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CORSO DI DOTTORATO DI RICERCA IN: DIRITTO INTERNAZIONALE,  
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**THE RIGHT OF PEOPLES TO SELF-DETERMINATION IN THE POST SOVIET  
AREA: THE CASE OF ABKHAZIA**

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## LIST OF ABBREVIATIONS

<b>English abbreviation</b>	<b>Full Form</b>	<b>Russian transliteration /Russian abbreviation</b>	<b>Transliteration/ Full form in Russian</b>
AASSR or Abkhazian ASSR	Abkhazian Autonomous Soviet Socialist Republic	<i>Abkhazskaja ASSR/</i> Абхазская АССР	<i>Abkhazskaja avtonomnaja socialističeskaja sovetskaja respublika/</i> Абхазская Советская Социалистическая Республика
ANC	Abkhazian National Congress	<i>ANS / АНС</i>	<i>Abkhazskij Narodnyj Sovet /</i> Абхазский Народный Совет
ASSR or Abkhazian SSR	Abkhazia Soviet Socialist Republic	<i>ASSR/ACCP</i> <i>Abkhazskaja SSR/</i> Абхазская ССР	<i>Abkhazskaja Sovetskaja Socialističeskaja Respublika</i> Абхазская Советская Социалистическая Республика
CIS	Commonwealth of Independent States	<i>SNG / СНГ</i>	<i>Sodružestvo nezavisimyx gosudarstv /</i> Содружество независимых государств
EJIL	European Journal of International Law	<i>EŽMP/ЕЖМП</i>	<i>Evropejskij žurnal meždunarodnogo prava/</i> Европейский журнал международного права
GA	United Nations General Assembly	<i>GA / ГА</i>	<i>General'naja Assambleja/</i> Генеральная Ассамблея
GDR	Georgian Democratic Republic	<i>GDR/</i>	<i>Gruzinskaja Demokratičeskaja Respublika /</i> Грузинская Демократическая Республика
GNC	Georgian National Congress	<i>НСГ/ NSG</i>	<i>Национальный Совет Грузии Nacional'nyj Sovet Gruzii</i>
GSSR or Georgian SSR	Georgian Soviet Socialist Republic	<i>GSSR/ГССР</i> <i>Gruzinskaja SSR/</i> Грузинская ССР	<i>Gruzinskaja Sovetskaja Socialističeskaja Respublika</i> Грузинская Советская Социалистическая Республика



ICJ	International Court of Justice	MS / MC	<i>Meždunarodnyj sud/</i> Международный суд
ILR	<i>International Law Reports</i>	DMP/ДМП	<i>Doklady meždunarodnogo prava/</i> Доклады международного права
OSCE	Organization for Security and Co-operation in Europe	OBSE / ОБСЕ	<i>Organizacija po bezopasnosti i sotrudničestvu v Evropi /</i> Организация по безопасности и сотрудничеству в Европе
Res.	Resolution	<i>Res./Резолюция</i>	<i>Resoluzija/Резолюция</i>
PCIJ	Permanent Court of International Justice	PPMP/ППМП	<i>Postojannaja palata meždunarodnogo pravosudija/</i> Постоянная палата международного правосудия
SC	United Nations Security Council	SB/CB	Совет Безопасности ООН/Sovet Bezopasnosti OON
UN	United Nations	OON/OOH	<i>Organizacija Ob'edinenyh Nazij/</i> Организация Объединённых Наций

## INTRODUCTION

Territorial disputes between new entities seceded from the USSR led to sanguinary conflicts, some of them are not yet resolved, to the detriment of international peace and security. Among the main issues that are still open, the legal *status* of Abkhazia is a relatively unexplored topic. Western scholars tend to limit their researches to the Georgian version of the facts, with little attention is paid to the historical background and to related local legal sources. By so doing, these scholars develop their analysis from the assumption that Abkhazia has to be considered as a part of the territory of Georgia. Thus, they interpret the Abkhazians' aspirations to independence and its secession from Georgia as violation of Georgian territorial integrity. At the same time, the view of the Abkhazian experts has a partial approach, disregarding some legal aspects of this issue.

This research will try to fill this gap, in order to produce a clearer and impartial picture of the legal and historical aspects from whom an assessment of the present legal status of Abkhazia will be possible. Thus, this study is aimed at providing a deeper analysis on several related issue, whose full comprehension is needed.

I will organise my work in the following way. The starting point is an analysis of the general aspects concerning legal and historical background of the USSR secession (dissolution) in order to assess criteria and rules applied to the definition of boundaries between the new States that emerged in the post -Soviet space. In particular, taking into consideration peculiar domestic system of the USSR system – its internal lines between its sub-units and their different legal status, I will investigate whether Soviet legislation could include rules and principles applicable even to its dissolution. I will also analyse the documents of the period of the sub-units' secession from the USSR, in particular the CIS treaties. Likewise I will focus on *uti possidetis* principle in order to ascertain whether it was actually applicable to the delimitation of new States that emerged from the USSR.

Then in the second part, taking account of the arguments of Abkhazia and Georgia, I will investigate on their legal condition, looking back at the moment of each one's access to the Russian Empire and under its domain. The analysis will be continued with reference to the period of the collapse of the Empire until the accession of each entity to the Soviet Union. In particular, I will focus on the Moscow Treaty of 1920; and then Soviet law will also be considered to verify the status of Georgia and Abkhazia as Soviet entities as well as their position after the end of the Soviet Union. Eventually, I will consider the peace treaties of 1992-1994 and other documents

material to understanding whether Georgia and Abkhazia could have been included within a binding common State framework.

In the third part I will discuss the present *status* of Abkhazia, taking into account the role of effectiveness in the State-building process. The concept of effectiveness is deeply entrenched in the ideas of statehood and territorial sovereignty. Since State-building process is not regulated by international law - the formation of a new State is a matter of fact and not of law<sup>1</sup> - effectiveness plays a crucial role in this process being the actual constitutive element of the statehood. From this perspective international law on the one hand acknowledges the existence of the State and on the other hand just rules its legal consequences, or impose non-recognition. Such principles will be taken into account to assess whether or not Abkhazia can claim to be actually independent notwithstanding the lack of international recognition by the great majority of States.

The analysis of the Abkhazian case will prove very useful, as it can provide new elements to the study of several more general issues presently debated among international lawyers. Among others, this case brings attention to the issue of the *uti possidetis juris* principle's applicability outside decolonization. In particular, I will examine whether the USSR's secession can be considered as a proper field for the application of that principle. Such an analysis could be important for finding a solution to the territorial boundaries' disputes in the post-Soviet space, which would be essential for the maintenance of international peace and security in that area. In fact, the emergence of many new States represents one of the major political developments of the twentieth century, mostly accompanied by serious problems concerning determination of the State boundaries among themselves.

Similarly, the Abkhazia case will bring attention even to a different principle originally referred mostly to the post-colonial context, that is the right to self-determination. It is commonly agreed that external self-determination is a right that can be claimed by colonised and occupied peoples. However, there is no consensus whether a similar right could exist outside of these situations. A theory is emerging arguing in favour of the admissibility of the so-called remedial secession: according to this doctrine, in exceptional cases, a right to secession would stem for peoples that were victims of gross and continued violations of their human rights. Hence this doctrine is to be explored with reference to the case of Abkhazia.

To reach its conclusions, the research will undertake both a historical and a legal analysis: assuming that any legal conclusion on the relevant issues would be misconceived without a previous proper historical reconstruction. A proper fact assessment will be essential to the purpose of determining effectiveness of the Abkhazian rule over its alleged territory. Lacking a possibility

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<sup>1</sup> Here I share the doctrine of the prof. Arangio-Ruiz on the factual nature of States, see G. Arangio Ruiz, *La persona internazionale dello Stato*, Utet Giuridica, Emerito di Diritto internazionale Università "La Sapienza", Roma, 2008, p. 29

of on-site analysis, the reconstruction will be as precise as possible, taking into account available official documents and reports by reliable sources.

A variety of different legal sources will come into consideration, ancient and modern treaties as well as domestic legislation. The study and interpretation of legal sources will be conducted according to the pertinent rules and different methods, that may include: rules of logic, (for instance, *a contrario* reading and juxtapositions); rules on interpretation of international treaties including teleological method in order to interpret legal norms and sources (as for the intention the CIS members in concluding the CIS treaties founding the Commonwealth of the Independent States). Opinions of legal scholars on the main issues will be evaluated and compared.

## I. PERESTROIKA

The end of Cold War<sup>2</sup> with the collapse of socialist block<sup>3</sup> and the dissolution of the Union of Socialist Soviet Republics radically changed economic and political environment of the world. The world structure was substantially reconfigured from the bipolar system, characterized by competition of the two superpowers USSR and USA, into a unipolar system with the American global hegemony.

The dissolution of the USSR, revolutions of 1989 in Eastern Europe, the end of the cold war could be traced back to on March 11, 1985, when Mikhail Gorbachev was appointed as the new General Secretary of Communist Party. After coming to power Gorbachev announced his revolutionary reforms called *Perestroika*, which entirely changed the political landscape of the Soviet Union. *Perestroika* (literally meaning “rebuilding” or “restructuring”) was thought to bring crucial changes to the life of all Soviet people, to “restructure” the Soviet political and economic system. It opened the Soviet Union to the World and the World to the Soviet people, but also led to economic fiasco and a fatal division within the Soviets themselves, accompanied by violent ethno-national conflicts, which persisted up to now (Ukraine, Nagorno-Karabakh, Moldavia). Since the sparking of ethno-national conflicts in the post-Soviet area and separatist movements, in particular in the former Georgian and Ukrainian Soviet republics, are associated with period of Mikhail Gorbachev’s reforms *Perestroika* it is necessary to briefly examine them.

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<sup>2</sup> On December 3, 1989 the leaders of the two superpowers, Gorbachev and Bush, declared an end to the Cold War. “We are at the beginning of a long road to a lasting, peaceful era.” Mikhail Gorbachev said. A year later, in November 1990, in Paris a so-called “Charter for a New Europe”, also known as Paris Charter was adopted by most European governments, Canada, the USA and the USSR actually proclaiming an end to an almost half a century long resistance and a beginning of a new era - of democracy, peace and unity, at <http://bibliotekar.ru/mihail-gorbachev/index.htm>; at <http://russiapedia.rt.com/of-russian-origin/perestroika/>

<sup>3</sup> *Treaty of Friendship, Co-operation and Mutual Assistance signed between Albania, Bulgaria, Hungary, German Democratic Republic, Poland, Romania, the Soviet Union and Czechoslovakia* on 14 May 1955 at <https://treaties.un.org/doc/Publication/UNTS/Volume%20219/volume-219-I-2962-Other.pdf>

Gorbachev's reforms entered in the history under the name *Perestroika*. *Perestroika* included besides a set of domestic reforms entitled the *uskoreniye* (acceleration), *perestroika* (restructuring), *glasnost* (transparency) and *democratization*, also *new thinking* concerning international agenda.<sup>4</sup> These reforms were associated with a huge number of acts and laws, especially period of 1987-1990. In my work I will pay attention to some of these documents, which brought fundamental changes within the Soviet Union and contributed to ethno-national tensions.

### 1. The 'New Thinking' Foreign policy

On the international arena M. Gorbachev proposed reforms, whose key idea of new foreign policy was Gorbachev's notion 'New Thinking' expressed in his book entitled "*Perestroika and new thinking for our country and the whole world*"<sup>5</sup> which appeared in 1987. Its main message was addressed to the world's superpowers which, the author claimed, have to unite in the nuclear age in order to protect international peace and stability. In the book, M. Gorbachev continued saying that all ideological and economic disagreements between the world's socialist and capitalist systems have to be left behind and forgotten before the common goal - the protection of universal human values. Therefore according to the policy of 'New Thinking' nuclear disarmament, radical reorganization and large force reductions were a main concern of new foreign policy of the Soviet Union.

On December 8th at the Washington summit Gorbachev and Reagan signed the Intermediate-Range Nuclear Forces Treaty (INF Treaty), eliminating all intermediate- and shorter-range missiles from Europe<sup>6</sup>. Additionally, on December 7, 1988, the Soviet leader Mikhail Gorbachev at the General Assembly ONU declared drastic cuts in the Soviet military budget as well as a unilateral reduction of fifty thousand troops from South, Eastern Europe within two years.<sup>7</sup> Later he also ordered the withdrawal of other fifty of thousands of Soviet militaries from Eastern European countries, Mongolia and Asia. In 1988, he reduced the size of the army by another 500,000 men. Moreover, in April 1988, Gorbachev signed a treaty, which provided total

4 История России, Электронная библиотека, at <http://www.bibliotekar.ru/sovetskaya-rossiya/91.htm>

<sup>5</sup> Gorbachev, *Перестройка и новое мышление для нашей страны и для всего мира* (*Perestroika and new thinking for our country and the whole world*), at <http://www.uio.no/studier/emner/hf/ilos/RUS2504/v14/Gorbatsjov.pdf>

<sup>6</sup> The INF Treaty requires elimination of all LRINF missiles (ranges between 1,000 and 5,500 kilometers) by June 1, 1991, and all SRINF (ranges between 500 and 1,000 kilometers) missiles within 18 months. In all, 2,692 missiles are to be eliminated. In addition, all associated launchers, equipment, support facilities, and operating bases worldwide are to be eliminated or closed out from any further INF missile system activity. INF's are "Intermediate-Range Nuclear Forces", which are distinct from ICBMs, or intercontinental ballistic missiles). The Russians also proposed the elimination of 50% of all strategic arms, including ICBMs, and agreed not to include British or French weapons in the count. The American side was instead asked to pledge not to implement strategic defenses for the next ten years, in accordance with the SALT I agreement. the INF Treaty (Intermediate-Range Nuclear Forces Treaty) in Washington on December 8, 1987 at <http://www.state.gov/t/avc/trty/102360.htm#text>

<sup>7</sup> Gorbachev's Speech to the U.N., *CNN Cold War* December 7, 1988: at [http://astro.temple.edu/~rimmerma/gorbachev\\_speech\\_to\\_UN.htm](http://astro.temple.edu/~rimmerma/gorbachev_speech_to_UN.htm); M. Gorbachev at the United Nations, C-Span today, December 7, 1988, at <http://www.c-span.org/video/?5292-1/gorbachev-united-nations>; at <http://www.unmultimedia.org/radio/russian/archives/60834/>

withdrawal of Soviet troops from Afghanistan by February 1989<sup>8</sup>. Additionally, Gorbachev proposed new doctrine that condemned the Brezhnev Doctrine.<sup>9</sup> In particular, in July 1988 he had declared that the Warsaw Pact<sup>10</sup> countries had the right to follow their own path towards socialist objectives. From this moment the Soviet countries allies couldn't rely anymore on automatic military aid of the Soviet Union troops and could not more grant the USSR privileges in trade, credits, prices and so on. With these decisions started a process of the Warsaw Pact disintegration. Indeed, it led to a string of revolutions in Eastern Europe throughout 1989, in which socialist block collapsed. In March 1990, Gorbachev called for converting the military Warsaw Alliance to a merely political organization.<sup>11</sup> At a session of the Political Consultative Committee of the Warsaw Treaty member States on July 1st 1991, it was officially disbanded<sup>12</sup> through signing *the Protocol on terminating the validity of the Treaty of Friendship, Cooperation and Mutual Assistance*. Subsequently Soviet troops were withdrawn from Central Europe over the next four years<sup>13</sup>.

