default.aspx> [accessed: 29.06.2009]

Chapter 8: The “Republic of Abkhazia”

8.1 Political context

8.1.1 History: from antiquity to the Soviet rule

The history of Abkhazia can be traced back to antiquity. In the first millennium BC the territory in question was part of the kingdom of Colchis and during the fourth through to the sixth century AD Abkhazia was subjected to the control of Byzantium.⁷⁹⁸ The kingdom of Abkhazia (including all of western Georgia) was established by Leon II in the eighth century and the Kingdom of the Abkhazians and the Kartvelians emerged by the late 970s as the origin of the Georgian Kingdom, the latter having the peak of its golden age during the reign of Queen Tamar (1184-1213).⁷⁹⁹

After the decline of the feudal Georgia, Abkhazia acquired the status of a principality and in 1810 it officially became a protectorate of Tsarist Russia, which abolished the Abkhazian principality in 1864 and replaced it with the Sukhumi District.⁸⁰⁰ It has to be noted that the local population put up resistance to the tsarist rule but, as respective Abkhazian rebellions were crushed by Russia, a great bulk of the ethnic Abkhaz population was forced to leave Abkhazia for Turkey in the 1870s.⁸⁰¹ This process is commonly known as “*Mohajirstvo*”.

After the collapse of the Russian Empire, in 1918 Abkhazia became part of the newly emerged Georgian Democratic Republic which was recognized by certain Western powers and Communist Russia. On the basis of the 1921 Georgian Constitution Abkhazia enjoyed autonomous status within the borders of the republic.⁸⁰² This state of things was soon altered as in 1921 the Red Army invaded Georgia and, after ousting the Georgian government

⁷⁹⁸ T. Potier, Conflict in Nagorno-Karabakh, Abkhazia and South Ossetia, A Legal Appraisal, The Hague et al., 2001, p. 8

⁷⁹⁹ E. Mihalkanin, The Abkhazians: A national minority in their own homeland, in: T. Bahcheli et al. (eds.), De Facto States, The quest for sovereignty, London / New York, 2004, p. 144

⁸⁰⁰ *Ibid.*

⁸⁰¹ *Ibid.*

⁸⁰² G. Nodia, Georgian perspectives, in: Accord, an international review of peace initiatives, Issue 7, J. Cohen (ed.), A question of sovereignty, The Georgia-Abkhazia peace process, Conciliation Resources, London, 1999, p. 20

(the Mensheviks) from power, declared the Soviet rule in the country. Thus, the short-lived independent Georgian republic ceased its existence.

This situation had its own impact on the status of Abkhazia. The Abkhazian Soviet Socialist Republic was created together with the Georgian one. The Special Union Treaty was signed between the Georgian SSR and the Abkhaz SSR on 16 December 1921.⁸⁰³ In 1922 these political entities entered the Transcaucasian Socialist Federative Soviet Republic (TSFSR) and in 1925 Abkhazia promulgated the constitution sanctioning its status as a union republic with treaty ties to Georgia.⁸⁰⁴ Thus, Abkhazia's 1925 constitution reiterated that the entity in question was united with the Georgian SSR on the basis of the special union treaty.⁸⁰⁵ An earlier reference in the 1924 Constitution of the Soviet Union to Abkhazia, as an autonomous republic within Georgia, was effectively endorsed in 1931, when Abkhazia was transformed into an Autonomous Soviet Socialist Republic within the Georgian SSR.⁸⁰⁶

Subsequent years of the Soviet rule are marked with widespread oppressive measures and harsh campaigns against certain groups throughout the Soviet Union. In 1937, as a consequence of measures directed by the then head of the Georgian Communist Party, Lavrenti Beria, and the policies of the late 1940s and early 1950s, the Abkhazians experienced a process they describe as the "Georgianization of Abkhazia": large numbers of non-Abkhaz were forcibly removed from western Georgia and Russia to Abkhazia, representation of the Abkhaz in local administration was restricted, Abkhaz schools were closed and the Abkhaz language was banned, the Abkhaz intellectuals and politicians were repressed.⁸⁰⁷ This period was followed in 1953 by the "rehabilitation" of the Abkhazians after the death of Stalin and

⁸⁰³ Abkhazia Today (15 September 2006), International Crisis Group, Europe Report № 176, footnote 37, p. 4

⁸⁰⁴ See Chronology of events, in: Accord, an international review of peace initiatives, Issue 7, J. Cohen (ed.), A question of sovereignty, The Georgia-Abkhazia peace process, Conciliation Resources, London, 1999, p. 81

⁸⁰⁵ Abkhazia Today (15 September 2006), International Crisis Group, Europe Report № 176, footnote 37, p. 4

⁸⁰⁶ Chronology of events, in: Accord, an international review of peace initiatives, Issue 7, J. Cohen (ed.), A question of sovereignty, The Georgia-Abkhazia peace process, Conciliation Resources, London, 1999, p. 81

⁸⁰⁷ *Ibid.*

then Beria: a new script, based on Cyrillic, was introduced, the Abkhaz schools were reopened, and administration was run again by the Abkhazians, ethnic Abkhazians were over-represented in local offices as a compensation for the repression.⁸⁰⁸

8.1.2 The Abkhaz and the Georgian political aspirations in the period of the downfall of the USSR

In 1978, 130 Abkhaz intellectuals signed a letter, a request addressed to Brezhnev, which was aimed at permitting Abkhazia to secede from Georgia and join the RSFSR. The Abkhazian State University was opened in response to that letter as a kind of “compensation” and other measures were taken supporting the popularization of the Abkhaz culture. In 1988 another appeal was made to the central Soviet authorities by 60 leading Abkhazians in the so-called “Abkhaz Letter” requesting the restoration of Abkhazia’s 1921-1931 status.⁸⁰⁹ The State Program for the Georgian Language which was adopted in 1989 caused a kind of precaution among the Abkhazians and intellectuals and Communist party leaders formed the public movement “Aydgylara” (the National Forum) which organized mass rallies and requested Moscow once again to restore the status enjoyed by Abkhazia from 1921 till 1931.⁸¹⁰

On 18 March 1989 a petition was signed at a mass meeting at Lykhny (Abkhazia) insisting on the restoration of the pre-1931 status of the territory in question. Georgian officials responded with the decision to open a branch of the Tbilisi State University in Abkhazia’s capital Sukhumi.⁸¹¹ It has to be noted at this point that not only the official reaction to the developments in Abkhazia expressed the opposition to the demands mentioned above. The Georgian population in Tbilisi responded to those aspirations with large counter-demonstrations aimed at achieving Georgia’s own independence

⁸⁰⁸ T. Potier, Conflict in Nagorno-Karabakh, Abkhazia and South Ossetia, A Legal Appraisal, The Hague et al., 2001, p. 9

⁸⁰⁹ *Ibid.*, p. 10

⁸¹⁰ Abkhazia Today (15 September 2006), International Crisis Group, Europe Report № 176, p. 5

⁸¹¹ T. Potier, Conflict in Nagorno-Karabakh, Abkhazia and South Ossetia, A Legal Appraisal, The Hague et al., 2001, p. 10

from the USSR and putting an end to the ethnic discrimination by minorities. On 9 April 1989 the peaceful mass demonstration in Tbilisi, demanding Georgia's independence from the USSR, was brutally crushed down by the Soviet special forces in a massacre of "Bloody Sunday".⁸¹²

The Abkhazians protested against the decision of opening a branch of the Tbilisi State University in Sukhumi and this dispute was followed by ethnic clashes in Sukhumi and Ochamchire in July 1989 leaving over a dozen dead.⁸¹³ On 18 November 1989 the Supreme Council of the Georgian SSR introduced following changes and amendments (among others) to the Constitution (Basic Law) of the republic:

"Article 69. The Georgian SSR reserves the right to secede freely from the USSR. This is a sacred and inviolable right.

Abolishment or restriction of the right of secession of the Georgian SSR from the USSR under the decree of the Supreme organ of the USSR or through other means is inadmissible.

From the moment of abolishment of the right of the Georgian SSR on secession from the USSR the Georgian SSR shall be considered seceded from the USSR."⁸¹⁴

Thus, it can be asserted that the "wind of change" blowing throughout the USSR after the introduction of "*glasnost*" and "*perestroika*" affected the structure of the Soviet Union. The passage of the document quoted above confirms Georgia's aspirations to restore its independence lost in 1921. This assertion is also backed by the fact that the Supreme Council of the Georgian SSR approved a special commission's report, according to which, Georgia's union with the USSR was an annexation achieved through brutal

⁸¹² Georgien 1989-1993: Statistik wichtigster Ereignisse, in: Menschenrechte in der GUS-Republik Georgien 1994, Berichte-Dokumente-Schicksale, IGF (Hrsg.), Verfasserin: W. Wahnsiedler, p. 4

⁸¹³ Abkhazia Today (15 September 2006), International Crisis Group, Europe Report № 176, p. 5

⁸¹⁴ Law of the Soviet Socialist Republic of Georgia on Changes and Amendments to the Constitution (Basic Law) of the Georgian SSR, 18 November 1989, (Article 69), available on the official website of the Parliament of Georgia, at: http://www.parliament.ge/files/426_5647_883674_2.pdf [accessed: 07.02.2009]

military force and occupation.⁸¹⁵ As a “response” to this state of affairs, on 25 August 1990, the Abkhaz Supreme Soviet adopted a declaration on the State Sovereignty of the Soviet Socialist Republic of Abkhazia which was declared null and void by the Georgian legislature.⁸¹⁶

Georgia’s independence from the Soviet Union, as an achievement, was largely promoted by the national liberation movement which developed gradually in the 1970s and gained its momentum in 1987. The most prominent leaders of the movement were former dissidents Zviad Gamsakhurdia (philologist, son of the eminent Georgian writer Konstantine Gamsakhurdia) and Merab Kostava (writer and musicologist). On 28 October 1990 free parliamentary elections were held in Georgia. Gamsakhurdia’s “Round Table – Free Georgia” bloc emerged victorious with 67% of votes and the leader of the coalition was elected chairman of the new Georgian Supreme Soviet.⁸¹⁷

In December 1990 the historian Vladislav Ardzinba was elected chairman of the Abkhaz Supreme Soviet.⁸¹⁸ On 31 March 1991 a referendum was conducted in Georgia, with a 90% turnout of eligible voters the overwhelming majority of which, namely 99%, voted for Georgia’s independence from the USSR.⁸¹⁹ On 9 April 1991 the Georgian parliament, chaired by Gamsakhurdia, proclaimed Georgia’s independence from the Soviet Union and on 26 May 1991 Gamsakhurdia was elected president with 87% of votes in the free presidential elections.⁸²⁰

The 17 March 1991 all-union referendum on the project of a Union Treaty, suggested by Gorbachev, demonstrated the disagreement between the Abkhazians and the Georgians concerning the future of the USSR. Georgia

⁸¹⁵ E. Mihalkanin, *The Abkhazians: A national minority in their own homeland*, in: T. Bahcheli et al. (eds.), *De Facto States, The quest for sovereignty*, London / New York, 2004, p. 147

⁸¹⁶ *Ibid.*

⁸¹⁷ Georgien 1989-1993: Statistik wichtigster Ereignisse, in: *Menschenrechte in der GUS-Republik Georgien 1994, Berichte-Dokumente-Schicksale*, IGFM (Hrsg.), Verfasserin: W. Wahnsiedler, p. 4

⁸¹⁸ *Abkhazia Today* (15 September 2006), International Crisis Group, Europe Report № 176, p. 5

⁸¹⁹ Georgien 1989-1993: Statistik wichtigster Ereignisse, in: *Menschenrechte in der GUS-Republik Georgien 1994, Berichte-Dokumente-Schicksale*, IGFM (Hrsg.), Verfasserin: W. Wahnsiedler, p. 4

⁸²⁰ *Ibid.*

boycotted the vote, whereas Abkhazia's non-Georgian population voted overwhelmingly in favour of entering the proposed arrangement.⁸²¹ Despite this, Gamsakhurdia was able to compromise with the Abkhaz leadership over the composition of the local parliament: of 65 parliament seats 28 were to be allocated to the Abkhazians, 26 to the Georgians and 11 to other nationalities. Furthermore, as an additional precautionary measure for respective minority groups, certain decisions were to be reached only with a qualified majority of 75% (this new system was implemented in December 1991).⁸²²

8.1.3 Gamsakhurdia's overthrow and the Georgian-Abkhaz war of 1992-93

Gamsakhurdia's presidency lasted for a short period of time. On 22 December 1991 the *coup d'état* took place in Georgia and on 6 January 1992 the president and the parliament were ousted from power (Gamsakhurdia was forced to go into exile in Chechnya).⁸²³ In February 1992 the provisional Georgian Military Council declared the reinstatement of Georgia's 1921 constitution.⁸²⁴

On 7 March 1992, Eduard Shevardnadze, former first secretary of the Georgian Communist Party (1972-1985) and Soviet minister of foreign affairs, returned to Tbilisi and assumed the position of a chairman of the Georgian State Council which replaced the Military Council in April of the same year.⁸²⁵ Two persons fulfilled the function of a deputy chairman within that body: Tengiz Kitovani and Jaba Ioseliani. They were both leaders of two main militias - the National Guard and the "Mkhedrioni"

⁸²¹ T. Potier, Conflict in Nagorno-Karabakh, Abkhazia and South Ossetia, A Legal Appraisal, The Hague et al., 2001, pp. 10-11

⁸²² *Ibid.*, p. 11

⁸²³ Georgien 1989-1993: Statistik wichtigster Ereignisse, in: Menschenrechte in der GUS-Republik Georgien 1994, Berichte-Dokumente-Schicksale, IGFM (Hrsg.), Verfasserin: W. Wahnsiedler, p. 4

⁸²⁴ Abkhazia Today (15 September 2006), International Crisis Group, Europe Report № 176, p. 5

⁸²⁵ J. Aves, Post-Soviet Transcaucasia, in: R. Allison (ed.), Challenges for the Former Soviet South, The Royal Institute of International Affairs, Russia and Eurasia Programme, Washington, D.C. / London, 1996, p. 168

(Horsemen) respectively. It has to be noted that those warlords had played a key role in the coup.

On 19 March 1992 Georgia was recognized by the EC and on 24 March 1992 Georgia became full member of the CSCE.⁸²⁶ The restoration of Georgia's 1921 constitution was met with certain precaution by the Abkhazians and on 26 June 1992 Ardzinba sent a draft treaty to the Georgian State Council providing for federative or confederative relations between Tbilisi and Sukhumi. As it received no reply from the State Council of Georgia, on 23 July 1992 the Abkhaz parliament reinstated its 1925 constitution, the Georgian legislature immediately annulled the latter decision.⁸²⁷

On 31 July 1992 Georgia became member of the UN.⁸²⁸ On 12 August 1992 the Abkhaz Supreme Soviet sent an appeal to Shevardnadze for negotiations on future federative relations and delegation of powers and consultations between senior Abkhaz and Georgian leaders followed.⁸²⁹ On 14 August 1992 Georgian armed forces, under the command of Tengiz Kitovani (who was appointed by Shevardnadze Minister of Defense in May 1992), entered the Gali region of Abkhazia, advanced towards Sukhumi and attacked Abkhaz government buildings.⁸³⁰ Ardzinba's government fled to Gudauta, a town north-west of Sukhumi.

It is important at this point to clarify the circumstances surrounding the deployment of the Georgian troops to the territory of Abkhazia. After the overthrow of President Gamsakhurdia, the new government was resisted by his supporters especially in Mingrelia, the region in western Georgia. Forces loyal to the ousted president kidnapped Georgian senior officials in summer 1992 and it was suspected that hostages were held in the Gali

⁸²⁶ Georgien 1989-1993: Statistik wichtigster Ereignisse, in: Menschenrechte in der GUS-Republik Georgien 1994, Berichte-Dokumente-Schicksale, IGF (Hrsg.), Verfasserin: W. Wahnsiedler, p. 4

⁸²⁷ T. Potier, Conflict in Nagorno-Karabakh, Abkhazia and South Ossetia, A Legal Appraisal, The Hague et al., 2001, p. 11

⁸²⁸ Information available on the official website of the UN, at: <http://www.un.org/News/Press/docs/2006/org1469.doc.htm> [accessed: 11.02.2009]

⁸²⁹ T. Potier, Conflict in Nagorno-Karabakh, Abkhazia and South Ossetia, A Legal Appraisal, The Hague et al., 2001, pp. 11-12

⁸³⁰ Abkhazia Today (15 September 2006), International Crisis Group, Europe Report № 176, p. 5

district, which bordered on Mingrelia. Furthermore, an ongoing sabotage and looting on the railway line, connecting Georgia with Russia via the territory of Abkhazia, was another problematic issue in the overall context.

Arguments of the parties with regard to the beginning of the war can be described as follows: the Abkhazians contend that Shevardnadze was directly involved in a planned operation to subdue the republic. The Georgian argument concentrates on two aspects: a) the August operation was the repeat of a similar successful operation carried out in April, in consultation with the Abkhaz leadership, aimed at securing communications; b) when Shevardnadze realized that the operation was going wrong, he tried to withdraw Georgian forces but his efforts were undermined by unilateral actions of Kitovani, who advanced to the Abkhaz capital.⁸³¹ Thus, it can be asserted that, according to the official Georgian version, the troops entered Abkhazia in order to rescue government hostages and secure the rail line to Russia.

From summer 1992 to summer 1993 Georgian armed forces controlled much of Abkhazia, including Sukhumi.⁸³² Three ceasefire agreements were signed through the mediation of Russia on 3 September 1992, on 14 May 1993 and 27 July 1993.⁸³³ But the turning point in the war came within that period of time. On 2-3 October 1992 the Abkhazians retook Gagra and later launched three unsuccessful offensives to retake Sukhumi on 5 January, 16 March and 1 July 1993.⁸³⁴ The Abkhazians were supported by Russian military units stationed in the area and volunteers from north Caucasian republics of the Russian Federation (particularly Kabarda and Chechnya) along with Cossacks. On 4 July 1993 the Confederation of Mountain

⁸³¹ J. Aves, Post-Soviet Transcaucasia, in: R. Allison (ed.), Challenges for the Former Soviet South, The Royal Institute of International Affairs, Russia and Eurasia Programme, Washington, D.C. / London, 1996, p. 170

⁸³² Abkhazia Today (15 September 2006), International Crisis Group, Europe Report № 176, pp. 5-6

⁸³³ See footnote 54, in: *Ibid.*

⁸³⁴ E. Mihalkanin, The Abkhazians: A national minority in their own homeland, in: T. Bahcheli et al. (eds.), De Facto States, The quest for sovereignty, London / New York, 2004, pp. 148-149

Peoples of the Caucasus (Confederation of the Peoples of the Caucasus (CPC)) announced the mobilization of forces.⁸³⁵

As a result of the Gagra offensive (in which the Chechen volunteers led by Shamil Basaev and advised by the Russian military intelligence officers played a key role)⁸³⁶ the front-line was formed along the Gumista river, north of Sukhumi. On 16 September 1993 the Abkhaz forces broke the ceasefire agreed in Sochi on 27 July 1993, and providing for the phased demilitarization of Abkhazia, and launched an all-front surprise offensive from Gudauta with the support of North Caucasus volunteers.⁸³⁷ After eleven days of fierce fighting they controlled almost the whole of Abkhazia, with the exception of the upper gorge of the Kodori river (Sukhumi fell on 27 September 1993).⁸³⁸ Thus, the Abkhaz forces advanced to the administrative border marked by the Inguri river “cleansing the republic of ethnic Georgians in the process.”⁸³⁹

8.1.4 The post-war settlement and further developments

In October 1993 the insurgency of the supporters of ex-President Gamsakhurdia resumed. Gamsakhurdia returned from exile in Chechnya and the ousted parliament reconvened in Zugdidi (Mingrelia). The port of Poti was captured and respective forces were on the brink of capturing Kutaisi, an important regional center.⁸⁴⁰ Shevardnadze contacted Yeltsin and agreed to join the CIS in return for the deployment of Russian forces in western Georgia.⁸⁴¹ On 9 October 1993 Shevardnadze submitted an application for Georgia’s membership in the CIS and signed an agreement

⁸³⁵ J. Aves, Post-Soviet Transcaucasia, in: R. Allison (ed.), Challenges for the Former Soviet South, The Royal Institute of International Affairs, Russia and Eurasia Programme, Washington, D.C. / London, 1996, footnote 14, p. 171

⁸³⁶ See *Ibid.*, footnote 15, p. 172

⁸³⁷ “When the Abkhazians resumed their offensive in September 1993 Grachev made it clear that Moscow was unwilling to do anything to prevent local Russian military commanders from supporting them.”, *Ibid.*, p. 182

⁸³⁸ Abkhazia Today (15 September 2006), International Crisis Group, Europe Report № 176, p. 6

⁸³⁹ J. Aves, Post-Soviet Transcaucasia, in: R. Allison (ed.), Challenges for the Former Soviet South, The Royal Institute of International Affairs, Russia and Eurasia Programme, Washington, D.C. / London, 1996, p. 172

⁸⁴⁰ *Ibid.*

⁸⁴¹ *Ibid.*, p. 182

aimed at stationing the Russian troops in Georgia. On 11 December 1993 Georgia became full member of the CIS.⁸⁴² In return, Russian troops were deployed in western Georgia and they defeated insurgents.

On 14 May 1994 an “Agreement on a Ceasefire and Separation of Forces” was signed in Moscow under UN auspices and with Russian facilitation. This document provided for a ceasefire, separation of forces and the deployment of the CIS peacekeeping force (CISPKF).⁸⁴³ The function of the latter was to monitor the frontier between Abkhazia and the rest of Georgia, which was divided into an inner “security zone” (where no Georgian or Abkhaz military presence was permitted) and an outer “restricted zone” (in which the deployment of heavy weapons was prohibited).⁸⁴⁴

It has to be noted that the Georgian government hoped that a multinational peacekeeping force, under the auspices of the UN, could be deployed in Abkhazia, but as no other countries were willing to contribute military contingents, according to the agreement of May 1994, a purely Russian force of 3,000 men was fielded.⁸⁴⁵ The United Nations Observer Mission in Georgia (UNOMIG), established by the UN Security Council on the basis of the Resolution 858 (1993)⁸⁴⁶, was also integrated into the framework of the 1994 Moscow Agreement which provides that:

“The peacekeeping force of the Commonwealth of Independent States and the military observers, [...] shall be deployed in the security zone to monitor compliance with this Agreement;”⁸⁴⁷

⁸⁴² Georgien 1989-1993: Statistik wichtigster Ereignisse, in: Menschenrechte in der GUS-Republik Georgien 1994, Berichte-Dokumente-Schicksale, IGFM (Hrsg.), Verfasserin: W. Wahnsiedler, p. 5

⁸⁴³ Abkhazia Today (15 September 2006), International Crisis Group, Europe Report № 176, p. 6

⁸⁴⁴ *Ibid.*

⁸⁴⁵ J. Aves, Post-Soviet Transcaucasia, in: R. Allison (ed.), Challenges for the Former Soviet South, The Royal Institute of International Affairs, Russia and Eurasia Programme, Washington, D.C. / London, 1996, p. 182

⁸⁴⁶ UNSC Res. 858 (1993) of 24 August 1993, para. 2, available on the official website of the UN, at: <http://www.un.org/Docs/scres/1993/scres93.htm> [accessed: 15.02.2009]

⁸⁴⁷ Para. 2 (b) of the Agreement on a Ceasefire and Separation of Forces, signed in Moscow on 14 May 1994, Key texts, Documents relating to the Georgia-Abkhazia peace process, in: Accord, an international review of peace initiatives, Issue 7, J. Cohen (ed.), A question of sovereignty, The Georgia-Abkhazia peace process, Conciliation Resources, London, 1999, p. 69

It has to be noted at this point that in 1994 the UN Security Council authorized the Secretary-General of the organization to increase the strength of the UNOMIG up to 136 military observers with the civilian support staff and determined full mandate of the observer mission.⁸⁴⁸ Thus, the UN Security Council refused to grant the CIS (in fact Russian) peacekeeping forces UN status, but accepted exclusive Russian participation in a respective operation. The function of the UN military observers was reduced to monitoring the situation and reporting back to the headquarters of the world organization.⁸⁴⁹

The Geneva Peace Process chaired by the UN, facilitated by Russia and including observers from the OSCE and the Group of Friends of the Secretary-General (the latter created in 1993 and composed of representatives of the US, Germany, Great Britain, France and Russia)⁸⁵⁰ emerged as an important forum for the dialogue between Tbilisi and Sukhumi.⁸⁵¹

In January 1995 Kitovani led a “peaceful” march on Abkhazia but before he reached the security zone, the Georgian government security forces intervened and interrupted his advancement. The accident was followed by Kitovani’s arrest.⁸⁵² In August 1997 Shevardnadze and Ardzinba met in Tbilisi and the statement issued in connection with the meeting stressed following:

“The parties have assumed an obligation not to resort to arms to resolve the differences that divide them and not under any circumstances to permit a renewal of bloodshed. Any differences of opinion will be resolved

⁸⁴⁸ UNSC Res. 937 (1994) of 21 July 1994, paras. 5, 6, available on the official website of the UN, at: <http://www.un.org/Docs/scres/1994/scres94.htm> [accessed: 17.02.2009]

⁸⁴⁹ G. Nodia, The Conflict in Abkhazia: National Projects and Political Circumstances, in: B. Coppeters et al. (eds.), Georgians and Abkhazians, The Search for a Peace Settlement, Bundesinstitut für ostwissenschaftliche und internationale Studien, Sonderveröffentlichung des BIOst, Oktober 1998, p. 46

⁸⁵⁰ Abkhazia Today (15 September 2006), International Crisis Group, Europe Report № 176, footnote 67, p. 7

⁸⁵¹ *Ibid.*, pp. 6-7

⁸⁵² J. Aves, Post-Soviet Transcaucasia, in: R. Allison (ed.), Challenges for the Former Soviet South, The Royal Institute of International Affairs, Russia and Eurasia Programme, Washington, D.C. / London, 1996, p. 175

exclusively by peaceful political means, through negotiations and consultations [...]”⁸⁵³

With respect to the overall situation, it can be asserted that no significant progress has been achieved since the ceasefire agreement in the context of the conflict resolution. According to Cohen, negotiations have oscillated between dialogue and deadlock and subsequent exchanges of draft proposals and counter-proposals have rarely been able to address the fundamental issues separating the parties.⁸⁵⁴

The political approachment between Georgia and Russia had dire consequences for Abkhazia: in 1995 the Russian Federation established a naval and land blockade of Abkhazia, closed its borders with the latter and refused to recognize the Abkhaz passports. Furthermore, in 1997 Russia cut off all telephone lines connecting Abkhazia with the outside world.⁸⁵⁵

In 1996 Georgian guerillas formed the “White Legion” and another unit was created later called “Forest Brothers”, the Georgian side accused Abkhazians of oppressing the civil population in the region. On 18 May 1998 the Georgian guerillas attacked the Abkhaz militia killing approximately 20. The Abkhaz counteroffensive against the Georgian villages of the Gali district ended with casualties on both sides and the flight of about 30.000 Georgian civilians which had returned to the region after the 1992-1993 war.⁸⁵⁶

⁸⁵³ Statement on the Meeting between the Georgian and Abkhaz Parties (Tbilisi, 14 August 1997), in: Key texts, Documents relating to the Georgia-Abkhazia peace process, in: Accord, an international review of peace initiatives, Issue 7, J. Cohen (ed.), A question of sovereignty, The Georgia-Abkhazia peace process, Conciliation Resources, London, 1999, p. 71

⁸⁵⁴ J. Cohen, Introduction: Trapped between war and peace, in: *Ibid.*, p. 10

⁸⁵⁵ V. A. Chirikba, The Georgian-Abkhazian Conflict: In Search for Ways out, in: B. Coppeters et al. (eds.), Georgians and Abkhazians, The Search for a Peace Settlement, Bundesinstitut für ostwissenschaftliche und internationale Studien, Sonderveröffentlichung des BIOst, Oktober 1998, p. 59

⁸⁵⁶ B. Coppeters, Westliche Sicherheitspolitik und der Konflikt zwischen Georgien und Abchasien, in: Berichte des Bundesinstituts für ostwissenschaftliche und internationale Studien, Bericht des BIOst Nr. 12/1999, p. 18

8.1.5 Abkhazia's declaration of independence and its aftermath

On 3 October 1999 a referendum was held in Abkhazia in which 97.7 % of the voters (turnout: 87.6 % of the registered voters) approved the Constitution adopted by the Supreme Council of the “Republic of Abkhazia” on 26 November 1994. On 12 October 1999 the “Republic of Abkhazia” (*Apsny Ahntkarra*) was proclaimed as an independent state.⁸⁵⁷

In December 2000 the visa regime was established by the Russian Federation on the Russian-Georgian border, but the regime was not applied to Russian borders with Abkhazia and South Ossetia.⁸⁵⁸ It has to be noted that Georgian efforts to internationalize peacekeeping and negotiation formats have persisted and in 2005 the parliament of Georgia enacted legislation forcing the government to report on the performance of the Russian peacekeepers, with a view of demanding their withdrawal in case of continued bias in their operations.⁸⁵⁹

On 18 July 2006 the Georgian parliament passed a resolution in which the legislative body stressed that it considered further continuation of the peacekeeping operation by the armed forces of the Russian Federation in Abkhazia and former Autonomous District of South Ossetia as inexpedient. It called on the government of Georgia to launch necessary procedures to immediately suspend the “so-called” peacekeeping operations in Abkhazia and in former South Ossetian Autonomous District and to withdraw the armed forces of the Russian Federation from the territory of Georgia.⁸⁶⁰

In July 2006, President Saakashvili announced that the Abkhaz government in exile, which has functioned in Georgia proper since 1995, would be

⁸⁵⁷ See Act of State Independence of the Republic of Abkhazia (12 October 1999), available on the website of the Unrepresented Nations and Peoples Organization (UNPO), at: <http://www.unpo.org/content/view/705/236/> [accessed: 20.02. 2009]

⁸⁵⁸ D. Lynch, Separatist states and post-Soviet conflicts, in: *International Affairs*, Vol. 78, 2002, p. 846

⁸⁵⁹ S. E. Cornell / S. Frederick Starr, *The Caucasus: A Challenge for Europe*, Central Asia-Caucasus Institute & Silk Road Studies Program, Silk Road Paper, June 2006, p. 32

⁸⁶⁰ Resolution of the Parliament of Georgia N3483 on the Peacekeeping Forces Located on the Territory of Georgia (18 July 2006), preamble and para. 1, available on the official website of the Parliament of Georgia, at: http://www.parliament.ge/index.php?lang_id=ENG&sec_id=98&info_id=13089 [accessed: 20.02.2009]

moved to the Kodori Gorge.⁸⁶¹ On 27 September 2006, the Georgian leadership inaugurated the headquarters of the Abkhaz government in exile (the “Government of the Autonomous Republic of Abkhazia”) in the Tbilisi-controlled upper Kodori Gorge (designated as the “Upper Abkhazia”). The first session of the Abkhaz government in exile in Upper Abkhazia was held on the same day in the village of Chkhaltá, the headquarters of the Government of the Autonomous Republic of Abkhazia.⁸⁶²

During the Russo-Georgian war in August 2008 over South Ossetia, the Abkhaz forces took control of the upper Kodori Gorge on August 12. The Abkhaz leader appointed his envoy in the upper Kodori Gorge on 3 September 2008, the latter also serving as head of the local administration which has been installed in the village of Azhara.⁸⁶³ Thus, the Georgian side lost the only part of Abkhazia being under Tbilisi’s control. Another consequence of the five-day war was that, on 26 August 2008, the Russian president signed decrees on the recognition of Abkhazia’s and South Ossetia’s independence and the establishment of diplomatic relations with them.⁸⁶⁴

8.2 International legal context

8.2.1 The Soviet nationalities policy and the “matrioshka-type” federalism of the USSR

Abkhazia’s status and the aspirations of respective elites cannot be clarified without reference to the very essence of the Soviet system, the structure of the USSR. The conflict in question has to be described as the one having its source in the cumulation of ethnicity and politics, i.e. “ethno-politisch in

⁸⁶¹ Abkhazia Today (15 September 2006), International Crisis Group, Europe Report № 176, pp. 20-21

⁸⁶² Tbilisi Turns Kodori into ‘Temporary Administrative Center’ of Abkhazia [27 September 2006], available on the website of the Civil Georgia (Daily News Online), at: <http://www.civil.ge/eng/article.php?id=13654&search=> [accessed: 21.02.2009]

⁸⁶³ Sokhumi Sets Up Abkhaz Administration in Kodori [3 September 2008], available on the website of the Civil Georgia (Daily News Online), at: <http://www.civil.ge/eng/article.php?id=19389&search=> [accessed: 21.02.2009]

⁸⁶⁴ Information available on the official web portal of the President of Russia, at: <http://www.kremlin.ru/eng/text/news/2008/08/205754.shtml> [accessed: 21.02.2009]

dem Sinne, dass politisierte ethnische Kriterien bei der Identifikation der Konfliktparteien die Schlüsselrolle spielen.”⁸⁶⁵ The combination of ethnic and political factors was a product of the Soviet nationalities policy which implied the demarcation of territorial administrative units on the basis of titular nationalities and their homelands.⁸⁶⁶

As a result of the policy maintained by Stalin, nationality was territorialized and politicized, ethnic identity and territory were made bases for the access to power and services, asymmetrical power relationships were created among republics aimed at directing ethnic antagonism toward non-Russians and away from the dominant Russian community at the center.⁸⁶⁷ The complex character of the USSR encompassed following “levels” of territorial units: the Soviet Socialist Union Republic (SSR), the Autonomous Soviet Socialist Republic (ASSR), the Autonomous Province and the Autonomous Area (Autonomous *Oblast* - AO).⁸⁶⁸ It has to be noted that each of these levels reflected a different degree of autonomy and distinct institutional resources: the highest in rank were the union republics, subordinate only to the central Soviet authorities, and possessing the fullest set of institutions, next in the rank were the autonomous republics, constituent parts of respective union republics, they were followed by the AOs usually (though not always) subordinate to a territory which was, in turn, subordinate to a union republic.⁸⁶⁹ This system has been described as the “matrioshka-type” federalism of the Soviet Union.⁸⁷⁰

⁸⁶⁵ U. Halbach, Erdöl und Identität im Kaukasus, in: Friedrich-Ebert-Stiftung (Hrsg.), IPG I/ 2003, p. 145

⁸⁶⁶ S. Demetriou, Politics from the Barrel of a Gun: Small Arms Proliferation and Conflict in the Republic of Georgia (1989-2001), in: Small Arms Survey, Occasional Paper No. 6, November 2002, p. 3

⁸⁶⁷ P. A. Goble, Coping with the Nagorno-Karabakh Crisis, in: The Fletcher Forum of World Affairs, Vol. 16, 1992, p. 20

⁸⁶⁸ See Chapters IX, X and XI of the Constitution (Fundamental Law) of the Union of Soviet Socialist Republics of 7 October 1977, in: W. B. Simons (ed.), The Constitutions of the Communist World, Alphen aan den Rijn et al., 1980, pp. 370-372

⁸⁶⁹ H. E. Hale, The Parade of Sovereignties: Testing Theories of Secession in the Soviet Setting, in: British Journal of Political Science, Vol. 30, 2000, p. 48

⁸⁷⁰ See B. Coppeters, Ethno-Federalism and Civic State-Building Policies: Perspectives on the Georgian-Abkhaz Conflict, in: Regional & Federal Studies, Vol. 11, 2001, p. 69

The structure of the USSR, based on the “politicisation and securitisation of ethnicity”⁸⁷¹, implied that respective nationalities had a right to varying degrees of internal self-determination.⁸⁷² Furthermore, the process of “*korenizatsia*”, or indigenization, created double loyalties where the local elites were tied both to the Soviet centre and to their regional constituencies.⁸⁷³ The politicisation of ethnicity meant that the administration of the USSR was decentralized according to the asymmetric model of self-governance under the general direction of the Communist Party, and the support for national state-building at the federal level was combined with the repression against nationalist threats.⁸⁷⁴ The hallmark of the Soviet ethno-federal system was that the politicisation of ethnicity took place in an institutional framework in which the political questions could only be addressed when they became security concerns. So, in any other case, political issues were either securitised or not addressed at all (security denoted in this context the strengthening of party and state institutions).⁸⁷⁵

As the process of the dissolution of the USSR gained momentum, the combination of the two factors mentioned above, namely the politicization of ethnicity and the securitization of the political agenda, caused dramatic consequences. The Soviet policy of “ethnic pacification”, implying a certain form of political participation of regional elites, turned meaningless: once a certain form of democratization took place, established political privileges of the titular nations were challenged by ethnic minorities.⁸⁷⁶

Thus, it has been correctly stressed that institutionalized legacies of the Soviet nationalities policy engendered bitter ethnic tensions and political fragmentation within Georgia, because aspirations of the republic denoting the attainment of independence were viewed by the non-Georgian population as a sign of oppressive political control. Those aspirations were

⁸⁷¹ B. Coppeters, *The Politicisation and Securitisation of Ethnicity: The Case of the Southern Caucasus*, in: *Civil Wars*, Vol. 4, 2001, p. 79

⁸⁷² *Ibid.*

⁸⁷³ *Ibid.*, p. 80

⁸⁷⁴ *Ibid.*

⁸⁷⁵ *Ibid.*

⁸⁷⁶ *Ibid.*, p. 81

countered by the Abkhaz ASSR and the South Ossetian AO with demands for greater autonomy within the Soviet federal framework.⁸⁷⁷

It has to be noted that “a built-in territorialisation of ethnicity”⁸⁷⁸ was a hallmark of a relatively small Georgian SSR, and while not formally a federation, it had a complex national-administrative structure under the Soviet regime.⁸⁷⁹ According to Starovoitova, this ethno-territorial arrangement was characteristic of the Communist regime’s efforts aimed at creating artificial sources of interethnic tension that it could exploit in a classic *divide et impera* fashion.⁸⁸⁰ In the specific Georgian case the ethnic card was played in a manner that respective autonomous territories encompassed sizable portions of historically Georgian lands and nationally conscious Georgians viewed them as a threat to the survival of the Georgian nation.⁸⁸¹

It has to be stressed at this stage that the concept of autonomy has to be approached with a certain degree of precaution, especially in the Soviet setting, in which decisions concerning territorial issues were guided by ambiguous considerations of the central ruling elite and sometimes appeared to be very dubious in practice. The best example confirming this latter assertion is that of Nagorno-Karabakh: on 4 July 1921 the Caucasian Bureau (*Kavburo*) of the Russian Communist Party’s Central Committee voted for the inclusion of Nagorno-Karabakh in Armenia, but the next day, the decision was revised by a new session of the *Kavburo* and the territory in question was incorporated into Azerbaijan. Thus, Nagorno-Karabakh was granted territorial autonomy within Azerbaijan and a respective resolution was implemented in 1923 with the creation of the Nagorno-Karabakh Autonomous Region (NKAO).⁸⁸² Bearing this in mind, it has to be asserted

⁸⁷⁷ S. Demetriou, Politics from the Barrel of a Gun: Small Arms Proliferation and Conflict in the Republic of Georgia (1989-2001), in: Small Arms Survey, Occasional Paper No. 6, November 2002, p. 4

⁸⁷⁸ J. Hughes, Chechnya: The Causes of a Protracted Post-Soviet Conflict, in: Civil Wars, Vol. 4, 2001, p. 16

⁸⁷⁹ G. Starovoitova, Sovereignty After Empire, Self-Determination Movements in the Former Soviet Union, United States Institute of Peace, Peaceworks No. 19, 1997, p. 15

⁸⁸⁰ *Ibid.*, p. 16

⁸⁸¹ *Ibid.*

⁸⁸² *Ibid.*, p. 23

that the decisions regarding territorial questions were made quite arbitrarily by the communist leaders.

The politicisation and securitisation of ethnicity within the Soviet Union resulted in the emergence of the official ideology, according to which, the peoples and ethnic groups living on the territory of the empire were “destined” to live in peace together and the possibility that ethnic conflicts could occur between “brothers” was excluded. If one follows this logic, it becomes evident that, in the case of Nagorno-Karabakh, it was this “brotherhood” of the Soviet people that officially determined the attitude of respective elites: there was no problem on the ideological plane in arbitrary alteration of the status of the territory, its belonging to one state or another, because both nations were Soviet “brothers” and they would somehow cope with the question, there could be no problem between Armenia and Azerbaijan. The disintegration of the USSR confirmed that the calculation, or the idea described above, was false and misleading.

Besides the official ideological considerations, there were also practical implications in the creation of the autonomous territorial units within the union republics. They served as excellent instruments for the furtherance of the “divide and rule” policy, as the central government was able to control and direct aspirations of the union republics by playing the ethnicity card. The practical result of the Soviet policies in the Caucasus was that, by defining everything in terms of ethnic groups, the central government broadened all conflicts, including those at the communal level, to national ones and by linking ethnicity to territory, transformed all ethnic conflicts into territorial ones.⁸⁸³ This state of affairs effectively contributed to the emergence of the situation in which the notion of autonomy assumed the role of a “first step towards secession”⁸⁸⁴ from the former union republics of the USSR, after the dissolution of the latter. Indeed, the myth of the politicized and secure ethnicity exploded with the initiation by Gorbachev

⁸⁸³ P. A. Goble, *Coping with the Nagorno-Karabakh Crisis*, in: *The Fletcher Forum of World Affairs*, Vol. 16, 1992, p. 22

⁸⁸⁴ G. Welhengama, *The Legitimacy of Minorities' Claim for Autonomy through the Right to Self-Determination*, in: *Nordic Journal of international Law, Acta Scandinavica Juris gentium*, Vol. 68, 1999, p. 420

of the campaign of “*glasnost*” and “*perestroika*”, the program of ideological and political liberalization:

“As the process of reform gained momentum between 1988 and 1991, it unleashed a growing tide of national self-assertion in which the tension between the formal rhetoric of republic sovereignty and the reality of a highly centralized state produced growing pressures to give substance to the claim.”⁸⁸⁵

Thus, as a result of these developments, the union republics were proclaimed sovereign independent states but as the Soviet federalism was a “matrioshka-type” one, the wind of change blowing through the empire affected all levels of the territorial units within respective union republics. The situation was aggravated by Yeltsin’s attitude which caused the process described as the “parade of sovereignties”.