Furthermore, the Gorbachev's abandonment of the Brezhnev Doctrine put an end of the Berlin Wall, which came down in November 1989. On 12 September 1990 in Moscow the four victorious powers of the Second World War, signatories of the Potsdam Agreements in 1945 (the Soviet Union, the United States, the United Kingdom and France) plus the two Germans (the German Democratic Republic and the Federative German Republic) signed a treaty on German Reunification<sup>14</sup>. In 1990 it followed the GDR's withdrawal from the Warsaw Pact due to its reunification with the German Federative republic.<sup>15</sup>

After German reunification and the disappearance of the Warsaw Pact, NATO has started its expansion into Eastern Europe, which has sparked a historical dispute. In particular, during the negotiations over German reunification where there were given commitments to the Soviet Union (today the Russian Federation) on the NATO not-expansion to the Eastern countries. The various players involved in the process of German reunification have different versions of events. US Secretary of State James Baker, Shevardnadze's American counterpart in 1990, has denied that

<sup>8</sup> Afghanistan and Pakistan signed an accord, with the United States and Soviet Union as guarantors, calling for withdrawal of Soviet troops from Afghanistan by February 1989. The Soviet Union subsequently met the accord's deadline for withdrawal

<sup>9</sup> The Brezhnev Doctrine gave the Soviet Union the right to intervene militarily in Warsaw Pact countries.

<sup>10</sup> Warsaw Pact, at <http://www.law.edu.ru/norm/norm.asp?normID=1168226>

<sup>11</sup> *Warsaw Pact*, at <http://histrf.ru/ru/lenta-vremeni/event/view/varshavskii-dogovor>

<sup>12</sup> Протокол о прекращении действия договора о дружбе, сотрудничестве и взаимной помощи, подписанного в Варшаве 14 мая 1955 года, и протокола о продлении срока его действия, подписанного 26 апреля 1985 года в Варшаве (подписан в г. праже 01.07.91) (Protocol on the termination of the Treaty of Friendship, Mutual Assistance and Post-War Cooperation between the Union of Soviet at <http://russia.bestpravо.ru/fed1991/data01/tex11658.htm>

<sup>13</sup> Soviet troops were withdrawn from Czechoslovakia and Hungary by mid-1991 and from Poland in 1993,

<sup>14</sup> On 12 September 1990, in Moscow, the representatives of the USSR (Eduard Shevardnadze), France (Roland Dumas), the United Kingdom (Douglas Hurd) and the United States (James Baker)), the German Democratic Republic (Lothar de Maizière) and the Federal Republic of Germany (Hans-Dietrich Genscher) sign the 'Two Plus Four' Treaty on the Final Settlement with respect to Germany, at [http://www.cvce.eu/en/collections/unit-content/-/unit/02bb76df-d066-4c08-a58a-d4686a3e68ff/80442829-047c-479a-afaf-18be757f1232/Resources#5db0b251-c5bf-4f5a-b5d0-2047f829c19a\\_en&overlay](http://www.cvce.eu/en/collections/unit-content/-/unit/02bb76df-d066-4c08-a58a-d4686a3e68ff/80442829-047c-479a-afaf-18be757f1232/Resources#5db0b251-c5bf-4f5a-b5d0-2047f829c19a_en&overlay).

<sup>15</sup> Конец Варшавского договора, at [http://ria.ru/history\\_comments/20110221/335768695.html#ixzz3m5DfikCm](http://ria.ru/history_comments/20110221/335768695.html#ixzz3m5DfikCm)

there was any agreement between the side is in this concern.<sup>16</sup> By contrast, according to Mikhail Gorbachev<sup>17</sup>, Jack Matlock<sup>18</sup>, Hans-Dietrich Genscher,<sup>19</sup> Anatolij Adamishin<sup>20</sup> it was made a solemn “pledge” by the governments of West Germany and the United States in 1990 that NATO would not to bring any former Warsaw Pact states into the alliance. However, after the German reunification and the disappearance of the Warsaw Pact, instead of a higher degree of integration, NATO started to expand eastwards endlessly. In NATO countries Gorbachev is highly considered for many concessions in arms reduction, for disbanding of the Warsaw Pact and for the German Reunification, while in Russia Gorbachev is instead very criticized for the way in which he ended the cold war. His policy principally was based on the unilateral concessions, and not equal cooperation, which put Russian actual national security at risk. In fact, NATO continues its expansion and remains a military force whose missiles are pointed towards Russian Federation’s territory.<sup>21</sup>

## 2. Economic reforms

A part of the change in the foreign policy, Mikhail Gorbachev brought radical changes on the domestic level by issuing economic and politic reforms. The economic reforms were doomed to modernize the Soviet economy by means of decentralizing economic controls and driving the country to a market economy. Reforms of the Soviet economy are associated with three periods. The first phase of 1985-1987 was period of gradual reforms, incoming under slogan *Uskorenje* (acceleration). This concepts was intended to improve the existing order without a radical transformation of the existing economic foundations. This period can be seen as a period of preparation for the fermentation of reform ideas and organizational developments. The second phase (1987-1991) is the period of the radical reforms named officially *Perestroika*. *Perestroika* transformed the economy system beyond traditional economic policy. In particular, it was started a process of decentralizing Soviet plan system bringing irreversible dramatic change in the life of the Soviet people and a deep economic crisis.<sup>22</sup>

<sup>16</sup> M. Kramer, *The Myth of a No-NATO-Enlargement Pledge to Russia*, THE WASHINGTON QUARTERLY APRIL 2009 at <http://dialogueeurope.org/uploads/File/resources/TWQ%20article%20on%20Germany%20and%20NATO.pdf>

<sup>17</sup> Mikhail Gorbachev is the former President of the USSR said that of course there was a promise not to expand NATO "as much as a thumb's width further to the East, at <http://www.spiegel.de/international/world/nato-s-eastward-expansion-did-the-west-break-its-promise-to-moscow-a-663315.html>

<sup>18</sup> Jack Matlock was the US ambassador in Moscow in 1990. Jack Matlock, has said, "We gave categorical assurances to Gorbachev back when the Soviet Union existed that if a united Germany was able to stay in NATO, NATO would not be moved eastward: at <http://www.nytimes.com/1995/08/10/opinion/10iht-edzel.t.html>

<sup>19</sup> Hans-Dietrich Genscher was the German foreign minister in 1990. Genscher said: "We are aware that NATO membership for a unified Germany raises complicated questions. For us, however, one thing is certain: NATO will not expand to the east." And because the conversion revolved mainly around East Germany, Genscher added explicitly: "As far as the non-expansion of NATO is concerned, this also applies in general." *Uwe Klußmann, Matthias Schepp and Klaus Wiegrefe*, NATO's Eastward Expansion: Did the West Break Its Promise to Moscow? Spiegel, 2009, <http://www.spiegel.de/international/world/nato-s-eastward-expansion-did-the-west-break-its-promise-to-moscow-a-663315.html>

<sup>20</sup> Anatolij Adamshin was Soviet deputy foreign minister in 1990

<sup>21</sup> Uwe Klußmann, Matthias Schepp and Klaus Wiegrefe, NATO's Eastward Expansion: Did the West Break Its Promise to Moscow? Spiegel, 2009, at <http://www.spiegel.de/international/world/nato-s-eastward-expansion-did-the-west-break-its-promise-to-moscow-a-663315.html>

<sup>22</sup> *История России*, Электронная библиотека, at <http://www.bibliotekar.ru/sovetskaya-rossiya/91.htm>

### *a. Gradual economic reforms 'Uskorenie' (Acceleration)*

Thus the first phase of Gorbachev's reforms started in 1985. The Leader of the Soviet Union advocated the policy *Uskorenie*, because he was convinced, together with his advisory team that the USSR could not see out the 20<sup>th</sup> Century in its then current condition. In fact, although the Soviet system still continued to guarantee a decent standard of living to Soviet people, had not any external debt and the ruble was an universal currency, the country from the 1970s to early 1980s was in a situation of stagnation, with economic and political problems which needed to be addressed and overcome. Moreover, the fall in oil prices in the mid-1980s made the rotten basis of the Soviet economy ever more visible.

Therefore, on April 23rd 1985 the Plenum of the Central Committee of the Communist Party of the Soviet Union (CPSU) approved a new policy entitled *Uskorenie* (acceleration) proposed by Gorbachev. Therefore at this '*April Plenum*' were officially launched the reforms which entered later in the history under name *Perestroika*.<sup>23</sup> At the '*April Plenum*' Gorbachev stated that his goal was to accelerate the development of the economy and bring the communist system to a point of perfection, based on the ideal of Marxist-Leninist materialism. In accordance with the Marxist economics postulate about prioritizing the development of the heavy industry over the light industry, the acceleration was planned to be based on revamping of heavy industry, taking the "human factor" into account and increasing the labour discipline and responsibility of apparatchiks. Thus, the improvement of the economy would have resulted in the correction of the entire 'superstructure' of Soviet society and was not yet intended a program of radical change but one of incremental change. However, his program was not developed adequately. Actually his reform *Uskorenie* was a vague hodgepodge of ideas of social and economic development of the Soviet Union.<sup>24</sup>

In fact, Program of policy *Uskorenie* provided the infusion of massive monetary emission into heavy industry. In practice, initially it was made investments for launching this process. But the monetary emission was not sufficient. It led to an unaccomplished reorganization of the heavy industry, with the result of a decreased productivity destabilizing the economy.<sup>25</sup>

In 1985 it was issued one of the first reform, which is the anti-alcohol campaign. The anti-alcohol reform was forcedly introduced by the resolution of May 16th 1985, entitled "Measures to

<sup>23</sup> Доклад Генерального секретаря ЦК КПСС М.С.Горбачева «О созыве очередного XXVII съезда КПСС и задачах, связанных с его подготовкой и проведением» // Правда. 1985. 24 апреля. №114; Материалы Пленума Центрального Комитета КПСС, 23 апреля 1985 г. М.: Политиздат, 1985. P. 32 at [http://www.constitution20.ru/ckeditor\\_assets/attachments/322/1985\\_04\\_23\\_gorbachev.pdf](http://www.constitution20.ru/ckeditor_assets/attachments/322/1985_04_23_gorbachev.pdf)

<sup>24</sup> M. Gorbachev Memoirs, Doubleday, New York, 1996, p. 67.

<sup>25</sup> П.М Леоненко., П.И. Юхименко, *Развитие экономики СССР в 50-80-х годах*, Учебное пособие, К. : Знания-Пресс, 2004, at <http://banauka.ru/4037.html>



Overcome Drunkenness and Alcoholism”<sup>26</sup> and by the Decree “Measures to Overcome Drunkenness and Alcoholism and to uproot of moonshining.”<sup>27</sup> Thus campaign was unprecedented in scale and scope and designed to fight alcoholism in the Soviet Union.<sup>28</sup> During this reform millions of vineyards were cut down across the country<sup>29</sup>. From 1985 to 1990, only in Russian Soviet Republic, their area decreased from 200 to 168 thousand hectares, and some unique collections of grape varieties were destroyed.<sup>30</sup> Prices of vodka, wine, and beer were raised, and their sales had fallen by as much as two-thirds. It was cut not only alcohol sales but also government revenue. The state budget had a loss of approximately 100 billion rubles, according to Alexander Yakovlev<sup>31</sup>, money which was really significant for the Soviet budget. The budget of the Soviet Union, which once saw up to 25 percent of its revenues derived from the state monopoly on alcoholic products. However, state profit was cut drastically not only because of a fall in consumption, but also for the unavoidable illegal alcohol production. Reduction of alcohol sales led to a flourishing black market. In effect, illegal alcohol makers snatched a huge part of alcohol production. The illicitly and skyrocketing distilled alcohol production led to sugar disappearing from the shelves of the stores, since the sugar was needed for the illegal alcohol manufacturing. Hence, unfortunately, this reform did not have any significant effect on the alcoholism in the country, but it brought a serious economic blow to the state budget. The campaign also led to a spike in black market and eroded the tax base.<sup>32</sup>

### ***b. Radical economic reforms***

Gorbachev’s economic reforms was furthered at the XXVII Party Congress in February–March, in which Guidelines for Economic Development were adopted for the next five years and a longer term.<sup>33</sup> Gorbachev himself was a vocal proponent of the policy. Notably, at the XXVII Party Congress in this document the Soviet leader first used the term *Perestroika* (literally

<sup>26</sup> Из постановления ЦК КПСС *О мерах по преодолению пьянства и алкоголизма* 1985 г., 16 мая, Постановление Совмина СССР от 07.05.1985 N 410 *О Мерах По Преодолению Пьянства И Алкоголизма, Искоренению Самогонварения* [Resolutions entitled “*Measures to Overcome Drunkenness and Alcoholism*”] (Ведомости Верховного Совета СССР, 1985, №21, ст. 369.См.; например, Указ Президиума Верховного Совета РСФСР от 16 мая 1985 г. *О мерах по усилению борьбы против пьянства и алкоголизма, искоренению самогонварения*, Ведомости Верховного Совета РСФСР, 1985, №21, ст. 738.

<sup>27</sup> Ibidem..

<sup>28</sup> Указ Президиума Верховного Совета РСФСР от 16 мая 1985 г., *О мерах по усилению борьбы против пьянства и алкоголизма, искоренению самогонварения*, Ведомости Верховного Совета РСФСР, 1985, №21, ст. 738. at <http://russia.bestpravо.ru/ussr/data02/tx12615.htm>.

<sup>29</sup> *ПОЛУ Сухой закон СССР*, Антиалкогольная компания в СССР 1985-1987 гг., at <http://reallystory.com/post/294?g=all>; *История России*, Электронная библиотека, at <http://www.bibliotekar.ru/sovetskaya-rossiya/91.htm>, at [http://www.ediblemanhattan.com/magazine/dr\\_franks\\_rkatsiteli/](http://www.ediblemanhattan.com/magazine/dr_franks_rkatsiteli/);

<sup>30</sup> Антиалкогольная компания, at <http://back-in-ussr.info/2012/03/antialkogolnaya-kampaniya-v-sssr/>; *Gorbachev Says His Soviet Anti-Alcohol Campaign Was a Mistake*, at <http://russia-insider.com/en/politics/gorbachev-says-his-soviet-anti-alcohol-campaign-was-mistake/ri7017>

<sup>31</sup> Alexander Yakovlev was a Soviet politician and historian. During the 1980s he was a member of the Politburo and Secretariat of the Communist Party of the Soviet Union. The chief of party ideology, the same position as that previously held by Mikhail Suslov, he was called the "godfather of glasnost" as he is considered to be the intellectual force behind Mikhail Gorbachev's reform program of glasnost and perestroika

<sup>32</sup> Антиалкогольная компания, at [http://asia.rbth.com/news/2015/05/15/gorbachev\\_admits\\_mistakes\\_made\\_in\\_anti-alcoholism\\_campaign\\_30\\_years\\_ago\\_46054.html](http://asia.rbth.com/news/2015/05/15/gorbachev_admits_mistakes_made_in_anti-alcoholism_campaign_30_years_ago_46054.html)

<sup>33</sup> On the basis Guidelines of the economic and social development of the USSR in 1986-1980 and in the period up to the year 2000", Pravda, 4 March 1986

'restructuring').<sup>34</sup> From June 1986 the Gorbachev's policy was named *Perestroika* but not yet became a full-scale campaign with practical results yielded. Only on January 27th 1987 at the Plenum of the CPSU Central Committee in January, *Perestroika* was proclaimed an official state ideology<sup>35</sup> launching the second phase, that is of radical changes(1987-1991), thus *de facto* admitting that the politics of mere "acceleration" eventually failed.

The period of 1987-1989 is especially characterized by radical changes in the Soviet Economy, when the Soviet government adopted a series of laws and acts, which created unfavourable environments for the development of manufacturing and for investments in national economy.