8.2.2 The “national question” in the USSR

The construction of the Russian doll, as a model, is also applicable to the management of ethnic tensions within the USSR. According to Suny, three distinct forms of nationalism emerged in the 1960s and 1970s, encompassing different levels of political units within the Soviet Union:

1) “Official nationalism”, or “patriotism” (as defined by the Soviet authorities), became a permissible form of expression during the more laissez-faire period of the 1950s and 1960s, but was controlled by the central government in order to avoid the strengthening of local nationalism which could lead to the political separation. In 1969-74 a renewed emphasis was made on the need to attach the priority to the Russian language and to curb what Shevardnadze described as “national narrow-mindedness and isolation”.⁸⁸⁶

⁸⁸⁵ G. W. Lapidus, *Contested Sovereignty: The Tragedy of Chechnya*, in: *International Security*, Vol. 23, 1998, p. 5

⁸⁸⁶ R. G. Suny, *On the Road to Independence: Cultural Cohesion and Ethnic Revival in a Multinational Society*, in: R. G. Suny (ed.), *Transcaucasia, Nationalism, and Social Change, Essays in the History of Armenia, Azerbaijan, and Georgia*, Revised Edition, Michigan UP, 1996, pp. 391-392

2) Dissident or “unorthodox nationalism” was furthered by intellectuals who formed human rights organizations. Various Helsinki Watch Committees addressed the issues connected with the violations of national rights within the USSR. In 1974 Georgian intellectuals (Zviad Gamsakhurdia, Merab Kostava and Viktor Rtskhiladze) formed the Initiative Group for the Defense of Human Rights in Georgia. They later published the first samizdat literary journal in Georgian “*okros satsmisi*” (Golden Fleece) and then the political journal “*sakartvelos moambe*” (Georgia’s Herald). The core group was transformed in 1977 into the Group for the Implementation of the Helsinki Accords.⁸⁸⁷ These developments played an important role in the context of the emergence of the Georgian national liberation movement which led the republic to the proclamation of independence in 1991.

3) The “counternationalism” of the minorities within republics was based on the assertion of discrimination by respective ethnic majorities. Thus, in contrast to the official nationalism (which was the legally sanctioned expression of the national majority in each republic) and the unorthodox nationalism (which represented an attempt to extend the bounds of national expression beyond the tolerance of central Soviet authorities), this third form of nationalism concentrated on the perception of frustrations and discrimination suffered by ethnic minorities within the union republics.⁸⁸⁸

It has to be noted that the manifestations described above had their own impact on the development of secessionist conflicts in the Soviet Union and the latter problem will be addressed below.

8.2.3 The constitutional right of secession in the Soviet setting and its limitations

The process of dissolution of the USSR made the issue of secession the question of overwhelming importance. It has to be noted that the Soviet constitution provided for the right to secession which was assigned solely to

⁸⁸⁷ *Ibid.*, p. 394

⁸⁸⁸ *Ibid.*, p. 395

the union republics: “Each union republic retains the right freely to secede from the USSR.”⁸⁸⁹

Thus, it has been emphasized in respect of the secessionist self-determination in the Soviet setting that the Constitution of the USSR was quite explicit about the rightholders to secession as, in addition to the norm quoted above, according to Art. 76, a union republic was a sovereign state united with other republics enjoying the same status. But autonomous formations were not “sovereign”, and in respective provisions of the Fundamental Law of the USSR they were described as being constituent parts of union republics.⁸⁹⁰ It follows that the autonomous territorial entities in Georgia enjoyed certain rights connected with their status but that status did not imply the right to secession.⁸⁹¹

Thus, it was Georgia, as the union republic, which could be regarded as an eligible “self” for the purposes of secessionist self-determination in the Soviet setting. The reason is that express constitutional self-determination was applicable to the union republics which were very specifically nominated in the constitution as full federal republics, and Georgia was a former sovereign entity which retained at least the seeds of original sovereignty.⁸⁹²

At the same time, it was extremely difficult to realize this right in practice. At the theoretical level the problem was that other articles of the document largely contravened the right in question.⁸⁹³ When the Baltic republics declared their will to revive full sovereignty and acquire the status of independent states in 1989-1990, this aspiration was met with fierce resistance by Moscow. The response of the central government concentrated in the legal context on Art. 78 of the constitution, according to which, the

⁸⁸⁹ Article 72 of the Constitution (Fundamental Law) of the Union of Soviet Socialist Republics of 7 October 1977, in: W. B. Simons (ed.), *The Constitutions of the Communist World*, Alphen aan den Rijn et al., 1980, p. 369

⁸⁹⁰ T. Potier, *Conflict in Nagorno-Karabakh, Abkhazia and South Ossetia, A Legal Appraisal*, The Hague et al., 2001, p. 39

⁸⁹¹ J. Radoman, *Future Kosovo Status-Precedent or Universal Solution*, in: *Western Balkans Security Observer-English Edition*, Issue no. 3, 2006, p. 15

⁸⁹² M. Weller, *The Self-determination Trap*, in: *Ethnopolitics*, Vol. 4, 2005, p. 20

⁸⁹³ G. Starovoitova, *Sovereignty After Empire, Self-Determination Movements in the Former Soviet Union*, *United States Institute of Peace, Peaceworks No. 19*, 1997, p. 13

alteration of boundaries between union republics required mutual agreement of respective union republics and was subject to confirmation by the USSR: “This interpretation would have rendered the unilateral right of secession established in Article 72 meaningless, and a legal race developed on this issue between the Baltic republics and Moscow.”⁸⁹⁴ It has to be noted at this point that this notion of the “legal race” was characteristic of the developments within the Soviet Union in the last years of its existence. Not only the Baltic republics and Georgia were involved in that struggle, but also the representatives of the “two centres” - the USSR and the RSFSR, i.e. Gorbachev and Yeltsin respectively.

One considerable example of the process described above was the “Law on Procedures for Resolving Questions Related to the Secession of Union Republics from the USSR” brought into effect on 3 April 1990. Relevant passage of the document in question, which provided for a lengthy interim period of at least five years and left to the central Congress of the USSR People’s Deputies the final saying in respect of giving effect to the will of the population of the republic involved⁸⁹⁵, reads as follows:

“In a Union republic that has within it autonomous republics, autonomous provinces and autonomous regions, the referendum shall be held separately in each autonomous unit. The peoples of autonomous republics and autonomous formations shall retain the right to decide independently the question of staying in the USSR or in the seceding Union republic, as well as to raise the question of their own legal state status.”⁸⁹⁶

This passage demonstrates that the empire tried to play the ethnic card and the document quoted above was determined to serve as a kind of safeguard against the secessionist aspirations of the constituent republics of the Soviet Union. The centre tried to revive once again the *divide et impera* policy of the “founding fathers” of the USSR aimed at utilizing the notion of autonomy as a means of preserving the Union when needed. It can be

⁸⁹⁴ M. Weller, The Self-determination Trap, in: *Ethnopolitics*, Vol. 4, 2005, p. 17

⁸⁹⁵ *Ibid.*

⁸⁹⁶ Article 3 of the Law on Procedures for Resolving Questions Related to the Secession of Union Republics from the USSR of 3 April 1990, in: H. Hannum (ed.), *Documents on Autonomy and Minority Rights*, Dordrecht et al., 1993, p. 754

asserted that the enactment of 1990 was a sort of legal blackmail directed towards the union republics, the essence of this tool was secession of the autonomous units from seceding republics, i.e. double secession as an expression of the “matrioshka-type” federalism.

The reason is the content of the enactment in question. According to Potier, this legal act was an attempt to slow down the momentum of the secession of the Baltic States but was later relevant to all union republics.⁸⁹⁷ This author examined the wording of the provision quoted above, especially the crucial phrase “as well as to raise the question of their own legal state status” and following conclusion has been drawn in respect of the secessionist self-determination of autonomous territorial units within the Soviet republics:

“The entire *raison d’etre* of this Law *and* the Soviet Union, even at this late stage, was centred around the means to maintain, intact, at all costs, the Union. Thus, I cannot imagine that the Kremlin, having formulated such a convoluted (to say the least) process of union republic secession, would have, merely and simply, through this phrase, ‘permitted’ sub-union republic entities to similarly secede ‘just like that’.”⁸⁹⁸

Indeed, the point here is that the preservation of the USSR was the issue in question and the enactment of 3 April 1990 has to be considered exactly from this perspective. The aim and “functioning” of the document has been explained as follows: if we consider an option, according to which, the union republic, containing autonomous territorial entities, had managed to secede in compliance with the procedures of the law but respective autonomous unit(s) had decided to stay in the union, it is quite possible that Moscow would have upgraded the status of those autonomies to the union republic status. Moreover, it has been stated that the autonomous entities bordering the RSFSR, including Abkhazia and South Ossetia, would have been incorporated within it, in order to counter separatist sentiments in the North Caucasus.

⁸⁹⁷ T. Potier, Conflict in Nagorno-Karabakh, Abkhazia and South Ossetia, A Legal Appraisal, The Hague et al., 2001, p. 40

⁸⁹⁸ *Ibid.*, p. 41 (italics and emphases in original)

Thus, an inference has been drawn from the considerations mentioned above that Art. 3 of the law on secession concretizes a right of autonomous entities to raise or alter their constitutional status even, perhaps, to the union republic level.⁸⁹⁹ It can be asserted that the enactment in question represented a mechanism designed by the “centre” and aimed at preserving the USSR.

It has to be noted at this point that subsequent developments initiated by the same “centre” of the Soviet Union decisively contributed to the fall of the latter. On 8 December 1991 the leaders of three Soviet republics – the Republic of Belarus, the RSFSR and Ukraine (Shushkevich, Yeltsin and Kravchuk respectively) agreed on the dissolution of the Soviet Union and the establishment of the Commonwealth of Independent States (CIS). This was the first important step towards creating a new geopolitical reality on the huge territory of the USSR, followed by the signing on 21 December 1991 of the Alma-Ata Protocol to the agreement mentioned above by representatives of all Soviet republics except Georgia and three Baltic states.⁹⁰⁰ These developments contributed decisively to the dismemberment and subsequent extinction of the USSR. On 25 December 1991 Gorbachev resigned and the Soviet Union officially broke up.⁹⁰¹

8.2.4 The documents adopted by the Abkhaz Supreme Soviet on 25 August 1990 and the issue of Abkhazia’s secession from Georgia

It has to be examined at this stage, whether the enactment of 3 April 1990 has altered the status of Abkhazia. As on 25 August 1990 the Abkhaz Supreme Soviet, in the absence of its Georgian deputies, declared Abkhazia’s sovereignty, it, at the same time, emphasized its willingness to enter into negotiations with the Georgian authorities for the formation of a federative framework which would preserve Georgia’s territorial

⁸⁹⁹ *Ibid.*, pp. 40-41

⁹⁰⁰ Agreements Establishing the Commonwealth of Independent States [Done at Minsk, December 8, 1991, and done at Alma Ata, December 21, 1991], in: 31 ILM 138 (1992), pp. 142-147

⁹⁰¹ Information available on the website of the BBC News, at: <http://news.bbc.co.uk/onthisday/hi/years/1991/default.stm> [accessed: 11.03.2009]

integrity.⁹⁰² The document in question was the declaration issued by the Supreme Soviet of the Abkhaz ASSR, but in the text itself, reference to the adjective “autonomous” was neglected and the organ issuing the document was designated as the Supreme Soviet of the *Abkhaz Soviet Socialist Republic*.⁹⁰³ The declaration stressed that the supreme legislative and executive bodies of the Abkhaz SSR would suspend acts of the USSR and the Georgian SSR violating the sovereignty of the Abkhaz SSR and contravening its rights.⁹⁰⁴

It has to be emphasized at this point that, on the same day (i.e. 25 August 1990), the Abkhaz ASSR (this time, the adjective “autonomous” is present in the designation of the territorial entity in question) passed a resolution on “Legal Guarantees for Protection of Statehood of Abkhazia” which entails following important clauses (among others): it has been decided to address the Supreme Soviet of the USSR, in accordance with Art. 73 of the Soviet constitution, on the issue of restoring the status of Abkhazia proclaimed on 31 March 1921. Accordingly, before the solution of the problem by the Supreme Soviet of the USSR, it was agreed to preserve an arrangement regulating relations between Abkhazia and Georgia, the arrangement which existed in that period.

At the same time, the readiness has been expressed by the Abkhaz side to conduct negotiations with Georgia aimed at regulating the relations between them. This intention was accompanied by the statement, according to which, in the case of conclusion of the new Union Treaty, Abkhazia, as one of the republics which created the USSR in 1922, should participate in negotiations, drafting and concluding the treaty in question as the subject of

⁹⁰² T. Potier, Conflict in Nagorno-Karabakh, Abkhazia and South Ossetia, A Legal Appraisal, The Hague et al., 2001, p. 10

⁹⁰³ Declaration on the State Sovereignty of the Abkhaz Soviet Socialist Republic of 25 August 1990 (in Russian), preamble, in: Abkhazia v sovetskuyu epokhu, Abkhazskie pisma, (1947-1989), Sbornik dokumentov, Tom 1 (Abkhazia in the Soviet Epoch, Abkhazian Letters (1947-1989), Collection of Documents, Vol. 1), Sukhumi, 1994, p. 479

⁹⁰⁴ Declaration on the State Sovereignty of the Abkhaz Soviet Socialist Republic of 25 August 1990, para. 7, in: *Ibid.*, p. 480

the Soviet Federation and on equal footing with other subjects of the Union.⁹⁰⁵

It has to be stressed at this point that the documents adopted by the Abkhaz Supreme Soviet on 25 August 1990 do not refer to the enactment of 3 April 1990 regulating the issue of secession in the USSR. Furthermore, not only was the Abkhaz declaration abolished by the Presidium of the Supreme Soviet of the Georgian SSR on the following day, but the Abkhaz Supreme Soviet itself, rescinded the declaration on 31 August.⁹⁰⁶

The fact that Abkhazia's status has not been altered on the basis of the secession law of 3 April 1990 is confirmed by the compromise achieved in 1991 between the Georgian government of Gamsakhurdia and the Abkhaz authorities. It has to be noted once again that the elections were held in December 1991 for a new Abkhaz parliament exactly on this basis. Thus, it has to be concluded that the documents of 25 August 1990 have not altered Abkhazia's status.

Moreover, such declarations of sovereignty were usual in the Soviet setting in the period of "parade of sovereignties": during September and October 1990, for example, some of Russia's autonomous republics, autonomous *oblasts* and national *okrugs* had already issued sovereignty declarations (alongside certain autonomous entities situated in other union republics), accompanied by unilateral upgrading of the status.⁹⁰⁷ This does not mean, however, that respective entities effectively seceded from their "mother states". The latter assertion is also confirmed by the fact that even union republics, which issued the declarations of sovereignty (for example, the RSFSR on 12 June 1990 and Moldova on June 23 of the same year⁹⁰⁸, Ukraine on 16 July 1990⁹⁰⁹), did not secede from the USSR.

⁹⁰⁵ Resolution of the Supreme Soviet of the Abkhaz ASSR of 25 August 1990 "On Legal Guarantees for Protection of Statehood of Abkhazia" (in Russian), paras. 4, 5, 6, in: *Ibid.*, pp. 485-486

⁹⁰⁶ See Keesing's Record of World Events, Vol. 36, 1990, p. 37665

⁹⁰⁷ *Ibid.*, p. 37788

⁹⁰⁸ *Ibid.*, p. 37539

⁹⁰⁹ "The declaration made no mention of the Ukraine's right to secede from the Soviet Union, however, most speakers in the debate having rejected full independence as a goal.", *Ibid.*, p. 37617

It is true that the documents adopted by the Abkhaz Supreme Soviet on 25 August 1990 were aimed at upgrading Abkhazia's status. As it was already mentioned above, the resolution on "Legal Guarantees for Protection of Statehood of Abkhazia" referred to Art. 73 of the USSR constitution. The latter provision envisaged, among other constellations, the admission of new republics into the USSR and the confirmation of changes of boundaries between union republics.⁹¹⁰

The resolution of 25 August 1990, aimed at unilateral upgrading of Abkhazia's status, contravened the constitution of the USSR. This latter assertion is confirmed by the example of South Ossetia: as on 10 November 1989 the local parliament of the province made a decision on upgrading the status of the autonomous *oblast* to the autonomous republic, this decision has been regarded as violating the USSR constitution which contained the exact enumeration of autonomous republics and autonomous *oblasts* in Art. 85 and the Art. 87.⁹¹¹ The same can be stressed in respect of the resolution passed by the Abkhaz Supreme Soviet on 25 August 1990. The latter document, if it envisaged unilateral upgrading of the status of the Abkhaz ASSR to the union republic level, violated the USSR constitution, because Art. 71 of the constitution contained the list of 15 republics enjoying such status.⁹¹²

Thus, it can be emphasized that the Abkhaz Supreme Soviet could not unilaterally upgrade Abkhazia's status under the Soviet law. Such an alteration would also violate Art. 78 of the USSR constitution, according to which, it was impossible to alter the territory of a union republic without its consent.⁹¹³ It is important at this point to note that, in accordance with Art.82 of the Soviet constitution, an autonomous republic was part of a

⁹¹⁰ See Article 73 (1), (2) of the Constitution (Fundamental Law) of the Union of Soviet Socialist Republics of 7 October 1977, in: W. B. Simons (ed.), *The Constitutions of the Communist World*, Alphen aan den Rijn et al., 1980, p. 369

⁹¹¹ O. Luchterhandt, *Völkerrechtliche Aspekte des Georgien-Krieges*, in: AVR, Bd. 46, 2008, p. 441

⁹¹² See Article 71 of the Constitution (Fundamental Law) of the Union of Soviet Socialist Republics of 7 October 1977, in: W. B. Simons (ed.), *The Constitutions of the Communist World*, Alphen aan den Rijn et al., 1980, pp. 368-369

⁹¹³ Article 78 of the Constitution (Fundamental Law) of the Union of Soviet Socialist Republics of 7 October 1977, in: *Ibid.*, p. 371

union republic.⁹¹⁴ Bearing in mind all the considerations mentioned above, it has to be concluded that the documents adopted by the Abkhaz Supreme Soviet on 25 August 1990 did not effect Abkhazia's unilateral secession from Georgia.

8.2.5 The issue of Abkhazia's secession from Georgia in the context of the all-union referendum of 17 March 1991

It is important at this stage to consider the question, whether the all-union referendum on the preservation of the Soviet Union (17 March 1991), and its results in Abkhazia, amounted to the secession of the latter from Georgia. The issue of referendum is directly connected with an attempt by the central government aimed at preserving the USSR on the basis of the new Union Treaty.

It has to be stressed that the referendum itself, had no legal force, but was designed as a test of popular support for the draft Union Treaty and the question, whether the "Soviet people" considered it necessary to preserve the USSR as a renewed federation of equal, sovereign republics, was a summary of the first article of the draft.⁹¹⁵ The latest draft of the treaty had been approved by the Federation Council on March 6 but Georgia, Armenia, Estonia, Latvia, Lithuania, and Moldova boycotted the meeting, whereas Azerbaijan and two of the 20 autonomous republics refused to sign the final version.⁹¹⁶ Thus, six of the fifteen union republics officially boycotted the referendum.

The voter turnout across the USSR was put at 80% (not including the vast majority of the people of voting age in six republics boycotting the referendum), 76.4% of voters taking part voted "yes" and 21.7% "no", this meaning that the "yes" vote was cast by just over 61% of registered electors and around 56% of all Soviet citizens of voting age.⁹¹⁷ Thus, Georgia boycotted the referendum, whereas Abkhazia's non-Georgian population

⁹¹⁴ See Article 82 of the Constitution (Fundamental Law) of the Union of Soviet Socialist Republics of 7 October 1977, in: *Ibid.*

⁹¹⁵ Keesing's Record of World Events, Vol. 37, 1991, p. 38078

⁹¹⁶ *Ibid.*

⁹¹⁷ *Ibid.*

(turnout in the Abkhaz ASSR: 52. 3%)⁹¹⁸ answered the question in the affirmative.

In April 1991 Gorbachev and the leaders of nine union republics issued a joint declaration after the negotiations held at “Novoye Ogarevo” (a government dacha) in which they expressed agreement on following important issues: a timetable has been set out for the signing of the new Union Treaty, which was expected to be ready within three months; no later than six months after the signature of the treaty in question, a new union constitution would be promulgated followed by the elections to the Congress of People’s Deputies.⁹¹⁹ At the same time, the declaration made it clear that the Union Treaty was only to be signed by the republics which participated in the Novoye Ogarevo meeting, and the only specified penalty for the republics which refused to participate and were not expected to sign the treaty, was that they would be excluded from a new common economic space.⁹²⁰

The third draft of the Union Treaty was sent for discussion to the USSR Supreme Soviet and the Supreme Soviets of the republics at the end of June 1991 and on 24 July 1991 Gorbachev announced that the work on the draft Union Treaty (with delegations from nine union republics) had been completed.⁹²¹ Gorbachev’s hope of signing the Union Treaty in time suffered serious setbacks caused by following developments: on 27 June 1991 Ukraine postponed debating the treaty until September in order to examine possible contradictions with Ukraine’s declaration of independence of July 1990 and in further negotiations with the centre, the union republics demanded more concessions, including the “guarantee that autonomous republics would not be allowed to sign the Union Treaty independently – an important clause for the Russian Federation which included 16 autonomous republics.”⁹²²

⁹¹⁸ *Ibid.*, p. 38079

⁹¹⁹ *Ibid.*, p. 38129

⁹²⁰ *Ibid.*

⁹²¹ *Ibid.*, p. 38348

⁹²² *Ibid.*, p. 38349

The draft Union Treaty was debated in the USSR Supreme Soviet and approved on 12 July 1991, after having been approved by eight of the nine republican parliaments, i.e. except Ukraine. Gorbachev stated that the document remained open for signature by the six republics which had declared their independence from the USSR (Georgia, Armenia, Estonia, Latvia, Lithuania and Moldova), whereas the presence at the negotiations of Armenia's leader, Levon Ter-Petrosyan, raised the possibility of signing the Union Treaty by Armenia.⁹²³

The signing of the Union Treaty by the RSFSR, the Republic of Belarus, Kazakhstan, Tajikistan and Uzbekistan was scheduled for 20 August 1991 but on the previous day, conservative politicians staged a coup and declared that President Gorbachev had effectively been deposed.⁹²⁴ The takeover of power by the "State Committee for the State of Emergency" lasted for only three days and Gorbachev was reinstated as President on August 21.⁹²⁵

In November 1991 the agreement had been reached on forming the Union of Sovereign States (which Gorbachev described as the union of "Confederal Democratic States") but seven republican delegations, which attended the meeting on November 25, refused to initial the treaty and sent it back for further discussion in the republican Supreme Soviets.⁹²⁶ One important circumstance was Ukraine's absence from the negotiations because of the forthcoming referendum on independence and this circumstance made the signing of the Union Treaty unlikely, and of little worth, if it were signed at all.⁹²⁷

December 1991 was a month of dramatic changes throughout the USSR: on 1 December 1991 Ukraine's wish for independence was confirmed in a referendum held in the republic, on December 4 the USSR Soviet of the Union (the lower house) approved the draft Union Treaty and on 6 December 1991 the Ukrainian Supreme Soviet decided not to ratify any Union Treaty. It is important to note that a meeting between Gorbachev and

⁹²³ *Ibid.*

⁹²⁴ *Ibid.*, p. 38368

⁹²⁵ *Ibid.*

⁹²⁶ *Ibid.*, p. 38581

⁹²⁷ *Ibid.*

Yeltsin, on December 5, had concluded that a treaty would be meaningless without Ukraine's participation.⁹²⁸

As it has already been stated in the present thesis, on 8 December 1991 the Slav republics (the RSFSR, the Republic of Belarus and Ukraine) declared the USSR, as a subject of international law and as a geopolitical reality, non-existent. On 21 December 1991 the USSR was effectively replaced by the Commonwealth of Independent States (CIS) on the basis of the Alma-Ata Protocol to the Agreement establishing the CIS.⁹²⁹ By 21 December 1991 the CIS was a grouping of 11 former union republics in a loose alliance, without central governing bodies.⁹³⁰ The final seal to the dissolution of the USSR was set by Gorbachev himself, as he resigned on 25 December 1991.

Bearing in mind the considerations and developments concerning the all-union referendum on the preservation of the Soviet Union and an attempt to save the Soviet state from collapse on the basis of the Union Treaty, it has to be concluded that these manifestations did not amount to Abkhazia's secession from Georgia. A positive vote in the referendum by Abkhazia's non-Georgian population had no legal significance as the referendum, as such, had no legal force. At the same time, the very essence of the referendum, which was aimed at testing popular support for the draft Union Treaty, lost its significance (together with this document) after respective developments described above.

The Union Treaty which would preserve the USSR or the Union of Sovereign States (the union of "Confederal Democratic States" in Gorbachev's wording), and would bind the union republics and confirm the relationship between the centre and the republics, never came into force. The Soviet Union collapsed and the CIS emerged, a loose grouping of states. Georgia did not become a member of this loose Commonwealth at the time of its establishment, Georgia acquired membership of the CIS in

⁹²⁸ *Ibid.*, p. 38654

⁹²⁹ Agreements Establishing the Commonwealth of Independent States [Done at Minsk, December 8, 1991, and done at Alma Ata, December 21, 1991], in: 31 ILM 138 (1992), pp. 142-147

⁹³⁰ Keesing's Record of World Events, Vol. 37, 1991, p. 38654

December 1993. Thus, it has to be concluded that the status of Abkhazia has not been altered on the ground of the all-union referendum in combination with the developments concerning the Union Treaty.

8.2.6 The resolution adopted by the Abkhaz Supreme Soviet on 23 July 1992 and the question of Abkhazia's secession from Georgia

Further step of the Abkhaz leadership was made after the official dissolution of the USSR, on 23 July 1992. It follows that the enactment of 3 April 1990, regulating secession from the Soviet Union, was already irrelevant. On 23 July 1992 the Abkhaz Supreme Soviet passed another resolution, on the basis of which, the Abkhaz ASSR's 1978 Constitution was annulled and the 1925 Abkhaz SSR Constitution was restored (for the interim period before the adoption of the new constitution).⁹³¹ The 1925 constitution stipulated Abkhazia's status as a republic united with the Georgian SSR on the basis of a special union-treaty, through which it enjoyed the membership of the USSR, mediated by the membership in the Transcaucasian Socialist Federative Soviet Republic (TSFSR).⁹³² The constitution envisaged the Abkhaz SSR's state sovereignty and Abkhazia's right to freely exit the TSFSR and the USSR.⁹³³ The Georgian State Council declared on July 25 the reinstated Abkhaz constitution null and void.⁹³⁴

It has to be stressed that the resolution of 23 July 1992 did not represent an act of secession of Abkhazia from Georgia. This assertion is confirmed by the fact that the chairman of the Abkhaz Supreme Soviet, Vladislav Ardzinba, denied that Abkhazia, by adopting the document in question, was seceding from Georgia.⁹³⁵ Moreover, on 26 June 1992 Ardzinba sent a draft treaty to the Georgian State Council "which would have provided for

⁹³¹ Resolution of the Supreme Soviet of the Republic of Abkhazia "On Termination of the 1978 Constitution of the Abkhaz ASSR" (in Russian), 23 July 1992, paras. 1, 2, in: Abkhazia v sovetskuyu epokhu, Abkhazskie pisma, (1947-1989), Sbornik dokumentov, Tom 1 (Abkhazia in the Soviet Epoch, Abkhazian Letters (1947-1989), Collection of Documents, Vol. 1), Sukhumi, 1994, p. 489

⁹³² Article 4 of the Constitution of the Soviet Socialist Republic of Abkhazia of 1925 (in Russian), in: *Ibid.*, p. 490

⁹³³ Article 5 of the Constitution of the Soviet Socialist Republic of Abkhazia of 1925, in: *Ibid.*

⁹³⁴ See Keesing's Record of World Events, Vol. 38, 1992, p. 39019

⁹³⁵ *Ibid.*

federative / confederative relations between Abkhazia and Georgia and the maintenance of Georgia's territorial integrity.”⁹³⁶ An appeal to Shevardnadze, aimed at conducting negotiations on future federative relations between Georgia and Abkhazia, was reiterated by the Abkhaz side even on 12 August 1992.⁹³⁷

8.2.6 (i) Georgia's steps towards independence and their legal implications: assessment of the Soviet past

It is important at this stage to refer to the overall context and the circumstances surrounding the reinstatement by the Abkhaz Supreme Soviet of the 1925 Abkhaz constitution on 23 July 1992. This resolution was passed in order to avoid the legal vacuum between Abkhazia and Georgia. On 9 March 1990 the Presidium of the Supreme Council of the Georgian SSR made a complex assessment of the establishment of Soviet power in Georgia after the downfall of the Georgian Democratic Republic in 1921 and concluded following:

“[...] introduction of the Soviet troops into Georgia in February 1921 and occupation of its territory amounted to, from legal point of view, sheer military intervention and occupation aimed at toppling the then existing political regime. From political point of view, these actions amounted to *de facto* annexation of Georgia;”⁹³⁸

The document in question also entailed other important provisions: the fact of occupation and *de facto* annexation of Georgia by the Soviet Russia has been condemned as a violation of the Georgian-Russian Treaty of 7 May 1920 and an international crime; the Union Treaty concluded on 21 May 1921 between the Georgian SSR and the RSFSR, as well as the Union Treaty of 12 March 1922 on creation of the Transcaucasian Socialist

⁹³⁶ T. Potier, Conflict in Nagorno-Karabakh, Abkhazia and South Ossetia, A Legal Appraisal, The Hague et al., 2001, p. 11

⁹³⁷ *Ibid.*, pp. 11-12

⁹³⁸ Decree issued at the 13th Extraordinary Session of the Supreme Council of the 11th Convocation of the Georgian SSR on Guarantees for Protection of State Sovereignty of Georgia, 9 March 1990, available on the official website of the Parliament of Georgia, at: http://www.parliament.ge/files/1_918_906655_2.pdf [accessed: 22.03.2009]

Federative Soviet Republic, have been declared illegal and null and void; the treaty creating the USSR (1922) has been qualified as unlawful in relation to Georgia.⁹³⁹

On the basis of the treaty concluded by the first Georgian republic with the Soviet Russia on 7 May 1920, the latter recognized sovereignty and independence of Georgia on the ground of the right of peoples to self-determination and assumed the obligation of non-interference in matters being within Georgia's domestic jurisdiction.⁹⁴⁰ This development was preceded by the *de facto* recognition of Georgian and Azerbaijani governments by the Supreme Council of the allied governments on 12 January 1920.⁹⁴¹ More important was, of course, collective *de jure* recognition of Georgia by the allied and associated Powers (represented in the Supreme Council) in January 1921. On 27 January 1921 Georgia was recognized *de jure* by Great Britain, France, Belgium, Italy and Japan at the interallied conference in Paris.⁹⁴² Before that, Georgia gained Argentinian and German recognition on 13 and 24 September 1920 respectively.⁹⁴³ Following conclusion has been drawn in respect of the impact of the Georgian-Russian Treaty of 7 May 1920, and the *de jure* recognition of Georgia by the Allied Powers, on the status of the Transcaucasian republic:

“In der Tat mußte sich Rußland wegen der Unbeachtlichkeit der Mentalreservation an dem im Vertrag vom 7. Mai 1920 ausgesprochenen Souveränitätsverzicht gegenüber Georgien festhalten lassen und konnte daher nicht geltend machen, daß es sich bei der *de jure*-Anerkennung durch die Alliierten um eine völkerrechtswidrige Intervention zum Nachteil Rußlands handelte.”⁹⁴⁴

According to Hillgruber, by the time of Georgia's *de jure* recognition, it became clear that the recognition of Georgia by the Soviet Russia itself, was

⁹³⁹ See *Ibid.*

⁹⁴⁰ C. Hillgruber, Die Aufnahme neuer Staaten in die Völkerrechtsgemeinschaft, Das völkerrechtliche Institut der Anerkennung von Neustaaten in der Praxis des 19. und 20. Jahrhunderts, in: H. Schiedermaier (Hrsg.), Kölner Schriften zu Recht und Staat, Bd. 6, Frankfurt am Main et al., 1998, p. 272

⁹⁴¹ *Ibid.*, p. 271

⁹⁴² *Ibid.*, pp. 274-275

⁹⁴³ *Ibid.*, footnote 32, p. 275

⁹⁴⁴ *Ibid.*, p. 276 (italics in original)

not regarded by the latter as a serious matter, despite the fact of Russian undertaking of contractual obligations in this regard and its affirmation of the opposite: “Die *de jure*-Anerkennung erfolgte also zu einem Zeitpunkt, als die Aktualisierung des in der bloßen *de facto*-Anerkennung angelegten Vorbehalts zugunsten des Mutterlandes unmittelbar bevorstand.”⁹⁴⁵ Nevertheless, it has been emphasized that the decision to recognize Georgia, even in the absence of military assistance requested by the Georgian representatives and virtually bearing the significance of a mere political demonstration, “verschaffte sie doch Georgien gegenüber den Alliierten einen gesicherten völkerrechtlichen Status.”⁹⁴⁶

On 20 June 1990 the Georgian Supreme Soviet decreed following:

“[...] the Supreme Council of the Georgian SSR declares null and void all those legal acts that abolished political and other institutions of the Democratic Republic of Georgia and replaced them with other political and legal institutions introduced through violence and external force [...]”⁹⁴⁷

Moreover, as it has already been stated, in February 1992 the Georgian Military Council reinstated Georgia’s 1921 constitution. The acts of the Supreme Council of the Georgian SSR of 18 November 1989, 9 March and 20 June 1990, which were quoted in the present study, also the reinstatement of the 1921 constitution by the Georgian Military Council in February 1992, all these documents have been referred to in the preamble of the resolution passed by the Abkhaz Supreme Soviet concerning the abrogation of the 1978 constitution of the Abkhaz ASSR and the restoration of the 1925 constitution of the Abkhaz SSR.⁹⁴⁸

⁹⁴⁵ *Ibid.*, (italics in original)

⁹⁴⁶ *Ibid.*

⁹⁴⁷ Decree issued by the Supreme Council of the Georgian SSR on introduction of amendments to the decree issued by the Supreme Council of the Georgian SSR on March 9, 1990 “Guarantees for Protection of State Sovereignty of Georgia”, 20 June 1990, para. 1, available on the official website of the Parliament of Georgia, at: http://www.parliament.ge/files/1_918_428220_3.pdf [accessed: 26.03.2009]

⁹⁴⁸ Resolution of the Supreme Soviet of the Republic of Abkhazia “On Termination of the 1978 Constitution of the Abkhaz ASSR” (in Russian), 23 July 1992, preamble, in: *Abxazia v sovetskuyu epoxu, Abxazskie pisma, (1947-1989), Sbornik dokumentov, Tom 1 (Abkhazia in the Soviet Epoch, Abkhazian Letters (1947-1989), Collection of Documents, Vol. 1), Sukhumi, 1994, p. 488*

It has been stressed in the document that Abkhazia's 1978 constitution was adopted in compliance with the 1978 constitution of the Georgian SSR and the constitution of the USSR of 1977. After the termination of these two, the Abkhaz constitution had been left without its legal basis and legal vacuum had emerged in relations between Georgia and Abkhazia.⁹⁴⁹ It was exactly the aim of the resolution of 23 July 1992 to overcome this problem but the preamble of the document included also the aspiration for the "reestablishment of state-to-state relations" between Abkhazia and Georgia.⁹⁵⁰

8.2.6 (ii) Alteration of Abkhazia's status on the basis of unilateral actions of the Georgian leadership?

It has to be noted at this point that an argument has been offered, according to which, the adoption by the Supreme Council of the Georgian SSR of the documents mentioned above (decrees of 9 March and 20 June 1990 particularly), amounted to the liquidation of the legal basis of relations between Abkhazia and Georgia.⁹⁵¹ It has been asserted that by abrogating the treaties regulating Georgia's relations with its neighbors, and the reinstatement of Georgia's 1921 constitution, the Georgian leadership severed all links with Abkhazia.⁹⁵² This argument, if it implies that after the developments mentioned, Abkhazia effectively seceded from Georgia, is unsound, as it goes too far in creating a fragile legal fiction.

The enactments of the Supreme Council of the Georgian SSR represented the legal and political assessment of the establishment of the Soviet rule in Georgia, which was regarded as unlawful, and Georgia expressed its willingness to sever links with the Soviet rule established in 1921 with the Red Army's invasion. The adoption of these documents was not aimed at

⁹⁴⁹ *Ibid.*, pp. 488-489

⁹⁵⁰ *See Ibid.*, p. 489

⁹⁵¹ *See* T. M. Shamba / A. Y. Neproshin, *Abkhazia, Pravovye osnovy gosudarstvennosti i suvereniteta (Abkhazia, Legal Foundations of Statehood and Sovereignty)*, Izдание 2-e, pererabotanno (2nd revised ed.), Moscow, 2004, pp. 158-160

⁹⁵² *Ibid.*, p. 160

regulating the specific issue of the status alteration of respective autonomous territorial entities.

The spirit, in which the documents in question were adopted, can be expressed by reference to the decree of the Supreme Council of the Georgian SSR of 9 March 1990 in which it “seeks to abolish the dire consequences for Georgia, brought about by Russia’s violation of the 7 May 1920 Treaty and restoration of those rights of Georgia, that had been recognized by Russia by the virtue of the aforementioned Treaty.”⁹⁵³ Indeed, the restoration of the Georgian statehood, as such, was the issue in question.

Furthermore, if we follow the logic of the argument mentioned above, it can be said that if in 1990 Georgia severed links with Abkhazia on the basis of the decrees in question, it similarly “restored” those links in February 1992 as the Georgian Military Council reinstated the 1921 constitution. The latter referred to Abkhazia as an integral part of the Georgian republic enjoying autonomy in the administration of its affairs⁹⁵⁴ and did not regard Abkhazia as a republic with its own statehood.⁹⁵⁵ Thus, the permanent alteration of Abkhazia’s status, on the basis of unilateral acts of the Georgian leadership mentioned above, has to be rejected.

The point here is that Georgia was preparing for independence in 1989 and onwards. Georgia had to make a comprehensive assessment of its Soviet past, imposed on the country despite popular resistance. It is true that theoretically, after the reinstatement of the 1921 constitution by the Military Council, Georgia was governed according to this document, but the latter bore no relationship to country’s current political reality and the process of

⁹⁵³ Decree issued at the 13th Extraordinary Session of the Supreme Council of the 11th Convocation of the Georgian SSR on Guarantees for Protection of State Sovereignty of Georgia, 9 March 1990, available on the official website of the Parliament of Georgia, at: http://www.parliament.ge/files/1_918_906655_2.pdf [accessed: 28.03.2009]

⁹⁵⁴ See Article 107 of the Constitution of the Georgian Democratic Republic adopted by the Constituent Assembly on 21 February 1921, available on the website of the Regionalism Research Center, at: http://www.rrc.ge/law/konstG_1921_02_21_e.htm?lawid=108&lng_3=en [accessed: 28.03.2009]

⁹⁵⁵ G. Starovoitova, *Sovereignty After Empire, Self-Determination Movements in the Former Soviet Union*, United States Institute of Peace, Peaceworks No. 19, 1997, p. 18

drawing up a new constitution was initiated.⁹⁵⁶ Indeed, Gaul makes the following statement in this respect: “In Georgien wurde schon einmal, im Februar 1921, eine eigenständige Verfassung verabschiedet. An dieses Dokument konnte man anknüpfen, [...]”⁹⁵⁷. According to the same author, the document in question was considered, at that time, as one of the most progressive constitutions and it contained a chapter dedicated to the protection of national minorities.⁹⁵⁸

It is another problematic issue that the very essence of the Georgian Constitution of 24.08.1995, in the context of the administrative-territorial arrangement and the accommodation of autonomous formations, did not represent an attractive opportunity to the leaders of Abkhazia⁹⁵⁹ and South Ossetia.⁹⁶⁰ The decisive point is that Abkhazia’s status was the question subject to the negotiations between respective parties after Georgia attained independence, and neither did the legal acts adopted by the Supreme Council of the Georgian SSR on 18 November 1989 and on 9 March and 20 June 1990 amount to Abkhazia’s secession from Georgia, nor did the reinstatement by the Georgian Military Council of the 1921 constitution in February 1992 cause such a secession.

As the Abkhaz document, adopted on 23 July 1992, concerning the termination of the 1978 constitution stresses, legal vacuum emerged between Abkhazia and Georgia. This circumstance confirms that Abkhazia did not secede from Georgia “just like that”, such attitude was assumed even by the Abkhaz side. Furthermore, another confirmation is that Ardzinba, commenting on the resolution of the Abkhaz Supreme Soviet, denied that Abkhazia was seceding from Georgia. The draft treaty sent by him to the Georgian State Council and an appeal to Shevardnadze concerning the need for negotiations aimed at regulating the relations between Tbilisi and

⁹⁵⁶ J. Aves, Post-Soviet Transcaucasia, in: R. Allison (ed.), Challenges for the Former Soviet South, The Royal Institute of International Affairs, Russia and Eurasia Programme, Washington, D.C. / London, 1996, p. 174

⁹⁵⁷ W. Gaul, Neue Verfassungsstrukturen in Georgien, in: VRÜ 32, 1999, p. 49

⁹⁵⁸ *Ibid.*

⁹⁵⁹ See B. Coppeters, The Politicisation and Securitisation of Ethnicity: The Case of the Southern Caucasus, in: Civil Wars, Vol. 4, 2001, p. 76

⁹⁶⁰ O. Luchterhandt, Völkerrechtliche Aspekte des Georgien-Krieges, in: AVR, Bd. 46, 2008, p. 448

Sukhumi, and the consultations just before the outbreak of hostilities, all these developments corroborate an assertion that Abkhazia did not secede from Georgia in that particular period.

8.2.6 (iii) Abkhazia's secession from Georgia on the basis of the resolution of 23 July 1992 has to be rejected

In sum, bearing in mind all the considerations concerning the resolution passed by the Abkhaz Supreme Soviet on 23 July 1992, it has to be concluded that the document in question did not effect Abkhazia's secession from Georgia. The fact that, by adopting certain constitutional acts in 1990-1992, Abkhazia did not secede from Georgia, is confirmed by Chirikba as he stresses that respective acts were aimed at protecting Abkhazia's autonomous status and the resolution passed by the Abkhaz Supreme Soviet on 25 August 1990, together with analogous acts adopted by all other former autonomous republics of the USSR, did not mean the separation of the territory from the "mother state".⁹⁶¹ As in respect of the reinstatement by the Abkhaz Supreme Soviet of the 1925 constitution on 23 July 1992, it has been confirmed that this document represented an attempt to overcome a constitutional vacuum between Abkhazia and Georgia.⁹⁶²

8.2.7 The issue of Abkhazia's secession from Georgia in the context of the notion of unilateral remedial secession

8.2.7 (i) General considerations

It follows that the question of the Abkhaz secessionist bid has to be considered in the context of relations between the "mother state", i.e. Georgia and its autonomous republic. In the late 1980s and early 1990s this relationship was loaded with the notion of ethnic nationalism as the latter

⁹⁶¹ V. A. Chirikba, *The Georgian-Abkhazian Conflict: In Search for Ways out*, in: B. Coppeters et al. (eds.), *Georgians and Abkhazians, The Search for a Peace Settlement*, Bundesinstitut für ostwissenschaftliche und internationale Studien, Sonderveröffentlichung des BIOst, Oktober 1998, p. 54

⁹⁶² *Ibid.*, p. 55

dominated the political discourse.⁹⁶³ Of course, those sentiments were unleashed during the war of 1992-1993, which, as most other internal wars of the 1990s, was mainly the result of an accumulation of protracted conflicts since the 1950s (and from an earlier period).⁹⁶⁴

With respect to the pre-war ethnic composition of the autonomous republic, it has to be noted that Abkhazians constituted 17.8% whereas Georgians made up 45.6% of the republic.⁹⁶⁵ Before the military conflict, Abkhazia had the population of 525.000 and, as a consequence of the war, 230.000 to 250.000 Georgians were expelled from the republic.⁹⁶⁶ According to Lynch, the Georgians of Abkhazia “did not flee their homes as an indirect consequence of the war: they were a target of the conflict.”⁹⁶⁷ The OSCE has addressed the issue in its declarations from the summits in Budapest⁹⁶⁸, Lisbon⁹⁶⁹ and Istanbul⁹⁷⁰ stressing that the ethnic cleansing of a predominantly Georgian population took place.

Thus, as the Abkhaz Supreme Soviet adopted new constitution on 26 November 1994 declaring Abkhazia a sovereign republic and subject of international law⁹⁷¹, this step has to be considered in the context of Abkhazia’s pre-war ethnic composition, also with reference to the war fought by respective parties and the developments after the armed conflict.

⁹⁶³ J. Popjanevski, *Minorities and the State in the South Caucasus: Assessing the Protection of National Minorities in Georgia and Azerbaijan*, Central Asia-Caucasus Institute & Silk Road Studies Program, Silk Road Paper, September 2006, p. 27

⁹⁶⁴ See J. D. Fearon / D. D. Laitin, *Ethnicity, Insurgency, and Civil War*, in: *American Political Science Review*, Vol. 97, 2003, p. 88

⁹⁶⁵ B. Coppieters, *Ethno-Federalism and Civic State-Building Policies: Perspectives on the Georgian-Abkhaz Conflict*, in: *Regional & Federal Studies*, Vol. 11, 2001, p. 69

⁹⁶⁶ U. Halbach, *Erdöl und Identität im Kaukasus*, in: Friedrich-Ebert-Stiftung (Hrsg.), *IPG I/ 2003*, p. 151

⁹⁶⁷ D. Lynch, *Separatist states and post-Soviet conflicts*, in: *International Affairs*, Vol. 78, 2002, p. 838

⁹⁶⁸ CSCE Budapest Document 1994, corrected version 21 December 1994, Budapest Decisions, Regional Issues, Georgia, para. 2, available on the official website of the OSCE, at: http://www.osce.org/documents/mcs/1994/12/4048_en.pdf [accessed: 03.04.2009]

⁹⁶⁹ OSCE Lisbon Document 1996, DOC.S/1/96 (3 December 1996), Lisbon Summit Declaration, para. 20, available on the official website of the OSCE, at:

http://www.osce.org/documents/mcs/1996/12/4049_en.pdf [accessed: 03.04.2009]

⁹⁷⁰ OSCE Istanbul Document 1999, January 2000/Corr., Istanbul Summit Declaration, para. 17, available on the official website of the OSCE, at:

http://www.osce.org/documents/mcs/1999/11/4050_en.pdf [accessed: 03.04.2009]

⁹⁷¹ See Declaration of the Supreme Soviet of the Republic of Abkhazia of 10 February 1994 (in Russian), footnote 1, in: *Abxazia v sovetskuyu epoxu, Abxazskie pisma, (1947-1989), Sbornik dokumentov, Tom 1 (Abkhazia in the Soviet Epoch, Abkhazian Letters (1947-1989), Collection of Documents, Vol. 1)*, Sukhumi, 1994, p. 508

This is the “critical date” on the basis of which the assessment of the Abkhaz secessionist claim should be made.

The correctness of this kind of attitude is confirmed by Coppieters as he makes following statement with regard to the Georgian-Abkhaz conflict: “Die Beschlüsse des UNO-Sicherheitsrats machten klar, daß die internationale Gemeinschaft keine durch Gewalt herbeigeführte Grenzveränderung oder Sezession anerkennen würde.”⁹⁷² This citation bears out the relevance of the 1992-1993 war to the issue of assessment of the Abkhaz secessionist claim and demonstrates that it is impossible to evaluate that claim exclusively in the post-war context. Such relevance is also confirmed by the fact that the main result of the war was not just the defeat of the Georgian troops, but the dramatic change in the ethno-demographic balance in Abkhazia, the latter being regarded as an even more important outcome.⁹⁷³

It has to be noted at this point that the ambiguity was left, as to whether on 26 November 1994 Abkhazia declared independence, because the Abkhaz side proposed a union state with Georgia on the basis of equal partnership.⁹⁷⁴ The constitution did not specify the form of relations between Abkhazia and Georgia.⁹⁷⁵ On 3 October 1999 Abkhazia conducted a referendum on independence as stipulated by the Constitution of the “Republic of Abkhazia” and on 12 October 1999 President Ardzinba and the People’s Assembly proclaimed Abkhazia’s independence.⁹⁷⁶ It is thus evident that a fully-fledged secessionist attempt took place. But it is the flaw

⁹⁷² B. Coppieters, Westliche Sicherheitspolitik und der Konflikt zwischen Georgien und Abchasien, in: Berichte des Bundesinstituts für ostwissenschaftliche und internationale Studien, Bericht des BIOst Nr. 12/1999, p. 4

⁹⁷³ G. Nodia, The Conflict in Abkhazia: National Projects and Political Circumstances, in: B. Coppieters et al. (eds.), Georgians and Abkhazians, The Search for a Peace Settlement, Bundesinstitut für ostwissenschaftliche und internationale Studien, Sonderveröffentlichung des BIOst, Oktober 1998, p. 38

⁹⁷⁴ Chronology of events, in: Accord, an international review of peace initiatives, Issue 7, J. Cohen (ed.), A question of sovereignty, The Georgia-Abkhazia peace process, Conciliation Resources, London, 1999, p. 84

⁹⁷⁵ V. A. Chirikba, The Georgian-Abkhazian Conflict: In Search for Ways out, in: B. Coppieters et al. (eds.), Georgians and Abkhazians, The Search for a Peace Settlement, Bundesinstitut für ostwissenschaftliche und internationale Studien, Sonderveröffentlichung des BIOst, Oktober 1998, p. 55

⁹⁷⁶ E. Mihalkanin, The Abkhazians: A national minority in their own homeland, in: T. Bahcheli et al. (eds.), De Facto States, The quest for sovereignty, London / New York, 2004, p. 152

of the secessionist claim in question that the Abkhazians represented the minority (in relation to Georgians) in Abkhazia itself. Thus, the requirement inherent in the notion of unilateral remedial secession, denoting that respective people should represent numerical majority within an identifiable part of the territory of a “parent state” (i.e. the territory which it claims), was not met.

8.2.7 (ii) Abkhazia and the issue of internal self-determination

As in respect of the representativeness of the central government and the ability to conduct negotiations with Abkhaz leaders, it has to be stressed that in a period, which, according to the theory of a critical date, has to be considered while assessing the validity of a secessionist claim, ethnic Abkhazians dominated the political life in the autonomous republic. Enjoying the status of a titular nationality, the Abkhazians were in full control over republican institutions despite their vast numerical inferiority.⁹⁷⁷ In early summer 1992, a high-level Georgian delegation paid an official visit to Abkhazia aimed at discussing the division of powers between Tbilisi and Sukhumi, but no significant results were achieved during negotiations.⁹⁷⁸ Moreover, the consultations between senior Georgian and Abkhaz officials were ongoing even just before the outbreak of hostilities.

On 24 June 1992 Col. Aleksandr Ankvab was appointed as Abkhaz Interior Minister, ousting the ethnic Georgian Givi Lominadze, in defiance of a 1989 order which reserved to Georgia’s interior minister the power of appointing interior ministers for Abkhazia.⁹⁷⁹ It is also true that after the overthrow of President Gamsakhurdia, the new Georgian governing bodies showed little

⁹⁷⁷ “In addition to the quota of seats in the republican parliament reserved for ethnic Abkhaz, in practice, more than two-thirds of government ministers and local communist party department heads were also ethnic Abkhaz. Hence by forming alliances with segments of the Russian and Armenian populations, guaranteeing control over the parliament, the Abkhaz could dominate the political development of the republic and guide policy toward the central government in Tbilisi against the wishes of the Georgian plurality.”, S. E. Cornell, *Autonomy as a Source of Conflict: Caucasian Conflicts in Theoretical Perspective*, in: *World Politics, A Quarterly Journal of International Relations*, Vol. 54, 2002, pp. 264-265

⁹⁷⁸ *Ibid.*, p. 264

⁹⁷⁹ *Keessing’s Record of World Events*, Vol. 38, 1992, p. 39019

interest in observing the enactment which reserved more places to ethnic Abkhaz in the local parliament than to ethnic Georgians, the compromise achieved by the ousted President of Georgia and the Abkhaz authorities.⁹⁸⁰ But the abrogation by the Abkhaz leadership of the agreement, according to which, the two ethnic communities had to share the most important posts in the executive branch⁹⁸¹, demonstrates that Abkhazians made significant steps limiting Georgian representation in the local government.

The point here is that, despite the criticism of the Georgian-Abkhaz agreement reached by Gamsakhurdia, the Georgian authorities did not officially assert that the agreement should not be honoured⁹⁸², although it is true that later, in 1994, the Georgian legislature abolished respective enactment.⁹⁸³ The Abkhaz side, on the contrary, openly challenged the Georgian-Abkhaz agreement as it forcibly removed the ethnic Georgian Minister of the Interior and the ethnic Abkhaz faction ignored the ethnic Georgian faction in the Abkhaz parliament.⁹⁸⁴ It has to be noted at this point that the local parliament, based on the Georgian-Abkhaz agreement, was paralyzed within months and was divided into two blocks: Georgian deputies on the one hand, and Abkhaz, Armenian, Russian, Greek etc, on the other. Decisions taken by a majority were rejected by the Georgian delegates and this state of things led to a walk-out, on 30 June 1992, by Georgian deputies.⁹⁸⁵

⁹⁸⁰ B. Coppieters, Westliche Sicherheitspolitik und der Konflikt zwischen Georgien und Abchasien, in: Berichte des Bundesinstituts für ostwissenschaftliche und internationale Studien, Bericht des BIOst Nr. 12/1999, p. 7

⁹⁸¹ *Ibid.*, p. 8

⁹⁸² G. Nodia, The Conflict in Abkhazia: National Projects and Political Circumstances, in: B. Coppieters et al. (eds.), Georgians and Abkhazians, The Search for a Peace Settlement, Bundesinstitut für ostwissenschaftliche und internationale Studien, Sonderveröffentlichung des BIOst, Oktober 1998, p. 32

⁹⁸³ See the Decree of the Parliament of Georgia on the Legislative Practice of Apartheid and Racism in the Abkhaz Autonomous Republic (in Russian), 10 March 1994, para. 1, in: Konflikty v Abkazi i Yuzhnoi Osetii, Dokumenty 1989-2006 gg., (Conflicts in Abkhazia and South Ossetia, Documents 1989-2006), Prilozhenie k «Kavkazskomu sborniku», Vypusk № 1 (Supplement to the “Caucasian Digest”, Issue № 1), compiled and commented by M. A. Volkhonskii et al., Moscow, 2008, pp. 79-80

⁹⁸⁴ G. Nodia, The Conflict in Abkhazia: National Projects and Political Circumstances, in: B. Coppieters et al. (eds.), Georgians and Abkhazians, The Search for a Peace Settlement, Bundesinstitut für ostwissenschaftliche und internationale Studien, Sonderveröffentlichung des BIOst, Oktober 1998, p. 33

⁹⁸⁵ T. Potier, Conflict in Nagorno-Karabakh, Abkhazia and South Ossetia, A Legal Appraisal, The Hague et al., 2001, p. 11

The Georgian-Abkhaz agreement of 1991 was finally broken as the Abkhaz Supreme Soviet reinstated the 1925 constitution on 23 July 1992, because the very essence of the agreement in question was that “the Abkhazian parliament could make no constitutional changes by a simple majority, i.e., without the consent of the two communal factions (the arcane Abkhaz justification for this step was that it was only adopting a new constitution, not restoring the old one, that called for a two-thirds majority).”⁹⁸⁶ It has to be noted at this point that the Georgian parliamentary faction opposed the resolution passed on July 23.⁹⁸⁷

It is thus evident that the Abkhaz authorities challenged the Georgian-Abkhaz agreement of 1991 which did not allow constitutional changes without a two-thirds majority, i.e. the consent of the Georgian faction of the local parliament was required. Following steps, made by the Georgian side, are also relevant in this context:

- a) The decision to open a branch of the Tbilisi State University on the basis of the Georgian sector of the Abkhaz State University in Sukhumi, causing the protest of the Abkhazians and ethnic clashes between the Georgians and the Abkhazians in July 1989⁹⁸⁸;
- b) Adoption by the Georgian Supreme Soviet of the State Program for the Georgian Language (19 August 1989) which made the teaching of the Georgian language obligatory in all schools, and required Georgian language and literature tests as prerequisites for entry into higher education, provoking fears of “Georgianisation” among the Abkhaz population⁹⁸⁹;
- c) Enactment by the Georgian Supreme Soviet of a new electoral law on 18 August 1990, according to which, only the parties operating on the whole

⁹⁸⁶ G. Nodia, *The Conflict in Abkhazia: National Projects and Political Circumstances*, in: B. Coppieters et al. (eds.), *Georgians and Abkhazians, The Search for a Peace Settlement*, Bundesinstitut für ostwissenschaftliche und internationale Studien, Sonderveröffentlichung des BIOst, Oktober 1998, p. 33

⁹⁸⁷ See Keesing’s Record of World Events, Vol. 38, 1992, p. 39019

⁹⁸⁸ See the Address to the People’s Deputies of the USSR in July 1989 (in Russian), in: *Abxazia v sovetskuyu epoxu, Abxazskie pisma, (1947-1989), Sbornik dokumentov, Tom 1 (Abkhazia in the Soviet Epoch, Abkhazian Letters (1947-1989), Collection of Documents, Vol. 1)*, Sukhumi, 1994, pp. 469-476

⁹⁸⁹ T. Potier, *Conflict in Nagorno-Karabakh, Abkhazia and South Ossetia, A Legal Appraisal*, The Hague et al., 2001, p. 10

territory of Georgia could field the candidates for the elections to the Georgian Supreme Soviet.⁹⁹⁰ On the basis of this legislation, the Abkhaz National Forum “Aydgylara” and the South Ossetian Popular Front “Adamon Nykhas” were prevented from fielding candidates for the posts of deputies.⁹⁹¹

Furthermore, it has been stated that as undisciplined Georgian paramilitary forces invaded Abkhazia, they committed grave violations on their way.⁹⁹² When Georgian troops entered Abkhazia in August 1992, they destroyed symbols of separate Abkhaz nationality together with the statues of Lenin.⁹⁹³ For example, the Abkhaz historical archives in Sukhumi were destroyed.⁹⁹⁴

The outbreak of the 1992-1993 war, as such, is a very obscure issue. As in respect of the pre-war situation in Georgia, it can be stressed that, after Gamsakhurdia’s overthrow, Georgia was a weak and divided state (divided between the supporters of the deposed President Gamsakhurdia and the adherents of the new government), its new authorities lacked both popular and formal legitimacy, and Abkhazia was separated from the territory under the control of the Georgian authorities by the Megrelian region, significant portions of which were controlled by pro-Gamsakhurdia forces.⁹⁹⁵ Nodia concludes that the open rebuttal of the Georgian-Abkhaz agreement of 1991 by the Abkhaz side deteriorated the conditions for the accommodation of conflicting claims:

“It amounted to a latent declaration of war on the Georgian community in Abkhazia and on Tbilisi, and significantly strengthened the position of those

⁹⁹⁰ Article 8 of the Law of the Georgian SSR on Elections to the Supreme Soviet of Georgia (18 August 1990), available on the official website of the Parliament of Georgia, at: <http://www.parliament.ge/archive/3784g/3784g-01.pdf> [accessed: 12.04.2009]

⁹⁹¹ Chronology of events, in: Accord, an international review of peace initiatives, Issue 7, J. Cohen (ed.), A question of sovereignty, The Georgia-Abkhazia peace process, Conciliation Resources, London, 1999, p. 82

⁹⁹² S. E. Cornell / S. Frederick Starr, The Caucasus: A Challenge for Europe, Central Asia-Caucasus Institute & Silk Road Studies Program, Silk Road Paper, June 2006, p. 52

⁹⁹³ G. Nodia, The Conflict in Abkhazia: National Projects and Political Circumstances, in: B. Coppeters et al. (eds.), Georgians and Abkhazians, The Search for a Peace Settlement, Bundesinstitut für ostwissenschaftliche und internationale Studien, Sonderveröffentlichung des BIOst, Oktober 1998, p. 24

⁹⁹⁴ B. Coppeters, Introduction, in: *Ibid.*, p. 5

⁹⁹⁵ G. Nodia, The Conflict in Abkhazia: National Projects and Political Circumstances, in: *Ibid.*, pp. 32-33

factions in the Georgian leadership who believed that military methods were best in dealing with Ardzinba. This is not to imply that starting the war was a good idea on the Georgian side, but simply that an extremely dangerous gamble by Ardzinba's government lent an important element of legitimacy to the Georgian military effort."⁹⁹⁶

As it has already been stated, the beginning of the war is an issue which can be described as obscure and confusing. The real decision-making body in Georgia was, at that time, the four-member "Presidium of the State Council" composed of Shevardnadze, two warlords (Kitovani and Ioseliani) and Prime Minister Sigua. There is no clarity in respect of the decision-making process within the body itself, Shevardnadze's protagonists, for example, maintained that he really did not want the war and the latter was a result of unauthorized actions by Kitovani, which Shevardnadze had later to legitimize. The indication that Shevardnadze attributed to the two warlords the responsibility for starting the 1992-1993 war, is confirmed by their later removal from power and imprisonment.⁹⁹⁷

As it has already been stated in the present study, according to the official Georgian version, the Georgian troops entered Abkhazia to guard highways and railways that were targeted by subversive activities by pro-Gamsakhurdia guerillas, and as the latter also operated on the territory of Abkhazia, the military operation had to comprise Abkhazia as well. But since the Abkhaz militia (an illegal armed formation) resisted the advancement of Georgian troops, it was natural that the government forces tried to suppress this resistance and also depose those who were behind the Abkhaz militia, i.e. separatist authorities led by Ardzinba.⁹⁹⁸

It has to be noted that on the eve of the Georgian military operation Shevardnadze went on the Georgian television to announce the plan: he only spoke of guarding communication links, which was a constitutional matter, and his threats could have been interpreted as being aimed at pro-Gamsakhurdia forces, rather than Abkhaz authorities. But, according to

⁹⁹⁶ *Ibid.*, p. 33

⁹⁹⁷ *Ibid.*, p. 34

⁹⁹⁸ *Ibid.*

Nodia, he certainly understood that military resistance by the Abkhazians was quite possible.⁹⁹⁹ Furthermore, Shevardnadze claimed that the plan for the Georgian military operation had been cleared with Ardzinba, which the latter denies and, of course, nobody can check, whether it is true or not. Nodia puts following questions in this respect: even if Ardzinba had accepted the plan, how could he be trusted? Or how could Shevardnadze's warlords be trusted?¹⁰⁰⁰

The fact remains that there was an agreement between the Georgian and the Abkhaz authorities which permitted the Georgian military to enter the territory of Abkhazia under certain circumstances. The Abkhaz authorities described the deployment of Georgian forces on 14 August 1992 as an act of "occupation", referring to the April 1992 agreement, which permitted the Georgian National Guard troops to enter Abkhazia only with permission of the Abkhaz government.¹⁰⁰¹ It can be recalled at this point that another important objective pursued by the Georgian side was the release of kidnapped officials, including the Interior Minister Roman Gventsadze, who had been taken hostage on 11 August 1992 by the supporters of ousted President Gamsakhurdia (Gventsadze was released on August 14). The kidnapped officials had gone to negotiate the release of hostages captured in July, including deputy Prime Minister Kavsadze.¹⁰⁰²

All the circumstances surrounding the outbreak of the 1992-1993 war demonstrate the complexity of the situation in the pre-war Georgia and those difficulties contributed to the deterioration of relations between Tbilisi and Sukhumi. Coppieters emphasizes that the deployment of Georgian troops in Abkhazia could not, in any case, be considered an act of aggression under international law.¹⁰⁰³ Despite this, the deployment of troops in Abkhazia on 14 August 1992 is a burden placed on the Georgian side. According to Nodia, "as political conflict with Sukhumi already

⁹⁹⁹ *Ibid.*, p. 35

¹⁰⁰⁰ *Ibid.*

¹⁰⁰¹ Keesing's Record of World Events, Vol. 38, 1992, p. 39059

¹⁰⁰² *Ibid.*

¹⁰⁰³ B. Coppieters, *Shades of Grey. Intentions, Motives and Moral Responsibility in the Georgian-Abkhaz Conflict*, in: B. Coppieters et al. (eds.), *Georgians and Abkhazians, The Search for a Peace Settlement*, Bundesinstitut für ostwissenschaftliche und internationale Studien, Sonderveröffentlichung des BIOst, Oktober 1998, p. 156

existed it is reasonable to assume that when Georgian troops entered Abkhazia they were intent on ‘solving’ the Abkhaz question.”¹⁰⁰⁴

Bearing in mind all theoretical considerations regarding the secessionist claims and respective cases examined in the present study, it is doubtful, whether the enactments of the Georgian legislative body mentioned above, and the circumstances surrounding the outbreak, the course and the aftermath of the 1992-1993 war amounted to the serious violation or denial of the right of Abkhazians to internal self-determination. Furthermore, as it has been demonstrated, the Abkhaz leadership took steps offending the Georgian-Abkhaz agreement of 1991 concerning the distribution of ethnic quotas in the legislative and executive branches among respective communities. Neither can it be asserted that, according to the theory of the critical date, the Abkhazians suffered grievous wrongs at the hand of the “parent state”, i.e. Georgia: serious and widespread violations of fundamental human rights of the Abkhazians were absent.

8.2.7 (iii) The problem of territorial definition of a claimant to external self-determination

It is thus evident that the Abkhaz secessionist claim is a flawed one. This assertion holds even if one tries to define the claim in question by territorial means. In the latter case, the holder of the right to self-determination, i.e. the eligible “self”, would be considered the territory of the Abkhaz ASSR, as such, not the Abkhaz people. The logic of such an approach reads as follows: modern separatist conflicts provide support for the doctrine of *uti possidetis* in that groups seeking self-determination, attempt to do so along the physical limits already demarcated for them by previous events in history, and respective non-state entities present territorially based

¹⁰⁰⁴ G. Nodia, Georgian perspectives, in: Accord, an international review of peace initiatives, Issue 7, J. Cohen (ed.), A question of sovereignty, The Georgia-Abkhazia peace process, Conciliation Resources, London, 1999, p. 22 (emphasis in original)

arguments for their right to self-determination.¹⁰⁰⁵ In the specific case of the USSR this would mean following:

“[...] das *uti possidetis* in Fremdherrschaftssituationen beruht auf dem Konzept der Territorialnation, d.h. auf der besonderen Situation der unabhängig werdenden Staaten, daß ihnen eine staatstragende Nation mit ausreichendem ethnischen, geschichtlichen und/oder religiösen Zusammenhang fehlt.”¹⁰⁰⁶

It has been emphasized that such a situation has been created in the newly emerged states in Europe, those political units being defined as: “Territorialnationen [...] die mangels ausreichender anderer identitätsstiftender Merkmale auf die zumeist willkürlich durch die ehemalige Föderation gezogenen administrativen Grenzen als Klammer angewiesen sind.”¹⁰⁰⁷

Thus, in the Soviet setting, the notion of *uti possidetis* meant that the administrative borders, i.e. the republican frontiers as the highest internal borders of the multinational federation, became the international borders of the newly emerged independent states, the latter being, at the moment of such a transition, the territorial units defined by those borders: “Bei den territorialen Einheiten handelt es sich wiederum um Territorialnationen, d.h. um grundsätzlich durch ihre Außengrenzen definierte Einheiten.”¹⁰⁰⁸

According to Simmler, the dissolution of Yugoslavia and the USSR demonstrates that ethnically defined people, for the purposes of self-determination, enjoyed the internal dimension of the right in question and were barred from the realization of the external one, i.e. secession. The international community of states accepted the dissolution of the federations mentioned above, on the basis of the principle of effectiveness, but rejected to grant all ethnically defined peoples within the republican borders (which, by then, were transformed into international ones) the right to external self-

¹⁰⁰⁵ J. Castellino / S. Allen, *Title to Territory in International Law, A Temporal Analysis*, Aldershot / Burlington, 2003, p. 20

¹⁰⁰⁶ C. Simmler, *Selbstbestimmungsrecht der Völker contra uti possidetis?*, *Zum Verhältnis zweier sich angeblich widersprechender Regeln des Völkerrechts*, in: VRÜ 32, 1999, p. 233 (italics in original)

¹⁰⁰⁷ *Ibid.*

¹⁰⁰⁸ *Ibid.*, p. 229

determination, and made the recognition of the newly emerged independent states contingent on the observance of high standards of the minority protection.

It follows that the dissolution of Yugoslavia does not represent the case of self-determination of the ethnically defined peoples, otherwise it is impossible to explain the attitude of the international community of states towards the secessionist aspirations of the “next level” within the structure of the federation: nobody could reasonably explain to the Serbs living in the Croatian region of Krajina, why the alleged ethnically defined right to external self-determination certified Croatia’s secession from the federal framework and, at the same time, barred Krajina from leaving Croatia itself.¹⁰⁰⁹

As in respect of Georgia, it has been asserted by the author that despite its independent existence which lasted for a long period of time in history, modern historical developments led to the situation, in which, there are no other elements than the territorial bond, which would provide an identity for the whole population of Georgia: “Fast alle Nachfolgestaaten der ehemaligen UdSSR beherbergen (teilweise sehr starke) ethnische Minderheiten auf ihren Gebieten, wodurch eine ethnische Definition der Staatsnation erschwert wird.”¹⁰¹⁰ Bearing in mind these considerations, it is important at this point to clarify the question of interaction between the notions of ethnicity and territoriality for the purposes of the realization of the right of peoples to self-determination, and to examine their application to the particular case of Georgia.

The whole difficulty and complexity of an approach denoting the territorial definition of the holder of the right to self-determination is expressed in Simmler’s following reasoning: the protagonists of the ethnical self-determination do not provide an answer to the question, how to justly define the holder of the right, by territorial means, in each and every single case, as the adherence to administrative borders is considered as contravening the right to self-determination. It follows that in order to make ethnical self-

¹⁰⁰⁹ *Ibid.*, p. 230

¹⁰¹⁰ *Ibid.*, p. 232

determination, in the form of secession, able to function as the basis for the emergence of new states, those protagonists should once again refer to the administrative borders and such territorial definition of the ethnic community is inconsistent and absurd.¹⁰¹¹ The interaction between the notion of *uti possidetis* and the right of peoples to self-determination has been summarized as follows:

“Einen indirekten Einfluß übt das *uti possidetis* allerdings insoweit auf das Selbstbestimmungsrecht der Völker aus, als es in Ermangelung einer anderen tauglichen Komponente hilft, durch das Festhalten an den administrativen Binnengrenzen nach dem Zerfall einer übergeordneten Einheit den Träger eines externen Selbstbestimmungsrechts nachträglich, aber durchaus mit vorgreiflicher Wirkung, als territoriale Einheit zu bestimmen.”¹⁰¹²

But the problem connected with the territorial definition of the aspirant to secession is that international law grants the right to self-determination to “peoples”, as such, and accordingly, the access to the right requires the threshold step of characterizing as a people the group invoking the right in question.¹⁰¹³ It is also true that international law is familiar with the situations in which the holder of the right in question was defined by territorial means. The most prominent cases were, in this context, the colonial, non-self-governing and trust territories. Thus, the territorially defined “self” is deduced in the context of the population of territories being under alien subjugation, domination and exploitation (foreign military occupation is one example of such a situation).

But, even those claims of the colonial territorial units to independence, were regarded as legitimate because of the right of respective *peoples* inhabiting those territories, the right to external self-determination. It follows that the right of self-determination legitimized the attainment of independent statehood by those territories. If we refer to a more recent example, it was exactly the right to self-determination of the East Timorese people, which

¹⁰¹¹ *Ibid.*, p. 234

¹⁰¹² *Ibid.*, p. 235 (italics in original)

¹⁰¹³ Reference Re Secession of Quebec, Canada, Supreme Court, 20 August 1998, in: Sir E. Lauterpacht et al., (eds.), *ILR*, Vol. 115, 1999, p. 583

caused and legitimized the emergence of an independent state Timor-Leste, not just the fact that East Timor was a non-self-governing territory. The latter status was ascribed to East Timor because the right of respective people to self-determination “was waiting” for its realization. In sum, it is the lack of sufficient degree of self-determination of respective people which causes the emergence of a non-self-governing territory, not *vice versa*.

The developments experienced by public international law demonstrate that the right of peoples to self-determination, to say precisely its external dimension, i.e. the secessionist self-determination, requires an approach distinct from the territorial definition of its holder. The point here is that, as it has been shown in the present study, only unilateral remedial secession is acceptable on the international plane. It follows that secession is a remedy, as such, the remedy against grievous wrongs suffered at hands of the “mother state”.

Thus, secession presupposes the existence of the victim of misgovernment, the people which has been denied internal self-determination. If we consider the case of Kosovo, it becomes evident that the decisive matter in this whole conflict was the denial by Belgrade of internal self-determination to the Kosovo Albanians and this state of things caused the current situation in the former province, not just the fact that Kosovo enjoyed an autonomous status as a territorial unit. Again, the right of respective people to self-determination legitimized Kosovo’s emergence with its recent status.

The creation of a state via secessionist self-determination should involve a strong moral claim of the victim of misgovernment, and the realization of external self-determination should remedy the wrongs suffered at hands of the former sovereign. The reference to the “people” which suffered grievous wrongs and has been denied internal self-determination, which represents the majority in the territory it claims, and which has exhausted all realistic and effective remedies for the peaceful settlement of the conflict (i.e. short of secession), all these notions are inherent in the legitimate claim to secessionist self-determination.

Bearing in mind these considerations, it has to be concluded that an approach, implying the territorially defined holder of the claim to external self-determination, does not represent an appropriate guideline for solving the problems connected with modern law of self-determination and respective secessionist conflicts. Nevertheless, I am going to apply such an approach to the case of Abkhazia at this stage and to draw conclusions in this regard.

8.2.7 (iv) The notion of *uti possidetis* and Abkhazia as a territorially defined “self” in the context of secessionist self-determination

It is important to refer to the concept of *uti possidetis* which is informative in this overall context. The content of the notion of *uti possidetis* has been clarified by the ICJ in the following way:

“[...] the principle is not a special rule which pertains solely to one specific system of international law. It is a general principle, which is logically connected with the phenomenon of the obtaining of independence, wherever it occurs. Its obvious purpose is to prevent the independence and stability of new States being endangered by fratricidal struggles provoked by the challenging of frontiers [...]”¹⁰¹⁴

On 20 November 1991 the Badinter Arbitration Commission received a letter of the Chairman of the Conference on Yugoslavia, Lord Carrington, containing the question put by the Republic of Serbia, whether the Serbian population in Croatia and Bosnia-Herzegovina enjoyed the right to self-determination.¹⁰¹⁵ The Commission provided the following answer:

“[...] it is well established that, whatever the circumstances, the right to self-determination must not involve changes to existing frontiers at the time

¹⁰¹⁴ Frontier Dispute, Judgment, I.C.J. Reports 1986, p. 554 (p. 565)

¹⁰¹⁵ Conference on Yugoslavia Arbitration Commission: Opinions on Questions arising from the Dissolution of Yugoslavia [January 11 and July 4, 1992], Opinion No. 2, in: 31 ILM 1488 (1992), pp. 1497-1498

of independence (*uti possidetis juris*) except where the States concerned agree otherwise.”¹⁰¹⁶

Accordingly, the Arbitration Commission concluded that the Serbian population in Bosnia-Herzegovina and Croatia was entitled to all the rights enjoyed by *minorities* and *ethnic groups* under international law.¹⁰¹⁷ The statement quoted above has been interpreted as presenting evidence for the acceptance of *uti possidetis* as a doctrine of legal value, stated as an additional criterion for recognition, and suggesting that the doctrine of *uti possidetis* has been readily accepted in state practice.¹⁰¹⁸

The statement of the Badinter Arbitration Commission has been criticized for different reasons. It has been stressed that the commission’s response to the two questions posed by Lord Carrington was divided into three separate opinions and, by this stage, the tone had already moved away from the notion of binding judicial decisions.¹⁰¹⁹ Furthermore, it has been emphasized that the assertion, that the opinions of the Badinter Commission (especially Nos. 2 and 3) have long-term ramifications beyond the situation in Yugoslavia, needs serious qualification.¹⁰²⁰ As the most controversial treatment of the issue of territoriality in contemporary international law has been regarded the extension by the Badinter Commission of the doctrine of stability of international frontiers to the internal administrative borders of the former Yugoslavia: “While it is true that *uti possidetis* upgraded colonial frontiers into international frontiers, its application in those cases was flawed and its extrapolation in this modern situation is only more problematic.”¹⁰²¹

The application of the *uti possidetis* concept to the post-Soviet setting was confirmed by the document establishing the CIS. According to the latter instrument, the High Contracting Parties expressed the acknowledgement of and respect for each other’s territorial integrity and the inviolability of the

¹⁰¹⁶ *Ibid.*, para. 1, p. 1498 (italics in original)

¹⁰¹⁷ *Ibid.*

¹⁰¹⁸ J. Castellino / S. Allen, *Title to Territory in International Law, A Temporal Analysis*, Aldershot / Burlington, 2003, pp. 16-17

¹⁰¹⁹ *Ibid.*, p. 169

¹⁰²⁰ *Ibid.*, p. 181

¹⁰²¹ *Ibid.*, p. 190 (italics in original)

borders existent, at that time, within the Commonwealth.¹⁰²² This principle was reiterated in the Alma-Ata Declaration of 21 December 1991.¹⁰²³ It has been emphasized in this respect that the Charter for the CIS formally respects *uti possidetis* as a norm applicable within the territories of the former USSR.¹⁰²⁴

It is also true that those members of the CIS endorsed the frontiers they received, but they still maintain territorial claims against each other, so the signing of the Charter has not been accompanied by the states relinquishing claims to each other's contested territories.¹⁰²⁵ But the decisive point is itself the fact of application of *uti possidetis* to the post-Soviet setting. It has to be mentioned that Georgia did not represent an original member of the CIS, but it acquired full membership on 11 December 1993 and, on that date at the latest, the principles enunciated in the document establishing the CIS became applicable to Georgia as well.

According to Simmler, there was no will before 1989 on the part of the states not directly affected by the frontier disputes, to transform the rule of *uti possidetis* from the particular customary international law into the rule of universal custom. But this state of affairs changed after respective developments in Europe and subsequent reaction throughout the world. The concept of *uti possidetis* acquired the status of general customary international law, because even those states not directly affected by the frontier disputes and representing all regions, especially due to the activity of the UN in the field of the border conflicts on the soil of the former Yugoslavia, demonstrated the corresponding *opinio juris* and appropriate state practice in the context of the acquisition of statehood by newly emerged independent territorial units (former federal republics).¹⁰²⁶

Thus, it can be stressed that one important manifestation, which represents an impediment to the realization of the territorially defined secessionist

¹⁰²² Article 5 of the Agreement Establishing the Commonwealth of Independent States [Done at Minsk, December 8, 1991], in: 31 ILM 138 (1992), p. 144

¹⁰²³ See the Alma Ata Declaration of 21 December 1991, in: *Ibid.*, p. 148

¹⁰²⁴ J. Castellino / S. Allen, *Title to Territory in International Law, A Temporal Analysis*, Aldershot / Burlington, 2003, p. 19

¹⁰²⁵ *Ibid.*

¹⁰²⁶ C. Simmler, *Selbstbestimmungsrecht der Völker contra uti possidetis?*, *Zum Verhältnis zweier sich angeblich widersprechender Regeln des Völkerrechts*, in: VRÜ 32, 1999, p. 229

claim of Abkhazia, is the concept of *uti possidetis*. It is important at this point to cite Weller's statement which is relevant to the situation in Georgia in the context of secessionist claims within the Soviet setting:

“Self-determination is not available to distinct ethnic entities within the self-determination unit that may feel that they too should have had the option of secession from secession. The doctrines of territorial unity and *uti possidetis* protect the territorial identity of the self-determination entity before, during and after the act of self-determination.”¹⁰²⁷

It follows that as the Georgian SSR was regarded, in the Soviet setting, as an eligible “self” for the purposes of the realization of the secessionist self-determination, Georgia was the territorially defined holder of the right in question. But it was the right of the Georgian people to self-determination which represented the legal basis of the emergence of the independent Georgian state in the post-Soviet epoch. It would be erroneous to argue that, by the time of the attainment of its post-Soviet independence, Georgia lacked the notion which is designated in German as “*staatstragende Nation*” with sufficient ethnical, historical and/or religious coherence. There was no identity problem in Georgia, the latter represents a state with the history dating back to ancient times and with the religion of Orthodox Christianity declared in Eastern-Georgian Kingdom of Iberia approximately in 337 AD.¹⁰²⁸

Indeed, it has been stressed with regard to Georgia's post-Soviet statehood that apparently, at a critical date, while not existing *de facto* (because of a lack of effectiveness), Georgia had emerged *de jure* due to the lawful exercise of the right to external self-determination, the latter circumstance having as a consequence the title to jurisdiction.¹⁰²⁹ The fact that there are ethnic minorities in Georgia does not mean that there is no ethnically

¹⁰²⁷ M. Weller, *The Self-determination Trap*, in: *Ethnopolitics*, Vol. 4, 2005, p. 13 (italics in original)

¹⁰²⁸ See G. Anchabadze, *History of Georgia, Georgian Kingdoms in the Late Antique Period (the IV cen. B.C. – V cen.)*, available on the official website of the Parliament of Georgia, at: http://www.parliament.ge/pages/archive_en/history/his2.html [accessed: 04.05.2009]

¹⁰²⁹ R. Lefeber / D. Raič, *Frontiers of International Law, Part One: The Chechen People*, in: *LJIL*, Vol. 9, 1996, p. 3

defined “*Staatsnation*” in the Georgian case: the existence of ethnic minorities does not exclude the presence of the notion known as “*staatstragende Nation*”. The fact that a national movement contributed to the attainment by Georgia of its independence, confirms this. Bearing in mind these considerations, the assertion that Georgia was solely a territorially defined holder of the right to self-determination, has to be regarded, at the best, as a highly questionable one.

There can be no secession from secession of a territorially defined “self” in the Georgian-Abkhaz context, the notions of the territorial integrity of states and *uti possidetis* serve as a bar to the realization of secessionist self-determination of the territorially defined aspirant. It has to be mentioned that the territorially defined “self” does not satisfy the criteria of secession in the case of Abkhazia.

It is true that the Abkhaz declaration of independence of 12 October 1999 refers to the “independent State created by the people of Abkhazia”¹⁰³⁰ and not the Abkhaz people, as such, i.e. the link is made to the territorial definition of the eligible “self” for the purposes of the realization of the right of peoples to self-determination. But, as the territorially defined unit, Abkhazia included 45.6% Georgian population which has been expelled from the republic in the course of the ethnic cleansing. At the same time, no reasonable conditions have been established by the Abkhaz authorities for the return of Georgians. Bearing in mind these facts, it has to be concluded that the Abkhaz secessionist claim, even if its holder is defined by territorial means, does not represent a strong one, it lacks the legitimacy. Decisive seems to be, in this case, the statement made by Judge Wildhaber in his concurring opinion (joined by Judge Ryssdal), in the case *Loizidou v. Turkey* in 1996:

“When the international community in 1983 refused to recognise the ‘TRNC’ as a new State under international law [...], it by the same token implicitly rejected the claim of the ‘TRNC’ to self-determination in the form

¹⁰³⁰ Act of State Independence of the Republic of Abkhazia (12 October 1999), available on the website of the Unrepresented Nations and Peoples Organization (UNPO), at: <http://www.unpo.org/content/view/705/236/> [accessed: 07.05.2009]

of secession [...] The ‘TRNC’ is constituted by what was originally a minority group in the whole of Cyprus (i.e. the ‘Turkish Cypriots’) but what is now the majority in the northern part of Cyprus. This group invokes a right to self-determination which under the 1985 Constitution is denied by them to the ‘Greek Cypriots’ living in the territory of the ‘TRNC’. This leads me to the conclusion that where the modern right to self-determination does not strengthen or re-establish the human rights and democracy of all persons and groups involved, as it does not in the instant case, it cannot be invoked to overcome the international community’s policy of non-recognition of the ‘TRNC’.”¹⁰³¹

Thus, having established that neither in the context of the ethnically defined “self”, nor in the sense of a territorially defined holder of the right to self-determination, does the Abkhaz secessionist claim represent a strong one, it is important at this point to address the issue, whether the Abkhaz secessionist aspiration can be legitimized despite its apparent shortcomings. Here we are led to the other “face” of the principle of effectiveness, namely the notion of prescription, and its functioning within the realm of public international law.

8.2.8 The notion of prescription and Abkhazia’s claim to independent statehood

8.2.8 (i) Essence of the concept of prescription and its dimensions within the realm of public international law

Prescription is a complex phenomenon which encompasses various elements and dimensions. It can be asserted that this manifestation represents an expression of the “mode of functioning” of the *de facto state* as it means that “lapse of time can lead to the creation or elimination of legal positions. An existing situation can become, through lapse of time,

¹⁰³¹ Concurring opinion of Judge Wildhaber, joined by Judge Ryssdal, Case of *Loizidou v. Turkey*, Appl. no. 15318/89, Judgment (Merits and just satisfaction), ECHR, judgment of 18 December 1996, available on the official website of the ECHR, at: <http://cmiskp.echr.coe.int/tkp197/search.asp?sessionId=6710424&skin=hudoc-en> [accessed: 07.05.2009]

legally cognizable although it was not so originally;”¹⁰³². It is evident that prescription operates on the basis of the requirement of time and is directly connected with the alleged law-creating influence of facts. Moreover, reference has been made to the situation illegal in origin and the importance of the notion of prescription is that it validates the factual situation illegal in origin, i.e. it represents the negative dimension of the notion of *ex factis jus oritur*.