The resolution "the Measures on Perfection of Mechanism Control" (issued on August 19th 1986 by CPSU Central Committee and Council of Ministers), which came into enforce of January 1st, 1987, started the erosive process of foreign trade system existing for decades.<sup>36</sup> This resolution from January 1st 1987 allowed to enterprises and to private persons to export directly a number of goods (mineral materials, timbering, gold, furs and so on) without differentiated currency index. Hence it partially abolished the monopoly of state to foreign trade.

On January 13th, 1987, the Presidium of the USSR Supreme Soviet and the Soviet Union's Council of Ministers issued the law on "*Joint Ventures*"<sup>37</sup> that authorized the establishment of joint ventures in the Soviet Union. This Law granted privileges to exporters of national raw material.<sup>38</sup> Actually it legalized a direct access of foreign-owned ventures to natural resource and to domestic market of the USSR.<sup>39</sup>

At the Central Committee Plenum of June 1987 it was promulgated the Law on "State Enterprises," which intended to encourage enterprises to become self-financing and to be independent from the central planning agencies. The Law also endorsed the priority of production directed for foreign sells. Moreover, the Law authorised converting non-cash transfer into cash. It was the first step of the USSR bank system's privatization. Capital funds were transporting from saving investments to consumption expenditure. The Law enabled the enterprises to set their own prices and wages.<sup>40</sup> Consequently, prices were going up. Besides, the Soviet state cut credit to state enterprises, but state enterprises did not invest a big part of its profits in its product activity.

<sup>34</sup> Материалы XXVII съезда Коммунистической партии Советского Союза, Политиздат, 1986,178 , р. 113; Из Политического доклада ЦК КПСС XXVII съезду КПС, at <http://pseudology.org/Documets/27KPSS2.pdf> at [http://www.knowbysight.info/2\\_KPSS/07178.asp](http://www.knowbysight.info/2_KPSS/07178.asp) at [http://www.lib.ru/MEMUARY/GORBACHEV/doklad\\_xxvi.txt](http://www.lib.ru/MEMUARY/GORBACHEV/doklad_xxvi.txt)

<sup>35</sup> Gorbachev's report on 27 JANUARY 1987 to the PLENUM of the CENTRAL COMMITTEE of the CPSU. "On Reorganization and the Party's Personnel Policy," Pravda, at [http://www.lib.ru/MEMUARY/GORBACHEV/doklad\\_xxvi.txt](http://www.lib.ru/MEMUARY/GORBACHEV/doklad_xxvi.txt)

<sup>36</sup> Постановление Цк Кпсс, Совмина Сссп От 19.08.1986 N 991 О Мерах По Совершенствованию Управления Внешнеэкономическими Связями, <http://pravo.levonevsky.org/baza/soviet/sss2286.htm>

<sup>37</sup> О порядке создания на территории СССР и деятельности совместных предприятий с участием советских организаций и фирм капиталистических и развивающихся стран at <http://www.bestpravo.ru/federalnoje/gn-normy/10p.htm>

<sup>38</sup> Ibidem

<sup>39</sup> Ibidem.

<sup>40</sup> Закон СССР от 30.06.1987 О Государственном Предприятии (Объединении), <http://russia.bestpravo.ru/ussr/data01/tex11996.htm>

It was a broken inter-industry balance. There were short-cut of central plan program causing the fast decrease of production. This led to a fall of gross national product and national income. The state deficit tripled (in 1985-1991 it grew from 0 to 109 billion rubles). Goods usually distributed through official state stores at fixed prices quickly disappeared causing production crisis. Indeed, many staples could not be found even in Moscow. For the first time since the end of the Second World War, a food ration ticket system returned.<sup>41</sup> Inflation and severe shortages of basic food caused public discontent. It brought more desperate strikes, especially to the coal mines and oil fields.

The Law on Cooperatives,<sup>42</sup> enacted in May 1988 legalized the private ownership of most businesses. This law was supposed to encourage private-sector activity, especially booting exports. Hence there were appeared a chain of cooperatives, which exported goods to foreign markets. The product chaos strengthened the hand of speculators both within and outside the official bureaucracy. According to experts by 1990 a third of consumption goods was sold away, which would have directed to the Soviet market.<sup>43</sup>

The next step in the economic reforms is represented by the USSR Council of Ministers's resolution titled "On Farther Development of External Economic Activity of State Enterprises, Cooperatives and other public Enterprises, Associations, organizations" of December 2nd 1988.<sup>44</sup> By force of this act on April 1st 1989 the differentiated currency indexes and the monopoly of the state at the foreign trade were totally abolished. The state monopoly at the foreign trade limited the falling of the prices of natural resources. But after its abolishing the natural resources were exported at lower prices, meaning at less than "normal value" of the goods. An under sale of raw materials, metals, oil products, woods and bold timbers as well as consumption goods by illegal merchants giving place to illegal enrichment at the expenses of the Soviet people.

Subsequent implementation of economic decentralization was the Resolution of the USSR Council of Ministers of March 7th 1989, which allowed republics and local ministries to directly conduct trade of natural resources on foreign markets. Furthermore, this resolution legalized the quoting and licensing right of all-union and republic ministries to foreign trade. This resolution generated fecund ground for officialdom's and black-market's elements' enrichment.<sup>45</sup>

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<sup>41</sup> The wartime system of distribution using food cards that limited each citizen to a fixed amount of product per month Severe shortages of basic food supplies (such as meat and sugar)

<sup>42</sup> Закон СССР от 26 мая 1988 г. N 8998-XI *О кооперации в СССР*" (с изменениями и дополнениями) at <http://base.garant.ru/10103075/>

<sup>43</sup> В. Катасонов, «Сталинская экономика» и государственная монополия внешней торговли. Часть 6, 17:41 28.03.2014 , at <http://www.km.ru/economics/2014/03/28/istoriya-sssr/735949-stalinskaya-ekonomika-i-gosudarstvennaya-monopoliya-vneshn>

<sup>44</sup> Закон 1988 г. *О Дальнейшем Развитии Государственных, Кооперативных и иных Общественных Организаций*, Постановление Совмина СССР от 02.12.1988 N 1405 *О дальнейшем развитии внешнеэкономической деятельности государственных, кооперативных и иных общественных предприятий, объединений и организаций* at <http://www.bestpravo.ru/sssrgn-normy/z7p.htm>

<sup>45</sup> Постановление Совмина Ссрр От 07.03.89 N 203 *О Мерах Государственного Регулирования Внешнеэкономической Деятельности* at <http://zakonbase.ru/content/base/10869>

In December-January, the government abolished the increment of the ruble derived from directional correlation of currencies causing the end to the Soviet currency. In fact, the ruble totally was undermined as universal currency in circulation and discouraged national producers' interest to domestic market. *De facto* the function of the national currency, the ruble, was replaced by the dollar.

Further economic decline was worsened by political tensions between forces supporting socialism and parties and movements insisting on capitalist principals,<sup>46</sup> which led to coup d'état.

In 1991 the Soviet economy had stopped declining and gone into complete collapse.

This Gorbachev's economic reforms *Perestroika* aimed at bringing the country out of the stagnation, eventually destroyed the Soviet Union. Indeed, the USSR leadership's economic reforms undermined the centrally planned economy without establishing a functioning market to replace it.

A result of these economic reforms were:

- by 1988-89 widespread shortages, rationing, and public discontent;
- industrial and agricultural output decline during 1990-91 leading to a drastic fall in gross national product and national income; GNP in 1991, compared to 1989 was over 20% less than national income (the +2.3% economic growth in 1985 was replaced by a -11% recession in 1991);
- a drastic price rise devalued the massive private ruble savings accumulated in the economy, cut credit to the Soviet industries, introduced hard currency trade and investment in the USSR
- gold funds decreased by 10 times from 2,000 to 200 tons; and under Gorbachev's administration external debt grew from 0 to US\$120 billion;
- the ruble, the Soviet national currency, devalued dramatically.<sup>47</sup>

### 3. Political reforms '*Glasnost*' (openness)

In parallel to economic reforms Gorbachev introduced also politic reforms under slogan *Glasnost* and *Democratization*, which had important impact on Soviet Society and played important role in dismantling of the Soviet Union. Indeed, in 1986 Gorbachev decided that fixing the economic reforms would be nearly impossible without reforming the political and social

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<sup>46</sup> In late July 1990, Gorbachev signed an agreement with Chairman of the RSFSR Supreme Soviet Yeltsin on joint development of the program of economic reform of the country, based on Grigory Yavlinsky's "500 Days" project. The resulting program gained the support of all 15 republics, but was roundly rejected by the USSR Council of Ministers. In the USSR Supreme Soviet Gorbachev advocated a merger of the Yavlinsky-Shatalin and the Abalkin-Ryzhkov programs, which, in the opinion of the two sides, was impossible. In October 1990, the USSR President was given extra powers to implement the program "Guidelines for Stabilizing the National Economy and Transition to a Market Economy," which provided for devising "regulated market relations." Both oppositions - the Interregional Deputy Group and the deputy group Soyuz - faced the President with an ultimatum-like demands.

<sup>47</sup> А.В Сидоров, *Советский Союз накануне распада: опыт антикризисного управления*. М., 2002. p.17.

structure of the Soviet Society. Therefore Gorbachev launched the politic reforms under slogan *Glasnost* (openness or transparency), which took part of the reforms called *Perestroika*.

#### 4. Criticism and self-criticism

The first use of the term *Glasnost* was in 1985 at the April Plenum of the Central Committee of the Soviet Union's Communist Party. This term was initially intended as simply openness to Gorbachev's reforms. Only at the 27<sup>th</sup> Congress<sup>48</sup> Gorbachev used the concept of *Glasnost* with broadened meaning. In particular, he spoke about policy of *Glasnost* which would be guarantee new freedoms: greater freedom of speech and expression, greater criticism and self-criticism in all spheres of the Soviet Society.

Actually the former Soviet leaders (especially Stalin) and who were opposed to perestroika were subject of criticism. For instance, at the jubilee plenum of the Communist Party on October 14th 1987 Gorbachev delivered a report in which he openly spoke about the criminal essence of Stalinism. A campaign was started to rehabilitate many members of the Communist Party subjected to repressions and thousands of political prisoners and many dissidents were released.

As an example of anti-reformers criticism is given by the reaction to the article of Nina Andreyeva.<sup>49</sup> The newspaper *Sovetskaya Rossiya* published an article of Nina Andreyeva, a chemistry teacher from Leningrad, entitled "I Cannot Sacrifice My Principles," in which she criticized Gorbachev's *Perestroika*, calling it 'a smeared campaign' and the administrative model of the economy as 'unacceptable'. In response, Politburo guided by Gorbachev passed a decision condemning the publication calling a "manifesto of anti-*perestroika* forces." Some weeks later an unsigned editorial article in the *Pravda* condemning Andreyeva's ideas (Aleksandr Yakovlev was the author) appeared. At the same time, Nina Andreyeva became subject of Gorbachev's persecution. She and her husband were dismissed and they remained without means of survival. She could not more express freely her opinion.<sup>50</sup>

Self-criticism meant criticism of tradition policies of the government. Namely, it was limited to criticized policies conservative opposition elements within CPSU and encourage to denounce the abuse of authorities.

Instrument of *Glasnost* was important to obtain support of elites and Soviet people and to introduce the *Perestroika* reforms. Indeed, Gorbachev believed in the power of the word and he

<sup>48</sup> Ю. Батулин, Краткая История Гласности СССР, XX Век, at <http://askjournal.ru/journal/item/kratkaya-istoriya-glasnosti>; at [http://malchish.org/lib/history/sssр\\_1980.htm](http://malchish.org/lib/history/sssр_1980.htm); Фонд Горбачева, at [http://www.gorby.ru/archival/expocenter/vneshpolitika/show\\_29323/](http://www.gorby.ru/archival/expocenter/vneshpolitika/show_29323/)

<sup>49</sup> Nina Andreyeva, *I Cannot Waive Principles*, in *Sovetskaya Rossiya*, March 13, 1988 at <http://web.archive.org/web/20120216082258/http://www.sadcom.com/pins/about/andreeva.htm>

<sup>50</sup> *Женщина, приостановившая Перестройку*. Интервью с Ниной Андреевой at <http://www.aif.ru/politics/russia/41401>

used heavily propaganda to enforce a program of ideological indoctrination. For those who stubbornly resisted change, he used a method of personnel and administrative purges.<sup>51</sup>

In fact, immediately after the 27<sup>th</sup> Congress of 1986, Aleksandr Yakovlev, 52, the closest adviser of Gorbachev, and who was in charge of the Central Committee's press department during 1986 replaced many titles of magazines and newspapers, that was disagreeing with new policy of Gorbachev and the press entirely passed under the control of reformers, namely liberal elites. In addition, Gorbachev during his office completed many personnel changes.<sup>53</sup> The most notable change was the replacement of Andrei Gromyko, who had served for 28 years as Minister of Foreign Affairs, with Eduard Shevardnadze, who was without experience in the diplomatic field but shared with Gorbachev an outlook.

Additionally Gorbachev was the first who used Soviet television to solicit directly Soviet people to participate in *Perestroika* 'experiments' and to encourage criticisms of his opponents. Leader of the USSR quickly turned to a kind of TV star with his reform intentions. In particular, Soviet television gave wide coverage of Gorbachev's endless trips from Moscow to Vladivostok aimed to propose his campaign for perestroika in the Soviet society.

So, through the mass media, Gorbachev and his advisor team could openly criticize the Communist party, oppositions and solicit the people to follow their example.<sup>54</sup>

## 5. *Democratisation*

A further measure taken on the continuation of the political reforms was a report adopted on January 27th, 1987 at the Central Committee Plenum of the CPSU Central Committee titled "On Reorganization and the Party's Personnel Policy".<sup>55</sup> In this report, Gorbachev expressed some delusion at the slow *Perestroika* introduction into Soviet society calling for truly revolutionary, comprehensive transformations of society. At the same time the Soviet leader advocated a faster political personnel turnover, a policy which was a reaction against the 'principle of cadre stability', which was a remnant of Brezhnev's policy. Simultaneously, Gorbachev encouraged political and civilian criticism of traditional policies and the count of the reforms. Likewise, Gorbachev in his

<sup>51</sup> З.А. Станкевич, *История крушения СССР. Политико-правовые аспекты*. М., 2001; Он же: СССР на завершающем этапе существования: эрозия и распад союзной государственности: (историко-правовые проблемы). М., 2009

<sup>52</sup> Aleksandr Yakovlev is known as architect of perestroika because is considered the intellectual force behind Mikhail Gorbachev's reform program of glasnost and perestroika.

<sup>53</sup> Gorbachev started to prepare the ground for reforms with a series changes in personnel (1985-1986). In practice the Soviet Leader moved many opponents of his reforms, from their positions and replaced them with reformers who shared his insight. Especially, among reformers promoted by Gorbachev there were two his allies, who played an important role in the reforms *Perestroika*, namely Aleksander Yakovlev and Eduard Shevardnadze. Yakovlev, who became closest adviser of Gorbachev known as "architect of perestroika" and the "Father of reform Glasnost" (openness), was promoted as a head of the Central Committee Propaganda Department and a secretary of the CPSU Central Committee. Shevardnadze, who had an essential contribute to the reunification of two Germans, was appointed as Minister of Foreign, at [https://www.rug.nl/research/portal/files/9816471/part\\_2\\_chapter\\_1.pdf](https://www.rug.nl/research/portal/files/9816471/part_2_chapter_1.pdf)

<sup>54</sup> А.С. Барсенков, *Реформы Горбачёва и судьба союзного государства*. 1985-1991. М., 2001 М.: Изд-во МГУ, 2001, p. 145.

<sup>55</sup> Gidadhulbi, R. G. (1987, May 02). *Perestroika and glasnost*, at <http://www.jstor.org/stable/4376986>, accessed on 8 November 2014.

speech urged the farther expansion of the idea of Glasnost and proposed the policy of *democratization*.