Indeed, the latter function of the concept of prescription has been confirmed by Lauterpacht, as this eminent scholar has included prescription in the list of the modes of the validation of illegality (together with the notions of consent of the injured party and recognition).¹⁰³³ The concept of prescription plays an important role in the domestic legal systems of different states but it is the content of this manifestation under public international law, which is important in the context of the *de facto state*.

First of all, it must be noted that the notion of prescription has two different “faces” within the realm of public international law: extinctive and acquisitive. The former refers “to the loss of a claim by failure to prosecute it.”¹⁰³⁴ This form of prescription is also known in English law and is expressed through the notions of “limitation” and “laches”. But it is the concept of acquisitive prescription which causes an academic interest in the context of the title to territory, the alleged law-creating influence of facts in the form of *ex factis jus oritur* and the *de facto state*. It is important at this stage to introduce the definition of the acquisitive prescription and its significance within the realm of public international law:

“If the conditions of effective, continuous and peaceful exercise of territorial jurisdiction are fulfilled, a relative title grows into an absolute title which is valid *erga omnes*. Acquisition of title in this manner may be called title by way of acquisitive prescription. It shares with extinctive prescription the

¹⁰³² C. - A. Fleischhauer, Prescription, in: R. Bernhardt (ed.), EPIL, Vol. 3 (1997), p. 1105

¹⁰³³ See H. Lauterpacht, Recognition in International Law, Cambridge, 1948, pp. 427-429

¹⁰³⁴ P. K. Menon, Title to Territory: Traditional Modes of Acquisition by States, in: RDI, Vol. 72, 1994, p. 13

legal effect of creating an estoppel against third states whose claims have become stale.”¹⁰³⁵

As it is evident from this statement, effective and continuous display of state functions, which is peaceful in relation to other states, amounts to the title. It is again the notion of effectiveness which becomes the issue of decisive importance in this context.

It must be noted that the acquisitive prescription, as such, appears in two different forms as the basis of the acquisition of a title to territory. The first one is an immemorial possession and denotes the situation in which there is uncertainty with regard to the origin of existing state of things. It is impossible to prove legality or illegality of the origin of respective factual situation and, for this reason, there is a presumption that it is legal, i.e. respective title is acquired under this manifestation of prescription. The second and more important form is prescription akin to *usucapio* of Roman law. Legal effect of *usucapio* under the Roman law was dependent on the interplay of following requirements: “(a) A thing susceptible of ownership (*res habilis*); (b) A title of some kind (*justus titulus*), such as a sale, gift, or legacy, albeit a defective title; (c) Good faith (*fides*); (d) Possession (*possessio*), implying physical control (*corpus*) and the intention to possess as owner (*animus*); (e) The possession must be uninterrupted for a period of time defined by law (*tempus*).”¹⁰³⁶

It must be stressed that the situation with regard to the notion of acquisitive prescription under public international law is quite different from the state of affairs described above. These considerable differences are of great importance in the context of the assessment of respective claims which have emerged in various *de facto* situations. Following criteria must be satisfied before the title is acquired on the basis of acquisitive prescription within the realm of public international law:

¹⁰³⁵ G. Schwarzenberger, Title to Territory: Response to a Challenge, in: AJIL, Vol. 51, 1957, p. 322 (italics in original)

¹⁰³⁶ D. H. N. Johnson, Acquisitive Prescription in International Law, in: BYIL, Vol. 27, 1950, pp. 334-335 (italics in original)

The prescribing state must exercise its possession à titre de souverain

This requirement refers to the prescribing state, as to the sovereign. Respective state must demonstrate that it regards itself as a sovereign in connection with the territory it wishes to acquire. If it admits that sovereignty over that territory belongs to another state, it cannot claim the title on the basis of the acquisitive prescription, because there is no acquiescence of the other state in this situation and the notion of acquiescence represents a *conditio sine qua non* of acquisitive prescription. This requirement of acting as a sovereign is based on the idea that “the actual exercise of sovereign jurisdiction tends to create a presumption in favour of the right to exercise such jurisdiction.”¹⁰³⁷ It has to be noted that the claim of a prescribing state must be based on its own, i.e. state acts. The acts of individual persons are left without consideration where the acquisition of the title to territory, on the basis of acquisitive prescription, is the issue in question.¹⁰³⁸ Another consequence of the requirement that the possession must be exercised by the prescribing state *à titre de souverain* is that it is not enough for the prescribing state to legislate on the affairs of its own nationals in the area concerned, it is only if the state has legislated for the territory, as such, and this legislation has been acquiesced in by the other state(s), that there has been an exercise of sovereign power which can serve as the basis of the acquisition of a title to the territory in question on the ground of the notion of prescription.¹⁰³⁹

The possession of the prescribing state must be peaceful and uninterrupted

This requirement denotes the situation in which the exercise of state functions by the prescribing state is not challenged by other states. The notion of challenge is of great importance in this context. It has to be noted that the diplomatic protest has been regarded as an issue having no overwhelming importance within the realm of contemporary international law in the sense of the principal mode of preventing the prescription from

¹⁰³⁷ P. K. Menon, Title to Territory: Traditional Modes of Acquisition by States, in: RDI, Vol. 72, 1994, p. 15

¹⁰³⁸ See D. H. N. Johnson, Acquisitive Prescription in International Law, in: BYIL, Vol. 27, 1950, p. 344

¹⁰³⁹ See *Ibid.*, p. 345

producing legal effects. Moreover, according to Johnson, “A protest since 1919 can be said to have amounted to no more than a temporary bar.”¹⁰⁴⁰ It has been asserted that, in order to interrupt the acquisitive prescription, it is a proper way within the corpus of public international law of modern age to bring the issue in question before the UN or the ICJ.¹⁰⁴¹

The possession of the prescribing state must be public

This requirement is directly connected with the notion of acquiescence and refers to the knowledge of respective state of affairs on the part of the acquiescing state: “Publicity is essential because acquiescence is essential. For acquisitive prescription depends upon acquiescence, express or implied. [...] but without knowledge there can be no acquiescence at all.”¹⁰⁴²

The possession of the prescribing state must persist for a certain period of time

This requirement represents one of the most problematic issues connected with the concept of the acquisitive prescription. The source of the problem is that, unlike the situation in domestic legal systems, there is no fixed period of time within the realm of public international law which could be applied to the functioning of the acquisitive prescription.¹⁰⁴³

Another problematic issue is that of peaceful and uninterrupted possession of the prescribing state. A certain degree of clarity exists in respect of the criterion of persistence of the possession of the prescribing state in the sense that, the period of time which is necessary to acquire the title to territory on the basis of the acquisitive prescription, is considered to be longer in comparison with a similar requirement of the domestic legal system. It has also been suggested that the notion of protest is of greater weight within the realm of public international law than in the internal legal order.¹⁰⁴⁴ This is again the real situation with regard to the requirement of time in the context

¹⁰⁴⁰ *Ibid.*, p. 346

¹⁰⁴¹ *Ibid.*

¹⁰⁴² *Ibid.*, p. 347

¹⁰⁴³ See P. K. Menon, *Title to Territory: Traditional Modes of Acquisition by States*, in: RDI, Vol. 72, 1994, p. 16

¹⁰⁴⁴ See F. Münch, *Brauch und Missbrauch der normativen Kraft des Faktischen*, in: *Jahrbuch der Albertus-Universität zu Königsberg / Pr.*, Bd. XV, 1965, p. 40

of the acquisitive prescription in public international law: it must be longer than the period applied within the domestic legal system but there is no concrete, i.e. fixed period of time within the corpus of public international law. Bearing in mind the uncertainty existing with regard to the requirement of time, it is important to clarify the status of the acquisitive prescription in public international law.

8.2.8 (ii) The place ascribed to the notion of acquisitive prescription within the realm of public international law

It has to be noted that international judicial agencies have “crystallized” the notion of acquisitive prescription and its components and it is useful to refer to respective decisions. One of the most important cases is that of *Grisbadarna*, between Norway and Sweden. The Permanent Court of Arbitration assigned the *Grisbadarna* banks to Sweden on the basis of the fact that the latter “has performed various acts in the *Grisbadarna* region, [...] owing to her conviction that these regions were Swedish, [...] whereas Norway, according to her own admission, showed much less solicitude in this region in these various regards.”¹⁰⁴⁵ It is evident that reference has been made to the continuous display of territorial jurisdiction which was peaceful and uninterrupted.

The Permanent Court of Arbitration made a statement of overwhelming importance with regard to the concept of effectiveness and its status within the realm of public international law. This statement refers to the firmly established factual situation and is indirectly connected with the alleged law-creating influence of facts in the form of *ex factis jus oritur*. The statement reads as follows:

“It is a settled principle of the law of nations that a state of things which actually exists and has existed for a long time should be changed as little as possible;”¹⁰⁴⁶

¹⁰⁴⁵ Decision of the Permanent Court of Arbitration in the Matter of the Maritime Boundary Dispute between Norway and Sweden, reprinted in: AJIL, Vol. 4, Part 1, 1910, p. 233

¹⁰⁴⁶ *Ibid.*

The case of El Chamizal is also of great importance with regard to the issue of acquisitive prescription. In this case between Mexico and the US, the latter asserted that it had acquired the title to the Chamizal Tract on the basis of prescription and Mexico was estopped from claiming the territory in question “by reason of the undisturbed, uninterrupted, and unchallenged possession of said territory by the United States of America”¹⁰⁴⁷, i.e. the reference has been made to some essential requirements of the acquisitive prescription. International Boundary Commission, which was the Arbitrator in this case, emphasized the fact that the possessions of the US citizens and the political control exercised by local and federal governmental authorities “have been constantly challenged and questioned by the Republic of Mexico, through its accredited diplomatic agents.”¹⁰⁴⁸ It is evident that the notion of diplomatic protest was the issue addressed by the Commission in this statement.

After that, the Arbitrators stressed that there is an essential attribute of the prescription that it must be “peaceable”.¹⁰⁴⁹ It has to be noted that reference has been made to the fact that it was impossible for Mexicans to take physical possession of the territory in question, because such attempts would provoke violence and Mexico could not be blamed for using the milder form of the diplomatic protest.¹⁰⁵⁰ The Arbitrators came to the conclusion that the US had not acquired the title to the disputed territory on the basis of the notion of prescription.¹⁰⁵¹

In the Anglo-Norwegian Fisheries Case the validity of the lines of delimitation of the Norwegian fisheries zone was the subject of the dispute. First of all, the ICJ stressed the fact that Norway had applied its system of delimitation “consistently and uninterruptedly” for a long period of time, until the moment when the dispute arose.¹⁰⁵² An important statement has been made by the Court with regard to the period of time and the notion of uninterrupted possession:

¹⁰⁴⁷ The Chamizal Case, 1911, in: RIAA, Vol. XI, p. 328

¹⁰⁴⁸ *Ibid.*

¹⁰⁴⁹ *Ibid.*, p. 329

¹⁰⁵⁰ *Ibid.*

¹⁰⁵¹ *See Ibid.*

¹⁰⁵² Fisheries case, Judgment of December 18th, 1951: I.C.J. Reports 1951, p. 116 (p. 138)

“The general toleration of foreign States with regard to the Norwegian practice is an unchallenged fact. For a period of more than sixty years the United Kingdom Government itself in no way contested it.”¹⁰⁵³

The Court examined circumstances of the case and arrived at the following conclusion:

“The notoriety of the facts, the general toleration of the international community, Great Britain’s position in the North Sea, her own interest in the question, and her prolonged abstention would in any case warrant Norway’s enforcement of her system against the United Kingdom.”¹⁰⁵⁴

As a consequence, the Court found that the method employed in the Royal Norwegian Decree of 1935 for the delimitation of the fisheries zone, and the base-lines fixed on the ground of that method, were not contrary to international law.¹⁰⁵⁵

It is evident that the notion of acquisitive prescription entered the international legal order long time ago and, although it is possible that, in some cases, international judicial agencies have not mentioned the word “prescription”, as such, the concept of acquisitive prescription was applied in different instances. As with regard to the exact status of the concept in question, it has to be noted that acquisitive prescription is regarded as a rule of international law “through being a ‘general principle of law recognised by civilised nations’”¹⁰⁵⁶ in the sense of Art. 38, 1.(c) of the Statute of the ICJ.¹⁰⁵⁷

8.2.8 (iii) Significance of the notion of acquisitive prescription in the context of de facto statehood and its application to the case of the “Republic of Abkhazia”

The notions which are connected with acquisitive prescription, such as acquiescence and estoppel, have already been examined in the present study

¹⁰⁵³ *Ibid.*

¹⁰⁵⁴ *Ibid.*, p. 116 (p. 139)

¹⁰⁵⁵ *See Ibid.*, p. 116 (p. 143)

¹⁰⁵⁶ D. H. N. Johnson, *Acquisitive Prescription in International Law*, in: *BYIL*, Vol. 27, 1950, p. 343 (emphasis in original)

¹⁰⁵⁷ *See Article 38, 1.(c) of the Statute of the International Court of Justice*, in: I. Brownlie (ed.), *Basic Documents in International Law*, 4th ed., Oxford, 1995, p. 448

in the context of the Kosovo case. It is thus sufficient to note that acquiescence is an essential element of the acquisitive prescription. Without acquiescence there can be no acquisitive prescription at all. An important question follows: is it possible that the *de facto state* acquires a valid title to territory on the basis of the acquisitive prescription? The following statement is likely to serve as a vehicle to push analysis still further with regard to the examination of the overall effect of this situation on the emergence and existence of the *de facto state*:

“Wird einer gewaltsamen Annexion nicht entgegengetreten, sondern ein solcher Zustand von den übrigen Staaten geduldet, kann eine nachträgliche Heilung des widerrechtlichen Gebietserwerbs durch Ersitzung eintreten. Trotz des völkerrechtlichen Annexionsverbotes und trotz des sich generell an die Staaten der Völkergemeinschaft richtenden Verbots, rechtswidrigen Gebietserwerb anzuerkennen, wird damit der Rechtsgrundsatz »ex iniuria ius non oritur« zugunsten der Maxime der praktischen Politik »ex factis ius oritur« modifiziert.”¹⁰⁵⁸

This alleged possibility of modification, i.e. the validation of illegality on the basis of the continuous factual existence, which represents the expression of the negative dimension of *ex factis ius oritur*, is the issue of overwhelming importance in the context of the *de facto state*. It follows that the question, which is crucial for the purposes of the present thesis in the context of Abkhazia, reads as follows: does the continuous display of state authority or, effective and exclusive exercise of state functions by the Abkhaz authorities, mean that this *de facto state* has acquired a valid title to the territory? In order to answer this question, it is important to refer to the Abkhaz claim officially asserted on 12 October 1999:

“[...] the people of Abkhazia have reaffirmed their determination to proceed with building a sovereign, democratic State functioning in accordance with

¹⁰⁵⁸ D. Blumenwitz, »ex factis ius oritur« - »ex iniuria ius non oritur«, Zur Frage einer Ersitzung der deutschen Ostgebiete durch die UdSSR und Polen, in: D. Blumenwitz / B. Meissner (Hrsg.), Staatliche und nationale Einheit Deutschlands – ihre Effektivität, Staats- und völkerrechtliche Abhandlungen der Studiengruppe für Politik und Völkerrecht, Bd. 3, Köln, 1984, pp. 48-49 (emphases in original)

law, a subject of international law, and to seek its recognition by the international community.”¹⁰⁵⁹

Thus, the Act of State Independence of the “Republic of Abkhazia” contains an appeal to the UN, the OSCE and to all states of the world, to recognize the state created by the people of Abkhazia on the basis of the right to self-determination.¹⁰⁶⁰ But the point here is that Abkhazia lacks substantive recognition by the international community, and that is why it has to be regarded as a *de facto state*. It can be recalled at this stage that, in order to attain substantive recognition, an entity in question would need success in at least a majority of certain areas of “functioning” of international recognition. Abkhazia is recognized as a state by one major power of the day, the Russian Federation, but others have not followed Russia’s steps in this regard. Georgia, the “mother state” which Abkhazia was seeking to leave, has not recognized Abkhazia and it cannot be said that there were no objections from Georgia to other states recognizing Abkhazia. On 28 August 2008, the Georgian parliament adopted the resolution, in which it resolved:

“1. To declare the Russian armed forces, including the so called peacekeeping forces, currently deployed on the territory of Georgia, as occupying military units.

2. To declare the Autonomous Republic of Abkhazia and the former Autonomous Region of South Ossetia as territories occupied by the Russian Federation.

6. To entrust the executive authorities of Georgia with the task of breaking off the diplomatic relations with the Russian Federation.”¹⁰⁶¹

¹⁰⁵⁹ Act of State Independence of the Republic of Abkhazia (12 October 1999), available on the website of the Unrepresented Nations and Peoples Organization (UNPO), at: <http://www.unpo.org/content/view/705/236/> [accessed: 20.05.2009]

¹⁰⁶⁰ *See Ibid.*

¹⁰⁶¹ Resolution of the Parliament of Georgia N243 on the Occupation of the Georgian Territories by the Russian Federation (28 August 2008), paras. 1, 2, 6, available on the official website of the Parliament of Georgia, at: http://www.parliament.ge/index.php?lang_id=ENG&sec_id=98&info_id=20047 [accessed: 20.05.2009]

Thus, on 2 September 2008, Envoy Extraordinary and Plenipotentiary of the Russian Federation to Georgia received two notes from the Ministry of Foreign Affairs of Georgia indicating termination by Georgia of the Protocol of 2 July 1992 on the establishment of diplomatic relations between the then Republic of Georgia and the Russian Federation. The second document notified the Russian side that Georgia would maintain consular relations with the Russian Federation.¹⁰⁶²

As in respect of Nicaragua, it has to be stressed that, in connection with the recognition by the latter of the independence of Abkhazia and South Ossetia on 2 September 2008, the Georgian government adopted a decision to terminate the Protocol of 19 September 1994 on the establishment of diplomatic relations between two countries and the Ministry of Foreign Affairs of Georgia transmitted an official note on the termination of diplomatic relations between the two states to the Mission of the Republic of Nicaragua to the UN.¹⁰⁶³ From neighbouring countries and countries with which it shares borders, Abkhazia is recognized by the Russian Federation. Abkhazia does not meet the criterion, according to which, the recognition by a majority of countries in the UN General Assembly is required. Abkhazia has been recognized by the Russian Federation, the Republic of Nicaragua and the Bolivarian Republic of Venezuela.¹⁰⁶⁴ Neither can it be asserted that Abkhazia participates in global and regional international organizations.¹⁰⁶⁵

¹⁰⁶² See Information for the Press issued by the Press and Information Department of the Ministry of Foreign Affairs of Georgia on 2 September 2008, available on the official website of the MFA of Georgia, at: http://mfa.gov.ge/index.php?lang_id=ENG&sec_id=30&info_id=7853 [accessed: 20.05.2009]

¹⁰⁶³ Information on the termination of diplomatic relations between Georgia and the Republic of Nicaragua issued by the Press and Information Department of the Ministry of Foreign Affairs of Georgia on 28 November 2008, available on the official website of the MFA of Georgia, at: http://www.mfa.gov.ge/index.php?lang_id=ENG&sec_id=30&info_id=8467 [accessed: 20.05.2009]

¹⁰⁶⁴ Venezuela Recognizes Abkhazia, S. Ossetia [10 September 2009], available on the website of the Civil Georgia (Daily News Online), at: <http://www.civil.ge/eng/article.php?id=21449&search> [accessed: 20.10.2009]

¹⁰⁶⁵ According to the information available on the website of the Ministry of Foreign Affairs of the Republic of Abkhazia, Abkhazia's international organization participation encompasses the Unrepresented Nations and Peoples Organization (UNPO) and the Community for Democracy and Rights of the Peoples: http://www.mfaabkhazia.org/blok_poleznaya_informaciya/obwaya_informaciya/ [accessed: 20.05.2009]

It is thus evident that Georgia and the international community have not acquiesced in the Abkhaz claim to independent statehood. It follows that Abkhazia, despite the fact that it satisfies the traditional or empirical criteria for statehood based on the principle of effectiveness, and, from the point of view of the Abkhaz authorities, exercises its *de facto* possession *à titre de souverain*, does not acquire the status of a state under contemporary international law. The possession of the prescribing territorial entity (Abkhazia) cannot be regarded as peaceful and uninterrupted because it is challenged by the “mother state” (Georgia) and the international community, as the latter regularly expresses its attitude through the resolutions of the UN Security Council reaffirming Georgia’s sovereignty, independence and territorial integrity within its internationally recognized borders.¹⁰⁶⁶ Bearing in mind these considerations, it has to be concluded that the principle of effectiveness does not guarantee Abkhazia’s statehood within the realm of contemporary international law through the notion of acquisitive prescription.

8.2.9 Alleged precedential value of the case of Kosovo and its impact on Abkhazia’s status

The troubled region of Caucasus became, once again, the centre of attention after the dissolution of the Soviet Union. With respect to secessionist aspirations, it has to be noted that the demonstrative effect of the notion of secession, i.e. its precedential value, is confirmed by the circumstances surrounding Kosovo’s status settlement and its impact on the secessionist regions of the Caucasus. Russia has warned that the attainment by Kosovo of the independent status would set a precedent for secessionist claims of breakaway regions such as Nagorno-Karabakh or South Ossetia and the

¹⁰⁶⁶ The list of the UN Security Council resolutions recognizing Georgia’s territorial integrity includes following documents: 876 (1993), 881 (1993), 892 (1993), 896 (1994), 906 (1994), 937 (1994), 971 (1995), 993 (1995), 1036 (1996), 1065 (1996), 1096 (1997), 1124 (1997), 1150 (1998), 1187 (1998), 1225 (1999), 1255 (1999), 1287 (2000), 1311 (2000), 1339 (2001), 1364 (2001), 1393 (2002), 1427 (2002), 1462 (2003), 1494 (2003), 1524 (2004), 1554 (2004), 1582 (2005), 1615 (2005), 1666 (2006), 1752 (2007), 1781 (2007), 1808 (2008). See Statement of the Ministry of Foreign Affairs of Georgia issued on 27 August 2008, available on the official website of the MFA of Georgia, at: http://www.mfa.gov.ge/index.php?lang_id=ENG&sec_id=59&info_id=7769 [accessed: 20.05.2009]

Russian Federation might indeed support the realization of respective aspirations.¹⁰⁶⁷ This kind of precedential effect of secession was referred to not only by the “external” actor, but also by the leadership of Abkhazia. The Abkhaz *de facto* President openly stated that Kosovo’s recognition would immediately be followed by the recognition of Abkhazia.¹⁰⁶⁸

It has to be noted at this point that the genuineness of the secessionist aspirations in Abkhazia and South Ossetia has been regarded as a problematic issue because “the trend of *de facto* annexation of the secessionist entities to Russia remained predominant”¹⁰⁶⁹. Not only did the Russian Federation impose a discriminatory visa regime, on the basis of which, residents of Abkhazia and South Ossetia were privileged from the visa requirement in contrast to the rest of Georgia, but Moscow began to extend Russian citizenship *en masse* to the population of these two territorial entities. This process was followed by a claim to defend the interests of Russian citizens abroad, the staffing of government officers with Russian security service personnel and discussions of annexation by Russia of the two regions.¹⁰⁷⁰

The Russian policy in the South Caucasus after the dissolution of the USSR, described as “Russia’s modern-day *reconquista*”, was guided by three major principles: the Caucasian states should be members of the CIS, the “external” borders of these states (i.e. former Soviet external borders with Turkey and Iran) were to be guarded by the Russian border troops and the Russian military bases should be present on the territory of the three states.¹⁰⁷¹ During Shevardnadze’s rule in Georgia, Russia took control over Georgia’s Turkish border and established four military bases in strategic locations: at Vaziani just outside the capital, in Gudauta (Abkhazia), in Batumi (capital of Ajaria) and in Akhalkalaki, centre of the Armenian minority in Georgia. It has to be stressed that the Georgian parliament never

¹⁰⁶⁷ J. Headley, Kosovo: Déjà vu for Russia [28 May 2007], in: Transitions Online (www.tol.org), Issue no.05/29/2007, p. 2

¹⁰⁶⁸ See N. Popescu, Europe’s Unrecognised Neighbours: The EU in Abkhazia and South Ossetia, CEPS Working Document No. 260 / March 2007, p. 18

¹⁰⁶⁹ *Ibid.*, p. 22

¹⁰⁷⁰ S. E. Cornell / S. Frederick Starr, The Caucasus: A Challenge for Europe, Central Asia-Caucasus Institute & Silk Road Studies Program, Silk Road Paper, June 2006, pp. 55-56

¹⁰⁷¹ *Ibid.*, pp. 50-51

ratified these agreements, making the legal status of the Russian military presence highly questionable.¹⁰⁷² In 1999, at the Istanbul summit of the OSCE, Russia took on an international contractual obligation to quit those bases, but only in 2006 was Georgia able to reach an agreement with the Russian Federation on the withdrawal of Russian bases and troops from the Georgian soil.¹⁰⁷³

In the international legal context, Russia has pressed an argument that the Kosovo case has the precedential value in respect of the status of secessionist claims in Georgia. If we address the specific case of Abkhazia, it becomes evident that there are more differences between the two, than similarities. It has been emphasized that Chechnya resembles Kosovo more than Abkhazia does, given the demographic situation in the region and the human rights violations conducted by the central government: those violations were also present in Georgia, but were much more one-sided in the case of Chechnya.¹⁰⁷⁴ Furthermore, following distinctive features have been stressed in this respect:

a) Kosovo's claim to independence is based on international law while Abkhazia's is not. The Security Council Resolution 1244 explicitly required a plebiscite to determine the province's future political status in accordance with the will of its people. Since then, Kosovo has fulfilled elaborated standards as a prerequisite to its recognition. Abkhazia's claim, however, falls far short of international standards;

b) It is true that the Resolution 1244 affirmed the sovereignty and the territorial integrity of the FRY, which, by that time, had been reduced to a rump state consisting of Serbia and Montenegro. However, the republic's legal identity changed as Montenegrins voted to secede in 2006, leaving only Serbia as a successor state. Even before these events, Kosovo, with ethnic Albanians comprising more than 90% of the population, had exercised its constitutional right in conducting a referendum that overwhelmingly endorsed independence. In contrast, after the dissolution of

¹⁰⁷² *Ibid.*, p. 52

¹⁰⁷³ *Ibid.*

¹⁰⁷⁴ *Ibid.*, footnote 36, p. 56

the USSR, Georgia was recognized by the international community within its borders which included Abkhazia and South Ossetia. As the Georgian-Abkhaz war broke out, the UN developed a process aimed at restoring Georgia's territorial integrity, it did not establish a protectorate managing Abkhazia's independence;

c) Kosovo's leadership has endorsed an extensive package of minority rights and promised autonomy for communities where Kosovo Serbs predominate, whereas Abkhaz leaders actively block the efforts of the UN to create security and economic conditions enabling the return of the IDPs because they know that a majority of Abkhazia's original population (for the purposes of the present study, the population residing in Abkhazia at the critical date is meant) supports reunification with Georgia;

d) Kosovo Albanians were victims of atrocities on a massive scale. After a decade of gross human rights abuses, Serbia's leaders launched an ethnic cleansing campaign in 1998 that resulted in the death of more than 10.000 and the displacement of a million, whereas Abkhaz separatists perpetrated violence directly aimed at the expulsion of ethnic Georgians.¹⁰⁷⁵

Bearing in mind the considerations mentioned above, it has to be concluded that "Abkhazia is not Kosovo. There are fundamental legal and political differences between the two territories."¹⁰⁷⁶

¹⁰⁷⁵ D. L. Phillips, Russia: Abkhazia Is Not Kosovo [7 February 2008], in: Transitions Online (www.tol.org), Issue no.02/12/2008, pp. 1-2

¹⁰⁷⁶ *Ibid.*, p. 1

Chapter 9: The “Republic of South Ossetia”

9.1 Political context

9.1.1 History: from ancient times to the creation of the South Ossetian AO

The developments in Georgia in the early 1990s have already been described in the present thesis in the context of the case of Abkhazia, so they will not be specifically referred to while considering the status of the former South Ossetian Autonomous *Oblast* (AO).

In the second half of the first millennium BC, the territory that is nowadays known as South Ossetia became part of the Iberian (Kartli) state.¹⁰⁷⁷ The Georgian names for this land (3900 sq km) are: “Shida Kartli” (Inner Kartli), “Samachablo” (the land of the aristocratic Georgian Machabeli family), and the “Tskhinvali Region” (after the capital of the area).¹⁰⁷⁸ The Ossetians claim to be descendants of the Alanian and Scythian tribes which migrated from Persia to the Caucasus and the Ossetian language belongs to the Indo-European group, is related to Pushto and Farsi, but uses the Cyrillic alphabet.¹⁰⁷⁹ Between the 9th and 13th centuries, the ancestors of the Ossetians (the Alani) formed an early feudal state but the invasions by the Mongol-Tatars, which began in the 1230s and Tamerlane, in the late 14th century, forced the Ossetians to move to the mountain gorges of the Caucasus where they began settling the southern slopes of the mountains.¹⁰⁸⁰

It has to be stressed at this point that the Ossetian settlements were traditionally located in the central region of the North Caucasus.¹⁰⁸¹ Accordingly, as Georgia was annexed by the Russian Empire in 1801, the territory in question, being part of Georgia, gained the status of the part of

¹⁰⁷⁷ T. Potier, Conflict in Nagorno-Karabakh, Abkhazia and South Ossetia, A Legal Appraisal, The Hague et al., 2001, p. 12

¹⁰⁷⁸ Georgia: Avoiding War in South Ossetia (26 November 2004), International Crisis Group, Europe Report № 159, footnote 10, p. 2

¹⁰⁷⁹ *Ibid.*

¹⁰⁸⁰ T. Potier, Conflict in Nagorno-Karabakh, Abkhazia and South Ossetia, A Legal Appraisal, The Hague et al., 2001, p. 12

¹⁰⁸¹ See O. Luchterhandt, Völkerrechtliche Aspekte des Georgien-Krieges, in: AVR, Bd. 46, 2008, pp. 436-437

Tbilisi Governorate, whereas North Ossetia belonged to the District of Vladikavkaz within the “Terek *Oblast*”. In this respect, Luchterhandt emphasizes the fact that not only were the territories in question separated by the mountainous barrier, but they were also integrated into distinct administrative units.¹⁰⁸² According to the same author, in April 1917 the Ossetian National Council was formed within the District of Vladikavkaz followed by the South Ossetian National Council which was constituted on the Georgian side of the Caucasus and for the first time in history, the designation “South Ossetia” was publicly used by the political organization in the national-territorial sense.¹⁰⁸³

Subsequent years were shaped by the power struggle between Bolsheviks and Georgian Mensheviks and this struggle had its direct impact on the status of the territory in question. In August 1917, the “Union of Revolutionary Working Peasants” was established in the village of Ortevi (after taking Tskhinvali, they were forced to retreat). On 12 June 1919, the District Committee of the All-Union Communist Party (Bolshevik) was elected at the First (illegal) Conference of Bolshevik Organizations of South Ossetia and in October the same year, uprisings against the Mensheviks broke out in several areas. On 23 October 1919, rebels in the Roka area proclaimed the establishment of Soviet power and advanced toward Tskhinvali, but Menshevik forces suppressed the uprising. Following the overthrow by the Red Army of the Menshevik government of the first Georgian republic in February 1921, the South Ossetian Autonomous *Oblast* was created as part of the Georgian SSR on 20 April 1922.¹⁰⁸⁴

9.1.2 Secessionist aspirations of the South Ossetian leadership and the outbreak of hostilities between the Georgian and South Ossetian sides

The situation in the region deteriorated significantly during the late 1980s. The emergence of the South Ossetian Popular Front “Ademon Nykhaz” was connected with the efforts of the Ossetians aimed at upgrading the status of

¹⁰⁸² *Ibid.*, p. 437

¹⁰⁸³ *Ibid.*, p. 438

¹⁰⁸⁴ T. Potier, Conflict in Nagorno-Karabakh, Abkhazia and South Ossetia, A Legal Appraisal, The Hague et al., 2001, pp. 12-13

the territory they inhabited. In Spring 1989, the head of the movement, Alan Chochiev, wrote an open letter to the Abkhaz people supporting Abkhazia's secession from Georgia.¹⁰⁸⁵ In November 1989, the Soviet of South Ossetian AO decided to upgrade the status of the autonomous province to that of an autonomous republic. The decision was revoked by the Georgian parliament and this was followed by violent clashes between Ossetian and Georgian paramilitaries.¹⁰⁸⁶ Some attempts were made to defuse the crisis and, in this sense, public forums were attended by both Ossetians and Georgians.

On 20 September 1990, the "South Ossetian Soviet Democratic Republic" was proclaimed as a sovereign republic within the USSR with reference to the right of peoples to self-determination.¹⁰⁸⁷ On 10 December 1990, South Ossetia reaffirmed the September proclamation of independence and state sovereignty within the USSR. As a response, the Georgian Supreme Soviet annulled the South Ossetian autonomy on 11 December 1990. On December 13, a clash between ethnic Georgian police officers and Ossetian militants caused casualties and the Georgian Supreme Soviet introduced a state of emergency in Tskhinvali and Dzhava (the function of enforcement of the state of emergency was assumed by the USSR Interior Ministry troops).¹⁰⁸⁸

The Soviet Union intervened on 7 January 1991, as President Gorbachev issued a decree annulling South Ossetia's September 1990 declaration of secession from Georgia, and the subsequent revocation by the Georgian Supreme Soviet of South Ossetia's autonomous status. On 9 January, the Georgian Supreme Soviet unanimously rejected Gorbachev's decree as "gross interference" in Georgia's internal affairs.¹⁰⁸⁹ On 30 January 1991, the Georgian police arrested the chairman of the South Ossetian *Oblast*

¹⁰⁸⁵ Georgia: Avoiding War in South Ossetia (26 November 2004), International Crisis Group, Europe Report № 159, footnote 18, p. 3

¹⁰⁸⁶ B. Coppieters, The Politicisation and Securitisation of Ethnicity: The Case of the Southern Caucasus, in: Civil Wars, Vol. 4, 2001, pp. 73-74

¹⁰⁸⁷ O. Luchterhandt, Völkerrechtliche Aspekte des Georgien-Krieges, in: AVR, Bd. 46, 2008, p. 442

¹⁰⁸⁸ Keesing's Record of World Events, Vol. 36, 1990, p. 37920

¹⁰⁸⁹ Keesing's Record of World Events, Vol. 37, 1991, p. 37971

Soviet, Torez Kulumbegov, reportedly as he was on his way to talks with Georgian leaders.¹⁰⁹⁰

Thus, by early 1991, two phases of the conflict could be recorded in South Ossetia: the first outbreak of violence (November 1989-January 1990) and the second outburst of fighting (December 1990-March 1991).¹⁰⁹¹ On 25 November 1991, the Georgian parliament lifted the state of emergency in the areas of South Ossetia, the decision aimed at reducing tension in the region.¹⁰⁹² On 21 December 1991, the South Ossetian legislature declared the region independent and confirmed the resolution on unification with Russia.¹⁰⁹³

The intensification of the South Ossetian conflict took place in January 1992, as the South Ossetian elites declared, once again, their intention to unite the region with North Ossetia, i.e. with the Russian Federation. The Georgian National Guard and Mkhedrioni forces began a siege of Tskhinvali and outlying villages and the Ossetian National Guard responded (with assistance of Russian troops which were also involved against Georgian forces), this state of things leading to the military stalemate and widespread destruction and instability.¹⁰⁹⁴ Approximately 1,000 people were killed, 115 villages destroyed and over 30,000 Georgians and Ossetians displaced.¹⁰⁹⁵

9.1.3 The post-conflict settlement and its implications

The Georgian Military Council released the chairman of the South Ossetian *Oblast* Soviet from custody in February 1992. In the same year, this gesture was followed by an intensive diplomatic effort initiated by Shevardnadze and aimed at establishing a cease-fire. At the meeting with Yeltsin in June,

¹⁰⁹⁰ *Ibid.*

¹⁰⁹¹ S. Demetriou, Politics from the Barrel of a Gun: Small Arms Proliferation and Conflict in the Republic of Georgia (1989-2001), in: Small Arms Survey, Occasional Paper No. 6, November 2002, p. 26

¹⁰⁹² Keesing's Record of World Events, Vol. 37, 1991, p. 38583

¹⁰⁹³ *Ibid.*, p. 38657

¹⁰⁹⁴ S. Demetriou, Politics from the Barrel of a Gun: Small Arms Proliferation and Conflict in the Republic of Georgia (1989-2001), in: Small Arms Survey, Occasional Paper No. 6, November 2002, p. 27

¹⁰⁹⁵ *Ibid.*

at the Black Sea resort of Dagomys, Shevardnadze agreed that a joint Russian-Georgian-Ossetian peacekeeping force should be deployed in the region (it was virtually a Russian operation).¹⁰⁹⁶

The function of monitoring was assumed by the Joint Control Commission (JCC) consisting of five parties: Georgia, South Ossetia, Russia, the Russian Republic of North Ossetia and the OSCE mission. Following flaws of the JCC format have been emphasized: Russia was a strong supporter of the South Ossetian side. The same can be said in respect of Russia's North Ossetian Republic (the latter is ethnically linked to South Ossetia). The presence of these three in the JCC effectively meant that three votes were present in favour of South Ossetia. At the same time, it has to be borne in mind that the Russian Federation holds a veto in the OSCE, this latter circumstance implying that Russia could hinder the OSCE mission from playing a significant role.¹⁰⁹⁷ As with regard to the negotiations, it has been stressed that there was no role foreseen for the OSCE (or any other international body) in the conflict and, by default, negotiations have been hosted by Russia, the latter being increasingly clearly identifiable as a party in the conflict.¹⁰⁹⁸

A series of protocols to the agreement signed in Dagomys were initialed including Protocol № 3, which defined the conflict zone – a circle of 15 km radius from the centre of Tskhinvali, and a security corridor – a 14 km band divided on both sides of the administrative border of the former South Ossetian Autonomous *Oblast*. The South Ossetian authorities maintained control over the districts of Tskhinvali, Dzhava, Znauri, and parts of Akhagori. The Georgian central government controlled the rest of Akhagori and several ethnic Georgian villages in the Tskhinvali district.¹⁰⁹⁹

¹⁰⁹⁶ J. Aves, Post-Soviet Transcaucasia, in: R. Allison (ed.), Challenges for the Former Soviet South, The Royal Institute of International Affairs, Russia and Eurasia Programme, Washington, D.C. / London, 1996, p. 169

¹⁰⁹⁷ S. E. Cornell / S. Frederick Starr, The Caucasus: A Challenge for Europe, Central Asia-Caucasus Institute & Silk Road Studies Program, Silk Road Paper, June 2006, pp. 30-31

¹⁰⁹⁸ *Ibid.*, p. 31

¹⁰⁹⁹ Georgia: Avoiding War in South Ossetia (26 November 2004), International Crisis Group, Europe Report № 159, p. 4

9.1.4 Further developments

On 19 November 1992, the South Ossetian legislature voted for the secession from Georgia and integration with Russia.¹¹⁰⁰ In May 1996, the “Memorandum on Measures to Ensure Security and Reinforce Mutual Confidence Between the Parties to the Georgian-Ossetian Conflict” was signed, according to which, the step-by-step demilitarization of the conflict zone and reduction of the number of frontier posts and guards of the Joint Peacekeeping Forces (JPKF) was agreed. The document called on the Georgian and Ossetian sides to continue their negotiations aimed at achieving a full-scale political settlement.¹¹⁰¹ Attempts to start negotiations on the political settlement did not begin until 1999 and have only reached an intermediary stage with the signature of the Baden Declaration in 2000.¹¹⁰²

It has to be noted at this stage that the meetings of the Georgian and South Ossetian leaders (Shevardnadze and Chibirov respectively) took place in Vladikavkaz on 27 August 1996, in Dzhava on 14 November 1997 and in Borjomi in June 1998.¹¹⁰³ They were followed by the November 2004 meeting between Georgian Prime Minister Zurab Zhvania and South Ossetian leader Eduard Kokoity¹¹⁰⁴, the latter convocation preceded by the armed clashes. The conflict over South Ossetia had been frozen for over a decade as it resumed in 2004. The security situation had deteriorated significantly by July, sporadic exchange of gunfire between ethnic Georgian and ethnic Ossetian villages took place and in August, intense hostilities between the South Ossetian forces and the Georgian troops broke out. A ceasefire was signed on 18 August 2004 and a precarious peace remained in place for the rest of the year.¹¹⁰⁵

On 14 November 2006 the South Ossetian Central Election Commission declared the results of the November 12 voting. According to them, Kokoity has been re-elected as “President” with 98.1% of votes and 99.88% voted in

¹¹⁰⁰ *Ibid.*, p. 3

¹¹⁰¹ *Ibid.*, p. 5

¹¹⁰² *Ibid.*

¹¹⁰³ *Ibid.*, footnote 45

¹¹⁰⁴ *Ibid.*

¹¹⁰⁵ L. Harbom / P. Wallensteen, *Armed Conflict and Its International Dimensions, 1946-2004*, in: *Journal of Peace Research*, Vol. 42, 2005, p. 626

favor of independence in the referendum.¹¹⁰⁶ On 8 May 2007 the Georgian parliament passed a resolution setting up the provisional administrative entity in South Ossetia based on the respective enactment of the parliament of April the same year.¹¹⁰⁷ On May 10, the Georgian President Saakashvili appointed Tbilisi-loyal South Ossetian alternative leader Sanakoev as head of the provisional administrative entity in South Ossetia.¹¹⁰⁸ But all diplomatic tactics and peace overtures were shattered by the Russian-Georgian war of August 2008 which had its own impact on the status of South Ossetia and this effect will be considered below.

According to Coppieters, the South Ossetian leadership has been striving for various objectives during the conflict in question: an upgrading of the regional status to the republican level, reunification with the North Ossetian Autonomous Republic which represents one of the constituent entities of the Russian Federation, recognition as an independent member of the Russian Federation and sovereign status.¹¹⁰⁹ The problematic issue of South Ossetia's status and its dimensions will be considered in the section dedicated to the international legal context.