The concept *Democratization* was intended as some basic elements of the democracy. In particular, this term was linked to multiple candidacy elections for some local government posts and the appointment of non-Party members to government positions.

In the summer of 1988, Gorbachev launched his most radical reform. In late June 1988 during the XIX All-Union Party Conference Gorbachev endorsed fundamental reform which went beyond the limits of the traditional Soviet system and adopted the Resolution "On Glasnost," which contributed to further triumph on the opponents of Perestroika. In particular, he proposed: a presidential system for the Soviet Union, a new parliament which was to be called the Congress of People's Deputies, an increase in the power of local Soviets at the expense of the Communist Party and the removal of the Party from state economic management. This led to the monopoly of the Communist Party being attacked. Indeed, the XIX All-Union Party Conference's decisions were the real turning point, when the perestroika became irreversible.<sup>56</sup> Accordingly, in December 1988, the Supreme Soviet approved the establishment of a Congress of People's Deputies as the Soviet Union's new legislative body. In March 1989, the elections were held in the Soviet Union to elect the USSR Congress of People's Deputies. These elections were a success for the reformers, while many Party candidates lost the election. Indeed, around 300 reformist candidates were elected and the conservatives were entirely removed from the government. In May, the first Congress of People's Deputies was opened in which Gorbachev was elected chairman. The permanent variant of the Congress of People's Deputies, the Supreme Soviet, was elected the day after the opening of the Congress. Both forums would become important places for political discussion and renewal.

In 1990 there were even more revolutionary events that marked the political life in the Soviet Union. In March, the Congress of People's Deputies amended Article 6 of the Soviet Constitution, ending the monopoly of power of the Communist Party. Moreover, later in the month, Gorbachev was elected as the president of the Soviet Union. The most crucial outcome of these two decisions was that the dual party-government structure had been dissolved. The institutional links between the party and the executive branch were cut. Despite the restructuring of the political institutions during this period, Gorbachev held the supreme power of the state in his hands. His role as a leader combined the functions of: Chairman of the legislative body, Head of State as well as General Secretary of the Communist Party. This combination of functions and the monopolization of supreme power in the hands of one man was a contradiction with the

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<sup>56</sup> Mikhail Gorbachev, *op.cit.*, p. 237

concept of democratization. Crucially, Gorbachev's election as president led to his political isolation and gradually loss of support of the reformers.<sup>57</sup>

A final result of political reforms was the discredit of the Communist and the end of the political supremacy of the Communist Party of the Soviet Union (CPSU). On the one hand the one-party, one-candidate political system upset citizens who saw the democratic process in action throughout Europe. On the other hand, the policy *Glasnost and Democratisation* of Gorbachev was also signed by the incoherence between claimed goals and measures actually undertaken. For instance, although the goal declared was free speech and free expression, but in practice Gorbachev's goal was to exclusively favour to discredit the CPSU and the counters to *Perestroika*. Moreover, excessive condemnation of the past and traditional policy undermined moral values. As another example, in contrast with basic principles of democracy Gorbachev monopolized the supreme power, namely, he was Chairman of the legislative body and head of State.<sup>58</sup>

Domestic reforms sparked secession movements within the Soviet Union.<sup>59</sup> In response to these demands, on April 3rd 1990 under Gorbachev's proposal, the Soviet Supreme legalized the right to secede from the USSR, promulgating the Law on secession.<sup>60</sup> Six Soviet republics (three Baltics republics, Armenia, Georgia, Moldova) violated the Law of 1990 and issued unilaterally declaration of independence.<sup>61</sup> After the coup d'état of 1991, other Soviet constituent units declared their independence thus putting the end of the USSR.<sup>62</sup>

To sum up, results of Gorbachev's reforms were disappointing. Instead of overcome stagnation and improving the economy and the political system promoting democratic values, his reforms caused destabilization, triggering a deep economic crisis and hastening the dissolution of the system, while democracy values were not introduced. The reforms seriously aggravated the standards of living of the Soviet people and sparked ethno-national tensions, some of which turned into armed conflict. As a result, the collapse of the Soviet economy marked the failure of the old system of bureaucratic command planning, but also that of the marketization reforms set up by *Perestroika*.

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<sup>57</sup> Барсенков А.С. Реформы Горбачёва и судьба союзного государства. 1985-1991, op.cit., p. 73.

<sup>58</sup> Ibid., p. 75.

<sup>59</sup> See II secessionist movements and the war of laws within the Soviet Union, pp. 19-27

<sup>60</sup> See 1. paragraph *Law On Secession, III Legal basis for secession and creation of the new States*, pp. 27-28

<sup>61</sup> See 4. paragraph *The self-declaration of Independence of Secessionist Republics*, p.38

<sup>62</sup> See IV *The Commonwealth of the Independent States*, pp.41-42



**PART ONE**  
**GENERAL ASPECTS**

**CHAPTER I**

**THE SECESSIONIST MOVEMENTS AND THE WAR OF LAWS WITHIN THE SOVIET UNION**

**1. The effects of *Perestroika* and *Glasnost***

The policies of *Perestroika* and *Glasnost* put an end to an industrial society based on a command economy and irreparably undermined the hegemony of the Communist Party of the Soviet Union (CPSU) and the authority of Gorbachev himself, but without giving rise to an efficient, alternative economic and political system. The *Glasnost* policy, which greatly contributed to discrediting the CPSU, was used as a tool to manipulate national sentiment with a view to gaining popular support for perestroika and eliminating opposition to Gorbachev's reforms.<sup>63</sup> Gorbachev, in attempts to gain support for his reforms, relied on nationalist groups.<sup>64</sup> In fact, with this very aim in mind, bureaucrats newly appointed by Gorbachev were to form *pro-Perestroika Popular Fronts* with '*National*' *Popular Fronts*, which should give support for nationalist groups throughout the Soviet Union. Inevitably, this policy provoked the emergence of weak nationalist pro-separatist groups from *clandestinely* gathering support for *Perestroika* and against the CPSU. However, thus policy created an unprecedented platform for nationalist pro-separatist movements in the Soviet Republics. This process was hastened by the economic reforms, which led to severe shortages of basic foods, an increase in the use of ration cards, a greater deficit in the state budget, a catastrophic reduction in gold funds and a devalued ruble, with a consequent increase in public discontent.<sup>65</sup> Hence, a deep dissatisfaction of the Soviet people with economic reforms and the Policy of *Glasnost* contributed to these movements falling more and more into the hands of openly pro-separatist forces '*National*' *Popular Fronts* moving them into a commanding position in the *Soviet republics*. As a consequence, secessionist movements affected the Soviet Union on the first level. According to the USSR Constitution of 1977 the Union of Soviet Socialist Republics was a federal, multinational state with multiple levels, which included the four levels of entities. In particular, it was composed of the 15 first-level units - the

<sup>63</sup> Г.Н. Севостьянов, *Трагедия великой державы: Национальный вопрос и распад Советского Союза*: Сб. РАН Институт российской истории, М., 2005, р. 13.

<sup>64</sup> В.А. Печенев, *Смутное время в истории России (1985-2003)*. М., 2007; Он же: *Распад СССР: историческая случайность или спланированная акция?*, *Представительная власть: мониторинг, анализ, информация*. 1998. Спец. Выпуск, р.145.

<sup>65</sup> С.Коэн, «*Вопрос вопросов*»: почему не стало Советского Союза? М., 2011. С. 42

*Union Soviet Socialist republics (Soviet Republics)* (e.g. the Georgian SSR)<sup>66</sup>, the 20 second-level units – the *Autonomous Republics* (e.g. Abkhazian Autonomous republic), the 8 third-level units – the *Autonomous regions* (e.g. the South Ossetian Autonomous region) and the 10 fourth-level units - *Autonomous areas*.<sup>67</sup>

## 2. The requests for greater autonomy within the Soviet Union

The disintegration of the Soviet Union began in the peripheries. The first region to produce organized nationalist movement was the Baltic region, in particular, the first-level sub-unit *Estonian Soviet Socialist Republic (the Estonian SSR)*. On November 16, 1988, the Estonian legislative organ *Soviet Supreme* issued the *Declaration on 'Sovereignty' of Estonia*.<sup>68</sup>

The document provided for the supremacy of Estonian laws over those of the Soviet Union. At the same time however, the Estonian Declaration asserted that the Estonian republic would remain part of the USSR, but on the basis of a new All-Union agreement. In other words, Estonia claimed for amendments to the All-Union Treaty (base law of the Soviet Union), namely, establishment of the new Union based on decentralized federation. Thus the Estonian republic demanded '*sovereignty*' within the reformed the Soviet Union. As can be seen the Declaration on Estonian '*sovereignty*' was contradictory. This contradiction could be explained only by inappropriate use of the term *Sovereignty*'. In practice the republic demanded greater autonomy within the Soviet Union. This declaration was soon followed by similar '*Declarations on 'Sovereignty'*' from the other (three first-level sub-units) *Soviet republics* Azerbaijan (on 23 September, 1989)<sup>69</sup>, Latvia (on July 28, 1989),<sup>70</sup> while Lithuania (on May 26, 1989)<sup>71</sup> in which they demanded greater autonomy within the Soviet Union.

Boris Yeltsin, as leader of the Russian Republic, expressed his solidarity with the Baltic republics and Azerbaijan.<sup>72</sup> In fact, the fifth *Soviet Republic* that adopted a Declaration on '*Sovereignty*' [autonomy] was the Russian SFSR.<sup>73</sup> On June 12, 1989 the Russian Congress of Deputies, guided by Chairman Boris Yeltsin, adopted a Declaration on '*sovereignty*'. The Declaration solemnly proclaimed the '*State sovereignty*' of the Russian SFSR throughout all of its

<sup>66</sup> Article 71, the USSR Constitution of 1977: the Russian Soviet Federative Socialist Republic (the Russian SSR); the Ukrainian Soviet Socialist Republic (the Ukrainian SSR), the Byelorussian Soviet Socialist Republic, the Uzbek Soviet Socialist Republic, the Kazakh Soviet Socialist Republic, the Georgian Soviet Socialist Republic, the Azerbaijan Soviet Socialist Republic, the Lithuanian Soviet Socialist Republic, the Moldavian Soviet Socialist Republic, the Latvian Soviet Socialist Republic, the Kirghiz Soviet Socialist Republic, the Tajik Soviet Socialist Republic, the Armenian Soviet Socialist Republic, the Turkmen Soviet Socialist Republic, the Estonian Soviet Socialist Republic.

<sup>67</sup> The USSR Constitution of 7 October 1977, at [http://constitution.garant.ru/history/ussr-rsfsr/1977/red\\_1977/5478732/](http://constitution.garant.ru/history/ussr-rsfsr/1977/red_1977/5478732/)

<sup>68</sup> Декларация Верховного Совета Эстонской Советской Социалистической республики о суверенитете Эстонской ССР,

<sup>69</sup> The Law on sovereignty of the Supreme Soviet of the Azerbaijan SSR, at <http://constitutions.ru/?p=2893>

<sup>70</sup> Декларация Верховного Совета Латвийской ССР О Государственном Суверенитете Латвии [Declaration on sovereignty of the Supreme Soviet of the Latvian SSR], at <http://constitutions.ru/?p=2945>

<sup>71</sup> Декларация Верховного Совета Литовской ССР О Государственном Суверенитете Литвы [Declaration on sovereignty of the Supreme Soviet of the Lithuanian SSR], at <http://constitutions.ru/?p=2932>;

<sup>72</sup> К. Брутенц, *Политическое "рождение" Ельцина: Мир перемен.* - М., 2004. - N 3. p.60

<sup>73</sup> The four first Declarations on the sovereignty were those of Estonia (November 16, 1988), Lithuania (26 MAY 1989), Azerbaijan (23 September 1989), Latvia (4 MAY 1990).

territory within the Soviet Union and established the supremacy of the constitution and laws of the Russian RSFSR over the legislation of the Soviet Union. The Declaration provided for reforming the USSR, where the relationships between the Soviet republics would be “based on an agreement.”<sup>74</sup> However, Yeltsin claimed not only greater autonomy for the Russian Republic, but also invited the other Soviet republics to follow his example. Since the Russian RSFSR actually formed the bulk and dominant force, (the largest constituent republic with about 2/3 of the population and territory), therefore its demands for greater autonomy within the USSR, which were, at least, odd. This surreal situation can only be explained by a personal confrontation between Gorbachev and Yeltsin. As a consequence, the other *Soviet republics* produced similar acts in the 1990s.<sup>75</sup>

Thus, in 1989-1990 the 14 *Soviet Republics* (excluding the Armenian SSR) demanded greater autonomy within the Soviet Union and the reformation of the Soviet Union. In response, the Presidium of the USSR *Soviet Supreme* initiated the process of drawing up of a new All-Union Treaty, which would grant greater political, economic and other autonomies to Georgia and Abkhazia. In fact, at the Plenum of CPSU in February of 1990 M. Gorbachev officially approved the drawing up of a new All-Union Treaty<sup>76</sup>.

### 3. The unilateral declarations of independence by the Baltic Republics

The situation changed in 1990s with the Baltic demands not more on greater autonomy, but for secession from the USSR. The Baltic republics were also the first *Soviet republics*, which moved unilateral declarations of independence. The reasons, on which the Baltic countries’ requests for independence from the Soviet Union were based, were used as a model by other Soviet republics, including Georgia to justify their unilateral secession from the Soviet Union. For this reason it is necessary to examine briefly the grounds of the Baltic republics.

According to the Baltic republics their right to unilateral secession from the Soviet Union was founded on the Treaty of *Non-aggression between Germany and the Union of Soviet Socialist Republics (Molotov–Ribbentrop Pact)* of 1939,<sup>77</sup> which in their opinion, contributed to the incorporation of the Baltic republics into the Soviet Union.

<sup>74</sup> Declaration on sovereignty of RSFSR at <http://constitutions.ru/?p=2924>

<sup>75</sup> The Uzbek SSR (20 June 1990), the Moldavian SSR (23 June 1990), the Ukrainian SSR (16 July 1990), Byelorussian SSR (27 JULY 1990), the TURKMEN SSR (22 August 1990), the Armenian (23 AUGUST 1990), THE TAJIK SSR (24 August, 1990), THE Kazakh SSR (25 Octobre 1990), the Georgian SSR (14 NOVEMBER 1990), THE Kirghiz SSR (15 DECEMBER 1990).

<sup>76</sup> *К Союзу Суверенных народов*. Сборник документов КПСС, законодательных актов, деклараций, обращений и президентских указов, посвященных проблеме национально-государственного суверенитета. М., 1991 [Collection of the KPSS documents: legislativeacts, declarations, statements and President’s decrees concerning the issue of national State sovereignty].

<sup>77</sup> Treaty of *Non-aggression between Germany and the Union of Soviet Socialist Republics (Molotov–Ribbentrop Pact)* of 1939, at <http://www.ibiblio.org/pha/nsr/nsr-02.html#21>

### *a. Historical backgrounds*

Before proceeding to an examination of the *Molotov–Ribbentrop Pact* it is important to give briefly the historical backgrounds of Baltic countries. The territory of Estonia and parts of Latvia had been part of the Russian Empire as its regions for 197 years, through to World War I, as acquired from Sweden by the Treaty of Nystadt (1721).<sup>78</sup> The rest of Latvia and the territory of current Lithuania was acquired under Catherine the Great in the third partition of Polish–Lithuanian Commonwealth amongst Prussia, Austria, and Russia in 1795.<sup>79</sup> The Baltic territories were a part of the Russian Empire until to its decline of 1917. After the Russian Empire’s collapse the Baltic entities were occupied by Germans. After the German defeat in 1918-1920 the Republics declared their independence. The self-proclaimed Russian Soviet Republic recognized them in the 1920s. At that time the majority of the states did not recognized *de jure* the Baltic Republics. Indeed, most states continued considered them a part of the Russian Empire, which actually *de facto* ceased to exist in 1917. Only in 1921-1922 new proclaimed Baltic states obtained *de jure* recognition. From 1939 to 1940, relying on left-wing political forces in Latvia, Lithuania, and Estonia, the Stalinist leadership established control over Baltic countries. In 1940 the parliaments of Baltic countries issued a law on reunification with the USSR and *de facto* took its part. Parallel to this in 1939 it was ratified the *Molotov–Ribbentrop Pact* on *Non-aggression* between Germany and the Union of Soviet Socialist Republics, which was supplemented with secret additional protocol. Under terms of Protocol Germany promised not to invade the spheres of Soviet influence, that is territories of actual Ukraine, Moldavia, Poland, the Baltic countries. The pact was ratified by the USSR Supreme Soviet within a week of its signing. While the secret additional protocol were never ratified by the Soviet Union. The *Molotov–Ribbentrop Pact* was not long in coming.<sup>80</sup> After the ratification, September 1, 1939, Germany invaded Poland, and June 22, in 1941 Hitler’s troops attached the USSR, thus violating the Pact.<sup>81</sup> The Baltic republics were military occupied by Nazi Germany from 1941 to 1944. In 1944 after their liberation from Nazi German forces, Latvia, Lithuania and Estonia returned to form a part of the Soviet Union. After the end of the Second World War the incorporation of the Baltic republics into the Soviet Union obtained international *de jure* recognition by the agreements made in the context of the

<sup>78</sup> *Ништадтский мирный договор между Россией и Швецией*, 30 августа 1721 г., Сборник архивных документов. М., Русская книга, 1992. (The Treaty of Nystad between Russia and Sweden, a collection of the archival documents, Moscow, Russian book), at <http://law.edu.ru/norm/norm.asp?normID=1119383>

<sup>79</sup> W. Roczniak, *The Polish-Lithuanian Commonwealth*, at <http://www.oxfordbibliographies.com/view/document/obo-9780195399301/obo-9780195399301-0119.xml>

<sup>80</sup> Non-Aggression Pact between Germany and the USSR (Molotov-Ribbentrop Pact) at: <https://sputniknews.com/analysis/20090820/155869035.html>

<sup>81</sup> *Ibid.*, at [http://www.istorik.ru/library/documents/molotov\\_ribbentrop/](http://www.istorik.ru/library/documents/molotov_ribbentrop/)

Yalta Conference<sup>82</sup> and the Potsdam Conference.<sup>83</sup> Moreover, this juridical situation was reaffirmed by the final act of the Conference on Security and Co-operation in Europe in 1975.<sup>84</sup>

Nonetheless, the issue of the Baltic countries' incorporation into the USSR has been arisen in the late 1980s, when the participants of the first Congress of USSR People's Deputies demanded disclosure of the circumstances surrounding the signing of the Pact. In fact, in the context new policy *Glasnost* of Gorbachev, on December 24, 1989 the USSR People's Deputies, which was the supreme body of state authority in the USSR at that time, adopted a resolution "On the Political and Legal Assessment of the Soviet-German Non-aggression Treaty of 1939," in which officially denounced the act of Stalin as "personal power," which in no way reflected the "will of the Soviet people who are not responsible for this conspiracy."<sup>85</sup> This document emphasized that "Stalin and Molotov conducted talks on the secret protocol with Germany while keeping it from the Soviet people, the Central Committee of the All-Union Communist Party (Bolsheviks), and the entire party, the Supreme Soviet, and the Soviet government."<sup>86</sup> Given a legal opinion on the Molotov-Ribbentrop Pact became a central issue in the context of Baltic secessionist movements.

### ***b. Assessment of the Molotov-Ribbentrop Pact and the secret Protocol***

According to the non-aggression pact (Art.1), the Soviet Union and Germany pledged to "desist from any act of violence, any aggressive action, and any attack on each other, either individually or jointly with other powers."<sup>87</sup> Moreover, the two parts promised not to support coalitions of other countries that may take action against the parties to the agreement. Neither of the two contracting parties shall participate in any grouping of powers whatsoever that is directly or indirectly aimed against the parties to the agreement (Art. I).<sup>88</sup> Hence, *the Molotov-Ribbentrop Pact* itself did not go beyond the established practice of international relations on the eve of World War II. Other countries signed (for instance, Poland, also signed a similar pact with Germany in 1934), or tried to sign such pacts as well. But the Pact was supplemented with secret additional protocols, in which Germany promised not to invade the spheres of Soviet influence. To be

<sup>82</sup> L. Goldman, *The Yalta Conference*, Law Library, Avalon Projects, in *Documents in laws, history and in diplomacy*, 2008, at <http://avalon.law.yale.edu/wwii/yalta.asp>

<sup>83</sup> Матералы Берлинской (Потсдамской) конференции руководителей трех союзных держав – СССР, США и Великобритании, 17 июля – 2 августа 1945 г., (Berlin (Potsdam) conference's materials of three powers in alliance - the USSR, the US and Great Britain, 17 July -2 August 1945), at [http://www.hist.msu.ru/ER/Etext/War\\_Conf/berlin.htm](http://www.hist.msu.ru/ER/Etext/War_Conf/berlin.htm)

<sup>84</sup> *The Final Act of the Conference on Security and Cooperation in Europe*, Aug. 1, 1975, 14 I.L.M. 1292 (Helsinki Declaration), at <http://www1.umn.edu/humanrts/osce/basics/finact75.htm>

<sup>85</sup> *Ibid.*, at [http://www.lawmix.ru/docs\\_cccp.php?id=1241](http://www.lawmix.ru/docs_cccp.php?id=1241); Mart Nutt, *The establishment and restoration of Estonian independence and the development of Estonian foreign relations*, 2007, at [http://vm.ee/sites/default/files/content-editors/web-static/439/Mart\\_Nutt.pdf](http://vm.ee/sites/default/files/content-editors/web-static/439/Mart_Nutt.pdf); Non-Aggression Pact between Germany and the USSR (Molotov-Ribbentrop Pact), at <https://sputniknews.com/analysis/20090820/155869035.html>; at [http://www.lawmix.ru/docs\\_cccp.php?id=1241](http://www.lawmix.ru/docs_cccp.php?id=1241)

<sup>86</sup> *Non-Aggression Pact between Germany and the USSR* (Molotov-Ribbentrop Pact at [http://www.lawmix.ru/docs\\_cccp.php?id=1241](http://www.lawmix.ru/docs_cccp.php?id=1241)

<sup>87</sup> *Ibid.*, at <http://www.ibiblio.org/pha/nsr/nsr-02.html#21>

<sup>88</sup> *Ibid.*, at <http://www.ibiblio.org/pha/nsr/nsr-02.html#21>

precise, in accordance with the secret protocol, Germany promised not to invade Poland's eastern regions, populated predominantly by Byelorussians and Ukrainians, and the Baltic states of Latvia, Lithuania, and Estonia. This Protocol remained secret until its official denunciation by the *Congress People's Deputies* headed by Gorbachev<sup>89</sup>. Hence *the Molotov-Ribbentrop Pact* itself was perfectly in the line with International law, but its secret protocol delimitating spheres of influence between sides, was undoubtedly contrary to international law. However, it is important to consider this secret agreement between Stalin and Hitler in the context of the military and political situation in Europe. This was the death of the idea of "collective security" in Europe. It became impossible to curtail actions of the aggressor (which Nazi Germany would later become) by concerted effort of peace-loving countries. According to Stalin's plan, the Pact was supposed to become a response to the policy of appeasing Hitler, which Britain and France had been conducting for several years with the aim of setting the two totalitarian regimes at loggerheads, and turning Nazi aggression principally against the USSR. In fact, by 1939, Germany had returned and had remilitarized the Rhine region, had fully reequipped its army in violation of the Versailles Treaty, had annexed Austria, and had established control over Czechoslovakia.<sup>90</sup>

After the official condemnation of *Molotov–Ribbentrop Pact*), although the incorporation of the Baltic republics into the Soviet Union had obtained international *de jure* recognition by the agreements made in the context of the Yalta Conference,<sup>91</sup> the Potsdam Conference,<sup>92</sup> and by the final act of the Conference on Security and Co-operation in Europe in 1975,<sup>93</sup> the issue on legality of the Baltic states' incorporation into the Soviet Union arose. Based on this Pact, in 1990s the Baltic leaders formulated the theses of the *illegal occupation* of the USSR of the Baltic States and their *continuity* as a subject of the International law. Actually, at the moment of establishment of the pro-Soviet government in the Baltic countries (by contrast with other Soviet republics), the latter were independent states, which had obtained international recognition in 1921-1922.

Thus, on November 12, 1989, Supreme Soviet of the Estonian Soviet Socialist Republic (SSR) passed a resolution "A Historical-Legal Assessment of the Events that occurred in Estonia in 1940," whereby assessment were given of the events of 1940 in Estonia and the Molotov-Ribbentrop Pact."<sup>94</sup> The establishment of the pro-Soviet government and the incorporation into the Soviet Union were qualified as an *illegal annexation* of the Republic of Estonia by the Soviet

<sup>89</sup> Ibidem.

<sup>90</sup> Ibidem

<sup>91</sup> L. Goldman, *The Yalta Conference*, Law Library, Avalon Projects, in *Documents in laws, history and in diplomacy*, 2008, at <http://avalon.law.yale.edu/wwii/yalta.asp>

<sup>92</sup> Матералы Берлинской (Потсдамской) конференции руководителей трех союзных держав – СССР, США и Великобритании, 17 июля – 2 августа 1945 г., (Berlin (Potsdam) conference's materials of three powers in alliance - the USSR, the US and Great Britain, 17 July -2 August 1945), at [http://www.hist.msu.ru/ER/Etext/War\\_Conf/berlin.htm](http://www.hist.msu.ru/ER/Etext/War_Conf/berlin.htm)

<sup>93</sup> *The Final Act of the Conference on Security and Cooperation in Europe*, Aug. 1, 1975, 14 I.L.M. 1292 (Helsinki Declaration), at <http://www1.umn.edu/humanrts/osce/basics/finact75.htm>

<sup>94</sup> Mart Nutt , *The establishment and restoration of Estonian independence and the development of Estonian foreign relations*, 2007 at [http://vm.ee/sites/default/files/content-editors/web-static/439/Mart\\_Nutt.pdf](http://vm.ee/sites/default/files/content-editors/web-static/439/Mart_Nutt.pdf)

Union. According to this the Estonian parliament was formed by pro-Soviet government, therefore the laws on *Reunification with the Soviet Union*, was null and void. For that reason, the incorporation of the Republic of Estonia into the Soviet Union was null and void.

The resolution of the Estonian SSR Supreme Soviet of March 30, 1990, regarding *the status of Estonia's statehood*, declared that the *occupation* of Estonia by the Soviet Union on June 17, 1940, had not terminated the existence of the Republic of Estonia *de jure*, and that the territory of the Republic of Estonia was to be considered as having been occupied up until that time. Based thereon, the Estonian SSR Supreme required to re-establish a situation that existed before their "occupation by the Soviet Union" (*restitutio ad integrum*). According to this principle a State guilty of having committed an internationally wrongful act has the obligation of returning the prejudice in kind, in order to restore the situation that existed before the wrongful act occurred, the restitution being made.<sup>95</sup> In particular, as entailed, under opinion of Estonia, of international responsibility for wrongful act – of Estonian *illegal occupation*, the USSR had obligation to restore the Estonian status *quo ante*, that is its independence. Thereby, the Estonian Supreme Soviet declared that Estonia was an independent state, and the all Soviet laws were declared null and void in Estonia.

After this, other Baltic republics issued their unilateral declarations of independence based on similar argumentations,<sup>96</sup> in which they accused the Soviet Union of their *illegal occupation* and advanced the thesis on their continuity as a subject of international law.<sup>97</sup> The thesis of the continuity of the Baltic States was largely shared by the European Community and US. In fact, the "restored Baltic republics" enjoyed a status under international law, which distinguishes from new independent states of the former USSR. This distinction determined the policy of the European Community from the beginning. Whereas the sovereign rights of the Baltic States were recognised without any additional condition,<sup>98</sup> the EC Ministers of Foreign Affairs laid down "guidelines on the recognition of new states in Eastern Europe and in the Soviet Union".

Moreover the Baltic republics were free from the liabilities of the USSR. In particular, since the Republic of Estonia is not regarded as a successor state of the Soviet Union and therefore bears no responsibility for the liabilities of the USSR. On the other hand, according to the principles of continuity, Estonia became fully responsible for the rights and obligations the Republic of Estonia had owned before the occupation. This includes obligations originating in international treaties which were concluded before annexation by the Soviet Union in June 1940. According to the

<sup>95</sup> Yearbook of the International Law Commission, vol. II (1), 1988, p.21; see <http://untreaty.un.org/ilc/guide/>.

<sup>96</sup> at <http://constitutions.ru/?p=2945>

<sup>97</sup> Декларация по вопросу государственной независимости Эстонии, Resolution on Estonian status approved on February, 2 1990, at <http://constitutions.ru/?p=2903>

<sup>98</sup> Bull.ES (1991) 7/8, 1.4.23

principle of *restitutio ad integrum* the country, should have inherited without exception all the obligations deriving from treaties concluded before June 16, 1940.

To sum up, the Baltic republics set the pace for the other *Soviet republics* (excluding the Armenian SSR), which broke from the Soviet laws and issued unilateral declaration of independence justified by ‘illegal occupation’ and ‘their state continuity’. Indeed, after the demands of the Baltic republics, the Georgian SSR (14 November 1990, 31 March 1991)<sup>99</sup> the Moldavian SSR (27 August 1991)<sup>100</sup> produced similar requests of independence.

## CHAPTER II

### THE LEGAL BASIS FOR SEPARATION AND CREATION OF THE NEW STATES

#### 1 The law on Secession

In response to growing secession movements (of the Baltic republics and the Georgian SSR) within the Soviet Union, at the Plenum of CPSU in February of 1990 M. Gorbachev officially approved the drawing up of a new All-Union Treaty, which should have replaced the Union of Soviet Socialist Republics (U.S.S.R.)’s treaty of 1922. It would grant greater political, economic and other autonomies to the Soviet Republics.<sup>101</sup> On 15 March 1990 at the III Congress of Peoples’ Deputies M. Gorbachev announced his main concern that is enacting of measures aimed at reinforcing autonomy of the ‘*Soviet republics*’ (the first-level subunits of the Soviet Union) and upgrading the status of the ‘*Autonomous republics*’ (the second-level sub-units) and other administrative Soviet sub-units.<sup>102</sup>

At the same time an alternative to the draft of the All-Union Treaty was proposed to the *Soviet republics* (the first-level Soviet sub-units) that aspired to secede from the Soviet Union. In particular, the USSR’s legislative body adopted, on 3 April 1990, a new “*Law on the Procedure for Resolving Questions Connected with a Union Republic's Secession from the USSR.*”<sup>103</sup> The Law established the procedures for effecting secession from the USSR. This was the first law<sup>104</sup> that made it possible, at least legally under Soviet law, for *Soviet republics* to exercise their right

<sup>99</sup> at <http://constitutions.ru/?p=2898>

<sup>100</sup> The Declaration of independence of the Republic of Moldova, 27 August 1991, at <http://www.presidente.md/rus/declaration>

<sup>101</sup> *К Союзу Суверенных народов. Сборник документов КПСС, законодательных актов, деклараций, обращений и президентских указов, посвященных проблеме национально-государственного суверенитета.* М., 1991

<sup>102</sup> Речь Президента СССР М.С.Горбачева на Третьем внеочередном Съезде народных депутатов СССР, 15 марта 1990 г. – М.: Политиздат, 1990. – 16 с./ Speech of the USSR President M.S. Gorbachev at the III Extraordinary USSR Congress of Peoples’ Deputies, 15 March 1990, М. Politizdat, 1990. – P. 16.