9.2 International legal context

9.2.1 The issue of South Ossetia's secession from Georgia

It is evident that the unilateral acts of the South Ossetian leadership aimed at upgrading the status of the AO (10 November 1989) and declaring South Ossetia as a sovereign Soviet Democratic Republic (20 September 1990) did not result in South Ossetia's secession from Georgia. According to Luchterhandt, the step made in 1989 contravened the constitution of the

¹¹⁰⁶ Breakaway S. Ossetia Announces Final Results of Polls [15 November 2006], available on the website of the Civil Georgia (Daily News Online), at: <http://www.civil.ge/eng/article.php?id=14089&search=> [accessed: 08.06.2009]

¹¹⁰⁷ Parliament Sets Up S. Ossetia Provisional Administration [8 May 2007], available on the website of the Civil Georgia (Daily News Online), at: <http://www.civil.ge/eng/article.php?id=15080&search=> [accessed: 08.06.2009]

¹¹⁰⁸ Sanakoev Appointed as Head of S. Ossetia Administration [10 May 2007], available on the website of the Civil Georgia (Daily News Online), at: <http://www.civil.ge/eng/article.php?id=15089&search=> [accessed: 08.06.2009]

¹¹⁰⁹ B. Coppieters, *The Politicisation and Securitisation of Ethnicity: The Case of the Southern Caucasus*, in: *Civil Wars*, Vol. 4, 2001, p. 76

USSR, namely its provisions which entailed conclusive enumeration of autonomous republics and autonomous *oblasts* (Art. 85 para. 3 and Art. 87 para. 2) and the Georgian constitution of that period, on the basis of which, the details connected with the regional status of South Ossetia were to be decided.¹¹¹⁰

At the same time, as we have already seen, unilateral upgrading of the status in 1989 was annulled by the Georgian Supreme Soviet and the decision made by the South Ossetian authorities in 1990 did not produce any significant results due to the subsequent intervention of Tbilisi and Moscow. It has to be noted at this stage that, in contrast to the central authorities of the USSR, the abolition of the South Ossetian AO was recognized by the RSFSR.¹¹¹¹ Furthermore, the Congress of the People's Deputies of the RSFSR requested the Georgian Supreme Council to restore the autonomous status of the South Ossetian AO.¹¹¹² Moreover, the formulation "former South Ossetian autonomous *oblast*" was used by the JCC in July 1992 as it defined the conflict zone and the security corridor.¹¹¹³

As in respect of the March 17 all-union referendum on the preservation of the USSR, it has to be stressed that the considerations submitted in the Abkhaz instance are also applicable to the case of South Ossetia. It can merely be added that the turnout in the Ossete-controlled areas of South Ossetia was 96% and overwhelming majority voted "yes".¹¹¹⁴

It is thus evident that, for the purposes of the present study, the status of South Ossetia has to be considered in the context of its declaration of

¹¹¹⁰ O. Luchterhandt, *Völkerrechtliche Aspekte des Georgien-Krieges*, in: AVR, Bd. 46, 2008, p. 441

¹¹¹¹ See the Protocol on Meeting and Negotiations conducted between the Chairman of the Supreme Council of the Russian Soviet Federal Socialist Republic and the Chairman of the Supreme Soviet of the Republic of Georgia (in Russian), Kazbegi, 23 March 1991, para. 1, in: *Konflikty v Abkhazii i Yuzhnoi Osetii, Dokumenty 1989-2006 gg.*, (Conflicts in Abkhazia and South Ossetia, Documents 1989-2006), Prilozhenie k «Kavkazskomu sborniku», Vypusk № 1 (Supplement to the "Caucasian Digest", Issue № 1), compiled and commented by M. A. Volkhonskii et al., Moscow, 2008, p. 246

¹¹¹² Resolution of the Congress of the People's Deputies of the RSFSR on the Situation in South Ossetia (in Russian), 31 March 1991, para. 1, in: *Ibid.*

¹¹¹³ Protocol № 3 of the Session of the Joint Control Commission of 12 July 1992 (in Russian), Vladikavkaz, available on the official website of the Office of the State Minister of Georgia for Reintegration, at: http://smr.gov.ge/file/1992-07-12_Protocol_3_Vladik.pdf [accessed: 10.06.2009]

¹¹¹⁴ Keesing's Record of World Events, Vol. 37, 1991, p. 38079

independence on 21 December 1991 and the referendum of 19 January 1992 which served as a confirmation of that proclamation.¹¹¹⁵ The objective of my thesis is to examine the status of the “Republic of South Ossetia” which was recognized by the Kremlin as a sovereign independent state on 26 August 2008.¹¹¹⁶

9.2.2 An approach to the problem of South Ossetia’s status: the issue of applicability of international legal norms to the de facto state

According to Krieger, the emergence of a notion of the “*de facto regime*” is connected with the very essence of the decentralized international order in which states cannot agree on the question of statehood of a respective political entity. It follows that in this situation, in order to avoid the legal vacuum, public international law developed the institute of the “*de facto regime*”. The latter is granted certain legal standing, described as partial international legal personality, on the basis of its existence (i.e. no specific recognition is needed).¹¹¹⁷ As the position of the “*de facto regime*” is deduced from the decentralized structure of public international law, the status of respective territorial entity has to be linked with the factual display of sovereignty, i.e. the effectiveness.¹¹¹⁸ Following conclusion has been drawn by the author in respect of the status enjoyed by the “*de facto regime*” on the basis of its effectiveness:

“Der Existenz eines effektiven Herrschaftsverbandes kann nicht jegliche rechtliche Bedeutung genommen werden. Der Status des *de facto*-Regimes bezeichnet den nicht zu unterschreitenden völkerrechtlichen Mindestbestand

¹¹¹⁵ See O. Luchterhandt, Völkerrechtliche Aspekte des Georgien-Krieges, in: AVR, Bd. 46, 2008, pp. 442-443

¹¹¹⁶ See the Decree of the President of the Russian Federation on Recognition of the Republic of South Ossetia (in Russian), № 1261 (26 August 2008), available on the official web portal of the President of Russia, at: <http://document.kremlin.ru/doc.asp?ID=047560> [accessed: 11.06.2009]

¹¹¹⁷ H. Krieger, Das Effektivitätsprinzip im Völkerrecht, Schriften zum Völkerrecht, Bd. 137, Berlin, 2000, p. 94

¹¹¹⁸ *Ibid.*, p. 95

an Rechtspositionen, der sich an die Effektivität eines Herrschaftsverbandes knüpft.”¹¹¹⁹

This state of affairs, denoting the legal standing of the *de facto state*, is exactly the subject of examination of the present thesis. It is important at this stage to refer to the case of South Ossetia and to examine the applicability of the prohibition of the use of force to this entity bearing in mind the citation concerning the legal position of *de facto* territorial units. I have decided to examine this international legal norm in the context of South Ossetia because of the war between Russia and Georgia in August 2008 and the theory developed by Frowein with regard to the applicability of the rule in question to the *de facto* situations. But before addressing the theory in question, it is meaningful to refer to the issue of an internal conflict as a mode of creation of the *de facto state*.

9.2.3 The notion of an internal armed conflict and its significance in the context of de facto statehood

9.2.3 (i) Civil strife and its internationalization – general considerations

According to Falk, traditional international law provides a procedure for designating the degree of formal acknowledgement by third states of the claims made on behalf of the anti-government faction and respective levels of the process in question have been described as follows: internal war remains fully domesticated in the form of a “rebellion”, partially internationalized on an *ad hoc* basis as “insurgency”, and fully internationalized on an *a priori* basis in the form of “belligerency”.¹¹²⁰

The notion of rebellion is applied if the faction seeking to seize the power of the state seems susceptible to rapid suppression by the common procedures of internal security. If this regime of rebellion is applied to an occasion of internal war, external support to the rebel faction represents an act of illegal

¹¹¹⁹ *Ibid.*, p. 256 (italics in original)

¹¹²⁰ R. A. Falk, *Janus Tormented: The International Law of Internal War*, in: J. N. Rosenau (ed.), *International Aspects of Civil Strife*, Princeton, 1964, p. 194

intervention whereas the external help to the government of a respective state is permissible.¹¹²¹ The legal regime of insurgency, on the contrary, represents international acknowledgement of the existence of an internal war but it leaves each state the discretion to control the consequences of such an acknowledgement. This hallmark distinguishes the concept of insurgency from the notion of belligerency, the latter establishing a common regime of rights and duties the existence of which does not depend on the will of a particular state.¹¹²² The concept of belligerency denotes the formalization of the relative rights and duties of all actors vis-à-vis an internal war. Thus, within the realm of international law, an internal war with the status of belligerency is essentially equated to a war between sovereign states. This state of affairs has the consequence that intervention on behalf of one party is an act of war against the other.¹¹²³

It is thus evident that the theory of recognition of belligerency was shaped by the conception that states were the only subjects of international law and that they were the only proper enemies in a war. Accordingly, since a war was supposed to take place only between two independent states, internal armed conflicts did not fall within the definition of the war and insurgents, in order to recognize them as a belligerent party, had to fulfill the requirements denoting the need for a certain degree of state organization.¹¹²⁴ In accordance with the theory of belligerency, a war that took place within the borders of a state could be regarded as the war, in the technical meaning of the term in question, solely on the basis of recognizing insurgents as a belligerent power, i.e. the recognition of belligerency was necessary in order to treat organized armed groups as subjects of international law and for the respective conflict to be subject to the laws of war.¹¹²⁵

Falk stresses the fact that the “old law” allowed belligerency to be proclaimed when the insurgents controlled territory, established an effective administering government, displayed a willingness to be bound by the laws

¹¹²¹ *Ibid.*, pp. 197-198

¹¹²² *Ibid.*, p. 199

¹¹²³ *Ibid.*, p. 203

¹¹²⁴ L. Perna, *The Formation of the Treaty Law of Non-International Armed Conflicts*, International Humanitarian Law Series, Vol. 14, Leiden / Boston, 2006, p. 29

¹¹²⁵ *Ibid.*, p. 30

of war and the encroachment on the interests of world-wide concern took place.¹¹²⁶ According to this author, it is essential within the realm of the contemporary international system that substantial participation in the internal war by private or public groups, external to the society experiencing violence, serves as the basis for internationalizing the civil strife:

“The facts of external participation are more important than the extent or character of insurgent aspirations as the basis for invoking transformation rules designed to swing control from the normative matrix of “domestic jurisdiction” to the normative matrix of “international concern.””¹¹²⁷

As in respect of the state of affairs established nowadays, following principles have been suggested which internationalize conflicts: a) a conflict is internationalized when it violates the principle of respect for sovereignty (outside states intervene coercively in a civil war, or the effects of the civil war spill over state boundaries into neighboring states); b) a conflict is internationalized when it violates the principle of respect for fundamental human rights (human rights violations occur systematically as part of a conflict, or the subject matter at issue in the conflict is the vindication of fundamental human rights); c) a conflict is internationalized when it violates the principle of respect for humanitarian needs (populations are dislocated, or famine is created by a conflict).¹¹²⁸ These considerations result from the most important developments experienced by public international law and they create a contemporary international legal environment for the internationalization of civil strife.

9.2.3 (ii) Internal armed conflicts and the “old law”: recognition of belligerency

Schachter defines internal conflicts “as conflicts within a state involving violence between nationals of the same state.”¹¹²⁹ Hampson refers, in this

¹¹²⁶ R. A. Falk, *Janus Tormented: The International Law of Internal War*, in: J. N. Rosenau (ed.), *International Aspects of Civil Strife*, Princeton, 1964, p. 223

¹¹²⁷ *Ibid.*, (emphases in original)

¹¹²⁸ M. J. Mattler, *The Distinction Between Civil Wars and International Wars and Its Legal Implications*, in: *New York University Journal of International Law and Politics*, Vol. 26, 1994, p. 656

¹¹²⁹ O. Schachter, *The United Nations and Internal Conflict*, in: J. N. Moore (ed.), *Law and Civil War in the Modern World*, Baltimore / London, 1974, p. 401

sense, to “armed struggles within the frontiers of one State.”¹¹³⁰ As it is evident from these statements, the notion of civil strife denotes essentially the events that occur within the boundaries of one particular state and those incidents fall under the scope of domestic jurisdiction of a respective state.¹¹³¹

The traditional approach to civil strife, i.e. the “old law” governing internal conflicts can be described as follows: the issue was that of internal concern of an affected state until the rebels were recognized by that state as belligerents. In the latter case the civil strife was treated as an international conflict and international law of war became applicable.¹¹³² It follows that recognition of belligerency was the issue of overwhelming importance with regard to the status of the rebel faction, as Schindler puts it, “Recognition of *belligerency* was essentially the same as recognition of a state of war, but was used with regard to civil wars.”¹¹³³

The consequence of the recognition of belligerency was that the law of war became applicable between the government of a respective state and the insurgent faction and, at the same time, the law of neutrality governed the relations between the parties involved in the conflict and third states.¹¹³⁴ Higgins has summarized the criteria which traditional international law deemed necessary for the application of the status of belligerency:

“[...] first, the existence within a state of a widely spread armed conflict; second, the occupation and administration by rebels of a substantial portion of territory; thirdly, the conduct of hostilities in accordance with the rules of war and through armed forces responsible to an identifiable authority; and fourth, the existence of circumstances which make it necessary for third

¹¹³⁰ F. Hampson, Human Rights and Humanitarian Law in Internal Conflicts, in: M. A. Meyer (ed.), *Armed Conflict and the New Law: Aspects of the 1977 Geneva Protocols and the 1981 Weapons Convention*, London, 1989, p. 55

¹¹³¹ See A. Cassese, *The Spanish Civil War and the Development of Customary Law concerning Internal Armed Conflicts*, in: A. Cassese, (ed.), *Current Problems of International Law, Essays on U.N. Law and on the Law of Armed Conflict*, Milan, 1975, p. 287

¹¹³² See R. R. Baxter, *Ius in Bello Interno: The Present and Future Law*, in: J. N. Moore (ed.), *Law and Civil War in the Modern World*, Baltimore / London, 1974, p. 518

¹¹³³ D. Schindler, *State of War, Belligerency, Armed Conflict*, in: A. Cassese (ed.), *The New Humanitarian Law of Armed Conflict, Studies in International Law 1*, Naples, 1979, p. 3 (italics in original)

¹¹³⁴ See *Ibid.*

parties to define their attitude by acknowledging the status of belligerency.”¹¹³⁵

It follows that the recognition of belligerency was regarded as a mode of internationalization of a civil strife, i.e. of a matter essentially being within the scope of a state’s domestic jurisdiction. Thus, the issue in question depended on the subjective decision of an affected state. This means that the regime under the “old law” was a subjective one. Further developments within the realm of public international law have to be examined in this context and the attitude of the contemporary international legal order has to be introduced.

9.2.3 (iii) Civil wars and their legal regulation

It can be asserted that the process of creation of the *de facto state* rests on the domestic strife with a relatively high degree of intensity, essentially the typical civil war, the latter representing the mode of emergence of this kind of territorial entity. It is important at this stage to introduce the hallmarks of the notion of a civil war:

“A civil war is a war between two or more groups of inhabitants of the same State. A civil war may be fought for control of the government of a State, or it may be caused by the desire of part of the population to secede [...] and form a new State.”¹¹³⁶

As it is evident from this definition, the civil war encompasses two dimensions which, at the same time, represent the objectives of the rebel faction: internal (control of the government of a state) and external (secession). It is the external dimension of the civil war which is decisive with regard to the emergence and existence of the *de facto state* as the notion of secession, namely the secessionist attempt, is a “genuine” way of creation of the entity in question.

¹¹³⁵ R. Higgins, *International Law and Civil Conflict*, in: E. Luard (ed.), *The International Regulation of Civil Wars*, London, 1972, pp. 170-171

¹¹³⁶ M. B. Akehurst, *Civil War*, in: R. Bernhardt (ed.), *EPIL*, Vol. 1 (1992), p. 597

The issue of overwhelming importance is to clarify the question, whether the civil war, as such, is governed by the domestic legal system or the rules of public international law. Falk has emphasized the fact that, despite the terminology, the notion of civil war is not and has never been the issue of entirely internal character.¹¹³⁷ This author distinguishes among following five manifestations of the notion of civil war: standard civil war, war of hegemony, war of autonomy, war of separation, war of reunion.¹¹³⁸ There is no need to describe all these types of the civil war, but it has to be stressed that the mode of the creation of the *de facto state* is expressed through the concept of a war of separation.

Falk refers to the notions of ethnic, religious and economic separatism as to the underlying reasons in the context of the secessionist attempt and explains the essence of secessionist wars in a following way: “Wars of secession are common in states that try to impose homogeneous standards upon a heterogeneous social, ethnic, and political tradition.”¹¹³⁹ Secession remains the issue of overwhelming importance in the context of the emergence and existence of the *de facto state* but the question of the law governing civil strife has to be addressed at this point.

Castrén draws following conclusion with regard to the rules governing civil wars: “civil war as a judicial phenomenon lies within the realm of both municipal and international law.”¹¹⁴⁰ Bearing in mind possible consequences of a civil war, namely the emergence of a new state, the formation of a local government by the rebel faction or the succession of a new government¹¹⁴¹, it becomes apparent that the notion of civil war, as such, has its own impact on the international plane, especially if it culminates in the birth of a new state. But a civil war can also culminate in the birth of the *de facto state* and the latter constellation falls under the scope of the present study.

¹¹³⁷ R. A. Falk, Introduction, in: R. A. Falk (ed.), *The International Law of Civil War*, Baltimore / London, 1971, p. 1

¹¹³⁸ *Ibid.*, pp. 18-19

¹¹³⁹ *Ibid.*, p. 19

¹¹⁴⁰ E. Castrén, *Civil War*, Helsinki, 1966, p. 22

¹¹⁴¹ *Ibid.*, p. 25

According to Lombardi, it is the characteristic feature of civil wars that they represent internal armed conflicts which essentially fall within the scope of the sovereignty of respective states, but because of growing interdependence, civil wars became the expressions of international tensions and controversies and the threat to the peace and international security is inherent in modern civil wars.¹¹⁴² It has been stated that both, internal and international armed conflicts meet the requirements of the material concept of war because, in both cases, there are armed conflicts, with political objectives, between organized entities which can guarantee the observance of the rules of war by organizational means.¹¹⁴³

It follows that the rigid conceptual differentiation between a civil war and an international war is practically impossible and it has to be noted that this is again the result of internationalization of the notion of domestic strife. Lombardi makes the following statement with regard to the latter manifestation:

“Ein internationalisierter Bürgerkrieg liegt vor, wenn Drittstaaten militärisch intervenieren, wobei die Rechtsstellung der Aufständischen sicherlich dann verbessert werden müßte, wenn allein zugunsten der etablierten Regierung interveniert wird.”¹¹⁴⁴

The issue of overwhelming importance, the central question with regard to the internationalization of the civil war, as such, remains the fact that this transformation does not merely depend on geographical factors, it is rather a matter of intensity and the degree of outside participation and subsequent spread of the motives and consequences of a respective war.¹¹⁴⁵

According to Cassese, the state of things with regard to civil strife is that certain basic rules of warfare do not benefit all kinds of internal armed conflicts but solely the situations of large-scale civil wars, i.e. the cases in which rebels form organized entities that effectively control territories on

¹¹⁴² A. V. Lombardi, *Bürgerkrieg und Völkerrecht, Die Anwendbarkeit völkerrechtlicher Normen in nicht-zwischenstaatlichen bewaffneten Konflikten, Schriften zum Völkerrecht*, Bd. 53, Berlin, 1976, p. 353

¹¹⁴³ *Ibid.*, p. 347

¹¹⁴⁴ *Ibid.*, p. 351

¹¹⁴⁵ See I. Detter, *The Law of War*, 2nd ed., Cambridge UP, 2000, p. 47

the basis of the administration and organized armed forces. It is required in addition that the hostilities between respective parties must reach a considerable degree of intensity and duration.¹¹⁴⁶

Profound changes denoting the problematic character of wars fought within the boundaries of particular states, i.e. internal armed conflicts, have produced an effective means of the creation of *de facto states*, viz. civil wars aimed at secession. It can be asserted that modern secessionist wars are the issues of essential relevance to the question of the emergence of *de facto states* and it has to be borne in mind that there are internal conflicts of *sui generis* nature in the sense that they possess both, internal and external dimensions. Burgos refers in this context to “the so-called ‘mixed’ armed conflicts, i.e. conflicts that are both internal and international.”¹¹⁴⁷ The issue of decisive importance is to examine the impact of the latter on the status of the *de facto state*.

9.2.4 Article 2 (4) of the UN Charter – its content and dimensions

Unfortunately, the history of public international law is the history of wars. Bearing in mind the fact that, for a long period of time, *jus ad bellum* was regarded as a genuine expression of sovereignty, it is not surprising that the notion of war was instrumental to promotion of respective goals of different sovereigns. But it must be noted that international society tried to balance this situation and it introduced the notion of *jus in bello*. Since the Peace of Westphalia (1648), which laid the foundation of the modern international order, public international law has experienced significant changes and most important of them are following notions: “partielles Kriegsverbot” of the

¹¹⁴⁶ A. Cassese, The Spanish Civil War and the Development of Customary Law concerning Internal Armed Conflicts, in: A. Cassese, (ed.), Current Problems of International Law, Essays on U.N. Law and on the Law of Armed Conflict, Milan, 1975, p. 288

¹¹⁴⁷ H. S. Burgos, The application of international humanitarian law as compared to human rights law in situations qualified as internal armed conflict, internal disturbances and tensions, or public emergency, with special reference to war crimes and political crimes, in: F. Kalshoven / Y. Sandoz (eds.), Implementation of International Humanitarian Law, Research papers by participants in the 1986 Session of the Centre for Studies and Research in International Law and International Relations of the Hague Academy of International Law, Dordrecht, 1989, p. 1 (emphasis in original)

Covenant of the League of Nations¹¹⁴⁸, “generelles Kriegsverbot” of the Briand – Kellogg Pact¹¹⁴⁹ and “generelles Gewaltverbot” of the Charter of the UN.¹¹⁵⁰ Indeed, Art. 2 (4) of the Charter reads as follows:

“All Members shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any State, or in any other manner inconsistent with the Purposes of the United Nations.”¹¹⁵¹

The issue of the content of Art. 2 (4) of the Charter is a complex one and it cannot be clarified solely by the reference to the provision in question. First of all, it has to be stressed that the prohibition of the use of force, as enshrined in the Charter of the UN, refers solely to the notion of armed force.¹¹⁵² According to Randelzhofer, the reference in the preamble of the Charter to the need for assurance that armed forces shall not be used in the interests of one particular state, the teleological interpretation of the provision in question and history of the origins of the Charter, all these factors lead us to the conclusion that it is the use of armed force which is meant under the scope of Art. 2 (4) of the UN Charter.¹¹⁵³

The ICJ has dealt with the issue in question in the Nicaragua Case when it assessed the role of the US in the context of activities displayed by *contras* against the government of the Republic of Nicaragua. The Court stressed that the Charter does not cover the whole area of regulation of the use of force on the international plane:

“On one essential point, this treaty itself refers to pre-existing customary international law; this reference to customary law is contained in the actual text of Article 51, which mentions the “inherent right” (in the French text the “droit naturel”) of individual or collective self-defence, [...]. The Court therefore finds that Article 51 of the Charter is only meaningful on the basis

¹¹⁴⁸ See S. Hobe / O. Kimminich, Einführung in das Völkerrecht, 8. Aufl., 2004, p. 45

¹¹⁴⁹ See *Ibid.*, p. 48

¹¹⁵⁰ See *Ibid.*, p. 50

¹¹⁵¹ Article 2 (4) of the Charter of the United Nations, in: I. Brownlie (ed.), Basic Documents in International Law, 4th ed., Oxford, 1995, pp. 3-4

¹¹⁵² A. Randelzhofer zu Art. 2 Ziff. 4 Rdnr. 15, in: B. Simma (Hrsg.), Charta der Vereinten Nationen, Kommentar, München, 1991, p. 73

¹¹⁵³ *Ibid.*

that there is a “natural” or “inherent” right of self-defence, and it is hard to see how this can be other than of a customary nature, even if its present content has been confirmed and influenced by the Charter.”¹¹⁵⁴

It has been further asserted that the Charter does not regulate all aspects of the notion of self-defence, e.g. it does not contain the rule concerning the requirement of proportionality of the measures taken against the armed attack, whereas this criterion is an established rule of customary international law.¹¹⁵⁵ It follows that, according to the Court’s view, the presence of Art. 51 of the UN Charter denotes the parallel existence of the rules of treaty law and customary international law. The Court emphasized the fact that the fields governed by these two sources of law do not necessarily overlap and, even if those spheres were identical, this would not prejudice the separate applicability of respective rules of the treaty law, on the one hand, and the customary international law, on the other.¹¹⁵⁶ As with regard to the prohibition of the use of force and its status within the realm of public international law, the Court made following important statement:

“[...] the Charter gave expression in this field to principles already present in customary international law, and that law has in the subsequent four decades developed under the influence of the Charter, to such an extent that a number of rules contained in the Charter have acquired a status independent of it. The essential consideration is that both the Charter and the customary international law flow from a common fundamental principle outlawing the use of force in international relations.”¹¹⁵⁷

It follows that the ICJ acknowledged the validity of prohibition of the use of force as a rule of customary international law and as a fundamental norm enshrined in the Charter of the UN and the independent existence of the rule in question (independent from the UN Charter) has been confirmed. Indeed, prohibition of the use of force has acquired universality and its validity does not depend on the existence of the UN, Verdross refers in this sense to its

¹¹⁵⁴ Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America), Merits, Judgment, I.C.J. Reports 1986, p. 14 (p. 94, para. 176; emphases in original)

¹¹⁵⁵ *Ibid.*

¹¹⁵⁶ *Ibid.* (p. 94, para. 175)

¹¹⁵⁷ *Ibid.* (pp. 96-97, para. 181)

“absolute Geltung”¹¹⁵⁸. Art. 2 (4) of the UN Charter represents an expression of the most important development within the corpus of public international law and is itself a peremptory norm of the international legal order, i.e. the rule of *jus cogens*.¹¹⁵⁹

There are also respective exceptions to the rule concerning the prohibition of the use of force. Brownlie has emphasized the fact that Art. 2 (4) of the UN Charter refers to the general prohibition of the use of force in the sense of actions taken by particular states and, according to the statement of this eminent scholar, justifications for the actions mentioned above “must, in the framework of the Charter, be specific and in a strict sense exceptional.”¹¹⁶⁰ With regard to the individual cases of exceptions, it must be noted that the Charter of the UN contains the provisions concerning the measures against ex-enemy states¹¹⁶¹ and the possibility that a single state can be authorized to act in this context on behalf of the organization. But it has to be stressed that these provisions, referring to ex-enemy states, “have become obsolete, as all former enemy States now are UN members.”¹¹⁶²

The issue of great importance, which represents an exception from the rule regarding the prohibition of the use of force, is the right of individual and collective self-defence against an armed attack as enshrined in Art. 51 of the UN Charter. According to Falk, “Article 51 limits the right of self-defense to action taken in response to prior armed attacks across international boundaries.”¹¹⁶³ The significance of Art. 51 of the UN Charter is twofold: on the basis of the norm in question, the use of force is explicitly allowed for the purpose of self-defence and the prohibition of the use of force is broken. At the same time, the provision permits the use of forcible reaction as an individual measure, outside the scope of the collective security system,

¹¹⁵⁸ A. Verdross, *Die Quellen des universellen Völkerrechts, Eine Einführung*, 1. Aufl., Freiburg, 1973, p. 29

¹¹⁵⁹ See B. Reschke, *Gewaltverbot*, in: H. Volger (Hrsg.), *Lexikon der Vereinten Nationen*, München, 2000, p. 198

¹¹⁶⁰ I. Brownlie, *The Principle of the Non-Use of Force in Contemporary International Law*, in: W. E. Butler (ed.), *The Non-Use of Force in International Law*, Dordrecht, 1989, p. 22

¹¹⁶¹ See Articles 53 and 107 of the Charter of the United Nations, in: I. Brownlie (ed.), *Basic Documents in International Law*, 4th ed., Oxford, 1995, pp. 18, 33

¹¹⁶² A. Randelzhofer, *Use of Force*, in: R. Bernhardt (ed.), *EPIL*, Vol. 4 (2000), p. 1252

¹¹⁶³ R. A. Falk, *Janus Tormented: The International Law of Internal War*, in: J. N. Rosenau (ed.), *International Aspects of Civil Strife*, Princeton, 1964, p. 239

and breaks also the system of the UN aimed at the collective maintenance of international peace and security: “Der Begriff „armed attack“ muß daher eine Schädigungshandlung beschreiben, deren Vorliegen einen Verzicht auf die Einhaltung dieser beiden Grundsätze rechtfertigt.”¹¹⁶⁴

According to Rifaat, the UN Charter developed following dimensions of the right to self-defence: it was extended to include individual as well as collective self-defence, it was limited to cases where an “armed attack” occurs against a member of the UN, and it was regarded as a temporary right to be used only if the need arose until the UN Security Council has taken the measures necessary to maintain international peace and security.¹¹⁶⁵ It follows that the wording of Art. 51 does not allow its use, unless an armed attack has occurred and no allegations of economic or ideological aggression can be applied as a plea or excuse for an action in self-defence.¹¹⁶⁶

As in respect of the characteristic of an “armed attack”, it has been emphasized that such an attack must be of serious nature that threatens the inviolability of the attacked state, and consequently, small border incidents do not evoke the provision of Art. 51 in so far as there is no unequivocal intention of attack.¹¹⁶⁷ According to Hummrich, the armed attack requires the increased use of force which would overreach the dimensions of Art. 2(4) of the UN Charter:

“Der „bewaffnete Angriff“ ist auch der tendenziell engere Begriff gegenüber der Aggression gemäß Art. 39 CVN. Ob ein bewaffneter Angriff vorliegt, richtet sich nach Umfang oder Auswirkung der eingesetzten Gewalt, wobei eine Gesamtbewertung aller Umstände des jeweiligen Falles vorgenommen werden muß.”¹¹⁶⁸

¹¹⁶⁴ K. Kersting, „act of aggression“ und „armed attack“, Anmerkungen zur Aggressionsdefinition der UN, in: NZWehrr, 23. Jg., 1981, p. 136 (emphasis in original)

¹¹⁶⁵ A. M. Rifaat, *International Aggression, A Study of the Legal Concept: Its Development and Definition in International Law*, 2nd printing, Stockholm, 1979, p. 124

¹¹⁶⁶ *Ibid.*, p. 125

¹¹⁶⁷ *Ibid.*

¹¹⁶⁸ M. Hummrich, *Der völkerrechtliche Straftatbestand der Aggression, Historische Entwicklung, Geltung und Definition im Hinblick auf das Statut des Internationalen Strafgerichtshofes*, P. Kunig / W. Rudolf (Hrsg.), *Völkerrecht und Außenpolitik*, Bd. 59, Baden-Baden, 1. Aufl., 2001, pp. 203-204 (emphasis in original)

The interaction between Art. 2 (4) and Art. 51 of the UN Charter has been clarified in a following manner: every single “armed attack” represents the “force” in the sense of the Art. 2 (4) of the UN Charter, whereas not every use of force amounts to the “armed attack”, as such, and it follows that self-defence against the use of force not amounting to the “armed attack” is forbidden by law.¹¹⁶⁹

The requirement of proportionality is inherent in the notion of self-defence. Thus, the defending state has to observe the principle of proportionality, because the measures exceeding the proper reaction to the unlawful attack may be considered as aggressive measures by the defendant state:

“[...] if the defendant State, after the moment the attack was stopped and the danger was released, advanced its military operations in the territory of the other State, such additional measures would be aggressive in character and the defendant State would turn to be an aggressor itself. Accordingly, the occupation of foreign territory, even if it resulted from an act of justifiable self-defence, constitutes by itself an act of armed aggression.”¹¹⁷⁰

Indeed, it has been stressed in this respect that actions taken in self-defence may themselves constitute threats to the peace and the UN Security Council may properly order that states refrain from such actions in order to restore international peace and security, i.e. the Security Council has the authority, under Chapter VII of the Charter, to suspend a state’s right of self-defence.¹¹⁷¹

Thus, the principle of proportionality requires that the harm caused by the defender’s action must be proportional to the harm avoided and where defensive measures exceed offensive ones, the defender will be presumed to have acted unlawfully and may forfeit the protection that law otherwise confers, i.e. such a defender is then liable for using an excess of forces

¹¹⁶⁹ *Ibid.*, p. 192

¹¹⁷⁰ A. M. Rifaat, *International Aggression, A Study of the Legal Concept: Its Development and Definition in International Law*, 2nd printing, Stockholm, 1979, p. 127

¹¹⁷¹ M. J. Mattler, *The Distinction Between Civil Wars and International Wars and Its Legal Implications*, in: *New York University Journal of International Law and Politics*, Vol. 26, 1994, p. 693

beyond that which the law allows.¹¹⁷² According to the proportionality principle, when a country is the victim of an armed attack and acts in self-defence, it must do no more than is required to repel the attack. So, an all out war will not be a proportionate response to a small scale incursion, but will be a legitimate response where the armed attack on the victim state is of a magnitude to threaten the continued existence of that state.¹¹⁷³

Following general principles of the exercise of the right to self-defence have been summarized: a) the necessity for a forcible reaction must be instant (or at least extremely urgent), overwhelming, leaving no choice of means and no moment for deliberation; b) the forcible reaction must be exclusively directed to repel the attack of the attacking state; c) the force used must be proportionate to the purpose of repelling the attack; d) the forcible reaction must be terminated as soon as the attack has come to an end or the UN Security Council has taken effective measures to restore peace and security and e) the forcible reaction must comply with humanitarian law.¹¹⁷⁴

As a result of this state of affairs, it has been stressed that an act of aggression is committed by a state that responds disproportionately to an armed attack.¹¹⁷⁵ At the same time, it is true that a state, the territory of which has been illegally occupied, has the right of self-defence and this type of self-defence cannot be considered to be illegal use of force under Art. 2 (4) of the UN Charter, so this right to self-defence is an integral part of international *jus cogens*.¹¹⁷⁶ As in respect of the legal status of the principle of proportionality, it has to be noted that this manifestation has been described as “gesicherter Rechtssatz des Völkergewohnheitsrechts”¹¹⁷⁷.

Further category of exceptions from the rule concerning the prohibition of the use of force refers to the enforcement measures taken by the UNSC.

¹¹⁷² O. Olusanya, Identifying the Aggressor under International Law, A Principles Approach, Bern, 2006, p. 107

¹¹⁷³ R. L. Griffiths, International Law, the Crime of Aggression and the Ius Ad Bellum, in: International Criminal Law Review, Vol. 2, 2002, p. 330

¹¹⁷⁴ *Ibid.*, p. 331

¹¹⁷⁵ *Ibid.*, p. 332

¹¹⁷⁶ F. Malekian, International Criminal Law, The Legal and Critical Analysis of International Crimes, Vol. I, Uppsala, 1991, pp. 67-68

¹¹⁷⁷ K. Kersting, „act of aggression“ und „armed attack“, Anmerkungen zur Aggressionsdefinition der UN, in: NZWehrr, 23. Jg., 1981, p. 141

According to Art. 24 (1) of the UN Charter, the SC bears primary responsibility in the context of maintenance of international peace and security.¹¹⁷⁸ The SC can determine “the existence of any threat to the peace, breach of the peace, or act of aggression” (Art. 39 of the UN Charter)¹¹⁷⁹, and if it does so and considers that measures under Art. 41 of the Charter will be inadequate or have proved to be inadequate, this principal organ of the UN, according to Art. 42, has the competence to take action involving the use of armed force.¹¹⁸⁰

On the basis of Art. 25 of the UN Charter, members of the Organization are obliged to accept and carry out respective decisions of the SC.¹¹⁸¹ It has to be stressed at this point in the context of an approach embodied in the UN Charter that this document refers to the manifestations such as “threat or use of force”, “threat to the peace”, “breach of the peace”, “act of aggression” and these expressions cover, in contrast to Art. 2 (4), a wide range of gradations of intensity of coercion, including not only force, but also all applications of coercion of a lesser intensity or magnitude.¹¹⁸²

These are exceptions to the rule concerning the prohibition of the use of force on the international plane and theoretical considerations regarding the norm in question. It is important at this point to refer to the problem of application to *de facto* situations of the rule outlawing the threat or use of force.

¹¹⁷⁸ See Article 24 (1) of the Charter of the United Nations, in: I. Brownlie (ed.), *Basic Documents in International Law*, 4th ed., Oxford, 1995, p. 10

¹¹⁷⁹ See Article 39 of the Charter of the United Nations, in: *Ibid.*, p. 14

¹¹⁸⁰ See Article 42 of the Charter of the United Nations, in: *Ibid.*, p. 15

¹¹⁸¹ See Article 25 of the Charter of the United Nations, in: *Ibid.*, p. 10

¹¹⁸² A. V. W. Thomas / A. J. Thomas, Jr., *The Concept of Aggression in International Law*, Dallas, 1972, p. 22

9.2.5 The problem of applicability of Article 2 (4) of the UN Charter to the relations between a “mother state” and the de facto territorial entity and the Georgia – South Ossetia case

9.2.5 (i) Frowein’s theoretical approach concerning the internationalization of relations between a “parent state” and the “de facto regime”

Frowein’s theory concerning the applicability of the prohibition of the use of force to *de facto states* is based on the assertion that *de facto* territorial entities established after the Second World War enjoy the factual international status. The content of this international status is effectiveness of respective entities and existence of international relations with them. Frowein’s statement in this regard reads as follows:

“Wenn Art. 2, 4 der UN-Charter das Gewaltverbot auf die internationalen Beziehungen beschränkt, so ist der erkennbare Sinn der Abgrenzung der, daß die Staaten die Gewalt nicht mit dem Ziel der Ausdehnung ihres Hoheitsbereiches gebrauchen dürfen, daß sie sie aber wohl zur Abwehr eines Angriffes oder einer Bedrohung aus ihrem eigenen Hoheitsbereich einsetzen können. Die Anwendung der Gewalt durch den Staat im normalen Bürgerkrieg ist eine Reaktion auf Bestrebungen zur Änderung des *status quo* im Innern. Aus diesem Rahmen des Bürgerkrieges fällt der Angriff auf ein effektiv unabhängiges *de facto*-Regime, das sich in einem Staatsteil etabliert hat, heraus. Hier hat die Gewaltanwendung das Ziel, den faktischen Hoheitsbereich des Staates, der das Gebiet des *de facto*-Regimes in Anspruch nimmt, zu erweitern. Insofern ist hier die Lage der bei dem Angriff auf einen fremden Staat vergleichbar.”¹¹⁸³

As it is evident from the statement quoted above, Frowein makes an interesting transformation of the nature of relations between a “mother state” and respective *de facto* territorial unit and claims, for the latter, the protection under the principle concerning prohibition of the use of force.

¹¹⁸³ J. Abr. Frowein, *Das de facto-Regime im Völkerrecht: Eine Untersuchung zur Rechtsstellung »nichtanerkannter Staaten« und ähnlicher Gebilde*, Max-Planck-Institut für ausländisches öffentliches Recht und Völkerrecht, H. Mosler (Hrsg.), Beiträge zum ausländischen öffentlichen Recht und Völkerrecht 46, Köln / Berlin, 1968, p. 53 (italics in original)

This transformation is expressed through the fact that the writer has “internationalized” relations between a “mother state” and a *de facto* territorial entity created on respective territory. It follows that, as the *de facto state* represents a firmly established effective entity, this effectiveness serves as the basis of application of the *jus cogens* norm regarding the prohibition of the use of force and the same feature of the *de facto state* has to be considered as a foundation of the maintenance of “international relations” by the latter.