<sup>103</sup> Закон СССР от 3 апреля 1990 г. *О порядке решения вопросов, связанных с выходом союзной республики из СССР*, at <http://constitutions.ru/?p=2973>.

<sup>104</sup> Before the foundation of the USSR the Russian Republic guided by V. Lenin conceded to all the Russian and not-Russian people (who had taken part of the Russian Empire) the right to self-determination up to secession, see *Part Two, Analysis Of Cases, Chapter II The Dissolution of Russian Empire and the origin of the Georgian'Abkhazian conflict, b. Declaration of the Rights of the Peoples 1918*, p. 84



of secession from the USSR. In fact, although the federal Constitution of 1977 endorsed provisions on the possibility of the Soviet republics to freely secede from the Union Soviet Republics, this point was ambiguous. On one hand, art. 72 stated that ‘Each *Soviet Republic* shall retain the right freely to secede from the USSR. On the other hand, Soviet republics this right was limited. This limitation was explained by art. 73: ‘The jurisdiction of the Union of Soviet Socialist Republics, shall cover:... determination of the State boundaries of the USSR and approval of changes in the boundaries between Soviet republics.’<sup>105</sup> It follows that the right to secede of Soviet republics from the Soviet Union was limited by authorization of the Union of Soviet Socialist Republics government. Moreover, the Soviet law did not provide any adequate tools and procedures to exercise such a right<sup>106</sup>.

The Law specified the conditions, over whom such secession could take place. Article 1 required that the procedure of secession of a Soviet Republic from the USSR in accordance with the Article 72 of the Constitution of the USSR.<sup>107</sup> To secede, a Union (Soviet) republic would have to hold a referendum in which all Soviet citizens legally resident in the republic could participate. Two-thirds of eligible voters (the USSR citizens permanently resident in the republic’s territory) would have to vote in favour of secession (art.6). The law also contained provisions specifying, that in those ‘*Union (Soviet) republics*’ (that is the first-level Soviet sub-units) with ‘*Autonomous republics*’ (the Soviet entities of the second-level) and *Autonomous regions* (sub-units of the third-level), referendums would “held separately” and the electorates of the autonomous entities would retain the right “to decide independently the question of remaining in the USSR or within the seceding *Soviet republic* (the first-level sub-units of the Soviet Union), even to raise the question of their own state-legal status (art.3).

In other words, the high legislative body of the USSR permitted the second-level sub-units ‘*Autonomous republics*’ (e.g. Abkhazia) and the third-level sub-units *Autonomous regions* (South Ossetia and Nagorno-Karabakh) within the territory of the same republic to decide their own legal status freely and independently up to secession and creation their own state.

Moreover, in areas within the seceding republics “that are densely populated by ethnic groups constituting a majority of the population in question”, a separate tally of the results of the referendum on secession would have to be gathered and agreement would have to be reached between the USSR and republic concerned on how to deal with those compactly settled territories

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<sup>105</sup> The 1977 USSR Constitution, at <http://www.hist.msu.ru/ER/Etext/cnst1977.htm#9>

<sup>106</sup> F. J. M. Feldbrugg. Russian Law: The End of the Soviet System and the Role of Law, *Martinus Nijhoff Publishers / Brill Academic*

<sup>107</sup> Article 72. Each Union Republic shall retain the right freely to secede from the USSR. The 1977 USSR Constitution, at <http://www.hist.msu.ru/ER/Etext/cnst1977.htm#9>

(art.3 and art. 14.8).<sup>108</sup> A similar procedure was specified for areas not belonging to republics at the time of their entry into the USSR (art.14.7) (e.g. Crimea, Transnistria).<sup>109</sup>

Article 5 of the Law on Secession endorsed provisions regarding free expression of the will of the peoples of Soviet Republics during the preparation, the course and the review of the results of a referendum on secession from the USSR through observers representing the USSR, Soviet and Autonomous republics and autonomous entities. Furthermore, the Supreme Council of the USSR in the case of necessity could invite observers from the United Nations to the territory of a given republic.<sup>110</sup>

As for results of the referendums the Law provided the following: in a republic, which had Autonomous republics, autonomous regions, autonomous territories or territories with a compactly settled national minority population within its borders, the results of the referendum were to be reviewed by the *Supreme Soviet*<sup>111</sup> of the *Soviet Republic* jointly with the *Supreme Soviet*<sup>112</sup> of the *Autonomous republic* and respective *Soviets of People's Deputies*<sup>113</sup> of the *Autonomous regions* (art.6). Upon the presentation of results by the Supreme Soviet in conformity with the Supreme Soviet of a seceding Republic, the Congress of People's Deputies would set an interim period, which should not to exceed five years and during which problems arising in connection with the secession of the Republic from the USSR had to be resolved.<sup>114</sup> This point was criticized by some authors. For example, Marcelo G. Kohen affirmed that the Law on secession established “such a complicated procedure that it made secession practically impossible”.<sup>115</sup> But this point of view is difficult to accept. This procedure is based on a rational approach. It was due rather to necessity than the intention to put up obstacles for the Soviet sub-units that aspired to leave the Union. A long shared history of the constituent Soviet entities within Russia, in particular in the Russian Empire (actually, all the Soviet sub-units had been the provinces of the Russian Empire until its decline) and then in the Soviet Union determined a significant degree of economic, political and socio-cultural amalgamation. In particular, the centrally planned economy and centralized production planning of the Soviet Union required a certain time for the rebuilding of a new economy, new production systems for all the Soviet sub-units. The Soviet Union was like a unique body, where productive functions were shared between its subunits and none of them were practically able to produce separately. Since the Gorbachev’s reforms did not prepare an efficient

<sup>108</sup> Закон СССР от 3 апреля 1990 г. «О порядке решения вопросов, связанных с выходом союзной республики из СССР», at <http://constitutions.ru/?p=2973>.

<sup>109</sup> Ibid., at <http://constitutions.ru/?p=2973>

<sup>110</sup> Ibid., at <http://constitutions.ru/?p=2973>

<sup>111</sup> The highest body of the first-level sub-units of the Soviet Union

<sup>112</sup> The highest body of the second-level sub-units of the Soviet Union

<sup>113</sup> The highest body of the third-level sub-units of the Soviet Union

<sup>114</sup> Закон СССР от 3 апреля 1990 г., *О порядке решения вопросов, связанных с выходом союзной республики из СССР*, at <http://constitutions.ru/?p=2973>.

<sup>115</sup> M. G. Kohen, *Secession: International Law Perspectives*, 2006, p.23,

basis for decentralizing existing production system, the withdrawal of any Soviet Republic from the Soviet Union meant the total breakdown of economic and production systems. Indeed, the legislative attempts of Gorbachev to decentralised the economic system without creating new effective production and an economic base, just had a very negative effect on the economies of the Soviet Union entities. It was without doubt that the secession of the Soviet republics would lead to the total economic collapse of the Soviet Union and seceding their sub-units. As, indeed happened, after the dissolution of the USSR.

First of all, the issues of All-Union property and financial matters had to be settled during the interim period. Indeed majority of the All-Union property such as, industrial enterprises and industrial complexes, space research, energy, communication, was situated in the not-Russian republics. Thus, art. 14 of the Law on Secession specified that during the interim period the issues of property and financial matters would be settled jointly between the Soviet Union and the seceding the first-level sub-units *Soviet republic*, as well as between the latter and other the first-level republics and other autonomous entities. Thus, art. 14 (1-10)<sup>116</sup> listed property and financial matters, which would have to be decided<sup>117</sup>: (art. 14, 1) the status of the Soviet property on the territory of the seceding republic (industrial enterprises and complexes of industry, space research, energy, communication, sea, rail and air transportation, pipelines, property of the Armed Forces of the USSR, defence and other installations), as well as the property of all-Soviet non-governmental organizations; (art. 14, 2) the property, financial and credit relations of the seceding republic with the USSR and with other *Soviet Republics* as well as with Autonomous republics and autonomous entities (art.14,2, 14,3); the procedure for completing the agreements signed between the industrial enterprises and organizations located on the territory of the seceding Republic and industrial enterprises and organizations located on the territory of other *Soviet Republics*, *Autonomous republics* or other autonomous entities (art.14,4); the legal status and forms of settling accounts of joint enterprises and subsidiaries of enterprises created on the bases of the USSR property and property of other *Soviet republics*, *Autonomous republics* or autonomous entities (art. 14,5), guarantees to secure protection of historic and cultural monuments and ancient burial sites on the territory of the seceding republic (14,9) and other issues to be resolved mutually (14.5).<sup>118</sup>

After the termination of the interim period, (which was set for problems arising in connection with the secession of the Republic from the Soviet Union), or earlier at the pre-scheduled settlement provided by the law, it would convene the Congress of People's Deputies of the USSR, which would verify if the claims of interested parties in that regard were mutually satisfied, ,

<sup>116</sup> Закон СССР от 3 апреля 1990 г., at <http://constitutions.ru/?p=2973>

<sup>117</sup> *Ibidem*.

<sup>118</sup> *Ibidem*.

whereupon they would pass a decision on the withdrawal of a seceding republic. From that moment a seceding Soviet republic would no longer be part of the Soviet Union. Afterwards, the Congress of People's Deputies of the USSR would insert corresponding amendments into the Constitution of the USSR. The reason for this law (*ratio legis*) was prevention of the further destabilization within the Soviet Union and in seceding republics. In fact, since during the Soviet era, determining the administrative boundaries between the USSR's subordinated entities did not reflect the historical and national realities, there were, within the same administrative division there were (often) considerable ethnical and cultural differences in the populations. In some cases, the co-existence of several ethnic groups' was forced (e.g. Azeri and Armenians, Abkhazians and Georgians and so on). Thus the Law on Secession permitted the *Soviet republics, Autonomous republics and regions* of the USSR independently to decide whether to remain in the Soviet Union, or in the seceding Republics, to decide as well on their state legal status. In practice, the Law was designed with the purpose of endorsing the supremacy of the principle of self-determination of peoples over the principle of territorial-administrative boundaries within the USSR in the case of the USSR's dissolution. Thus it was clear, that in the case of secession a Soviet republic, which included within itself smaller entities, ethno-national conflict would be provoked.

## **2. The law “*On the delineation of powers between the USSR and the subjects of the federation*”**

Another equally important law was approved by the USSR Supreme Soviet on the 26 April 1990 entitled “On the delineation powers between the USSR and the subjects of the federation”.<sup>119</sup> Its opening article, as in the 1977 Constitution of the USSR<sup>120</sup>, named the constituent first-level sub-units as “*Sovereign Soviet Socialist states.*” But further articles made explicit that the term ‘*Sovereign states*’ was used incorrectly and under this notion was meant federated units. It did not deal with the Union of ‘*Sovereign states*’ but with a Union formed on the principle of federalism.

Art. 6 contained a list of exclusive competences of the federal government, including a common foreign policy, a uniform monetary system, defence, state banks and federal taxation. These exclusive competences could not have been expanded without the approval of federal subjects (art.7). Art. 4 established that *Soviet republics* and the *Autonomous republics* as well as all the other autonomous sub-units could enter into economic, social and cultural agreements with each other. These agreements would not have to contradict the interest of the USSR or of other

<sup>119</sup> Закон СССР от 26 апреля 1990 г. *О разграничении полномочий между Союзом ССР и субъектами федерации*, at <http://constitutions.ru/?p=2965>

<sup>120</sup> The 1977 USSR Constitution, at <http://www.hist.msu.ru/ER/Etext/cnst1977.htm#9>

republics or other autonomous entities (art.4,3). Moreover, the *Soviet republics* would be allowed to enter into direct relations with foreign governments and sign treaties, but only to the extent that they did not violate federal laws or treaties signed by the USSR. The Law granting a right of secession specified that the right could only be exercised in accordance with federal law.<sup>121</sup>

However, really new aspect of the Law was introduced by Articles 1 (3), which declared that *Autonomous republics* were “Social states” and federal subjects of the Soviet Union. It meant that the *Autonomous republics* (second-level constituent sub-units of the URSS) and the *Soviet republics* (the first-level constituent sub-units) were put on the same level of the Soviet multi-level structure. But this provision came into collision with the USSR Constitution of 1977. The USSR Constitution of 1977 established that the *Autonomous republics* were included directly into the *Soviet republics* within the Soviet Union. Thus, it was an attempt to create the legal basis for introducing the *Autonomous republics* in exclusive sphere of jurisdiction of the federal government of M. Gorbachev.

Since this law was in contradiction to with the USSR Constitution of 1977, it was expected to have become part of the USSR constitution by amendment. Accordingly the USSR Soviet Supreme Resolution of 25 April 1990 “On coming into force the law *On the delineation of powers between the USSR and the subjects of the federation*” should have been inserted as an amendments into the USSR Constitution (5).<sup>122</sup> Although these amendments had not been made, the Law had impact on the *Soviet republics*, which included the *Autonomous republics* and *Autonomous republics*. Only four *Soviet republics* included *Autonomous republics*: the Azerbaijan SSR (Nakhichevan Autonomous SSR), the Georgian SSR (the Abkhazian and Adjar Autonomous SSR), the Russian SFSR (16 Autonomous SSR<sup>123</sup>), the Uzbek SSR (the Kara-Kalpak Autonomous SSR). Thus, after coming in force the Law “On the delineation of powers between the USSR and the subjects of the federation,” all 15 *Autonomous republics* of the Russian SFSR proclaimed ‘sovereignty’ (here the second-level sub-units used term ‘sovereignty,’ in an inappropriate way.’ It should be understood as greater ‘autonomy’) within the USSR upgrading their status to first-level sub-units. Whereas six *Autonomous republics*<sup>124</sup> claimed for greater autonomy within the Russian SFSR. Only the Chechen-Ingush autonomous republic declared independence from the Soviet Union.<sup>125</sup> By contrast with the leader of the Georgian republic<sup>126</sup>, the leader of the Russian SSR,

<sup>121</sup> Supreme Resolution of 25 April 1990 *On coming into force the law “On the delineation of powers between the USSR and the subjects of the federation”*, Ведомости Верховного Совета СССР, 1991, N 1, p.3.

<sup>122</sup> Закон СССР от 26 апреля 1990 г. *О разграничении полномочий между Союзом ССР и субъектами федерации*, at <http://constitutions.ru/?p=2965>

<sup>123</sup> The USSR Constitution, Article 85. The Russian Soviet Federative Socialist Republic includes the Bashkir, Buryat, Dagestan, Kabardin-Balkar, Kalmyk, Karelia, Komi, Mari, Mordovia, North Ossetia, Tatar, Tuva, Udmurt, Chechen-Ingush, Chuvash, and Yakut Autonomous Soviet Socialist Republics. at [http://constitution.garant.ru/history/ussr-rsfsr/1977/red\\_1977/5478732/chapter/10/#block\\_85](http://constitution.garant.ru/history/ussr-rsfsr/1977/red_1977/5478732/chapter/10/#block_85)

<sup>124</sup> The Burjatian ASSR, the Chuvash ASSR, the Karelian ASSR, the Komi ASSR, the Mari ASSR, Nord Ossetian ASSR, at <http://constitutions.ru/?p=2932>

<sup>125</sup> *Ibid.*, at <http://constitutions.ru/?p=2932>

B. Yeltsin stated that everyone should “take as much ‘sovereignty’ as they are able to get hold of”<sup>127</sup>. The Law “On the Delineation of powers” should have served as the basis for a renewed Union. The Law also allowed the *Soviet Autonomous republics* to participate directly in the process of the drawing up of the draft of the All-Union Agreement.

### 3. The drafts of *the All-Union Agreements*

The first Draft of All-Union Agreement was published on 24 November 1990 in Soviet newspapers<sup>128</sup> so that the Soviet citizens could consult it. The Document was elaborated on the basis of 5 versions proposed by several Soviet republics, the USSR Supreme body. The draft of new All-Union Treaty was supposed to redefine the relationship between the central government headed by Gorbachev and the Soviet republics as well other autonomous entities. The Preamble announced the creation of the *Union of the Soviet Sovereign Republics*, of which the parties would be ‘Sovereign’ republics. This Union would be based on new principles.<sup>129</sup>

Article 1 made clear the nature of this Union, indicating that the USSR (Union of the Soviet ‘Sovereign’ Republics) would be based on federation (1,1).

In comparison with the Constitution of 1977, the Draft conceded much more autonomy to its sub-units. According to the Draft, the republic-members could define freely their own state structure, government and administrative divisions within their own territory (Art.1,5), and impose their own taxes (Art. 8,1). At the same time, the Draft provided for All-Union taxation (Art. 8,2). Each republic-member’s laws had supremacy over the All-Union laws and other laws regarding all matters (Art.9), except the matters belonged to exclusive competences of the Union in its territory (Art.5). The republic-members conceded exclusive competences to the Union government for the most important issues of the existence of the Union: the adoption and amendments of the USSR Constitution, defence of the USSR sovereignty and territorial integrity, securing defence of the country, control of the USSR Armed Forces and foreign policy (Art.5). The relations between the Soviet republics, when one of them took part of the other, were regulated on the basis of the mutual internal republic agreements (1, 2).<sup>130</sup>

Thus, Union was based on decentralized federation with weaker central government.

Although the Draft granted a unprecedented degree of authority to the Soviet republics, the

<sup>126</sup> The leader of the Georgian SSR declared the laws of Abkhazia and South Ossetia on upgrading their status to the first-level sub-units null and void, see Chapters IV, 2. The war of laws and Georgian unilateral abolition of Soviet law, p.118.

<sup>127</sup> А.Б.Безбородов, Е.И.Пивовар, *История СССР/РФ в контексте современного Российского общества*, Учебное пособие, М.:Прспект, 2015, Стр.: 55, А.В.Безбородов, Е.И.Пивовар, *The History of the USSR/RF in the context of the modern science for Russian studies*, University book, М. Проспект, 2015, p. 55.

<sup>128</sup> Известия. 1990. 31 августа

<sup>129</sup> *Договор о Союзе Суверенных Государств. Проект*, at [http://www.gorby.ru/userfiles/02\\_soyuznyy\\_dogovor\\_12\\_09\\_91\(2\).pdf](http://www.gorby.ru/userfiles/02_soyuznyy_dogovor_12_09_91(2).pdf)

<sup>130</sup> Ibid..

leaders of the Soviet republics (three Baltic republics, Georgia, Moldavia, Armenia and Russia) refused to sign the new All-Union agreement.<sup>131</sup>

Therefore, at the IV Congress of People's Deputies (24 December 1990) a decision was approved fixing of an All-Union referendum for 17 March 1991.<sup>132</sup> At the same time the federal government with the leaders of the republics (*Soviet and Autonomous republics*) carried on with the drawing up of the draft of the All-Union Agreement. Gorbachev spent next few months trying to negotiate a new Union treaty from the position of increasing weakness. He, with his aides, proposed treaties, each of which would provide for an ever weaker federal centre.<sup>133</sup>

In March of 1991 the 27 republics (the 8 Soviet republics and the 19 Autonomous republics<sup>134</sup>) agreed the new draft of the All-Union Agreement. While Armenia, Georgia, Moldavia and the Baltic republics refused to take part in the process of the drawing up of the new Draft of the All-Union.<sup>135</sup> The original draft, published in November, has been revised in a number of negotiating sessions between representatives of the republics. Nearly all the changes were in favour of the rights of the republics at the expense of those of the Soviet Union. Among the other significant amendments, the new draft treaty recognized large autonomy of republics [*Soviet and Autonomous republics*] within the limits of their competences. Chapter 1, art. 1 declared that both *Soviet and Autonomous republics* had equal rights. Chapter 5, art.1 endorsed the right of the republics [*Soviet and Autonomous republics*] to secede from the union according to a procedure to be set by the republics in the future.<sup>136</sup>

It recognized the right of the republics to full diplomatic relations with other countries, including the exchange of ambassadors and signing of treaties. However, these agreements would not have to contradict to the All-Union treaty and interests of the parties of the Treaty (Chapter 1, Paragraph 7). This draft granted large autonomy within a decentralized federation, not only to the first-level sub-units, those of Soviet republics, but also the second-level sub-units – the Autonomous republics.

On 9 March the Draft of the All-Union Agreement was published.<sup>137</sup>

<sup>131</sup> В. Кудрявцев, *Декларация о суверенитете союзный договор, Новый союзный договор : поиски решений*. М.,1990, р.3-8.

<sup>132</sup> О проведении референдума СССР по вопросу о Союзе Советских Социалистических Республик: Постановление Съезда народных депутатов СССР от 24.12.1990 г. № 1865-1 // Ведомости Съезда народных депутатов СССР и Верховного Совета СССР. 1990. № 52, ст. 1161 / On the implementing of the All-Union Referendum regarding the issue on the USSR: Congress People's Deputies' Resolution, 24.12.1990 N. 1865-1//Vedomosti of the USSR Congress People's Deputies and the Supreme Soviet. 1990.N.52, p. 1161.

<sup>133</sup> СССР и хроника распада, at <http://www.gorby.ru/cccp/new/>

<sup>134</sup> Among these Autonomous republics were Abkhazia, Chechen-Ingush and so on

<sup>135</sup> P.P. Kremnev, *Raspad SSSR mezhdunarodno-pravovye problem*, М., Zerkalo-M, 2005, s.176.

<sup>136</sup> Договор о Союзе Суверенных Государств. Проект, at <http://www.gorby.ru/cccp/alliance/>

<sup>137</sup> Izvestija, 9 March 1990, Newspaper, Russian Version.

#### 4. The All-Union Referendum

Thus, the USSR government headed by M. Gorbachev proposed two alternatives to leaders of the Soviet Union sub-units: establishment of the new Union based on decentralized federation, or secede according to a procedure set by the Law on secession of 1990.

With respect to the two USSR Resolutions (Congress People's Deputies' Resolution of 24 December 1990 "On the implementing of the All-Union Referendum on the USSR Issue" the All-Union Referendum,<sup>138</sup> the USSR Supreme Soviet Resolution "On the organization and guarantee measures for the implementing the All-Union Referendum for the USSR Preservation"<sup>139</sup>) on 17 March 1991 it was agreed to hold the All-Union Referendum for 'the USSR preserving it as a Federation of the equal republics.'<sup>140</sup> All Soviet citizens were asked to vote "yes" or "no" to the following: "Do you think that the Union of Soviet Socialist Republics should be preserved as a renewed federation of equal sovereign republics, in which the rights and freedoms of the person of any nationality should be fully guaranteed?"

In accordance with the Law on Secession of 1990,<sup>141</sup> referendums were held separately in each republic (in the Soviet and Autonomous republics<sup>142</sup>). Thus, the All-Union referendum on the USSR Preservation took place in the nine *Soviet republics* (the Russian SFSR, the Ukrainian SSR, the Byelorussian SSR, the Uzbek SSR, Azerbaijan SSR, the Kazakh SSR<sup>143</sup>, the Kirgiz SSR, the Tadjik SSR, Turkmen SSR). The All-Union referendum was also held in the 20 *Autonomous republics*, which were included in *the Soviet republics* within the Soviet Union (in the 16 second-level sub-units comprising part of the Russian SFSR<sup>144</sup> within the USSR; the Nakhichevan *Autonomous republic* (comprising part of the Azerbaijan SSR within the USSR), the Abkhazian *Autonomous republics* (comprising part of the Georgian SSR within the USSR), the Kara-Kalpak *Autonomous republic* (comprising part of the Uzbek SSR within the USSR). Moreover, in the seceding republics the All-Union referendum was conducted in the other Soviet entities by the force of the *Law on Secession*. For instance, in the third-level sub-units *South Ossetian*

<sup>138</sup> О проведении референдума СССР по вопросу о Союзе Советских Социалистических Республик: Постановление Съезда народных депутатов СССР от 24.12.1990 г. № 1865-1 // Ведомости Съезда народных депутатов СССР и Верховного Совета СССР. 1990. № 52, ст. 1161

<sup>139</sup> Верховный Совет СССР Постановление от 16 января 1991 г. N 1910-1 об Организации и мерах по обеспечению проведения референдума СССР по вопросу о сохранении Союза Советских Социалистических Республик: at <http://ppt.ru/newstext.phtml?id=16598>

<sup>140</sup> Ibid., Art. 1, at <http://ppt.ru/newstext.phtml?id=16598>

<sup>141</sup> The USSR Supreme Soviet's Law of 3 April 1990 *Law on the Procedure for Resolving Questions Connected with a Union Republic's Secession from the USSR*, The Register of the Congress of the People's Deputies of USSR and Supreme Soviet of USSR. 1990, issue No. 13, p. 252; at <http://russia.bestpravo.ru/ussr/data01/tex10974.htm>

<sup>142</sup> Excluding the Adjarian Autonomous republic.

<sup>143</sup> While, in the Kazakh SSR the residents were asked to vote to vote "yes" or "no" to: "Do you think that the Union of Soviet Socialist Republics should be preserved as a renewed Union of equal sovereign republics". However, the Presidium of the Kazakh SSR Supreme Soviet officially called for the putting of the Kazakh residents' votes on the overall All-Union electoral roll.

<sup>144</sup> The USSR Constitution, Article 85. The Russian Soviet Federative Socialist Republic includes the Bashkir, Buryat, Dagestan, Kabardin-Balkar, Kalmyk, Karelian, Komi, Mari, Mordovia, North Ossetia, Tatars, Tuva, Udmurt, Chechen-Ingush, Chuvash, and Yakut Autonomous Soviet Socialist Republics. at [http://constitution.garant.ru/history/ussr-rsfsr/1977/red\\_1977/5478732/chapter/10/#block\\_85](http://constitution.garant.ru/history/ussr-rsfsr/1977/red_1977/5478732/chapter/10/#block_85)



*Autonomous region* (comprising part of the Georgian SSR within the Soviet Union); in territories with a compactly settled national minority population, such as Gagauz and Transdnistria, which were included in the Moldavian SSR within the USSR.<sup>145</sup>

Whereas the six Soviet republics (Lithuania, Estonia, Latvia, Georgia, Moldavia, Armenia) boycotted the All-Union referendum.

The results were the following: the total electoral roll of the USSR was 148,574,606<sup>3</sup> people (80%). Out of these figures, the overwhelming majority of the Soviet citizens, namely 113,512,812 (76.4 %) people, reportedly voted for preserving the renewed USSR.<sup>146</sup>

Thus, it is worth noting<sup>147</sup> that the percentage of Belarusians (82.7%), Uzbeks (93.7%), Kazakhs (94.1%), Kyrgyz (96.4%), Tajiks (96.2%), Turkmen (97.9%) voted for the USSR preservation, who voted in favour of preserving the USSR, was even higher than the percentage of residents of Russia (71.3%), Ukraine (70.2%) and Azerbaijan (45.1%) who did so.<sup>148</sup>

The figures of vote results for some *Autonomous republics* of the Soviet Union: the Chechen-Ingush *Autonomous republic* (Chechen republic) forming part the Russian SFSR - 75.9 % of the Chechen electorate voted for the USSR preservation; the Abkhazian *Autonomous republic* within the Georgian Soviet Republic - the Abkhazian electorate 71.6 % voted for the USSR preservation. Although the Georgian local authority attempted to prohibit the implementing the All-Union referendum in the South Ossetian *Autonomous region* (part of Georgia within the USSR), the South Ossetian people not only participated, but also demonstrated quite high percentages of pro-USSR voters (79.6 %). The overwhelming majority of Gagauzs (98%) and Pridnestrian people (98%) voted for the USSR preservation.<sup>149</sup>

Based on the referendum results (76.4 % of the Soviet citizens' electorate opted for preserving the renewed All-Union federation) the leaders of the *Soviet republics* and *Autonomous republics* should have to sign the new All-Union Agreement. To the contrary, the will of the Soviet people, the new All-Union Agreement was not signed by the Soviet leaders because of

<sup>145</sup> РИА Новости at [http://ria.ru/history\\_spravki/20110315/354060265.html#ixzz3svH1xF1q](http://ria.ru/history_spravki/20110315/354060265.html#ixzz3svH1xF1q)

<sup>146</sup> Постановление Верховного Совета СССР от 21.03.1991 г., *Об итогах референдума СССР 17 марта 1991 г.*, Ведомости Съезда народных депутатов СССР и Верховного Совета СССР. 1991. № 13, ст. 350; / On the vote results of the All-Union referendum of 17 March 1991: the USSR Supreme Soviet's Resolution of 21 March 1991 //Vedomosti of the Congress of People's Deputies and the USSR Supreme Soviet.

<sup>147</sup> the Russian SFSR (out of 75.4% people 71.3% voted for the USSR preservation); the Ukrainian SSR (out of 83.5% people 70.2% voted for the USSR preservation); the Belorussian SSR (out of 83.3% people 82.7% voted for the USSR preservation); the Uzbek SSR (out of 95.4% people 93.7% voted for the USSR preservation); the Kazak SSR (out of 88.2% people 94.1% voted for the USSR preservation); the Azerbaijan SSR (out of 75.1% people 45.1% voted for the USSR preservation); the Kirgiz SSR (out of 92.9% people 96.4 % voted for the USSR preservation); the Tajik SSR (out of 94.4% electorates 96.2% voted for the USSR preservation); the Turkmen SSR (out of 97.% electorates 97.9% voted for the USSR preservation). Об итогах референдума СССР 17 марта 1991 г.: Постановление Верховного Совета СССР от 21.03.1991 г., Ведомости Съезда народных депутатов СССР и Верховного Совета СССР. 1991. № 13, ст. 350; / On the vote results of the All-Union referendum of 17 March 1991: the USSR Supreme Soviet's Resolution of 21 March 1991 //Vedomosti of the Congress of People's Deputies and the USSR Supreme Soviet.

<sup>148</sup> Постановление Верховного Совета СССР от 21.03.1991 г., *Об итогах референдума СССР 17 марта 1991 г.*, Ведомости Съезда народных депутатов СССР и Верховного Совета СССР. 1991. № 13, ст. 350; / On the vote results of the All-Union referendum of 17 March 1991: the USSR Supreme Soviet's Resolution of 21 March 1991 //Vedomosti of the Congress of People's Deputies and the USSR Supreme Soviet.

<sup>149</sup> Ibid..

August Revolt and then by coup of Boris Eltsin, Leonid Kravchuk, Stanislav Shushkevich, which led to the termination of the existence of the USSR.

## 5 The declaration of independence of the Secessionist States

The Baltic republics, Georgia, Armenia, and Moldova violating the USSR Resolutions,<sup>150</sup> the Law on Secession,<sup>151</sup> the USSR Constitution of 1977 were unequivocally committed to break away from the USSR through boycotting the absolutely binding All-Union referendum.