It has to be stressed at this point that Frowein’s theory concerning the application of Art. 2 (4) of the UN Charter to *de facto states* rests on the very nature of the environment in which these territorial entities exist:

“Wesentlich ist nur die Tatsache der befriedeten, nicht mit Anwendung von Waffengewalt bekämpften Existenz von *de facto*-Regimen und ihrer faktisch internationalen Stellung. Unter internationaler Stellung wird dabei die effektive Unabhängigkeit von dem »Mutterstaat« und die Existenz internationaler Beziehungen des *de facto*-Regimes verstanden.”¹¹⁸⁴

It has been emphasized that only if the prohibition of the use of force is applied to the factual international relations between respective parts of divided states, which are independent from each other, can it be said that the use of force is widely prohibited on the international plane.¹¹⁸⁵ Thus, the following conclusion has been drawn in this respect:

“Insofern erschiene es bei Berücksichtigung des Sinnes der Beschränkung des Gewaltverbotes auf die internationalen Beziehungen durchaus folgerichtig, das Verbot immer dann anzuwenden, wenn ein Staat durch Gewalt versucht, seinen faktischen Hoheitsbereich auszudehnen, nachdem eine befriedete Situation eingetreten ist. Das müßte dann umgekehrt entsprechend auch für das *de facto*-Regime gelten.”¹¹⁸⁶

Frowein emphasizes that in order to make, nowadays, the prohibition of the use of force effective, it is important to apply it to *de facto* territorial

¹¹⁸⁴ *Ibid.*, p. 52 (italics and emphasis in original)

¹¹⁸⁵ *Ibid.*, pp. 52-53

¹¹⁸⁶ *Ibid.*, pp. 53-54 (italics in original)

entities, otherwise it will be impossible for public international law to fulfill comprehensively its task of safeguarding the international peace through legal norms. So, the principle of absolute validity of the prohibition of the use of force requires its application to the *de facto states* features of which have been described above.¹¹⁸⁷ It has to be noted at this point that the notion “befriedete Unabhängigkeit” has been clarified by the author: when a respective “mother state”, for months or years, cannot affect the situation in order to alter the state of affairs denoting effective independence of the *de facto state*, the application of the prohibition of the use of force has to be approved of, because the situation has been “pacified”.¹¹⁸⁸

The reasoning denoting the applicability of the prohibition of the use of force to *de facto states* reads as follows: “Das Gewaltverbot soll den Frieden schützen und daher genügt die Existenz einer befriedeten internationalen Situation für seine Anwendbarkeit.”¹¹⁸⁹ It has been stressed that *de facto states* enjoy the protection under the rule prohibiting the use of force on the international plane and are themselves obliged to observe the norm in question. Thus, the lack of substantive recognition does not result in non-applicability of the legal norm being one of the most important foundations of contemporary international law: “Es kommt dafür vielmehr allein auf die Existenz eines effektiv Hoheitsgewalt ausübenden *de facto*-Regimes an, das eine befriedete und faktisch internationalisierte Stellung einnimmt.”¹¹⁹⁰ Thus, Hummrich stresses that the addressees of the rule prohibiting the use of force are states, and, according to the prevailing view in the legal scholarship, “*de facto regimes*” the characteristics of which have been described above.¹¹⁹¹

¹¹⁸⁷ *Ibid.*, pp. 66-67

¹¹⁸⁸ *Ibid.*, p. 67

¹¹⁸⁹ *Ibid.*, p. 68

¹¹⁹⁰ *Ibid.*, p. 69 (italics in original)

¹¹⁹¹ M. Hummrich, Der völkerrechtliche Straftatbestand der Aggression, Historische Entwicklung, Geltung und Definition im Hinblick auf das Statut des Internationalen Strafgerichtshofes, P. Kunig / W. Rudolf (Hrsg.), Völkerrecht und Außenpolitik, Bd. 59, Baden-Baden, 1. Aufl., 2001, p. 184

9.2.5 (ii) Criticism of Frowein's theoretical approach and its specification

According to Hillgruber, Frowein's theory depicted above is at odds with the very essence of the notion of non-recognition because it disregards the will of states, not to apply public international law in relations with respective (*de facto*) territorial entities, although the concept of recognition is exactly the procedure which entails the binding decision on the existence of prerequisites of statehood.¹¹⁹² The author stresses that the so-called "*de facto regime*" does not fall under the protection of the prohibition of the use of force on the basis of its mere factual existence for a significant period of time and virtual international status, but solely on the ground of an international legal act which grants the territorial entity in question this kind of protection:

“Wenn und soweit einem staatlichen Gebilde ein und sei es auch nur begrenzter, unverletzlicher internationaler Status durch einen es nicht als Staat im völkerrechtlichen Sinne anerkennenden, anderen Staat oder durch die organisierte Staatengemeinschaft mit verbindlicher Wirkung für den nicht anerkennenden Staat eingeräumt worden ist, ihm also in diesem Sinne die „Anerkennung“ zumindest teilweiser Völkerrechtssubjektivität zuteil geworden ist, gelten das Gewaltverbot und, je nach dem, wie der völkerrechtliche Status des staatlichen Gebildes im einzelnen beschaffen ist, möglicherweise auch andere allgemeine Regeln des Völkerrechts. Es kommt also auf die in jedem Einzelfall zu untersuchende *Rechtslage*, nicht allein auf die faktische Situation an.”¹¹⁹³

It has been emphasized that a certain degree of integration of a respective territorial entity in the international legal system, achieved through (collective) recognition and granting the respective territorial entity full or partial international legal capacity (i.e. own international legal status), is required in order to enjoy the protection of the rule prohibiting the use of

¹¹⁹² C. Hillgruber, Die Aufnahme neuer Staaten in die Völkerrechtsgemeinschaft, Das völkerrechtliche Institut der Anerkennung von Neustaaten in der Praxis des 19. und 20. Jahrhunderts, in: H. Schiedermaier (Hrsg.), Kölner Schriften zu Recht und Staat, Bd. 6, Frankfurt am Main et al., 1998, p. 754

¹¹⁹³ *Ibid.*, pp. 755-756 (emphasis and italics in original)

force in international relations.¹¹⁹⁴ It follows that the mere factual existence is insufficient in this context, something more is required. The following conclusion has been drawn by the author in this respect:

“Nicht auf die tatsächliche, sondern auf die völkerrechtliche Stabilisierung und Befriedung des *de facto*-Régimes kommt es an. Ohne eine ihm in diesem Sinne zuteil gewordene Anerkennung steht das *de facto*-Régime nicht unter völkerrechtlichem Schutz. Auch hier – wie allgemein im Völkerrecht – gibt es keine normative Kraft des Faktischen.”¹¹⁹⁵

It has been concluded that, in order to apply the rule prohibiting the use of force on the international plane to a *de facto state*, it is necessary to vest the respective territorial entity with the status implying protection by the legal norm in question on the basis of granting recognition (in the broad sense). As one possible expression of this state of affairs has been regarded the fixing of lines of demarcation on the ground of an agreement reached between respective belligerent parties, or set up by the occupying power, or made compulsory for the so-called “divided countries” (divided into respective occupied zones) as part of the occupying regime imposed on them. In such cases, respective demarcation lines fall under the protection of the rule prohibiting the use of force as enshrined in Art. 2 (4) of the UN Charter.¹¹⁹⁶

The case of two German states has been regarded as an example confirming this state of things. It has been stressed that exactly the regime described above, not merely the GDR’s effective existence, guaranteed the application of the prohibition of the use of force to the inner German zonal frontier and, accordingly, between the GDR and the FRG, from 1949 until the conclusion of the Basic Treaty on 21 December 1972 (the latter recognizing the absolute validity of the prohibition of the use of force in relations between two German states) or their admission to the membership of the UN in September 1973.¹¹⁹⁷

¹¹⁹⁴ *Ibid.*, p. 759

¹¹⁹⁵ *Ibid.* (italics in original)

¹¹⁹⁶ *Ibid.*, pp. 759-760

¹¹⁹⁷ *Ibid.*, p. 760

It has been stressed by the author that the applicability of international legal rules to interstate relations depends on a certain degree of recognition by the members of the international community of states. Such recognition can also be expressed through establishing contractual relations with a respective territorial entity, or the latter can be held liable for certain acts on the international plane. According to the author, all these circumstances confirm that, in contrast to Frowein's theory implying the establishment of the international legal personality of a "*de facto regime*" irrespective of its recognition as a state, the recognition of, at least, the partial international legal capacity of the entity in question is required and the status of the *de facto state*, enjoying the protection of international legal norms, is an expression of this kind of recognition.¹¹⁹⁸

One important legal problem for the *de facto state* is in this context the circumstance that due to its factual "ousting" from the territory controlled by the *de facto state*, the "mother state" loses what is called in German "*Gebietshoheit*", but not the territorial sovereignty. For a third state which does not recognize the effective territorial entity in question as a state, but regards it as a legal nullity, the "mother state" remains the holder of the territorial sovereignty.¹¹⁹⁹

As it was mentioned in the present study, the notion of a line of demarcation serves as a vehicle in furtherance of the application of the prohibition of the use of force to the *de facto state* and, in doing so, it backs an effective territorial entity in solving the problem of the territorial sovereignty described above, it bridges the gap, it remedies the defects connected with the lack of the territorial sovereignty. In this context, Hillgruber refers to the Friendly Relations Declaration of 1970 and quotes a respective passage concerning the application of the rule prohibiting the use of force to the regime governing international lines of demarcation.¹²⁰⁰

Wright emphasizes the fact that Art. 39 of the UN Charter does not apply to internal strife, as such, but according to this author, experience has shown

¹¹⁹⁸ *Ibid.*, p. 763

¹¹⁹⁹ *Ibid.*, pp. 763-764

¹²⁰⁰ *Ibid.*, p. 759

that the domestic strife can develop into an international war.¹²⁰¹ The main problem is, in this context, to draw clear boundaries between the two notions of internal and international armed conflicts, i.e. to determine the “moment of transformation” of the former into the latter.

Wright examines the issue with reference to the questions of breach of the peace and threat to the peace and describes the situation in a following way: a breach of the peace, in the sense of Art. 39 of the UN Charter, presupposes the existence of an armed conflict between the forces under the control of governments *de facto* or *de jure*, these armed forces acting at opposite sides of an internationally recognized frontier. With regard to this latter term, it has been stressed that it encompasses more than respective boundary of a recognized state and if civil strife is of such magnitude that it is generally recognized as a war and disturbs the interests of third states, the requirements connected with the term in question are met.¹²⁰²

Reference has also been made, in this context, to the notion of the “juridical frontier” which is drawn in the absence of an active civil war and which is generally recognized by states (respective cases of such borders in Korea, Germany, Vietnam and China since the Second World War have been mentioned). It has been stressed that policing actions, by an administering power, against local uprisings in provinces or protected, mandated, trusteeship or other non-self-governing territories, in which it is generally recognized to have policing authority, would not come within the definition of the “internationally recognized frontier”, unless those actions are of such magnitude as to be generally recognized as belligerency.¹²⁰³

It is evident that these considerations are essentially similar to Frowein’s approach in the sense of internationalization of relations between a *de facto* territorial entity and a “mother state”. The viewpoints are different: Frowein considers the issue in the context of Art. 2 (4) of the UN Charter, whereas Wright examines Art. 39 with regard to respective question. It is the notion of an “internationally recognized frontier” which is the central issue in the

¹²⁰¹ Q. Wright, *The Prevention of Aggression*, in: AJIL, Vol. 50, 1956, p. 524

¹²⁰² *Ibid.*, pp. 524-525

¹²⁰³ *Ibid.*, p. 525

context of the breach of the peace. Wright links the status of the frontier, as an international one, with the recognition of belligerency but as this kind of recognition “has lost all practical significance”¹²⁰⁴, it is possible to consider Wright’s approach in the context of the “new law” providing for an objective status of the rebel faction.

As it is evident from the considerations mentioned above, the notion of an international line of demarcation, in the form of an armistice line established on the basis of an international agreement, is a component critical to the problem of applicability of the prohibition of the use of force to the *de facto state*. This mechanism represents the mode of vesting a *de facto* territorial entity with the partial international legal capacity, it is the form of “recognition” of such a capacity creating, on the *ad hoc* basis, “international legal environment” for the existence of the *de facto state*. The point here is that “Das Abgegrenztsein von dem anderen Staatsteil durch eine über längere Zeit international respektierte Grenze läßt eben auf ein erhebliches Maß von faktischer Unabhängigkeit von dem anderen Staatsteil schließen.”¹²⁰⁵ The question of decisive importance remains for me to clarify the impact of this state of affairs on the emergence and existence of the “Republic of South Ossetia”, i.e. to examine the applicability of the above-mentioned considerations to the specific case in question.

9.2.5 (iii) The issue of applicability of Article 2 (4) of the UN Charter to the relations between Georgia and the “Republic of South Ossetia”

On 24 June 1992 the Georgian and Russian leaders (Shevardnadze and Yeltsin respectively) signed an agreement on the basis of which, the Republic of Georgia and the Russian Federation, reaffirming their adherence to the principles of the UN Charter and the Helsinki Final Act,

¹²⁰⁴ R. Higgins, *International Law and Civil Conflict*, in: E. Luard (ed.), *The International Regulation of Civil Wars*, London, 1972, p. 171

¹²⁰⁵ D. Rauschnig, *Die Geltung des völkerrechtlichen Gewaltverbots in Bürgerkriegssituationen*, in: W. Schaumann (Hrsg.), *Völkerrechtliches Gewaltverbot und Friedenssicherung, Berichte – Referate – Diskussionen einer Studientagung der Deutschen Gesellschaft für Völkerrecht*, Baden-Baden, 1971, p. 78

worked out a comprehensive ceasefire going into effect between the Georgian and Ossetian sides by 28 June 1992.¹²⁰⁶

On 31 October 1994, another document was signed in Moscow by the Georgian, Russian, South Ossetian and North Ossetian sides in the presence of the then CSCE. In the preamble of the latter agreement, the significance attached to the establishment of a durable peace and stability and adherence to the principles of international law have been reaffirmed and, according to Art. 5 of the document, the parties to the conflict confirmed their obligation to resolve all contentious questions solely by peaceful means and without any resort to the threat or use of force.¹²⁰⁷

Further important development that broadened the comprehensive ceasefire agreement between the Georgian and South Ossetian sides took place on 16 May 1996: the parties to the conflict, together with the North Ossetian republic of the Russian Federation, the OSCE and Russia, signed the document on the basis of which, the Georgian and South Ossetian sides explicitly renounced the threat or use of force, or political, economic or other forms of pressure, as means for the settlement of the dispute between them.¹²⁰⁸

Bearing in mind the circumstances surrounding the conclusion of the documents mentioned above, as well as the very nature of the commitments assumed by the parties to the conflict on the basis of those arrangements, it has to be concluded that a security corridor, a 14 km. band divided evenly on both sides of the administrative border of the former South Ossetian AO

¹²⁰⁶ Agreement on the Principles for Settling the Georgian-Ossetian Conflict (in Russian), signed in Sochi on 24 June 1992, preamble and Art. 1 (1), available on the official website of the Office of the State Minister of Georgia for Reintegration, at: <http://smr.gov.ge/uploads/file/Dagomis%20Accord.pdf> [accessed: 14.07.2009]

¹²⁰⁷ Agreement on the Further Development of the Process for the Peaceful Settlement of the Georgian-Ossetian Conflict and on the Joint Control Commission, signed in Moscow on 31 October 1994, preamble and Art. 5, available on the official website of the Office of the State Minister of Georgia for Reintegration, at: http://smr.gov.ge/en/tskhinvali_region/legal_documents/peace_format_documents [accessed: 14.07.2009]

¹²⁰⁸ Memorandum on Measures for Ensuring the Security and Reinforcement of Mutual Confidence between the Parties of the Georgian-Ossetian Conflict (in Russian), signed in Moscow on 16 May 1996, Art. 1, in: *Konflikty v Abkhazii i Yuzhnoi Osetii, Dokumenty 1989-2006 gg.*, (Conflicts in Abkhazia and South Ossetia, Documents 1989-2006), *Prilozhenie k «Kavkazskomu sborniku», Vypusk № 1* (Supplement to the “Caucasian Digest”, Issue № 1), compiled and commented by M. A. Volkhonskii et al., Moscow, 2008, p. 300

(7 km. on each side), represented an armistice line established in the zone of conflict (defined as a circle of 15 km. radius from the centre of Tskhinvali) on the basis of international agreements.¹²⁰⁹ It follows that this armistice line can be regarded as an “international line of demarcation” in the sense of the Friendly Relations Declaration of 1970, entailing the obligation of respective parties to refrain from the threat or use of force to violate the line in question. Relevant passage of the document reads as follows:

“Every State likewise has the duty to refrain from the threat or use of force to violate international lines of demarcation, such as armistice lines, established by or pursuant to an international agreement to which it is a party or which it is otherwise bound to respect.”¹²¹⁰

It has to be noted at this point that the Friendly Relations Declaration of 1970 does not represent a binding document *per se* but it can be applied in order to interpret the principles of the UN Charter endorsed in the resolution itself.¹²¹¹ It is important at this point to refer to the principles of the UN Charter concerning the prohibition of the use of force. It has to be noted that the very first principle of the document in question is the maintenance of international peace and security.¹²¹² Merriam stresses, in this respect, that the UN was formed to accomplish two main goals: first, to prevent the use of force as a means of settling disputes, and the second, to protect universal human rights.¹²¹³

According to Stone, Art. 2 (4) of the UN Charter, entailing the obligation to refrain from the threat or use of force, is qualified in the text of the

¹²⁰⁹ Protocol № 3 of the Session of the Joint Control Commission of 12 July 1992 (in Russian), Vladikavkaz, available on the official website of the Office of the State Minister of Georgia for Reintegration, at: http://smr.gov.ge/file/1992-07-12_Protocol_3_Vladik.pdf [accessed: 15.07.2009]

¹²¹⁰ UNGA Res. 2625 (XXV) of 24 October 1970, Declaration on Principles of International Law Concerning Friendly Relations and Co-operation Among States in Accordance with the Charter of the United Nations, in: D. Rauschning et al. (eds.), *Key Resolutions of the United Nations General Assembly (1946-1996)*, Cambridge UP, 1997, p. 4

¹²¹¹ M. Hummrich, *Der völkerrechtliche Straftatbestand der Aggression, Historische Entwicklung, Geltung und Definition im Hinblick auf das Statut des Internationalen Strafgerichtshofes*, P. Kunig / W. Rudolf (Hrsg.), *Völkerrecht und Außenpolitik*, Bd. 59, Baden-Baden, 1. Aufl., 2001, pp. 183-184

¹²¹² See Article 1 (1) of the Charter of the United Nations, in: I. Brownlie (ed.), *Basic Documents in International Law*, 4th ed., Oxford, 1995, p. 3

¹²¹³ J. J. Merriam, *Kosovo and the Law of Humanitarian Intervention*, in: *Case Western Reserve Journal of International Law*, Vol. 33, 2001, p. 114

document itself, and in the light of *travaux préparatoires*, and Art. 2 (3), as a general provision on peaceful settlement, must be read by reference to the special provisions of Art. 2 (4) and Chapter VII regarding the prohibition of resort to force.¹²¹⁴ It has been stressed that Art. 2 (4) does not prohibit the use of force, as such, but as used against the “territorial integrity or political independence of any State” or “in any other manner inconsistent with the Purposes of the United Nations” and these purposes may extend beyond Article 1 of the Charter (containing respective purposes of the world organization), to include the passages in the preamble of the document concerning the saving of the world from the scourge of war, *fundamental human rights, respect for the obligations arising from treaties and general international law* etc.¹²¹⁵

Dinstein asserts that the words “or in any other manner inconsistent with the Purposes of the United Nations” form the centre of gravity of Art. 2 (4) because they create some kind of “residual catch-all provision”¹²¹⁶. Indeed, Rifaat stresses that the scope of the prohibition enshrined in Art. 2 (4) of the UN Charter is broadened by the statement concerning the threat or use of force in any other manner inconsistent with the purposes of the world organization and, as a result of this state of affairs, Art. 2 (4) becomes potentially all-embracing in completely prohibiting the use of armed force on the international plane.¹²¹⁷

It has been stressed, in this respect, that the UN is charged with the maintenance of international peace and security regardless of whether or not a state involved is a member of the world organization, and basic purposes of the Charter are not to be thwarted by technicalities concerning the question of statehood (i.e. what constitutes a state) or recognition.¹²¹⁸ The point here is that the prime purpose of the UN is the maintenance of

¹²¹⁴ J. Stone, *Aggression and World Order, A Critique of United Nations Theories of Aggression*, G. W. Keeton / G. Schwarzenberger (eds.), *The Library of World Affairs*, N° 39, London, 1958, p. 43

¹²¹⁵ *Ibid.*

¹²¹⁶ Y. Dinstein, *War, Aggression and Self-Defence*, 4th ed., Cambridge UP, 2005, p. 87

¹²¹⁷ A. M. Rifaat, *International Aggression, A Study of the Legal Concept: Its Development and Definition in International Law*, 2nd printing, Stockholm, 1979, pp. 121-122

¹²¹⁸ H. F. Cunningham, *Meaning of “Aggression” in the United Nations Charter*, in: *Nebraska Law Review*, Vol. 33, 1953-1954, pp. 607-608

international peace and security and the use of force can only be consistent with the Charter if it is directed to this end and, additionally, complies with the direction in para. 7 of the preamble of the UN Charter stressing that armed force shall not be used, save in the common interest.¹²¹⁹

Bearing in mind these dimensions of Art. 2 (4) of the UN Charter and considerations regarding the applicability of the prohibition of the use of force to *de facto states*, it has to be concluded that the “Republic of South Ossetia” enjoys the protection under the norm in question. The point here is that this territorial entity can be regarded (before 2004 and, possibly, until August 2008) as existing in an environment which has to be described with the term used by Frowein, namely “*befriedet*”. It is thus true that the signing of the documents (which were examined above) entailing the obligation of the parties to the conflict in question, not to use force against each other and to resolve the problems by peaceful means, was followed by a long period of time which can be described as “*befriedet*”. Luchterhandt makes the following assessment of the situation by the time the Memorandum of 1996 was concluded:

“Es markiert eine geschichtliche Phase, die bemerkenswert lange durch einen zwar zerbrechlichen, aber insgesamt von beiden Seiten eingehaltenen und wiederholt bekräftigten Verzicht auf Gewalt unter internationaler Beobachtung gekennzeichnet war.”¹²²⁰

As in respect of the period afterwards, it has been stressed that the agreements were violated by shootings and minor skirmishes between the Ossetians and the Georgians but, all in all, the control mechanisms established on the basis of those agreements have fulfilled their function till the end of Shevardnadze’s term of office (2003).¹²²¹ Thus, it can be asserted that the territorial entity in question existed in the environment in which its very existence, as such, was not endangered by the use of armed force and this situation lasted for years. As with regard to the factual international

¹²¹⁹ R. L. Griffiths, International Law, the Crime of Aggression and the Ius Ad Bellum, in: International Criminal Law Review, Vol. 2, 2002, pp. 308-309

¹²²⁰ O. Luchterhandt, Völkerrechtliche Aspekte des Georgien-Krieges, in: AVR, Bd. 46, 2008, p. 446

¹²²¹ *Ibid.*

status enjoyed by the entity in question, it has been stressed that effectively independent South Ossetian “*de facto regime*” became active, in the sense of international law, by participating in conclusion of ceasefire agreements with Georgia and Russia.¹²²² Here we are led to the problem of contractual relations with unrecognized territorial entities.

Both, bilateral and multilateral treaties are relevant with regard to the *de facto state*. As legal capacity is a prerequisite for the conclusion of treaties, this circumstance makes the case in question worthy of examination. The argumentation is that an unrecognized entity enjoys legal capacity only in connection with the specific treaty, party to which it is and this capacity is implicitly recognized by the fact of the conclusion of a respective agreement:

“Somit handelt es sich hier nicht um eine kategorische Anerkennung oder Nichtanerkennung, sondern vielmehr um eine Teilanerkennung. Diese Teilanerkennung bedeutet aber nicht, daß sie für den Abschluß weiterer Verträge *ipso facto* gilt. Sie gilt und betrifft nur jenen spezifischen Vertrag, dessen rechtslogische und unumgängliche Voraussetzung sie darstellt.”¹²²³

An important conclusion is that full recognition, for example as a state, is not regarded to be an inevitable result of these relations. This principle applies also to bilateral treaties. Balekjian mentions the agreement signed between the FRG and Israel in 1952, as an example. This agreement was published in the UNTS, at that time, however, Israel was not recognized by the FRG, this followed only in 1965.¹²²⁴

When states enter into treaty relations with unrecognized entities, they try to show that these relations are distinct from those normal agreements between recognized states. Reservations and declarations are made concerning multilateral treaties. Lachs summarized them in a following manner: “(a) refusal to admit the unrecognized State or government to any participation in the multilateral instrument; (b) refusal to accept any obligations resulting

¹²²² *Ibid.*, pp. 457-458

¹²²³ W. H. Balekjian, *Die Effektivität und die Stellung nichtanerkannter Staaten im Völkerrecht*, Den Haag, 1970, p. 141 (*italics in original*)

¹²²⁴ *Ibid.*, p. 144

from the treaty *vis-à-vis* the unrecognized State or government; (c) a declaration that participation in the treaty does not amount to recognition.”¹²²⁵

The non-recognizing states do have the discretion described above, but it does not prejudice the fact that unrecognized entities can enjoy the status of parties to multilateral treaties. In the case of accession of an unrecognized entity to a multilateral treaty, it has been asserted that this entity is automatically in the position of a party to the document for the parties recognizing it. With regard to other states, not recognizing this entity, the status of a party to the agreement depends on the content of the treaty in question and the attitude of those states.¹²²⁶

It follows that, by participating in the conclusion of the agreements considered in the present study, South Ossetia activated its partial international legal capacity on the *ad hoc* basis. Thus, it can be stated that, together with the “pacified” environment in which South Ossetia existed for years, the component of “partial (and *ad hoc*) internationalization” of its status is also present. At the same time, as it was stated above, the respective armistice line established in the zone of the conflict in question can be regarded as an “international line of demarcation”. Bearing in mind these considerations and the “all-embracing” provision of Art. 2 (4) of the UN Charter, it has to be concluded that the latter norm became applicable to the relations between Georgia and the “Republic of South Ossetia”.

It has to be borne in mind that even if the organs of the UN regard civil strife as being a threat to the peace and decide to occupy themselves with the matter, in spite of Art. 2 (7) of the UN Charter concerning the *domaine réservé* of states, this does not mean that there is an international armed conflict. The point here is that the competence of the UN organs, concerning the maintenance of peace, can exist even in the sphere to which the prohibition of the use of force does not apply. It follows that a discussion regarding the applicability of the prohibition of the use of force to concrete

¹²²⁵ M. Lachs, Recognition and Modern Methods of International Co-operation, in: BYIL, Vol. 35, 1959, pp. 256-257 (italics in original)

¹²²⁶ U. Erdmann, Nichtanerkannte Staaten und Regierungen, Göttingen, 1966, pp. 97-98

civil wars concerns the issue, whether the special case, e.g. the intervention by a third party, is present, not the applicability of the norm in question between the warring parties.¹²²⁷ Thus, the solution to the problem of applicability of the norm prohibiting the use of force to *de facto* situations is not, in practice, as easy as it seems.

At the theoretical level, the application of the right of collective self-defense, in the form of Art. 51 of the UN Charter, to the substate ethnic groups, as peoples, and subsequent use of the notion of assistance in an emergency (*Nothilfe*) in favour of them, has been criticized by Nolte. According to this author, such an application contradicts not only the wording and systematic context of the article in question, but it is also in conflict with the central function of the prohibition of the use of force which is aimed at creating a high degree of clarity in respect of the limits of admissible unilateral use of force, in order to minimize the danger of escalation which is also connected with the use of force for humanitarian purposes:

“Wenn jede Gewaltanwendung gegen ein Volk [...] die ein anderer Staat für völkerrechtswidrig hält, für die Inanspruchnahme eines Nothilferechts ausreichen würde, könnte das Gewaltverbot kaum noch eine praktische begrenzende Funktion entfalten.”¹²²⁸

It follows that the applicability of the right of collective self-defense to the situations in which respective groups are persecuted or militarily oppressed within the borders of particular states, has to be rejected:

“Selbstverteidigung darf nach der Charta nur gegenüber einem bewaffneten Angriff gegen ein Mitglied der Vereinten Nationen geübt werden, setzt also einen in aller Regel klar zutage tretenden Vorgang voraus. Im internen Konflikt gibt es aber normalerweise keinen Vorgang, der als ein

¹²²⁷ D. Rauschnig, Die Geltung des völkerrechtlichen Gewaltverbots in Bürgerkriegssituationen, in: W. Schaumann (Hrsg.), Völkerrechtliches Gewaltverbot und Friedenssicherung, Berichte – Referate – Diskussionen einer Studientagung der Deutschen Gesellschaft für Völkerrecht, Baden-Baden, 1971, p. 77

¹²²⁸ G. Nolte, Kosovo und Konstitutionalisierung: Zur humanitären Intervention der NATO-Staaten, in: ZaöRV, Bd. 59, 1999, p. 949

vergleichbar deutlicher Auslöser für eine Aggression gegen eine Menschengruppe identifiziert werden kann.”¹²²⁹

Charney stresses that liberal interpretation of the phrases “territorial integrity” and “inconsistent with the purposes of the Charter” enshrined in Art. 2 (4) of the UN Charter and applied by some in the form of exceptions to the prohibition of the use of force, is incorrect, because the use of force by bombing the territory of a sovereign state violates its territorial integrity regardless of the motivation and, besides this, the protection of human rights, although being among the primary purposes of the Charter, is subsidiary to the objective of limiting war and the use of force in international relations.¹²³⁰

It has been stated that the *travaux préparatoires* of the Charter establish that the phrases “territorial integrity” and “inconsistent with the purposes of the Charter” were added to Art. 2 (4) of the document to close all the potential loopholes in its prohibition of the use of force, rather than to open up new ones, and neither the use of force by regional organizations, nor the intervention in support of domestic insurrections is admissible, absent the authorization by the Security Council or resort to self-defense.¹²³¹

Bearing in mind even these arguments, the considerations submitted at the theoretical level confirm that the armistice line established in the conflict zone could be regarded as an “international line of demarcation” the violation of which could clearly trigger the aggression against the “Republic of South Ossetia”. Accordingly, the Independent International Fact-Finding Mission on the Conflict in Georgia concluded that the Georgian shelling and ground offensive directed against the city of Tskhinvali and the surrounding villages, beginning in the night from 7 to 8 August 2008, constituted illegal use of force in the sense of Art. 2 (4) of the UN Charter.¹²³²

¹²²⁹ *Ibid.*

¹²³⁰ J. I. Charney, Anticipatory Humanitarian Intervention in Kosovo, in: AJIL, Vol. 93, 1999, p. 835

¹²³¹ *Ibid.*, pp. 835-836

¹²³² See the Report of the Independent International Fact-Finding Mission on the Conflict in Georgia, September 2009, Vol. I (pp. 22-23), Vol. II (p. 243), available on the website of the Mission, at: <http://www.ceiig.ch/Report.html> [accessed: 05.11.2009]

At the same time, bearing in mind the dimensions and characteristics of the territorial entity in question, it has to be noted that the use of force by Georgia against the “Republic of South Ossetia” would not fit into a category described in the above mentioned quotation, namely the simple use of force in the form of an internal measure. The argument advocating applicability of the prohibition of the use of force to the territorial entity in question is also backed by the importance attached to the maintenance of international peace and security in the system of the UN Charter¹²³³ and the all-embracing nature (also in the form of customary international law) of the *jus cogens* norm prohibiting the use of force.¹²³⁴

9.2.6 Article 2 (4) of the UN Charter and the de facto state – problems of application revealed by practice

9.2.6 (i) The case of Chechnya: a setback suffered by the de facto state in the context of its protection under Article 2 (4) of the UN Charter

The problems concerning the applicability to *de facto states* of the norm prohibiting the use of force on the international plane arise not only at the theoretical level, but also in practice. Indeed, it has been stressed in 1996 with regard to the case of Chechnya that the military occupation by Russia of the Chechen Republic of Ichkeria would amount to the use of force against an independent state and would fall under the scope of the prohibition of Art. 2 (4) of the UN Charter.¹²³⁵

Thus, the Chechen Republic of Ichkeria possessed the right of self-defence stipulated by Art. 51 of the Charter (although the UN Charter, itself, did not apply to the conflict between the Russian Federation and Chechnya, the same rules represent customary international law). Respective conflict has

¹²³³ A. Verdross / B. Simma, *Universelles Völkerrecht*, 3. Aufl., Berlin, 1984, p. 73

¹²³⁴ O. Luchterhandt, *Völkerrechtliche Aspekte des Georgien-Krieges*, in: AVR, Bd. 46, 2008, p. 459

¹²³⁵ R. Lefeber / D. Raič, *Frontiers of International Law, Part One: The Chechen People*, in: LJIL, Vol. 9, 1996, p. 4

been described as an international one and the international community has been regarded as entitled to assist the Chechen people to vindicate its rights not only by issuing political statements, but also by admitting the Chechen Republic of Ichkeria to international organizations and even by rendering direct or indirect military support.¹²³⁶

It is also true that the peace treaty signed by the Chechen and Russian sides on 12 May 1997 postponed the regulation of Chechnya's status (autonomy within the borders of the Russian Federation or independent statehood) until 2001: "Beide Seiten vereinbarten, Konflikte künftig unter Verzicht auf militärische Gewalt in Übereinstimmung mit den Grundsätzen des internationalen Rechts auszutragen."¹²³⁷ But it remains the fact that the Russian Federation "reconquered" Chechnya in the second military campaign initiated in 1999 and the international community, once again, acquiesced in the Russian argument, that the conflict in question was the matter of Russia's domestic jurisdiction.

Thus, applicability of the prohibition of the use of force to the relations between the Chechen Republic of Ichkeria and the Russian Federation suffered a significant blow. Further important consideration regarding the problematic question of such applicability is connected with the cases of *de facto states* existing on the Georgian territory itself. This consideration demonstrates the complexity of the situation and interrelation between the developments surrounding Abkhazia and South Ossetia.

9.2.6 (ii) *The Russian – Georgian war of 2008 and its implications*

In the course of the Russian-Georgian war of August 2008 over South Ossetia, the Abkhaz forces assumed control over the upper Kodori Gorge (the Abkhaz side has claimed that its troops took over the area after fighting with the Georgian forces on 12 August), the only part of breakaway

¹²³⁶ *Ibid.*

¹²³⁷ U. Halbach, Nordkaukasien – von Widerstand geprägt, in: Informationen zur politischen Bildung, Nr. 281/2003, Kaukasus-Region, p. 7

Abkhazia under Tbilisi's control.¹²³⁸ This was exactly the use of force aimed at the expansion of the factual "sovereign territory" of the *de facto state* and, as it was stressed above, according to Frowein, this action falls under the scope of the prohibition of the use of force on the international plane (it has to be borne in mind that respective *de facto states* are protected by the norm in question, but, on the other hand, they can also violate it).

Here we are led to the military intervention by the Russian Federation "in furtherance of the right of (South) Ossetians to self-determination". The reason is that Russia conducted military operations not only in the proximity to the territory of the former South Ossetian AO, but across Georgia¹²³⁹ and the Russian military advancement had its own impact on the situation in Abkhazia, it changed the *status quo* established in that region.

The argument that force may be used to implement the right of self-determination depends on whether there is a species of self-defence, recognized by Art. 51 of the UN Charter which permits the use of force in such circumstances.¹²⁴⁰ Indeed, it has been stressed in this respect that there is no consistent state practice or rule of international law supporting a right to forceful self-determination independent of the right to self-defence, and even less support for a right of ethnic groups to use force to secede from existing states. It follows that, in the absence of support for such a right and considering the general prohibition contained in Art. 2 (4) of the UN Charter, the use of force by a state against another state in support of self-determination by a people within that second state will, if the circumstances do not grant the supported people the right to self-defence, amount to an act of aggression.¹²⁴¹

¹²³⁸ Kodori Under Abkhaz Control [12 August 2008], available on the website of the Civil Georgia (Daily News Online), at: <http://www.civil.ge/eng/article.php?id=19073&search=> [accessed: 19.07.2009]

¹²³⁹ For the classification of particular actions of the Russian military campaign on the Georgian soil *see* O. Luchterhandt, *Völkerrechtliche Aspekte des Georgien-Krieges*, in: AVR, Bd. 46, 2008, p. 473

¹²⁴⁰ J. Dugard, SWAPO: The Jus ad Bellum and the Jus in Bello, in: The South African Law Journal, Vol. 93, 1976, pp. 148-149

¹²⁴¹ R. L. Griffiths, International Law, the Crime of Aggression and the Ius Ad Bellum, in: International Criminal Law Review, Vol. 2, 2002, p. 360

Abkhazia was not attacked in August 2008, so the activation of the right to self-defence, on the part of respective people, was excluded. But the Abkhaz forces seized momentum, utilized Russia's massive military advancement in the western part of Georgia (in the course of which Abkhaz armed forces launched an operation to drive Georgian forces out of the Kodori Gorge)¹²⁴² and assumed control over the only part of Abkhazia being, at that time, under the control of the Georgian central authorities. The Tbilisi-controlled upper Kodori Gorge was under ground and air attack by Russian and Abkhaz forces and Abkhaz *de facto* president declared on 10 August 2008 that he ordered 1,000 troops to the territory in question.¹²⁴³ Bagapsh even said that the Abkhaz side was coordinating its actions with Russia, the "biggest friend" of Abkhazia.¹²⁴⁴

It has been concluded in respect of Russia's massive military involvement in western Georgia that it was not aimed at repulsing the Georgian forces and re-establishing the *status quo ante* in and around South Ossetia, its goal was to destroy the military capability of Georgia in the western part of the country and to boost Abkhazia's position in the region.¹²⁴⁵ Thus, according to Luchterhandt: "Für den „Süd-Ossetien-Komplex“ waren die russischen Aktionen in Westgeorgien ohne Belang; sie waren erst recht nicht notwendig sowie unangemessen und daher völkerrechtswidrig."¹²⁴⁶ Bearing in mind these considerations, it has to be concluded that Russia committed aggression against Georgia (flagrant violation of the principle of proportionality took place), whereas the Abkhaz forces violated the prohibition of the use of force and seized the territory being under the control of the central government of Georgia. With regard to the use of force by the Ossetian side, it has to be stressed that by initiating the shooting

¹²⁴² Upper Kodori Attacked [9 August 2008], available on the website of the Civil Georgia (Daily News Online), at: <http://www.civil.ge/eng/article.php?id=18990&search=> [accessed: 19.07.2009]

¹²⁴³ Kodori Under Attack [10 August 2008], available on the website of the Civil Georgia (Daily News Online), at: <http://www.civil.ge/eng/article.php?id=19021&search=> [accessed: 19.07.2009]

¹²⁴⁴ Bagapsh: Abkhazia Dispatches Troops to Kodori [10 August 2008], available on the website of the Civil Georgia (Daily News Online), at: <http://www.civil.ge/eng/article.php?id=19016&search=> [accessed: 19.07.2009]

¹²⁴⁵ O. Luchterhandt, *Völkerrechtliche Aspekte des Georgien-Krieges*, in: AVR, Bd. 46, 2008, p. 476

¹²⁴⁶ *Ibid.*, (emphasis in original)

on Georgian villages, police and peacekeepers before the outbreak of the large-scale hostilities, South Ossetia violated the prohibition of the use of force.¹²⁴⁷ Furthermore, use of force by South Ossetia after 12 August 2008 was also illegal from the *ius ad bellum* perspective.¹²⁴⁸

Not only did the Russian Federation commit an act of aggression against the Georgian state, but the Russian conduct of military operations fell short of the requirements attached to the modern humanitarian intervention. The latter notion is important in the present context because, according to the claim of the Russian leadership, the Russian Federation intervened in the conflict on humanitarian grounds.¹²⁴⁹ It is thus meaningful to examine modern requirements attached to the concept of humanitarian intervention.

9.2.6 (iii) The notion of humanitarian intervention and contemporary international law: justification of unilateral use of force

It has been emphasized by Merriam that in order to justify a military intervention, human rights violations must meet two conditions: they must violate the highest norms of human rights (most notably the right to life and the right to be free from physical abuse) and the violations themselves must be widespread and large in scale.¹²⁵⁰ Furthermore, use of force must be the last resort when a state or group of states attempts to resolve a humanitarian crisis. So, other means, such as diplomacy and sanctions, must be employed before exercising the military option and during the period of time in which the humanitarian crisis has not reached its peak.

¹²⁴⁷ See the Report of the Independent International Fact-Finding Mission on the Conflict in Georgia, September 2009, Vol. II (p. 262), available on the website of the Mission, at: <http://www.ceiig.ch/Report.html> [accessed: 05.11.2009]

¹²⁴⁸ *Ibid.*, p. 263

¹²⁴⁹ President of Russia, Statements on Major Issues, Opening Remarks at a Meeting with the leaders of parties represented in Russian Parliament, 11 August 2008, The Kremlin, Moscow, available on the official web portal of the President of Russia, at: http://kremlin.ru/eng/speeches/2008/08/11/1924_type82912type84779_205145.shtml [accessed: 20.07.2009]

¹²⁵⁰ J. J. Merriam, Kosovo and the Law of Humanitarian Intervention, in: Case Western Reserve Journal of International Law, Vol. 33, 2001, p. 129

It follows that the exhaustion of other remedies short of military option should be a two-step process with a pre-crisis phase and the crisis phase itself: during the former, other methods of preventing the tragedy (e.g. trade sanctions, attempts at mediation, political pressure) are required, whereas once the crisis begins, a state or group of states can intervene unilaterally only when faced with a deadlocked UN Security Council, because by attempting to initiate the Security Council action, the intervening state adds further weight to the legitimacy of the intervention by establishing a record of humanitarian intent.¹²⁵¹

At the same time, the sole objective of the intervention must be to end the humanitarian emergency and prevent its resurgence and the purpose of the intervention should not be extended to include territorial conquest or liberation, the break-up of a state in question, or the toppling of its government. The reason for such a restriction is that the aims mentioned would destroy the disinterested humanitarian intent which is required for a legitimate intervention. Thus, in acting within the territory of a sovereign state, every attempt must be made to comply with the spirit of Art. 2 (4) of the UN Charter.¹²⁵²

The criterion of the limited objective is followed by the requirement of the limited duration of the intervention. Under the latter, the intervenor must not remain in occupation of the sovereign territory of another state any longer than necessary to accomplish the humanitarian mission, in order to avoid pretextual intervention, annexation or indefinite occupation by the intervenor of the territory of a sovereign state. It is also important to emphasize that the limited duration of a unilateral intervention should be monitored and enforced by the UN.¹²⁵³

Further important requirement is that of the multilateral character of the intervention. It follows that the humanitarian intervention should be multilateral whenever possible, because the more states that are involved in the intervention, the greater the legitimacy of the intervention and, therefore,

¹²⁵¹ *Ibid.*, pp. 131-132

¹²⁵² *Ibid.*, p. 133

¹²⁵³ *Ibid.*, pp. 134-135

the less likelihood of an abuse of the doctrine. But, at the same time, it has been stressed that this should not be understood to require the presence of more than one state's military forces in the affected area. Rather, this criterion requires that the endorsement of the intervention be multilateral: "A humanitarian intervention must be supported by many voices, and the existence of a humanitarian crisis be accepted by the world community as a whole. Any signs that the UN has endorsed intervention will further add to its legitimacy."¹²⁵⁴ Thus, after elaboration of the criteria of a modern humanitarian intervention, it is important to examine Russian military involvement of August 2008, the operations conducted on the Georgian soil.

9.2.6 (iv) Russia's "humanitarian war" of August 2008 and its legal assessment

If we apply those criteria to the Russian military campaign, it becomes evident that significant flaws were inherent in the intervention but the most flagrant violations are connected with the requirements of limited objective and limited duration of the intervention. As it was already stated above, Russia's actions went far beyond the goal of putting an end to the humanitarian emergency and covered the bombardment of military and civil objects in Poti, Senaki, Vaziani (outside Tbilisi)¹²⁵⁵, Gori, Kopitnari airport (close to Georgia's second largest city of Kutaisi in western part of the country)¹²⁵⁶, Upper Kodori¹²⁵⁷, outskirts of the capital Tbilisi¹²⁵⁸, a military installation in Tbilisi itself¹²⁵⁹, Tbilisi International Airport¹²⁶⁰ etc. It has to

¹²⁵⁴ *Ibid.*, pp. 135-136

¹²⁵⁵ Strategic Targets Bombed Across Georgia [9 August 2008], available on the website of the Civil Georgia (Daily News Online), at: <http://www.civil.ge/eng/article.php?id=18976&search=> [accessed: 21.07.2009]

¹²⁵⁶ Scores of Civilians Dead in Gori Bombing – Reports [9 August 2008], available on the website of the Civil Georgia (Daily News Online), at: <http://www.civil.ge/eng/article.php?id=18983&search=> [accessed: 21.07.2009]

¹²⁵⁷ Official: Upper Kodori Bombed [9 August 2008], available on the website of the Civil Georgia (Daily News Online), at: <http://www.civil.ge/eng/article.php?id=18989&search=> [accessed: 21.07.2009]

¹²⁵⁸ Russia's Air Strike Targets Factory in Tbilisi [10 August 2008], available on the website of the Civil Georgia (Daily News Online), at: <http://www.civil.ge/eng/article.php?id=19008&search=> [accessed: 21.07.2009]

¹²⁵⁹ Military Installation Bombed in Tbilisi [11 August 2008], available on the website of the Civil Georgia (Daily News Online), at: <http://www.civil.ge/eng/article.php?id=19037&search=> [accessed: 21.07.2009]

be noted that Russia conducted military operations using its Black Sea fleet.¹²⁶¹ Bearing in mind these circumstances, it can be stated that those actions, in their very essence, “overreached” the objective of ending the humanitarian crisis and the alleged humanitarian intent was destroyed, i.e. the requirement of the limited objective of the humanitarian intervention was not met.

As in respect of the criterion of limited duration of the humanitarian intervention, it has been stressed that the Russian counter-attack, including large-scale military actions in central and western Georgia and in Abkhazia, failing to respect the principle of proportionality and the requirements based on the international humanitarian law, “led to the occupation of a significant part of the territory of Georgia”¹²⁶². On 28 January 2009 the Parliamentary Assembly of the Council of Europe adopted the resolution in which it:

“[...] condemns the Russian non-mandated military presence and the building of new military bases within the separatist regions of South Ossetia and Abkhazia, as well as in Akhagori, Perevi and Upper Abkhazia and in villages controlled by the central government of Georgia before the breakout of the conflict.”¹²⁶³

Bearing in mind these circumstances, it has to be concluded that the Russian Federation, i.e. the intervenor, remained in the occupation of the sovereign territory of Georgia longer than necessary to accomplish its “humanitarian”

¹²⁶⁰ Timeline of Overnight Attacks [11 August 2008], available on the website of the Civil Georgia (Daily News Online), at: <http://www.civil.ge/eng/article.php?id=19040&search=> [accessed: 21.07.2009]

¹²⁶¹ Russia’s Black Sea Fleet Blockades Georgia [10 August 2008], available on the website of the Civil Georgia (Daily News Online), at: <http://www.civil.ge/eng/article.php?id=19012&search=> [accessed: 21.07.2009]

¹²⁶² Resolution 1633 (2008) of the Parliamentary Assembly of the Council of Europe on the Consequences of the War between Georgia and Russia [2 October 2008], para. 6, available on the official website of the Council of Europe, at: http://assembly.coe.int/ASP/Doc/ATListingDetails_E.asp?ATID=11016 [accessed: 21.07.2009]

¹²⁶³ Resolution 1647 (2009) of the Parliamentary Assembly of the Council of Europe on the Implementation of Resolution 1633 (2008) on the Consequences of the War between Georgia and Russia [28 January 2009], para. 5.4., available on the official website of the Council of Europe, at: http://assembly.coe.int/ASP/Doc/ATListingDetails_E.asp?ATID=11043 [accessed: 21.07.2009]

mission and, in doing so, Russia has committed a pretextual intervention causing indefinite occupation of the Georgian territory.

The International Crisis Group depicted in its June 2009 document the measures taken by the Russian Federation having the destructive impact on the situation in and around the conflict zone: a) since August 2008, Russia has consolidated its position in Abkhazia and South Ossetia (facing relatively slight criticism), it has not returned its military presence to pre-war levels and locations (as envisioned by the 12 August six-point agreement achieved on the basis of the EU's mediation and leading to a ceasefire) and in April 2009 it sent additional troops to South Ossetia and Abkhazia; b) in violation of its 7-8 September agreement with the EU, the Russian Federation has prevented the OSCE from continuing pre-war activities in South Ossetia; c) Russia vetoed the UN mission working in Abkhazia and blocked a renewed mandate for the OSCE mission to Georgia that has been active in South Ossetia.¹²⁶⁴

Russia justifies its position by referring to “new realities”, i.e. the recognition by the Russian Federation of “independent states” in South Ossetia and Abkhazia and the conclusion of bilateral security agreements with them. But it is also a reality that Russia has not fully complied with the ceasefire agreements and its troops have not withdrawn from the sovereign territory of Georgia which they did not occupy before 7 August 2008 (the Akhgori district of South Ossetia, Perevi village on the Georgian side of the administrative border with the former South Ossetian AO and the Kodori Gorge region of Abkhazia).¹²⁶⁵ Furthermore, the way Russia conducted its intervention demonstrates that the operations had nothing to do with the very essence of the notion of humanitarian intervention. As Ossetian militias systematically looted and bulldozed most ethnic Georgian villages, committing “ethnic cleansing”, Russian troops stood by and did not

¹²⁶⁴ Georgia-Russia: Still Insecure and Dangerous, International Crisis Group Policy Briefing, Europe Briefing № 53, 22 June 2009, p. 1

¹²⁶⁵ *Ibid.*, pp. 1-2

perform their security duties, the function inherent in the status of an occupying force.¹²⁶⁶

It follows that actions of the Russian Federation did not meet the criterion of limited duration of humanitarian intervention. At the same time, they were not aimed at ensuring the security of the local population, regardless of ethnicity, and at preventing human rights abuses in areas under Russia's control. Furthermore, as it is evident from the considerations mentioned above, most of the on-the-ground conflict resolution machinery (UNOMIG and the OSCE mission in Georgia) is being dismantled by Russia.¹²⁶⁷ In doing so, the Russian Federation gradually reduces the international presence in the conflict zones to a minimum, i.e. it tries to "kill" multilateral framework of the conflict resolution, and claims the role of a sole arbiter in this overall context. This circumstance makes the Russian "humanitarian intervention" and its subsequent policies less reliable. Thus, leaving aside the question, whether (in August 2008) Russia has exhausted all available means short of military force to end the crisis in the region and whether the use of force was a last resort, it has to be concluded that Russia's actions did not satisfy the requirements attached to the notion of humanitarian intervention.

9.2.6 (v) Russia's "political impact" on the status of the "Republic of South Ossetia"

It is also true that the Russian Federation recognized independence of the "Republic of South Ossetia" and this step provokes the worst fears. These fears denote the possibility of the attachment of the territory of the former South Ossetian AO to one of the constituent entities of the Russian Federation, namely the North Ossetian republic, the unification of Ossetians living in the territory of the former South Ossetian AO with their ethnic brethren in the north, a kind of "Ossetian *Enosis*". Some time ago, Galina Starovoitova wrote following in respect of the possibility of recognition by Russia of South Ossetia's secession from Georgia:

¹²⁶⁶ *Ibid.*, p. 1

¹²⁶⁷ *Ibid.*

“Such a move would have been tantamount to a Russian *Anschluss* of a portion of Georgia’s territory and could have provoked demands on the part of other minorities for a similar *Anschluss*, [...]”¹²⁶⁸

It is a hallmark of the case of South Ossetia that the legal status of this territorial entity is affected by the actions of a third state, namely the Russian Federation. The point here is that Ossetians living in the territory of the former South Ossetian AO were granted en masse the citizenship of the Russian Federation by Russian authorities, the “activity” which has been taking place across the whole area since 2004 and which represents the illegal intervention in a matter being within the domestic jurisdiction of the Georgian state.¹²⁶⁹ This is an additional factor denoting the fear of the creeping annexation by Russia of the territory in question. This naturalization en masse is a step expressing one particular component of the problem mentioned above: “Sie nimmt die hoheitliche Inkorporation Süd-Ossetiens in die Russländische Föderation partiell, nämlich personell, vorweg.”¹²⁷⁰

Bearing in mind this consideration and the facts of ethnic cleansing conducted against Georgians, together with the position of the *de facto* authorities declaring to prevent their return to the territory in question (most of their houses have been destroyed)¹²⁷¹, it becomes evident that the fear mentioned above is not groundless. These circumstances reveal the flaws of the South Ossetian “independence”: Russia effectively controls South Ossetia politically, financially and militarily¹²⁷² and, at the same time, recognizes the “Republic of South Ossetia”, an entity in which 80-90% of the population has Russian citizenship¹²⁷³, as a “sovereign independent state”. The Independent International Fact-Finding Mission on the Conflict

¹²⁶⁸ G. Starovoitova, *Sovereignty After Empire, Self-Determination Movements in the Former Soviet Union*, United States Institute of Peace, Peaceworks No. 19, 1997, p. 17 (italics in original)

¹²⁶⁹ For the comprehensive assessment of these actions see O. Luchterhandt, *Völkerrechtliche Aspekte des Georgien-Krieges*, in: AVR, Bd. 46, 2008, pp. 466-468

¹²⁷⁰ *Ibid.*, p. 468

¹²⁷¹ See Georgia-Russia: Still Insecure and Dangerous, International Crisis Group Policy Briefing, Europe Briefing № 53, 22 June 2009, p. 4

¹²⁷² See *Ibid.*

¹²⁷³ See O. Luchterhandt, *Völkerrechtliche Aspekte des Georgien-Krieges*, in: AVR, Bd. 46, 2008, footnote 103, p. 466

in Georgia stressed, in this context, that the process of state-building was not gradually stabilised after South Ossetia's declaration of independence in 1992 but suffered setbacks after 2004 as *de facto* control of South Ossetia was gradually built up by Moscow since summer 2004.¹²⁷⁴ The following conclusion has been drawn in this respect:

“To sum up, Russia's influence on and control of the decision-making process in South Ossetia concerned a wide range of matters with regard to the internal and external relations of the entity. The influence was systematic, and exercised on a permanent basis. Therefore the *de facto* Government of South Ossetia was not “effective” on its own.”¹²⁷⁵

Furthermore, it has been acknowledged that the traditional criteria for statehood are gradual ones and, at the time of the military conflict in 2008, South Ossetia was (from the perspective of international law) an entity without a sufficient degree of effectiveness, as domestic policy was largely influenced by Russian representatives “from “within””¹²⁷⁶.

9.2.7 The “Republic of South Ossetia” as the *de facto* state

Thus, after eleven years from the appearance of a respective paper delivered by Starovoitova, the Russian Federation recognized South Ossetia as a “sovereign independent state”. But, for the time being (and for the purposes of the present thesis), the “Republic of South Ossetia” represents a *sui generis de facto state* the government of which lacks actual independence. It follows that the territorial entity in question does not meet one important (traditional) criterion for statehood based on the principle of effectiveness. If we apply the “substantive recognition test” to the current case, it becomes evident that the “Republic of South Ossetia” enjoys the same “acceptance” on the international plane as the “Republic of Abkhazia”. So, there is no need to describe, once again, the recognition granted to the entity in question.

¹²⁷⁴ See the Report of the Independent International Fact-Finding Mission on the Conflict in Georgia, September 2009, Vol. II (p. 133), available on the website of the Mission, at: <http://www.ceiig.ch/Report.html> [accessed: 05.11.2009]

¹²⁷⁵ *Ibid.*, (italics and emphasis in original)

¹²⁷⁶ *Ibid.*, p. 134 (emphasis in original)

The “Republic of South Ossetia” enjoys the protection, vis-à-vis Georgia, under the norm prohibiting the use of force as an expression of the partial international legal capacity of the territorial entity in question. Such a capacity, on the part of the *de facto state*, is also expressed in the relations maintained by this kind of territorial entity. Decisive seems to be, in this context, the will of members of the international community:

“Die anerkennungsrechtliche Seite solcher Kontakte scheint nicht vom *modus* (offiziell, usw.) sondern vom *animus* der betreffenden Regierungen abhängig zu sein. Ist ein *animus* zur Anerkennung *expressis verbis* oder implizit nicht vorhanden, wie dies aus entsprechenden Erklärungen zu entnehmen sein kann, so sind Art und Ebene der Kontakte für eine Anerkennung belanglos.”¹²⁷⁷

The attitude of states which do not recognize respective entities is that these states try to enter into relations “short of recognition.”¹²⁷⁸ It is thus evident that “*relations officieuses*”¹²⁷⁹ are conducted with unrecognized territorial entities. This circumstance demonstrates that, despite the lack of substantive recognition, business is done with *de facto states*. But again, this state of affairs does not amount to the attainment by the *de facto state* of the normative status which would be valid *erga omnes*. The point here is that the partial international legal capacity of the *de facto state* does not entail “Legitimierung der [...] tatsächlichen Machtlage”¹²⁸⁰.

¹²⁷⁷ W. H. Balekjian, Die Effektivität und die Stellung nichtanerkannter Staaten im Völkerrecht, Den Haag, 1970, pp. 128-129 (italics in original)

¹²⁷⁸ A. Verdross / B. Simma, Universelles Völkerrecht, 3. Aufl., Berlin, 1984, p. 242

¹²⁷⁹ H. W. Briggs, Relations Officieuses and Intent to Recognize: British Recognition of Franco, in: AJIL, Vol. 34, 1940, p. 52 (italics in original)

¹²⁸⁰ BVerfGE, Urteil des Ersten Senats vom 4. Mai 1955 – 1 BvF 1/55 – in dem Verfahren wegen verfassungsrechtlicher Prüfung des Bundesgesetzes vom 24. März 1955 betreffend das am 23. Oktober 1954 in Paris unterzeichnete Abkommen über das Statut der Saar, in: Entscheidungen des Bundesverfassungsgerichts, Bd. 4, 1956, p. 175

Preliminary remarks

The second part of the present study reveals how different those *de facto states* really are. The most important “finding” of this part is that alleged precedential value of *de facto* statehood, as such, has to be rejected. Respective *de facto states* are too distinct to have direct (or indirect) legal impact on the status of each other within the realm of public international law: they exist in different political settings, they are not alike in the context of ethnic composition, their emergence is connected with distinct political and legal developments. The point here is that “independence requires more than claims to the right to self-determination and that each case will be considered *ad hoc*.”¹²⁸¹ Thus, there can be no precedential value of *de facto* statehood on the international plane.

It follows that the principle of effectiveness changes its “faces” in each and every single *de facto* situation in accordance with the distinctive features of a particular case. The ROC has made its way from a sovereign state to *de facto* local government and acquired the status of a fully-fledged *de facto state* with prosperous economy and viable democracy. The TRNC is the entity emergence of which is branded as “illegal” because of Turkey’s 1974 military intervention. The latter violated Art. 2 (4) of the UN Charter and undermined the foundation on which the existence of the Republic of Cyprus was based. The “Republic of Kosovo” represents the *de facto state* status of which is a product of the UN Security Council “legislation” and the notion of unilateral remedial secession as an expression of external self-determination. The way made through by Kosovo implies the transition from an autonomous province within Serbia to the fully-fledged *de facto state* via the status of the UN protectorate and by means of the application of an “earned sovereignty approach”, the latter denoting the principle known as “standards before status”.

I have examined the status of the “Republic of Abkhazia” in the context of secessionist self-determination and, after concluding that respective claim does not represent a strong one, the possibility of validation of its effective

¹²⁸¹ J. Radoman, Future Kosovo Status-Precedent or Universal Solution, in: Western Balkans Security Observer-English Edition, Issue no. 3, 2006, p. 20 (italics in original)

existence (in the form of statehood) has been considered with reference to the notion of acquisitive prescription. The result is that the latter manifestation, being one particular “mode of functioning” of the principle of effectiveness, does not entail Abkhazia’s statehood within the realm of contemporary international law. The case of the “Republic of South Ossetia” has been considered in the present study in the context of partially normative character of the principle of effectiveness which, in the situation described as “völkerrechtliche Stabilisierung und Befriedung”¹²⁸², guarantees partial international legal capacity of the *de facto state* and, accordingly, partial international legal personality on the *ad hoc* basis. It follows that particular rules of public international law of essential importance are applicable to *de facto states*. This was demonstrated by reference to the prohibition of the use of force enshrined in Art. 2 (4) of the UN Charter.

Indeed, according to Frowein, the application of public international law to *de facto* territorial entities can depend on the very essence of norms foreseen for such an application and be different in various *de facto* situations, because the preconditions of the application of international legal rules are distinct: in principle, all international legal norms are applied to states, as such, whereas in the case of *de facto states* it is possible, or likely, that only a part of those legal norms will be applied.¹²⁸³ This is the way in which the principle of effectiveness functions in the context of existence of the *de facto state*: “Insofern kommt der faktischen Beherrschung eines Territoriums *eine bestimmte völkerrechtliche Bedeutung* zu.”¹²⁸⁴

What the principle of effectiveness cannot guarantee, is the attainment by respective territorial entities of sovereign statehood within the realm of contemporary international law. The reason can be found in the lack of

¹²⁸² C. Hillgruber, Die Aufnahme neuer Staaten in die Völkerrechtsgemeinschaft, Das völkerrechtliche Institut der Anerkennung von Neustaaten in der Praxis des 19. und 20. Jahrhunderts, in: H. Schiedermaier (Hrsg.), Kölner Schriften zu Recht und Staat, Bd. 6, Frankfurt am Main et al., 1998, p. 759

¹²⁸³ J. Abr. Frowein, Das *de facto*-Regime im Völkerrecht: Eine Untersuchung zur Rechtsstellung »nichtanerkannter Staaten« und ähnlicher Gebilde, Max-Planck-Institut für ausländisches öffentliches Recht und Völkerrecht, H. Mosler (Hrsg.), Beiträge zum ausländischen öffentlichen Recht und Völkerrecht 46, Köln / Berlin, 1968, p. 34

¹²⁸⁴ *Ibid.*, p. 230 (italics mine)

substantive recognition. Thus, here we are led to the issue of recognition of statehood which will be considered in the next chapter.

Chapter 10: Recognition of statehood and its significance in the context of *de facto* territorial situations

10.1 Content of the notion of recognition and its dimensions

It is important at this stage to refer to the notion of recognition as a means of clarifying the status of the *de facto state* in public international law. The relevance of the concept in question to the subject of examination of the present study is twofold: on the one hand, it is inherent in the definition of the *de facto state*, as the lack of substantive recognition is a hallmark of this kind of entity and, at the same time, recognition represents an important instrument at hands of the international community affecting, or to say precisely, determining legal status of the *de facto state*. It has to be borne in mind that the *de facto state* represents (in most cases) a “product” of a secessionist bid and full independence and international recognition remain the ultimate goals for the overwhelming majority of secessionist groups.¹²⁸⁵

Of course, the notion of collective non-recognition as the “severest form of diplomatic ostracism”¹²⁸⁶ has to be examined in connection with the problem of recognition of statehood. Indeed, recognition covers variety of factual situations within the realm of public international law, the situations calling for acknowledgment by members of the international community¹²⁸⁷, but the recognition of states is informative with regard to the subject of examination of the present study:

“Wird ein neuer Staat von einem bereits existierenden Staat anerkannt, so beinhaltet dies, falls die Anerkennung nicht ausdrücklich qualifiziert wird, eine auf die Staatsqualität und damit auf eine umfassende Völkerrechtssubjektivität bezogene Anerkennung.”¹²⁸⁸

It is also important to distinguish among following concepts: *cognition*, *cognizance* and *recognition*. The difference between them is that not all of

¹²⁸⁵ P. Kolstø, The Sustainability and Future of Unrecognized Quasi-States, in: Journal of Peace Research, Vol. 43, 2006, p. 736

¹²⁸⁶ D. Geldenhuys, Isolated States: A Comparative Analysis, in: S. Smith et al. (eds.), Cambridge Studies in International Relations: 15, Cambridge et al., 1990, p. 124

¹²⁸⁷ See D. P. O’Connell, International Law, Vol. 1, London / New York, 1965, p. 137

¹²⁸⁸ E. Klein, Die Nichtanerkennungspolitik der Vereinten Nationen gegenüber den in die Unabhängigkeit entlassenen südafrikanischen *homelands*, in: ZaöRV, Bd. 39, 1979, pp. 475-476

the manifestations aimed at acknowledging particular facts have consequences within the realm of public international law. *Cognition* is described as a mere noting of facts, whereas *cognizance* represents an act of a legislative or judicial branch aimed at taking note of facts and allowing consequences to follow from such an acknowledgment (not involving executive admission of legal consequences). In contrast to these forms, *recognition* can be defined as an act of the executive authority taking note of facts and indicating willingness to allow all the legal consequences, attached to that noting in international law, to operate.¹²⁸⁹

Brierly notes, in this respect, that the primary function of recognition is to acknowledge, as a fact, something that was regarded as uncertain before (i.e. the independence of a body claiming to be a state) and to declare the readiness on the part of the recognizing state to accept normal consequences of that fact expressed in the “usual courtesies of international intercourse.”¹²⁹⁰ This circumstance demonstrates the relevance of the recognition of states to the problematic issue of *de facto* situations. *De facto states* are considered as aspirants for the fully-fledged status of sovereign independent states, they wish to be treated as normal states and receive all the privileges connected with the sovereign statehood, they wish to become subjects of international law.

Thus, the notion of international legal personality is an important indicator denoting the standing of the political entity on the international plane and implies that the entity in question is directly affected by rights and duties at the international level.¹²⁹¹ It is true that nation states have been recognized as the traditional subjects of international law as, for a long period of time, they were exclusively responsible for the formulation, application and termination of international legal rules.¹²⁹² They are also regarded as the primary subjects of international law possessing the fullest range of rights

¹²⁸⁹ D. P. O’Connell, *International Law*, Vol. 1, London / New York, 1965, pp. 138, 179

¹²⁹⁰ J. L. Brierly, *The Law of Nations, An Introduction to the International Law of Peace*, 6th ed., Sir H. Waldock (ed.), Oxford, 1963, p. 139

¹²⁹¹ See M. Shaw, *The International Status of National Liberation Movements*, in: *The Liverpool Law Review*, Vol. V, 1983, p. 32

¹²⁹² A. F. Kassim, *The Palestine Liberation Organization’s Claim to Status: A Juridical Analysis Under International Law*, in: *Denver Journal of International Law and Policy*, Vol. 9, 1980, p. 4

and duties.¹²⁹³ This latter circumstance makes the notion of sovereign statehood more attractive to respective elites in *de facto* situations. The other important aspect is that international legal personality does not merely denote having certain rights, it also implies responsibility to fight against exclusion and misrecognition on the international plane.¹²⁹⁴

The concept of international legal personality refers “to the identity of the Self in relation to otherness institutionally mediated by law (as justice). As such, international legal personality emerges with law as an order of recognition.”¹²⁹⁵ Thus, bearing in mind the latter quotation, the importance of the notion of recognition has to be emphasized in connection with ascribing international legal personality to a particular political entity. Moreover, it has to be stressed that the determination of such a personality is generally a function of recognition extended by the existing international persons, i.e. primarily sovereign states.¹²⁹⁶

The overwhelming importance of the notion of recognition is expressed through the fact that it concerns the construction of legal subjectivity and the bestowal of international legitimacy.¹²⁹⁷ According to Klabbers, one important function of the notion of legal personality is that it forms recognition of the group’s legitimate existence.¹²⁹⁸ It is exactly this meaning of the concept of international legal personality which is decisive for the purposes of the present study: the problem of recognition of the legitimate existence of the *de facto state* represents the issue in question and this issue has been examined in my thesis.

¹²⁹³ M. Shaw, The International Status of National Liberation Movements, in: The Liverpool Law Review, Vol. V, 1983, p. 20

¹²⁹⁴ J. E. Nijman, Paul Ricoeur and International Law: Beyond ‘The End of the Subject’. Towards a Reconceptualization of International Legal Personality, in: LJIL, Vol. 20, 2007, p. 61

¹²⁹⁵ *Ibid.*, p. 56

¹²⁹⁶ W. V. O’Brien, The PLO in International Law, in: Boston University International Law Journal, Vol. 2, 1984, p. 372

¹²⁹⁷ C. M. Constantinou / Y. Papadakis, The Cypriot State(s) *in situ*: Cross-ethnic Contact and the Discourse of Recognition, in: Global Society, *Journal of Interdisciplinary International Relations*, Vol. 15, 2001, p. 127

¹²⁹⁸ J. Klabbers, The Concept of Legal Personality, in: *Ius Gentium*, Journal of the University of Baltimore Center for International and Comparative Law, Vol. 11, 2005, p. 65

At the same time, recognition remains one of the most problematic concepts of international law, especially in the context of the criteria of statehood. Grossman correctly observes that the criteria for admitting of statehood reflect conflict of policies and engender conflict of laws.¹²⁹⁹ This circumstance serves as a source of the conflict of views regarding the very nature of recognition within the realm of public international law. The conflict in question bears following description: the declaratory theory of recognition versus the constitutive one.

This relationship of tension between respective approaches leads us to the problematic issue of law-fact interaction, i.e. statehood as a matter of law or statehood as a matter of fact. Following statement has been made by the US Court of Appeals in respect of the latter question as it dealt with the Republika Srpska and the state action requirement for international law violations:

“Srpska is alleged to control defined territory, control populations within its power, and to have entered into agreements with other governments. It has a president, a legislature, and its own currency. These circumstances readily appear to satisfy the criteria for a state in all aspects of international law.”¹³⁰⁰

This is a classic expression of the empirical statehood based on the principle of effectiveness. Thus, the present study concentrates on the examination of the following assertion: “Die Existenz eines Staates ist eine Frage der politisch-sozialen Wirklichkeit.”¹³⁰¹ At the same time, it is also true that new states come into existence, as legal persons, when the conditions of international law concerning international legal personality are fulfilled.¹³⁰² It is important to note that in order to address this latter issue, reference to the notion of recognition is inevitably needed.

¹²⁹⁹ A. Grossman, Nationality and the Unrecognised State, in: ICLQ, Vol. 50, 2001, p. 855

¹³⁰⁰ United States: Court of Appeals for the Second Circuit Decision in *Kadic v. Karadžić* [October 13, 1995], in: 34 ILM 1592 (1995), p. 1607

¹³⁰¹ J. M. Mössner, Die Völkerrechtspersönlichkeit und die Völkerrechtspraxis der Barbareskenstaaten (Algier, Tripolis, Tunis 1518-1830), Neue Kölner Rechtswissenschaftliche Abhandlungen, Heft 58, Berlin, 1968, p. 34

¹³⁰² D. P. O’Connell, International Law, Vol. 1, London / New York, 1965, p. 179

Thorough examination of the declaratory and constitutive theories of recognition and resolution of the conflict of these two views does not represent the objective of the present study. It is the impact of the notion of recognition (and non-recognition) on the status of the *de facto state* which is important for the purposes of my thesis. As a short description of rival theories, it is sufficient to stress that under the declaratory model the emergence of a state is a fact independent of recognition. The latter only declares that respective community does possess all the requisites of statehood, i.e. the act of recognition serves as an evidence that a state has come into being, it is in no way an instrument of the creation of that state. In contrast to such an approach, the constitutive theory asserts that a state has its genesis in recognition, the latter is itself a requisite of statehood and constitutes the state.¹³⁰³ It has to be noted at this stage that both approaches have been widely debated and criticized by legal scholars.

10.2 Recognition and the issue of statehood

It is not the objective of the present study to clarify whether recognition of states, as such, is a political or legal manifestation. My thesis concentrates on the particular aspect of the notion of recognition, namely its “functioning” in the context of *de facto* statehood. This kind of significance of recognition has been examined by the Supreme Court of Canada in the context of secession:

“Although recognition by other states is not, at least as a matter of theory, necessary to achieve statehood, the viability of a would-be state in the international community depends, as a practical matter, upon recognition by other states. That process of recognition is guided by legal norms.”¹³⁰⁴

The law-fact interaction and the relationship of tension between these two manifestations are reflected in approaches to the issue of statehood. The notion of empirical statehood expresses the importance of the principle of

¹³⁰³ T. D. Grant, *The Recognition of States, Law and Practice in Debate and Evolution*, Westport, 1999, p. xx

¹³⁰⁴ Reference Re Secession of Quebec, Canada, Supreme Court, 20 August 1998, in: Sir E. Lauterpacht et al., (eds.), *ILR*, Vol. 115, 1999, p. 589

effectiveness and is based on traditional or empirical criteria for statehood enshrined in the Montevideo Convention of 1933. The concept of juridical statehood, on the contrary, denotes the need for introduction of additional criteria for the establishment of statehood within the realm of public international law, it regards the mere effectiveness as insufficient for the validation of a claim to statehood. The status of a juridical state has been described as an expression of the negative sovereignty:

“Die negative Souveränität [...] ist ein formaler, juristischer Status, der durch die Anerkennung der anderen Staaten erlangt werden kann und zunächst nichts mit empirischer Staatlichkeit im traditionellen Sinne zu tun hat.”¹³⁰⁵

It is exactly the lack of this kind of negative sovereignty which is a hallmark of the *de facto state* and, in this sense, the latter represents an antipode of a state possessing negative sovereignty. The point here is that the *de facto state* does not enter the realm of public international law via its mere effectiveness and is not regarded as a member of the international community of states, whereas those political entities lacking internal viability but possessing negative sovereignty on the basis of international recognition, are states for the purposes of contemporary international law.

As it has already been stated in this study, the Montevideo criteria have to be considered a kind of starting point within the framework of examination of the question of statehood. Indeed, it is uncontested that the Montevideo Convention is highly contingent upon the political, historical and legal environment of the time at which it was drafted. Bearing in mind these considerations, Redman arrives at the conclusion that the convention “as a law-making tool of normative value, [...] is limited and outdated.”¹³⁰⁶

Of course, I am not going to diminish the importance of the Montevideo Convention which represents the meaningful codification of requirements attached to the claim of statehood. But, as I have already stated before, the

¹³⁰⁵ B. Jahn, Humanitäre Intervention und das Selbstbestimmungsrecht der Völker. Eine theoretische Diskussion und ihre historischen Hintergründe, in: PVS, 34. Jg., 1993, Heft 4, p. 579

¹³⁰⁶ M. Redman, Should Kosovo Be Entitled to Statehood?, in: The Political Quarterly, Vol. 73, 2002, p. 342

present thesis contemplates the document in question as something that needs a kind of addendum, in order to respond to the developments experienced by public international law since the adoption of the convention.

It has to be noted that juridical statehood, as such, implies “normative” and “international” dimensions. It is an important aspect of the juridical statehood that respective state is both a creature and a component of the international community of sovereign independent states and its properties can solely be defined in international terms.¹³⁰⁷ This circumstance is clearly demonstrated by the example of recognition of Bosnia-Herzegovina (1992) in the situation in which respective government did not control more than 30% of the territory, nor did it enjoy the loyalty of large, definable portions of the population.¹³⁰⁸

Thus, it can be asserted that Bosnia-Herzegovina was recognized as an independent state in such circumstances in which it did not meet the traditional criteria for statehood. Bearing in mind this circumstance, Hillgruber concludes that international recognition granted to Bosnia created for the latter “den völkerrechtlichen Status eines Staates im Wege der rechtlichen Fiktion. Die Anerkennung fungierte hier nicht nur als widerlegliche Vermutung, als “evidence” für das Vorliegen der Voraussetzungen von Staatlichkeit, sondern ersetzte diese offensichtlich fehlenden Merkmale.”¹³⁰⁹

An example quite different from Bosnia-Herzegovina is that of Somaliland. As the Somali state collapsed in 1991, its northwestern province (formerly the colony of British Somaliland before independence and union with the former Italian Somalia in 1960) declared independence but the international community has been reluctant to extend recognition to the aspirant for

¹³⁰⁷ R. H. Jackson / C. G. Rosberg, Why Africa’s Weak States Persist: The Empirical and the Juridical in Statehood, in: *World Politics, A Quarterly Journal of International Relations*, Vol. XXXV, 1982, p. 12

¹³⁰⁸ R. M. Hayden, Bosnia’s Internal War and the International Criminal Tribunal, in: *The Fletcher Forum of World Affairs*, Vol. 22, 1998, p. 47

¹³⁰⁹ C. Hillgruber, Die Aufnahme neuer Staaten in die Völkerrechtsgemeinschaft, Das völkerrechtliche Institut der Anerkennung von Neustaaten in der Praxis des 19. und 20. Jahrhunderts, in: H. Schiedermaier (Hrsg.), *Kölner Schriften zu Recht und Staat*, Bd. 6, Frankfurt am Main et al., 1998, p. 671 (emphasis in original)

statehood.¹³¹⁰ According to Eggers, Somaliland has operated as an independent state for certain period of time and it meets international legal standards for statehood but Somaliland lacks formal recognition of its statehood by other states, an act which would enable it to take its place on the world stage.¹³¹¹

The problem is that internal effectiveness is not sufficient to guarantee the general effectiveness of the government that is inevitable in order to qualify as a state, respective institutions must also possess the international *effectivité* dependent on obtaining the recognition of statehood.¹³¹² It follows that widespread non-recognition can severely impede the international *effectivité* of the entity in question.¹³¹³ This circumstance is of decisive importance in the context of *de facto* statehood. As this kind of territorial unit emerges (most usually) as a result of the secessionist bid, the notion of recognition acquires great significance, because the ultimate success of a secessionist claim depends on obtaining substantive international recognition.¹³¹⁴

Thus, the examples of Bosnia-Herzegovina and Somaliland demonstrate two diametrically opposite approaches to the notion of recognition: the international community recognized Bosnia despite its inability at that time to meet the traditional criteria for statehood based on effectiveness and, in doing so, the international community created the juridical state. On the other hand, the same international community refused to extend substantive recognition to Somaliland and, in doing so, it deterred this entity from acquiring the status of a sovereign independent state, despite the exercise of effective control by respective authorities over a defined territory. Bearing in mind these circumstances, it has to be concluded that the fulfillment of

¹³¹⁰ T. Zierau, State Building without Sovereignty: The Somaliland Republic, in: *Mondes en Développement*, Vol. 31, 2003, p. 57

¹³¹¹ A. K. Eggers, When Is a State a State? The Case for Recognition of Somaliland, in: *Boston College International and Comparative Law Review*, Vol. XXX, 2007, p. 222

¹³¹² J. D'Aspremont, Regulating Statehood: The Kosovo Status Settlement, in: *LJIL*, Vol. 20, 2007, p. 655

¹³¹³ *Ibid.*, pp. 660-661

¹³¹⁴ P. Radan, The Badinter Arbitration Commission and the Partition of Yugoslavia, in: *Nationalities Papers*, Vol. 25, 1997, p. 543

empirical criteria of statehood does not inevitably mean that the political entity in question will be granted international recognition.

10.3 Collective recognition and non-recognition

Examples show that, in order to effect deterrence or validation of the claim to statehood, a concerted effort is required on the part of the international community. This problem leads us to the collective aspect of the recognition policy. It has to be noted that the international community knows examples of institutionalization of recognition policies. One has to refer to the Yugoslav crisis and the attitude of the then EC towards the question of recognition.

The essence of the stance mentioned above is expressed through the fact that the EC negotiations originally concentrated on the principle that “recognition would be granted only in the framework of a general settlement acceptable to all parties.”¹³¹⁵ It is also true that the approach of the EC did not represent the collective recognition, as such, it was the recognition by individual member states on the basis of common guidelines on recognition.¹³¹⁶ Furthermore, in practice, the recognition process was not as ideally unanimous and concerted as wished by the members of the EC but it is the approach itself, which is important for the purposes of the present study.

It is the notion of the UN which is of specific importance in the context of *de facto* statehood and the institutionalization of the recognition policy. But it has to be stressed, at the outset, that the issue is a problematic one. Kirgis emphasizes that an international organization of states does not recognize state status simply by admitting an entity to membership, even if that status is the relevant condition for membership of the organization in question.¹³¹⁷

¹³¹⁵ R. Caplan, The European Community’s Recognition of New States in Yugoslavia: The Strategic Implications, in: The Journal of Strategic Studies, Vol. 21, 1998, p. 31

¹³¹⁶ See C. Hillgruber, Die Aufnahme neuer Staaten in die Völkerrechtsgemeinschaft, Das völkerrechtliche Institut der Anerkennung von Neustaaten in der Praxis des 19. und 20. Jahrhunderts, in: H. Schiedermaier (Hrsg.), Kölner Schriften zu Recht und Staat, Bd. 6, Frankfurt am Main et al., 1998, footnote 175, p. 651

¹³¹⁷ F. L. Kirgis, Jr., Admission of “Palestine” as a Member of a Specialized Agency and Withholding the Payment of Assessments in Response, in: AJIL, Vol. 84, 1990, p. 228

Another argument is that the UN does not contain an apparatus for collective recognition and, though the organization is competent to decide questions of recognition for its own purposes, respective decisions on the matter are not universally binding.¹³¹⁸

On the other hand, according to Hoyle, recognition by the international community is most usually demonstrated by acceptance into the UN as a member state and without such recognition, respective aspirants for statehood will find it difficult to achieve the status wished by them.¹³¹⁹ Grant emphasizes the fact that the definition of statehood may never require UN membership, but the association is too close to ignore, because the UN membership is conclusive as to entity's statehood.¹³²⁰

It is not argued here that, if an entity is not a member of the UN, it inevitably does not represent a state. Switzerland became member of the UN in 2002 but this does not mean that it was not the state before. The point here, the decisive matter for the purposes of the present study, is the specific context of *de facto* statehood, namely the impact of the UN on the status of the *de facto* state. This impact can be demonstrated by reference to the case of Kosovo: according to Mitic, without UN membership Kosovo will remain in legal limbo because it is not only about abstract symbols, it is also about practicalities, and no UN means no membership in most international institutions.¹³²¹

The very nature of the concept of recognition, as a tool at hands of the international community, acquires its overwhelming importance in this context. This character of recognition is expressed through the fact that even the political aspect of recognition "is amenable to legal control."¹³²² This circumstance is demonstrated by the example of Southern Rhodesia which

¹³¹⁸ T. D. Grant, *The Recognition of States, Law and Practice in Debate and Evolution*, Westport, 1999, p. 153

¹³¹⁹ P. Hoyle, *Somaliland: Passing the Statehood Test?*, in: *IBRU Boundary & Security Bulletin*, Vol. 8, 2000, p. 82

¹³²⁰ T. D. Grant, *Defining Statehood: The Montevideo Convention and its Discontents*, in: *Columbia Journal of Transnational Law*, Vol. 37, 1999, p. 446

¹³²¹ A. Mitic, *Kosovo: Lessons Learned* [18 March 2008], in: *Transitions Online* (www.tol.org), Issue no. 03/25/2008, p. 2

¹³²² A. C. Bundu, *Recognition of Revolutionary Authorities: Law and Practice of States*, in: *ICLQ*, Vol. 27, 1978, p. 25

satisfied the criterion of establishment of *de facto* independence, i.e. the entity in question met the traditional criteria for statehood based on effectiveness. But, after the adoption by the UN Security Council of the mandatory resolutions concerning the situation in Rhodesia and subsequent non-recognition of the latter, states were legally prevented from exercising their political discretion in favour of recognition of Rhodesia.¹³²³

The claim aimed at becoming member of the UN has been described as a claim to “comprehensive participation”¹³²⁴, something that represents the wish of the political elite of the *de facto state*. This can also be described as a claim to “comprehensive inclusion”, the inclusion in the club of sovereign states. From the affirmation by the ICJ of the “objective international personality” enjoyed by the UN¹³²⁵, Dugard deduces the conclusion that this determination of the Court “must surely place the capacity of the United Nations to confirm the existence of a new State beyond all doubt.”¹³²⁶ It has to be mentioned that authoritative character of Art. 4 of the UN Charter, dealing with the question of admission to membership of the organization, has been underscored by the ICJ. The Court stressed that Art. 4 (1):

“[...] by reason of the close connexion which it establishes between membership and the observance of the principles and obligations of the Charter, clearly constitutes a legal regulation of the question of the admission of new States.”¹³²⁷

The Court also emphasized that Art. 4 (1) demonstrates the intention of its authors to establish a legal rule which, on the one hand, fixes the conditions of admission and, at the same time, determines the reasons for which admission may be refused.¹³²⁸ Respective provision of the UN Charter reads as follows:

¹³²³ *Ibid.*, p. 26

¹³²⁴ R. Higgins, *The Development of International Law Through the Political Organs of the United Nations*, London et al., 1963, p. 14

¹³²⁵ *Reparation for injuries suffered in the service of the United Nations*, Advisory Opinion: I.C.J. Reports 1949, p. 174 (p. 185)

¹³²⁶ J. Dugard, *Recognition and the United Nations*, Hersch Lauterpacht Memorial Lectures (III), Cambridge, 1987, p. 79

¹³²⁷ *Admission of a State to the United Nations (Charter, Art. 4)*, Advisory Opinion: I.C.J. Reports 1948, p. 57 (p. 63)

¹³²⁸ *Ibid.*, p. 62

“Membership in the United Nations is open to all other peace-loving *States* which accept the obligations contained in the present Charter and, in the judgment of the Organization, are able and willing to carry out these obligations.”¹³²⁹

It has to be stressed that the article in question bears profound implications in the context of the problematic issue of statehood and the membership of the UN. Hillgruber emphasizes the fact that the admission to membership of the world organization (which he describes as a form of “collective recognition”) depends on the positive vote of the overwhelming majority of states, and necessarily, of permanent members of the UN Security Council, this positive vote denoting that respective states have already recognized an aspirant for membership as a state under international law, or expressing the readiness to recognize it as such during the procedure of admission.¹³³⁰ Furthermore, it has been stated that “völkerrechtliche Zuverlässigkeit”¹³³¹ of the aspirant for membership represents the decisive criterion of statehood under international law.

The notion of recognition is exactly the tool used in assessing the “völkerrechtliche Zuverlässigkeit” (of a respective aspirant for statehood) mentioned above, i.e. the ability and the will of the “newcomer” to integrate into the international community and to accept and comply with its rules. This explains the reason, why those “newcomers” do not possess legally enforceable entitlement under public international law, to be recognized as states, even if they satisfy empirical criteria for statehood.¹³³² The legal significance of membership of the UN can be described as follows:

“Mit der Aufnahme als Mitglied in die Vereinten Nationen vollzieht sich dann im Wege der Kooptation der Eintritt des Neustaates in die weltweit organisierte Staatengemeinschaft. Die Staatlichkeit eines Mitglieds der Vereinten Nationen kann nach der Aufnahmeentscheidung nicht mehr mit

¹³²⁹ Article 4 (1) of the Charter of the United Nations, in: I. Brownlie (ed.), *Basic Documents in International Law*, 4th ed., Oxford, 1995, p. 4 (italics mine)

¹³³⁰ C. Hillgruber, *Die Aufnahme neuer Staaten in die Völkerrechtsgemeinschaft, Das völkerrechtliche Institut der Anerkennung von Neustaaten in der Praxis des 19. und 20. Jahrhunderts*, in: H. Schiedermaier (Hrsg.), *Kölner Schriften zu Recht und Staat*, Bd. 6, Frankfurt am Main et al., 1998, p. 719

¹³³¹ *Ibid.*, p. 722

¹³³² *Ibid.*, p. 731

der Wirkung in Frage gestellt werden, daß die Geltung der sich aus der gemeinsamen Mitgliedschaft ergebenden gegenseitigen Rechte und Pflichten bestritten wird.”¹³³³

Thus, according to Art. 4 (1) of the UN Charter, members of the organization can solely be states. If we combine this circumstance with the determination of the ICJ that the provision in question entails the reason for which the admission to membership of the UN may be refused, it can be stressed that the organization has the authority to issue such a denial on the basis of the finding that respective aspirant does not enjoy the status of a state. Again, this assertion is made by me in the special context of *de facto* statehood and not in general terms.

These considerations lead us to the notion of non-recognition. The latter manifestation does not represent something new within the realm of public international law. The origins of the *policy* of non-recognition can be traced back to the period before the outbreak of the First World War and this manifestation started later to be transformed into an *obligation* of non-recognition.¹³³⁴ On 7 January 1932 the US Secretary of State Stimson delivered an identic note to the Japanese and Chinese governments. Relevant passage of the document in question stresses that the US government:

“[...] does not intend to recognize any situation, treaty, or agreement which may be brought about by means contrary to the covenants and obligations of the Pact of Paris of August 27, 1928, to which treaty both China and Japan, as well as the United States, are parties.”¹³³⁵

The problem to which the note referred was the territorial one. Japanese military succeeded in conquering Manchuria and the puppet “Manchukuo” was established on 18 February 1932 (in addition to Japan, following states recognized Manchukuo: El Salvador, Italy, Germany and Hungary).¹³³⁶ The note quoted above served as a source for the emergence of the policy known

¹³³³ *Ibid.*, p. 743

¹³³⁴ Dissenting Opinion of Judge Skubiszewski, East Timor (Portugal v. Australia), Judgment, I.C.J. Reports 1995, p. 90 (p. 262)

¹³³⁵ G. H. Hackworth, Digest of International Law, Vol. I, Washington, 1940, p. 334

¹³³⁶ P. C. Jessup, The Birth of Nations, New York / London, 1974, p. 334

as the Stimson non-recognition doctrine. Thus, the US applied the notion of non-recognition in order not to admit the legality of the creation of a political entity under the violation of its treaty rights (including those relating to the sovereignty, independence or the territorial and administrative integrity of the ROC).¹³³⁷

It follows that non-recognition was applied on legal grounds. The Assembly of the League of Nations made a step towards transforming the policy of non-recognition into an obligation as it, on 11 March 1932, adopted a resolution in which it declared non-recognition incumbent on the members of the League in case of any situation, treaty or agreement which contravened the League Covenant or the Briand-Kellogg Pact on the Renunciation of War.¹³³⁸

As it is evident from the very nature of collective recognition, it presupposes the existence of the international community, because respective policy can solely be maintained by the latter. The same can be asserted in respect of the notion of non-recognition. The General Assembly and the Security Council of the UN have acted as “arbiters” in respective cases concerning recognition and non-recognition policies, especially the role of the Security Council has to be acknowledged. Furthermore, it has been emphasized with regard to the Charter of the world organization that it has been recognized as the constitutional document of the international community of states.¹³³⁹ This circumstance backs the assertion concerning the importance of the UN in the context of recognition and non-recognition of states.

The maintenance of these policies also presupposes collective approaches to certain situations where the problem of statehood is the issue in question. It has to be noted that because of *Realpolitik*, which represents the concept inherent in international relations, the wilful and crude disregard by respective governmental policymakers of the principles of international law

¹³³⁷ G. H. Hackworth, *Digest of International Law*, Vol. I, Washington, 1940, p. 334

¹³³⁸ S. R. Patel, *Recognition in the Law of Nations*, Bombay, 1959, p. 115

¹³³⁹ B. Simma / A. L. Paulus, *The ‘International Community’: Facing the Challenge of Globalization*, in: *EJIL*, Vol. 9, 1998, p. 274

is not excluded in the face of strong geopolitical considerations.¹³⁴⁰ It is also true that deviant acts of great powers, i.e. the acts that deviate from established interpretations of law in the international legal system, carry potential to shape a new interpretation¹³⁴¹, but this circumstance does not affect the non-recognition of *de facto states* by decisive means.

The fact that the Russian Federation recognized Abkhazia is not insignificant, because Russia is a great power, but this recognition does not have the crucial impact on the attitude of the international community, as such, Russia's deviation from the attitude of the international community towards Abkhazia, expressed in non-recognition, does not alter the overall approach. This is because deviant acts affect the international legal order with singular power (if, of course, there is no adherence of the world community to such acts) and the reason for such a state of things is that the members of the international community are creators and interpreters of international legal norms.¹³⁴²

The meaning of non-recognition as a sanction is crucial to the purposes of my thesis. Following situations have been asserted to be possible manifestations concerning the non-recognition of an entity as a state:

“a) Mit »Nichtanerkennung« kann zunächst nur die Ablehnung diplomatischer Beziehungen gemeint sein. [...] Entscheidend ist, daß sie den Status als Staat völlig unberührt läßt.

b) Nichtanerkennung eines Staates kann auch bedeuten, daß zwar die Staatsqualität einer territorialen Einheit nicht bestritten wird, wohl aber, daß daraus bestimmte Konsequenzen nicht gezogen werden sollen, etwa die Ausschließlichkeit des Völkerrechts als des die bilateralen Beziehungen regelnden Rechts.

c) Nichtanerkennung kann aber auch Bestreiten der staatlichen Existenz heißen.

¹³⁴⁰ R. Falk, The East Timor Ordeal: International Law and Its Limits, in: *Bulletin of Concerned Asian Scholars*, Vol. 32, 2000, p. 52

¹³⁴¹ T. J. Farer, The Prospect for International Law and Order in the Wake of Iraq, in: *AJIL*, Vol. 97, 2003, p. 622

¹³⁴² *Ibid.*

d) Schließlich kommt die Nichtanerkennung als Waffe gegen völkerrechtliche Unrechtstatbestände in Betracht.”¹³⁴³

It is true that the maintenance of non-recognition policy can be a meaningful instrument. The last two constellations, namely non-recognition in accordance with the contestation of statehood of a respective entity and the non-recognition as a sanction against wrongs which occur on the international plane, are important, because there are entities, the emergence of which takes place in violation of certain norms. Among those norms, there are also criteria for statehood, so there is no valid claim to statehood and such emergence represents an international wrong that will be condemned. This condemnation can be voiced by the international community, as such, in accordance with international law “as it is applied between all nations belonging to the community of States.”¹³⁴⁴

The objective of the obligation of non-recognition is to prevent validation of what represents legal invalidity or nullity and the principle on which the doctrine of non-recognition is based, denotes that illegal acts should not produce results beneficial to the wrongdoers.¹³⁴⁵ This is an expression of the maxim *ex injuria jus non oritur*. The content of the notion of non-recognition, which is important for the purposes of the present study, reads as follows:

“[...] the doctrine of the obligation of non-recognition as applied to *statehood* holds that States are under an obligation not to recognize, through individual or collective acts, the purported statehood of an effective territorial entity created in violation of one or more fundamental norms of international law.”¹³⁴⁶

¹³⁴³ E. Klein, Die Nichtanerkennungspolitik der Vereinten Nationen gegenüber den in die Unabhängigkeit entlassenen südafrikanischen *homelands*, in: ZaöRV, Bd. 39, 1979, pp. 477-478 (emphasis in original)

¹³⁴⁴ The S.S. Lotus, Judgment No. 9, September 7, 1927, [Series A, No. 10, pp. 4-108], in: M. O. Hudson (ed.), World Court Reports, A Collection of the Judgments, Orders and Opinions of the Permanent Court of International Justice, Vol. II (1927-1932), Washington, 1935, p. 33

¹³⁴⁵ S. R. Patel, Recognition in the Law of Nations, Bombay, 1959, p. 112

¹³⁴⁶ D. Raič, Statehood and the Law of Self-Determination, Developments in International Law, Vol. 43, The Hague et al., 2002, p. 107 (italics in original)

As it is evident from this description, the obligation of non-recognition does not refer, in this case, to all norms of international law, but only to those which are of *erga omnes* application, they must represent the interests of the international community as a whole. Raič stresses following legal norms in this context, deduced from the UN practice: prohibition of the use of force (reference is made, in particular, to the prohibition of aggression), the prohibition of the violation of peoples' right to self-determination and the prohibition of racial discrimination which has systematic character, with particular reference to the prohibition of apartheid.¹³⁴⁷ Thus, the obligation of non-recognition has the legal basis. Moreover, it has been stressed that the concept of non-recognition constitutes part of contemporary international law.¹³⁴⁸

10.4 “Regulation of statehood” on the basis of the recognition policy

It is important to depict the “mode of functioning” of the UN in respect of regulating the question of statehood. It follows that the political organs of the UN have assumed the function of legitimization and illegitimization and this competence of the world organization may not be analyzed solely in the political context, but has to be applied within the framework of the new legal order, as such, which has experienced the “erosion” of the monolithic structure of traditional international law by a hierarchization (or relativization) of norms resulting from the introduction of novel legal concepts (reference is made to *jus cogens* norms, obligations *erga omnes* and international crimes). Thus, the process of legitimization and illegitimization by the UN has become a legal procedure, a tool in the collective defence of fundamental norms of the new legal order.¹³⁴⁹

These developments have profoundly affected the issue of statehood. According to Grant, statehood has come to be defined as more than solely

¹³⁴⁷ *Ibid.*, p. 141

¹³⁴⁸ Dissenting Opinion of Judge Skubiszewski, East Timor (Portugal v. Australia), Judgment, I.C.J. Reports 1995, p. 90 (p. 262)

¹³⁴⁹ V. Gowlland-Debbas, Collective Responses to the Unilateral Declarations of Independence of Southern Rhodesia and Palestine: An Application of the Legitimizing Function of the United Nations, in: BYIL, Vol. 61, 1990, pp. 144-145

effectiveness and new criteria for statehood, such as the requirement to comply with *jus cogens* norms, to guarantee minority rights and democracy, reflect new claims to international competence over domestic governance.¹³⁵⁰ It follows that the Montevideo Convention as a “snapshot from a particular epoch”¹³⁵¹ (to say precisely, its definition of statehood) can, at the best, serve as soft law.¹³⁵² The document in question was signed at Montevideo by nineteen states, but was ratified by only five as of the middle of 1936 and, if it was binding at all, it was binding only on small number of states of the Western Hemisphere representing parties to it. Furthermore, subsequent practice and treaty-making did not promote the definition being at its core.¹³⁵³

The point here, the decisive matter concerning the question of statehood, is that factual personality is not equal and identical with the legal personality, because the legal personality emerges when law invests respective aspirant with it, according to its rules.¹³⁵⁴ It has been emphasized that factual existence plus granting of international status and personality by the internationally competent authority, are both essential and, unless it is so, a state has no international legal existence.¹³⁵⁵ For the purposes of the present study, this statement has to be applied to the special context of *de facto* situations, where respective aspirants for statehood assert their claims. I do not argue that the assertion mentioned above is generally applicable to the question of statehood.¹³⁵⁶ My argument is that unless the international community extends substantive recognition to a *de facto state*, it cannot be said that this political entity represents a “state” under contemporary international law.

¹³⁵⁰ T. D. Grant, *The Recognition of States, Law and Practice in Debate and Evolution*, Westport, 1999, p. 213

¹³⁵¹ T. D. Grant, *Defining Statehood: The Montevideo Convention and its Discontents*, in: *Columbia Journal of Transnational Law*, Vol. 37, 1999, p. 453

¹³⁵² According to Grant, it may well be that it never achieved even that status. *See Ibid.*, p. 456

¹³⁵³ *Ibid.*

¹³⁵⁴ S. R. Patel, *Recognition in the Law of Nations*, Bombay, 1959, p. 35

¹³⁵⁵ *Ibid.*, p. 36

¹³⁵⁶ “The rights and attributes of sovereignty reside in a state as soon as it comes into factual existence and it may even exercise them, but it is only after a state has been given recognition that it is assured of exercising them, for otherwise it is perfectly open to other states not to allow operation to the exercise of the rights of sovereignty so far as it falls within their province for its execution or giving it effect otherwise.” *Ibid.*, p. 2

The point here is that any claim denoting that an unrecognized state possesses *erga omnes* legal capacity, as a full subject of international law, cannot be supported by reference to concrete rights and duties. If the internal effectiveness of the political entity in question is a prerequisite for statehood, the concrete “actualization” of the rights of that entity, as a subject of international law, is dependent on the willingness of members of the international community to extend recognition to respective aspirant for statehood.¹³⁵⁷ It follows that there is a certain (it can be said meaningful) degree of interrelation or interaction between the notions of internal effectiveness, external effectiveness and recognition: the domestic effectiveness and its extraterritorial effects (i.e. external or international legal effectiveness) may be, on the one hand, promoted and consolidated by recognition or, on the other hand, weakened by non-recognition.¹³⁵⁸

The international legal order experiences different shifts and developments as it can be regarded as a dynamic system and one of the most important developments is, for the purposes of the present study, a late 20th century turn away from the strict application of the doctrine of effectiveness toward an attempt to establish a gap between facts and norms (i.e. effectiveness and legitimacy) in such a manner that “effectiveness no longer automatically translates to legitimacy.”¹³⁵⁹ Thus, the endeavour can be registered aimed at healing public international law of its pathology and alleged weakness, namely the “particular proximity to reality”.¹³⁶⁰

With respect to the territorial entity with a *de facto* situation satisfying the empirical or traditional criteria for statehood, it has to be stressed that its effectiveness does not automatically mean that the entity in question represents a state under contemporary international law. The point here is that effectiveness alone, as a consequence of a mere factual event, does not

¹³⁵⁷ W. H. Balekjian, Die Effektivität und die Stellung nichtanerkannter Staaten im Völkerrecht, Den Haag, 1970, pp. 214-215

¹³⁵⁸ *Ibid.*, p. 215

¹³⁵⁹ O. C. Okafor, Re-Defining Legitimate Statehood, International Law and State Fragmentation in Africa, Developments in International Law, Vol. 36, The Hague et al., 2000, p. 67

¹³⁶⁰ For the impact of respective developments on the interaction between effectiveness and recognition of states *see* S. Oeter, Die Entwicklung der Westsahara-Frage unter besonderer Berücksichtigung der völkerrechtlichen Anerkennung, in: ZaöRV, Bd. 46, 1986, pp. 65-66

create rights¹³⁶¹, nor does it, *per se*, render the recognizability of an action unlawful under peremptory international law.¹³⁶² The factual existence of a respective territorial entity needs validation, otherwise one cannot speak of a “state”, as such, the state under contemporary international law. It follows that the notion of recognition acquires its specific importance in the context of validating *de facto* situations:

“The function of determining legally relevant facts is termed “recognition.” Recognition, then, is the general procedure provided by international law for the determination of facts which, once established, have certain legal consequences. Thus recognition determines the legal existence of such varied facts as state, [...]”¹³⁶³

The decisive matter is that legal consequences cannot simply be deduced from facts, but only from legal rules which confer upon certain facts the law-creating effect.¹³⁶⁴ The impact of the notion of recognition on the status of the *de facto state* can be demonstrated by reference to Tucker’s description of the administrative and legislative dimensions of recognition. It follows that the objects of recognition of both, the situations illegal in origin and those in the emergence of which no violation of law is involved, are not facts but legal rules which attach to those facts certain legal consequences. Accordingly, the act of recognition is an administrative act because the notion of effectiveness is applied and it is a legislative act because new law is created by the act of validation.¹³⁶⁵

The point here is that international recognition of substantive character validates the claim to statehood asserted by respective elites in *de facto* situations. It is a “legislative act” regulating the issue of statehood. It is not to say that the international community possesses centralized and specialized organs which fulfill the law-creating and law-enforcing

¹³⁶¹ K. Doehring, Effectiveness, in: R. Bernhardt (ed.), EPIL, Vol. II (1995), p. 44

¹³⁶² *Ibid.*, p. 47

¹³⁶³ H. Kelsen, Principles of International Law, 2nd ed., Revised and Edited by R. W. Tucker, New York et al., 1966, p. 421 (emphasis in original)

¹³⁶⁴ *Ibid.*, pp. 421-422

¹³⁶⁵ R. W. Tucker, The Principle of Effectiveness in International Law, in: G. A. Lipsky (ed.), Law and Politics in the World Community, *Essays on Hans Kelsen’s Pure Theory and Related Problems in International Law*, Berkeley / Los Angeles, 1953, p. 43

functions¹³⁶⁶, but it is true that public international law has nowadays reached the stage of development which is necessary to cope with the task of regulating law-fact interaction in the context of *de facto* statehood.

According to Dugard, the “collective certification of statehood” occurs in practice and non-recognition of states and territorial acquisitions illegal in origin has become an essential instrument at hands of the UN law-enforcement process.¹³⁶⁷ Of course, the role of the UN should not be overestimated in the context of granting international recognition, because the recognition by the world organization does not even oblige a member state to enter into bilateral relations with respective (newly recognized) fellow member, but the purpose of such recognition is to certify the existence of a political entity as a state, subject to the benefits and burdens of international law.¹³⁶⁸

The UN has brought the elements of collective approaches to effective situations and respective claims based on them. The point here is that “Today there is a coherent doctrine of non-recognition backed by effective collective machinery for its enforcement.”¹³⁶⁹ In contrast to the inability of the League of Nations to deal effectively with the problem of Manchukuo and the invasion of Abyssinia by Italy in 1935 in the context of collective non-recognition, the UN has demonstrated this kind of ability on many occasions. The cases of Katanga, Southern Rhodesia and the South African homeland territories (Bantustans), also South Africa’s administration in Namibia confirm the success of non-recognition as a sanction.¹³⁷⁰

It can be stressed with regard to the state of affairs as established nowadays that “the United Nations plays an important role in the recognition of States by certificating the existence of some States through its admission procedure and by denying the existence of others by means of non-

¹³⁶⁶ See L. Gross, States as Organs of International Law and the Problem of Autointerpretation, in: *Ibid.*, p. 70

¹³⁶⁷ J. Dugard, Recognition and the United Nations, Hersch Lauterpacht Memorial Lectures (III), Cambridge, 1987, p. 11

¹³⁶⁸ *Ibid.*, p. 50

¹³⁶⁹ *Ibid.*, p. 135

¹³⁷⁰ *Ibid.*

recognition.”¹³⁷¹ But again, it is not submitted in the present study that the world organization acts on behalf of sovereign independent states in the context of recognition. The latter still falls within the scope of the competence of each sovereign state, except where the UN Security Council has directed states not to recognize an entity as a state.¹³⁷² It is exactly this latter circumstance, which is decisive for the purposes of my thesis and which denotes the status of the *de facto state*. It underscores the importance of the membership of the UN:

“Gewiß ist die Quasi-Universalität der Vereinten Nationen auch eine Quelle ihrer Krisen. Auf der anderen Seite folgt daraus der Trend zur geschlossenen Gesellschaft, der dem Außenstehenden im Prinzip eine inferiore Stellung zuweist. Fragen der Aufnahme oder des Ausschlusses aus der Organisation erhalten dadurch eine ganz andere Bedeutung.”¹³⁷³

It follows that as only states can be members of the UN and the developments denoting the emergence of an “exclusive society” have been emphasized, it can be asserted that the world organization represents, in this context, an “exclusive club” of states. Accordingly, this state of things determines the position of the international community vis-à-vis an “outsider”, i.e. the *de facto state*. The latter does not represent a member of the club.

10.5 Legal impact of recognition and non-recognition of statehood on the principle of effectiveness

Bearing in mind all the considerations mentioned above, the legal significance of non-recognition of statehood has to be clarified at this stage. Hillgruber stresses that the notion of non-recognition implies a negative legal effect, namely withholding the status of a state (under international law) from a respective aspirant for statehood and averting the emergence of an international legal person. If the acquisition of an international legal

¹³⁷¹ *Ibid.*, p. 164

¹³⁷² *Ibid.*, p. 166

¹³⁷³ E. Klein, Die Nichtanerkennungspolitik der Vereinten Nationen gegenüber den in die Unabhängigkeit entlassenen südafrikanischen *homelands*, in: *ZaöRV*, Bd. 39, 1979, p. 490

status of a sovereign independent state were solely the matter of satisfying the traditional or empirical criteria for statehood based on effectiveness, this state of things would render the notion of non-recognition meaningless. The concept of non-recognition would then merely express the political disapproval of the emergence of a new entity, i.e. this kind of disapproval would entail no consequences within the realm of public international law. The author emphasizes that such an assertion is inconsistent with state practice.¹³⁷⁴

Indeed, the state practice within the realm of contemporary international law does not suggest that the notion of effectiveness was regarded by the members of the international community as a sole guiding principle in the context of granting international recognition as a state. On the contrary, even in one particular episode of the history, the traditional or empirical criteria for statehood were weighed against the components of juridical statehood and it cannot be said that the former got the upper hand over the latter.

The Badinter Arbitration Committee asserted that the existence or disappearance of a state is a question of fact and the effects of recognition by other states are purely declaratory.¹³⁷⁵ On the other hand, the guidelines on the formal recognition of new states in Eastern Europe and the former Soviet Union, adopted by the then EC, endorse following requirements: a) respect for the provisions of the UN Charter and commitments entailed in the Helsinki Final Act and the Charter of Paris, especially with regard to the rule of law, democracy and human rights; b) guarantees for the rights of ethnic and national groups and minorities in accordance with the commitments enshrined in the documents adopted within the framework of the CSCE; c) respect for the inviolability of frontiers which can only be changed by peaceful means and by common agreement; d) acceptance of all relevant commitments concerning disarmament and nuclear non-

¹³⁷⁴ C. Hillgruber, *Die Aufnahme neuer Staaten in die Völkerrechtsgemeinschaft, Das völkerrechtliche Institut der Anerkennung von Neustaaten in der Praxis des 19. und 20. Jahrhunderts*, in: H. Schiedermaier (Hrsg.), *Kölner Schriften zu Recht und Staat*, Bd. 6, Frankfurt am Main et al., 1998, p. 747

¹³⁷⁵ Conference on Yugoslavia Arbitration Commission: *Opinions on Questions arising from the Dissolution of Yugoslavia* [January 11 and July 4, 1992], Opinion No. 1 (para. 1 (a)), in: 31 ILM 1488 (1992), p. 1495

proliferation as well as security and regional stability; e) commitment to settle by agreement (where appropriate by recourse to arbitration) all questions regarding state succession and regional disputes.¹³⁷⁶

It is thus evident that the guidelines include elements of juridical statehood. The latter requirements can also be described as additional or modern criteria for statehood and, if one examines the principles adopted in the document in question, it becomes clear that they denote exactly the ability and the will to observe international law, the manifestation which has been discussed in the present study in connection with Art. 4 (1) of the UN Charter.

It has to be noted that the reference in the declaration to the readiness of respective parties to recognize new states subject to the normal standards of international practice and the political realities in each case, does not rebut the assertion concerning the overwhelming importance attached to the juridical statehood based on modern criteria, because the authors of the document make a clear statement, at the end, that the commitment to the principles enshrined in the declaration “opens the way to recognition by the Community and its Member States and to the establishment of diplomatic relations.”¹³⁷⁷ It is also important to emphasize that the document in question contains special reference to the right of peoples to self-determination in the context of the adherence of the EC and its member states to the principles of the Helsinki Final Act and the Charter of Paris.¹³⁷⁸

According to Krieger, there is no rejection of the requirement of effectiveness in the declaration on guidelines, and the reference to the traditional criteria for statehood is made in the formulation regarding the recognition subject to the “normal standards of international practice”. This author asserts that statehood is determined by the EC member states in

¹³⁷⁶ European Community: Declaration on Yugoslavia and on the Guidelines on the Recognition of New States [December 16, 1991], Declaration on the “Guidelines on the Recognition of New States in Eastern Europe and in the Soviet Union” of 16 December 1991, in: 31 ILM 1485 (1992), p. 1487

¹³⁷⁷ *Ibid.*

¹³⁷⁸ *Ibid.*, pp. 1486-1487

accordance with traditional criteria and other requirements enshrined in the document represent mere political manifestations.¹³⁷⁹

But my argument does not concern the outright rejection of the notion of effectiveness in the context of statehood. The point here is that, in practice, the international community widely adhered to the juridical statehood, as such, and the requirements of effectiveness were overruled by the criteria connected with the juridical statehood. This means that, despite the lack of effectiveness, respective aspirants for statehood were granted recognition and juridical states were created. Thus, the argument that the principles enumerated in the declaration on recognition were solely of political character, is unsustainable because recognition was granted, in certain cases, on the basis of assurances, given by respective elites, to fulfill the criteria enshrined in the document (e.g. in the case of Croatia) and those principles, as they guided the “recognizers” in the process of creating juridical statehood, can be regarded as legal criteria. It is important to refer to the right of peoples to self-determination and acknowledge the role of the notion of self-determination in the context of the process described above.

It is true that there are cases in which respective states have been recognized despite the lack of effectiveness. The point here is that “In such situations, the lack of effective government is compensated by an applicable right of external self-determination.”¹³⁸⁰ Although this assertion has been made by the author with reference to the colonial situation¹³⁸¹, the same can be asserted in respect of cases outside the colonial context. The latter assertion is confirmed by practical examples: the case of Bosnia-Herzegovina has already been referred to in the present thesis, the example of Croatia is also relevant in this context. The fulfilment of the criterion of effectiveness was the problem and one can find such a statement in this respect:

“Jede Hilfeleistung zugunsten der kroatischen Sezessionsbewegung – und dazu gehört auch der politische Akt der völkerrechtlichen Anerkennung,

¹³⁷⁹ H. Krieger, *Das Effektivitätsprinzip im Völkerrecht*, Schriften zum Völkerrecht, Bd. 137, Berlin, 2000, p. 138

¹³⁸⁰ D. Raič, *Statehood and the Law of Self-Determination*, *Developments in International Law*, Vol. 43, The Hague et al., 2002, p. 104

¹³⁸¹ *See Ibid.*

durch den Kroatien auf die Ebene eines internationalen Rechtssubjekts mit allen Rechten und Pflichten, die den Staaten eigen sind, gehoben wurde – war [...] eine unter dem Völkerrecht verbotene Intervention in die inneren Angelegenheiten Jugoslawiens.“¹³⁸²

The fact that the international community adhered to the juridical statehood in the case of Croatia is confirmed by the circumstances surrounding the recognition of this state. The assurance by the Croatian President Tudjman that his country would comply with the provisions of the guidelines concerning the protection of minorities, served as a vehicle in furtherance of the recognition of Croatia and, on 15 January 1992, the decision was made within the framework of the EPC in favour of recognition of Croatia and Slovenia by the members of the EC (the FRG had already recognized these two states on 23 December 1991).¹³⁸³ On 22 May 1992, the UN General Assembly made a decision on the basis of the recommendation of the Security Council and admitted Slovenia and Croatia to membership of the organization by consensus, i.e. without formal vote.¹³⁸⁴

Furthermore, Raič refers to the cases of Croatia and Bangladesh and stresses that both were considered to be states, and their recognition lawful, despite the fact that no effective government existed either at the date of the proclamation of independence, or at the time when most states recognized them.¹³⁸⁵ Thus, it can be asserted that the international community created the cases of prevalence of the juridical manifestation of statehood over the empirical one. Some other examples, where respective entities lacked effective governance but, despite this, were recognized as states and were regarded as such, are those of Algeria, Guinea-Bissau, Angola, the Congo.¹³⁸⁶

¹³⁸² H. Weber, Der Jugoslawien-Konflikt und die Grenzen des Selbstbestimmungsrechts der Völker, in: HuV-I, Jg. 6, Heft 1, 1993, p. 10

¹³⁸³ C. Hillgruber, Die Aufnahme neuer Staaten in die Völkerrechtsgemeinschaft, Das völkerrechtliche Institut der Anerkennung von Neustaaten in der Praxis des 19. und 20. Jahrhunderts, in: H. Schiedermaier (Hrsg.), Kölner Schriften zu Recht und Staat, Bd. 6, Frankfurt am Main et al., 1998, p. 651

¹³⁸⁴ *Ibid.*, p. 653

¹³⁸⁵ D. Raič, Statehood and the Law of Self-Determination, *Developments in International Law*, Vol. 43, The Hague et al., 2002, p. 363

¹³⁸⁶ *Ibid.*, pp. 96-101

It follows that in the absence of an effective situation, recognition was granted to respective entities if there was a valid claim to self-determination. On the other hand, violation of the right of peoples to self-determination was the basis of non-recognition of entities which satisfied the traditional criteria for statehood reflected in the principle of effectiveness. It is exactly the “compensatory force of the right of external self-determination”¹³⁸⁷ which is decisive in the context of respective developments concerning the issue of statehood.

Statehood means more than mere effectiveness and if the emergence of an entity, which aspires to the acquisition of the status of a “state”, is connected with the violation of a peremptory norm of public international law, *ex factis jus oritur* cannot validate this flaw on the basis of the existence of a factual situation because “An act in violation of a norm having the character of *jus cogens* is illegal and is therefore null and void. This applies to the creation of States, the acquisition of territory and other situations, [...]”¹³⁸⁸. Thus, the fact that statehood means more than mere effectiveness is a result of important developments experienced by public international law.

The international law of the nineteenth century gave way to the contemporary international legal system which embodies obligations *erga omnes* and *jus cogens* norms, which is familiar with the maxim *ex injuria jus non oritur* and, accordingly, with non-recognition of statehood and its coherent enforcement machinery. The assertion that the emergence of a state is an extralegal, sociological event which is not controlled by the legal order (the pure fact view)¹³⁸⁹, is unsustainable. The reason for this reads as follows:

“This view sets the entity’s own subjective power and will to exist as a State before any act of recognizing it as a State by the legal order. But it looks apologist in its reliance on the self-assessment of the entity itself. Surely, even if the process which leads to the establishment of the State may be a

¹³⁸⁷ *Ibid.*, p. 104

¹³⁸⁸ J. Dugard, *Recognition and the United Nations*, Hersch Lauterpacht Memorial Lectures (III), Cambridge, 1987, p. 135 (italics in original)

¹³⁸⁹ M. Koskenniemi, *From Apology to Utopia, The Structure of International Legal Argument, Reissue with a new Epilogue*, Cambridge UP, 2005, p. 272

sociological one, it cannot be wholly dependent on what the emergent entity does and how it itself views what it is doing.”¹³⁹⁰

Indeed, this kind of “self-assessment” is a hallmark of the *de facto state* which wishes to be treated like a normal state, it sees itself as being capable of entering into relations with existing states, it considers itself as a “state”. But this “self-assessment” does not guarantee the statehood under contemporary international law. The point here is that the creation of a state is not simply the establishment of some facts the verification of which is beyond the scope of public international law. It is otherwise impossible to explain, why the effective territorial entities claiming statehood, which were referred to in the present study, were not considered as states and remained unrecognized. They were not condemned for the reason of non-fulfilment of empirical criteria for statehood, rather, the violation of legal rules was the issue in question and those rules were applied in furtherance of non-recognition.

Again, it is not argued in the present study that the notion of effectiveness is irrelevant for the purposes of statehood. I only assert that “Statehood seems dependent on both facts and an external cognition of facts.”¹³⁹¹ For the purposes of the general problem of statehood this means that in contemporary international law, traditional criteria for statehood based on effectiveness are supplemented by the additional criteria based on legality. Accordingly, if the emergence of a state is connected with the breach of a peremptory rule of international law, the entity in question will be exposed to non-recognition by the international community. The latter consideration is also applied to the *de facto state*. The law-fact interaction within the realm of contemporary international law means, for this kind of territorial entity, that mere existence of an effective situation does not guarantee the acquisition of statehood by it, respective claim to statehood has to be validated by substantive recognition granted by the international community. This state of things is expressed in the following statement:

¹³⁹⁰ *Ibid.*, p. 273

¹³⁹¹ *Ibid.*, p. 280

“Wenn der Begriff ‘Staat’ mit der Effektivität als ein wesentliches Merkmal innerstaatlicher Ordnung völkerrechtlich *ab initio* einen objektiv normativen Wert hätte, würde die Anerkennungspraxis von neuen Staaten im bilateralen Verhältnis normativ wertlos werden. Daß neue Staaten von Drittstaaten anerkannt werden, geschieht aber auf Grund einer Ermessensregel der Anerkennung und nicht auf Grund eines *ipso facto* normativen Wertes des Begriffes ‘Staat’.”¹³⁹²

The point here is that if one regards the existence of an unrecognized state as an “undeniable fact”, the existence of third states and their sovereign will, to recognize or not to recognize the state in question, is no less undeniable. Furthermore, the existence of an unrecognized state, as a fact, is not regulated by public international law, whereas the notion of the sovereign will of states represents main pillar of the contemporary international legal order and scholarship.¹³⁹³ It follows that the notion of effectiveness does not possess absolute normative force and, therefore, it has to be regarded as a principle and not a norm.¹³⁹⁴

¹³⁹² W. H. Balekjian, Die Effektivität und die Stellung nichtanerkannter Staaten im Völkerrecht, Den Haag, 1970, p. 37 (emphases and italics in original)

¹³⁹³ *Ibid.*, p. 42

¹³⁹⁴ *Ibid.*, p. 44

Conclusions

Effectiveness has been used in the present study as an adjective denoting the existence of “factual” state of affairs, because this is the content of the notion of effectiveness under public international law in the literal sense.¹³⁹⁵ Effectiveness has been regarded as a “conceptual device that captures the inter-relation between social reality and law and the influence of the former over the latter.”¹³⁹⁶ This meaning of effectiveness has been applied to the issue of statehood in the context of the fulfillment of traditional criteria.

The issue of statehood was the question of overwhelming importance with regard to my project, because the status of the territorial entity representing the subject of examination has been considered in the light of the question of statehood. The *de facto state* has been regarded as an aspirant striving for the inclusion in the club of sovereign states. Of course, it is also possible that respective elites use their power to maintain the *status quo* and, in doing so, they wish to preserve existing state of things instead of actively and really promoting the idea of independent statehood. For example, the political elite of the “Republic of China on Taiwan” has not, as yet, made the official declaration of independence. Nevertheless, the issue of statehood has been considered, in the present study, as the ideological basis of existence of the *de facto state*.

The most important conclusion of the present study is that the principle of effectiveness, as such, cannot “guarantee” that an effective territorial entity acquires statehood within the realm of contemporary international law. The notion of the *de facto state* demonstrates that statehood does not represent solely a matter of fact, but requires, in this context, “supplementary elements” the emergence of which is the consequence of the developments experienced by public international law, connected with the existence of *jus cogens* norms and obligations *erga omnes*, and the developments in question make greater demands on effective territorial entities in the context of

¹³⁹⁵ H. Krieger, *Das Effektivitätsprinzip im Völkerrecht*, Schriften zum Völkerrecht, Bd. 137, Berlin, 2000, p. 39

¹³⁹⁶ E. Milano, *Unlawful Territorial Situations in International Law, Reconciling Effectiveness, Legality and Legitimacy*, Developments in International Law, Vol. 55, Leiden / Boston, 2006, p. 51

acquisition of statehood. My dissertation reveals that the certification of the existence of those additional components is a function of international recognition.

Theoretical discussion, whether the notion of recognition is declaratory or constitutive, is fruitless for the purposes of the present thesis. Despite the debates concerning the very essence of recognition of statehood, the case of the *de facto state* confirms that the concept in question serves as a means having its impact on the status of effective territorial entities. It follows that widespread non-recognition can deprive the *de facto* territorial entity of the status of a “state” within the realm of contemporary international law. It has to be borne in mind that the lack of substantive recognition, being a hallmark inherent in the definition of the *de facto state*, hinders the latter from acquiring full statehood and international legal personality. Thus, even if we assume that recognition of statehood is a declaratory act, in the context of existence of the *de facto state* it is, by its very essence, constitutive. Bearing in mind the considerations mentioned above with regard to the significance of the notion of recognition in the *de facto* territorial setting, I would describe this nature of the concept in question as “negative constitutiveness”.

The “statelessness” of public international law does not mean that effectiveness, *per se*, creates international legal personality of a territorial entity. Such self-evident or automatic law-creating influence of facts has to be rejected for the purposes of the present thesis: “Facts alone are powerless to create law. For facts to have significance an anterior legal system must be assumed to exist which invests facts with normative sense.”¹³⁹⁷ The point here is that although effectiveness influences acquisition of rights in international law, it is still the notion coupled by the international legal system to certain facts in defined situations, i.e. the effectiveness is only legally relevant as far as the legal system permits it.¹³⁹⁸

¹³⁹⁷ M. Koskenniemi, *From Apology to Utopia, The Structure of International Legal Argument, Reissue with a new Epilogue*, Cambridge UP, 2005, p. 274

¹³⁹⁸ D. Raič, *Statehood and the Law of Self-Determination, Developments in International Law*, Vol. 43, The Hague et al., 2002, p. 53

It follows that, in the case of the *de facto state*, contemporary international law does not allow the principle of effectiveness to function as a sole legitimizing factor of the claim to statehood. Thus, the claim of an effective territorial entity, to be treated like a “normal” state, needs the validation from the side of the international community and this validation is regarded to be substantive international recognition of the entity in question. It follows that, in order to transform an effective situation into the normative state of affairs, respective value judgment in the form of international recognition is needed.¹³⁹⁹

On the other hand, it is also true that international law has to respond to the factual developments in order to effectively cope with facts, but an exception to this kind of attitude is formed by the situation being result of a violation of a peremptory norm of international law.¹⁴⁰⁰ In this case, the international legal system will not, in principle, allow attainment of the legal status by the entity in question.¹⁴⁰¹ The point here is that “the legal rule never embraces social reality in all its fullness and complexity. Attempting to do so, law would risk compromising its proper ends as well as overshooting its possibilities.”¹⁴⁰² Thus, as a response to the factual situations involving breaches of peremptory rules of public international law, the latter has developed the doctrine of non-recognition which acquires its special significance within the realm of contemporary international legal order. This doctrine is nowadays backed by the effective machinery for its application, namely the UN. The cases of Katanga, Southern Rhodesia and the South African homelands confirm these considerations. They reveal, together with the case of Biafra, that the effective existence does not, *per se*, amount to the acquisition of statehood on the international plane.

¹³⁹⁹ “Effectivity usually attains to normativity only by way of presumptions that the mind of man bases upon facts or situations and the consequences that it attaches to them.”, C. De Visscher, *Theory and Reality in Public International Law*, Revised Edition, Translated from the French by P. E. Corbett, Princeton, 1968, p. 318

¹⁴⁰⁰ D. Raič, *Statehood and the Law of Self-Determination*, *Developments in International Law*, Vol. 43, The Hague et al., 2002, p. 54

¹⁴⁰¹ *Ibid.*, pp. 55-56

¹⁴⁰² C. De Visscher, *Theory and Reality in Public International Law*, Revised Edition, Translated from the French by P. E. Corbett, Princeton, 1968, p. 143

The role of overwhelming importance played by the principle of effectiveness within the realm of public international law until 1945 has been diminished. It follows that post World War II developments experienced by public international law denote the shift towards more limited acceptance of power as a “source” of law and effectiveness can no longer be regarded as a fundamental principle, but must be taken in due consideration with other manifestations such as principles of legality, recognition, acquiescence and protest.¹⁴⁰³ It is not to say that the principle of effectiveness bears no legal significance at all. Rather, the criterion of effectiveness is supplemented by the requirement of legitimacy in the context of acquisition of statehood and this test is applied to the notion of the *de facto state*.

Effectiveness alone, cannot guarantee statehood, it must be validated by the international community by means of substantive recognition. The same is also true in respect of the manifestation of the principle of effectiveness expressed through the notion of an accomplished fact, denoting the “political nature” of international law. It has been demonstrated in the present study that public international law is a phenomenon distinct from politics.¹⁴⁰⁴ Moreover, it has to be stressed that the norms of public international law “establish the legal parameters for politics.”¹⁴⁰⁵ Thus, the politics of *fait accompli*, as such, cannot transform the factual state of affairs into the legal one within the contemporary international legal order. The same has to be concluded in respect of other “faces” of the principle of effectiveness, namely the notion of *normative Kraft des Faktischen* and the concept of *ex factis jus oritur*: they do not “guarantee” the statehood of a territorial entity merely on the basis of its effective existence.

It is also an important conclusion of the present study that there can be no precedential impact of one *de facto state* on the status of the other, i.e. the precedential value of *de facto* statehood has to be rejected. This conclusion

¹⁴⁰³ E. Milano, *Unlawful Territorial Situations in International Law, Reconciling Effectiveness, Legality and Legitimacy*, *Developments in International Law*, Vol. 55, Leiden / Boston, 2006, p. 43

¹⁴⁰⁴ See G. I. Tunkin, *On the Primacy of International Law in Politics*, in: W. E. Butler (ed.), *Perestroika and International Law*, Dordrecht et al., 1990, p. 6

¹⁴⁰⁵ *Ibid.*

is drawn on the basis of the case studies made in the second part of my dissertation revealing characteristic features of particular *de facto states* and *legal* differences between them. Accordingly, each and every single case, where the realization of the right of peoples to self-determination is the issue in question, represents a *sui generis* case which has to be considered separately.

The ROC has made its way from a sovereign state to *de facto* local government and acquired the status of a fully-fledged *de facto state*. The TRNC is branded as an “illegal entity” because of Turkey’s 1974 military intervention. The latter violated Art. 2 (4) of the UN Charter and undermined the foundation on which the existence of the Republic of Cyprus was based. The “Republic of Kosovo” represents the *de facto state* status of which is a product of the UN Security Council “legislation” and the notion of unilateral remedial secession as an expression of external self-determination. The way made through by Kosovo implies the transition from an autonomous province within Serbia to the fully-fledged *de facto state* via the status of the UN protectorate and by means of the application of an “earned sovereignty approach”, the latter denoting the principle known as “standards before status”. The status of the “Republic of Abkhazia” has been examined in the context of secessionist self-determination and, after concluding that respective claim does not represent a strong one, the possibility of validation of its effective existence (in the form of statehood) has been considered with reference to the notion of acquisitive prescription. It follows that the latter manifestation, being one particular “mode of functioning” of the principle of effectiveness, does not entail Abkhazia’s statehood.

It has to be concluded that there is no uniform status enjoyed by the *de facto states* within the realm of public international law. The principle of effectiveness, as such, does not “guarantee” the acquisition by the *de facto state* of the status applicable *erga omnes* in the international legal order. But international law cannot be “blind” with regard to the existence of this kind of territorial entities and, in the environment described as “völkerrechtliche Stabilisierung und Befriedung”, they enjoy partial international legal

capacity and personality on the basis of the principle of effectiveness. This has been demonstrated with reference to the applicability of the prohibition of the use of force, enshrined in Art. 2 (4) of the UN Charter, to the case of the “Republic of South Ossetia”.

As with regard to the realization of the right of peoples to self-determination, it has to be stressed that indeed, to express its own national identity and exercise collective sovereignty, i.e. self-determination, is imperative for each people.¹⁴⁰⁶ But it is not to say that every people will be granted status claimed by its representatives. Rather, as self-determination of peoples has “many faces”, the status in question can be different but, despite this, it can still denote that the right to self-determination has been realized. There are situations in which factual reality does not coincide with the requirements of legitimacy and it is the trust of international law to distinguish valid claims to (external) self-determination from invalid ones. The point here is that *de facto* situations are different, secession is one of the most difficult problems facing the international community and my argumentation is that the secession cannot be claimed, as a vehicle for realization of the right of peoples to self-determination, in each and every single case.

The objective of the present study was to clarify the issue of the normative content of the principle of effectiveness in the context of existence of *de facto states*. It has to be concluded that the principle of effectiveness fulfils, in this respect, a partly normative function which guarantees that the *de facto state*, not enjoying the full international legal personality applicable *erga omnes*, does not “develop” into the legal nullity.

¹⁴⁰⁶ Y. Sayigh, Redefining the Basics: Sovereignty and Security of the Palestinian State, in: *Journal of Palestine Studies, A Quarterly on Palestinian Affairs and the Arab-Israeli Conflict*, Vol. XXIV, 1995, p. 16