At the same time the Baltic republics, Georgia and Armenia conducted their own referendums, at which voted for full independence. In particular, on 9 February 1991 the Lithuanian leader conducted national public-opinion poll, in which 90.4% of the Lithuanian residents expressed in favour of Independence. But four days before the Lithuanian local opinion-poll, Gorbachev had voided the result in advance, saying the vote could only be interpreted as an attempt to block another nationwide referendum that has been scheduled by the Soviet Parliament for March 17.

On 3 March 1991 the Latvian authorities carried out independence opinion poll, which showed that 73.7% of the voters opted for independence from the Soviet Union. On the same day the Estonian republic hold its own referendum on *the Restore of independence of the Estonian state*, at which only ethnic Estonians and residents with so-called *green card* (the cardholder could be only Estonian residents with pro-separatist outlook)<sup>152</sup> participated. Out of those, who were allowed to vote 77.8 % supported Estonian independence. On 31 March 1991 the Georgian leader, Zviad Gamsakhurdia, who provided for a nationalist, isolationist policy, conducted its own local referendum on so-called ‘the restore’ of independence of the Georgia, in which 98% of voters (minus South Ossetia and Abkhazia<sup>153</sup>) chose independence. On 21 September 1991 Armenia (deeply deluded with Gorbachev’s reforms and the position of the USSR President in regard to the Nagorno-Karabakh issue) hold its own referendum on Independence from the Soviet Union. Out of 95 % of the electorate 99% supported full Armenian independence.<sup>154</sup> The USSR president declared these republic polls invalid. Nevertheless, following the results of their respective

<sup>150</sup> Congress People’s Deputies’s Resolution of 24 December 1990 *On the implementing of the All-Union Referendum on the USSR Issue” the All-Union Referendum*, the USSR Supreme Soviet *Resolution On the organization and guarantee measures for the implementing the All-Union Referendum for the USSR Preservation*

<sup>151</sup> The USSR Supreme Soviet’s Law of 3 April 1990, *Law on the Procedure for Resolving Questions Connected with a Union Republic’s Secession from the USSR*, The Register of the Congress of the People’s Deputies of USSR and Supreme Soviet of USSR. 1990, issue No. 13, p. 252; at <http://russia.bestpravu.ru/ussr/data01/tex10974.htm>

<sup>152</sup> *Postanovlenie O gosudarstvennoj nezavisimosti Estonii*, Spravka, Ria Novosti.

<sup>153</sup> While South Ossetia and Abkhazia in full respect of the Soviet laws, which were in force at that time, boycotted the Georgian referendum and had participated at the All-Union Referendum.

<sup>154</sup> Armenia tozhe stala nezavisimoj//Izvestija n. 227, Newspaper, 23 September 1993

referendum on independence from the USSR the Baltic republics, Georgia and Armenia moved unilaterally the declaration of independence<sup>155</sup> before the official USSR disaggregation.

While the Moldavian authority did not carry out any opinion-poll or national referendum and on 27 August 1991 moved the Declaration of independence.<sup>156</sup> At the same time, in spite of the pressures exercised by the Moldavian local authority the residents in territories of Gagauz and Transdnistria voted to retain the Union.

### CHAPTER III

#### THE COMMONWEALTH OF THE INDEPENDENT STATES

##### 1. The revolt of August 1991

In the summer of 1991, after the Soviet population had voted in favour of preservation of the Union, the new All-Union Treaty published on 9 March 1991. The process of signing of the treaty, however, was interrupted by further drawing up of new Draft of the All-Union Agreement. After the All-Union Referendum, to the contrary to the will of the Soviet citizens, the leader of the federal government, under influence of the Russian republic's leaders, decided to draw up a new Draft of the Union Agreement. Hence Gorbachev's bureaucracy introduced amendments into the Draft. It meant to introduce basic changes to the draft of the Union treaty voted at the All-Union Referendum. In particular, these amendments were deemed to entirely change the nature of the Union treaty, namely the new document, the Soviet Union turned into a very "loose" confederation of 8-9 former Soviet republics, with weak government and governance, headed by a president — and with very limited powers. It was no longer even called a "union state" — a kind of "commonwealth" on complete dissolution of the Union. This new Draft provoked discontent among the USSR pro-preservation bureaucrats of the federal government. The result was the August Coup. A irresponsible and adventurous circles in the old party nomenclature "kidnapped" Gorbachev, and then, on August 19, they announced on state television that Gorbachev was very ill and would no longer be able to govern:

*Because of Mikhail Sergeevich Gorbachev's inability to perform his duties as the president of the USSR, due to health reasons, in accordance with Article 127 of the Constitution of the USSR, the vice president of the USSR has temporarily assumed the office of acting president.*<sup>157</sup>

<sup>155</sup> The Lithuanian Declaration of independence of 11 March 1991, the Estonian Declaration of independence of 20 August 1991, at <http://constitutions.ru/?cat=255>; Latvia proclaimed its independence on August 21, 1991, at <http://latvianhistory.com/2011/08/21/the-restoration-of-latvian-independence-1986-1992/>; Georgia declared independence on April 9, 1991, at <http://sputniknews.com/analysis/20110411/163471890.html>; on 21 september 1991 armenia proclaimed independence, at <http://www.gov.am/en/official/>

<sup>156</sup> *The Declaration of independence of the Republic of Moldova*, 27 August 1991, at <http://www.presedinte.md/rus/declaration>

<sup>157</sup> RIA Novosti, at <https://ria.ru/politics/20110818/419605305.html>

The plotters specifically wanted to prevent complete breakdown of the USSR<sup>158</sup> : *"In many regions of the USSR, as a result of ethnic conflicts, blood is being shed, and the disintegration of the USSR would have the most serious consequences, both domestic and international."*<sup>159</sup>

Although the August revolt has failed, it had fatal consequences for the country and its transformation, preparing the ground for Yeltsin, Shushkevich and Kravchuk's coup d'état in the USSR. This situation led to the victory of liberals headed by Yeltsin, hence to the breakdown of the USSR. •

## 2. The Belavezha Accords of 8 December 1991 or Minsk meeting

On 8 December 1991, the leaders of the Slavic Soviet Republics (Russian leader – Eltsin, Ukrainian leader – Kravchuk, and Belarussian leader - Shushkevich) signed secretly the Belavezha Accords, known as Minsk Agreement, in which they declared the dissolving of USSR and founded the Commonwealth of the Independent States.<sup>160</sup> In particular, in the Preamble to the Minsk Agreement it was stated that:

*We, the Republic of Belarus, the Russian Federation and the Republic of Ukraine, as founder states of the Union of Soviet Socialist Republics (USSR), which signed the 1922 Union Treaty, further described as the high contracting parties, conclude that the USSR has ceased to exist as a subject of international law and a geopolitical reality.*<sup>161</sup>

Additionally, art. 11 confirms that:

From the moment that the present agreement is signed, the norms of third states, including the former USSR, are not permitted to be implemented on the territories of the signatory states.<sup>162</sup>

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<sup>159</sup> Ibid..

<sup>160</sup> On the whole, the initial stage of the CIS formation provides reason to suppose that its founders shared no long-term plan and were therefore obliged to choose a cautious step by step approach. This was clearly seen in their attitude to the CIS institutional structure which was initially loose and lacked a clear statutory basis. The new emerged independent States, especially Azerbaijan, Moldova, Turkmenistan and Ukraine were quite reluctant to create any powerful institutions which could bound their newfound sovereignty. They put emphasis on the substantive, most of all economic, issues of relationships among the former members of the USSR, which urgently needed to be settled. Accordingly, during the first year of the CIS the participating States gave birth to more than 200 arrangements on economic, military, ecological, social and other matters. However, the quantity did not turn into the expected quality. Many decisions reached within the CIS did not work properly because of increasing disagreements among the members, which in turn fostered mutual distrust. Some participating States (e.g. Ukraine) evidently gave preference to bilateral treaties, while others favored the establishment of more compact sub-regional unions, such as the Central Asian common market which was established in early January 1993.<sup>23</sup> In the meantime, the exigency of economic survival confronting all the Commonwealth members pushed them to put aside their fears and disappointments and to make new efforts to continue and improve the CIS. The hopes of active supporters of the Commonwealth (Kazakhstan, Russia) were pinned on the Minsk summit of 22 January 1993, whose key issue was the adoption of the CIS Charter. But these hopes only partly materialized. The Charter was adopted by the Decision of the Council of Heads of State, but not all participating parties signed it. All ten States signed a declaration reaffirming their belief in the potential of the Commonwealth and their determination to improve it. Accession to the Charter by the founding States will need to be undertaken within a year, and only afterwards can the legal image of the Commonwealth be somewhat clarified. *Соглашение о создании Содружества Независимых Государств* (8 декабря 1991 года, г. Минск), <http://cis.minsk.by/page.php?id=176>; S.A. Voitovich, *The Commonwealth of Independent States: An Emerging Institutional Model*, *The European Journal of International Law*, 1993, pp. 403-417.

<sup>161</sup> *Соглашение о создании Содружества Независимых Государств* (8 декабря 1991 года, г. Минск), <http://cis.minsk.by/page.php?id=176>

<sup>162</sup> Ibid..

Article 1 called established the Commonwealth of Independent States: “The high contracting parties form the Commonwealth of Independent States”. Article 14 specified that the city of Minsk would be the official location of the coordinating bodies of the Commonwealth. It is to mention that in the text of the Agreement there is not any provision on its entering into force.<sup>163</sup>

### 3. The Declaration of five Asian republics

In a proclamation dated 13 December 1991, the presidents of the five Central Asia republics expressed their general sympathy for the idea of the Commonwealth and their disappointment over being excluded from the Minsk meeting. Moreover, they demanded their republics to be included as original founder-members (Russia, Belorussia and Ukraine) of the Agreement. The Caucasian Republics (except Georgia<sup>164</sup> that joined later on 9 December 1993) and Moldavian Republic advanced a claim to be a part of the CIS agreement as well.

The matter was regulated at a meeting on the 21st of December in Alma-Ata<sup>165</sup>, where five new documents were adopted: the Alma Ata Declaration, the Agreement on Joint Measures with respect to Nuclear Weapons, the Agreement on Coordinating Bodies of the Commonwealth of Independent States, the Decision by the Council of Heads of State of the Commonwealth of Independent States and the Minutes of the Meeting of Heads of Independent States.<sup>166</sup>

In particular, at this meeting the six Central Asia republics (the Republic of Kazakhstan, the Republic of Kyrgyzstan, the Republic of Tajikistan, Republic of Kazakhstan, the Republic of Kyrgyzstan, the Republic of Turkmenistan), the two Caucasian republics (The Republic of Armenia, the Republic of Azerbaijan) and the Republic of Moldova signed the Alma-Ata protocol joining the CIS agreement.

The CIS members with this agreement tried to confer retroactively to the other nine former Soviet republics the status of founder member of CIS, for example:

*The member states of this agreement, guided by the aims and principles of the agreement on the creation of a Commonwealth of Independent States of 8 December 1991 and the protocol to the agreement of 21 December 1991, ...*<sup>167</sup>

The Protocol to the Agreement Establishing the CIS would enter into force for each of the parties from the moment of its ratification as well as the foundation of CIS<sup>168</sup> would effect with

<sup>163</sup> This omission was subsequently filled by the Protocol of 21 December 1991

<sup>164</sup> However, Georgia notified its withdrawal on 18 August 2008

<sup>165</sup> The Alma-Ata summit of 21 December 1991, which ironically almost coincided with the 69th anniversary of the USSR, was another crucial point in the hasty dissolution the USSR.

<sup>166</sup> *The Alma-Ata Treaty* [http://www.operationspaix.net/DATA/DOCUMENT/3825~v~Declaration\\_d\\_Alma-Ata.pdf](http://www.operationspaix.net/DATA/DOCUMENT/3825~v~Declaration_d_Alma-Ata.pdf)

<sup>167</sup> *Ibid.*

<sup>168</sup> CIS can be considered an intergovernmental organization which may act as an international legal person in the field of its competence on the basis of appropriate decisions of the supreme organ. The past experience of intergovernmental organizations provides every reason to suggest that at least certain attributes of international legal personality will be indispensable for the CIS if it is to properly discharge its basic functions, S.A. Voitovich, *The Commonwealth of Independent States: An Emerging Institutional Model*, op.cit., pp. 403-417

the ratification Protocol by the individual republics.<sup>169</sup> Most of these ratifications were completed before the end of 1991.

The protocol was accompanied by a Declaration on the same date, in which the eleven (minus the three Baltic republics and Georgia) expressed as their common opinion that CIS is not state or ‘a super-state structure’<sup>170</sup>. The CIS has served as a vehicle for promoting co-operation among the former Soviet States on a number of issues in economic, military and internal affairs, although individual States have retained autonomy. In recent years the CIS appears to have waned in authority as some of the individual States have asserted greater independence.

Therefore, the extinction of the USSR was completed by the Alma-Ata Declaration by the end of 1991.

#### **4. The legal nature of the Minsk and Alma-Ata agreements**

The process of liquidation officially started December 8th, 1991, with the conclusion of the Minsk Agreement, which explicitly proclaimed the end of the USSR.

From a legal point of view, the Declaration and Agreement were far from perfect, and appeared to be hastily drafted. For instance, the absence in the text of the Agreement of any provision on its entering into force (this omission was subsequently filled by the Protocol of 21 December 1991<sup>171</sup>).

It is also apparent from Article 11, which states that the applications of the laws of third states, including the former USSR, henceforth be inadmissible on the territory of the signature states. Although the Preamble declares that “the USSR has ceased to exist as a subject of international law and a geopolitical reality”, thus it avoids the reference to the unilateral liquidation the USSR. However, Article 11 makes clear the true nature of Agreement, namely, the unilateral liquidation of the USSR. A practical application of this rule with regard to the laws of the Soviet Union (even hypothetically admitting that it could be considered 'the former' from the moment of signature) inevitably uncovers many lacunae in the legal systems of the new emerged States, and would in many ways hinder a normal course of legal succession<sup>172</sup>. Evidently, at the time of drafting, political considerations prevailed over the legal motivation of the signatories. In fact, this statement, was soon realized irresponsibly. The Russian ratification Decree of December 12th hastily corrected the matter by allowing the application of the USSR law until the appropriate

<sup>169</sup> 31 ILM (1992) 147.

<sup>170</sup> S.A. Voitovich, *The Commonwealth of Independent States: An Emerging Institutional Model*, cit, pp. 403-417

<sup>171</sup> *Соглашение о создании Содружества Независимых Государств* (8 декабря 1991 года, г. Минск), <http://cis.minsk.by/page.php?id=176>

<sup>172</sup> The subsequent practice of the CIS States did not *stricto sensu* follow this Article. For example, under Article 5 of the Agreement on the Protection of the State Boundaries and Maritime Economic Zones of the States-Participants of the CIS of 20 March 1992, until the conclusion by the States-Participants of the Commonwealth of inter-republican agreements on boundaries, maritime economic zones, and their regime, the organization and activity of border force shall be regulated by acts of the Commonwealth, national legislation of the States, and normative acts of the former Soviet Union which are not contrary to it. 31 ILM 497 (1992).

Russian legislation would have been adopted, under the condition that Russian law would prevail over USSR law. Similar position was taken by the other republics.<sup>173</sup>

Furthermore, declaring the extinction of the USSR as a subject of international law without the formal consent of the other nine Member States, the Russian, Belorussian and Ukraine republics had exceeded their power, and this could be legally challenged as follows. The question is whether they were competent to act as they became moot once the respective parliaments had approved the Agreement. However, the more fundamental question is whether the three concerned republics were able to liquidate the USSR of which nine other republics also were members at the time.

The Preamble to the Minsk agreement shows a certain sensitivity on this point. The three republics referred to themselves as original founders of the USSR appealing to the Union treaty of 1922.<sup>174</sup> But there is the fourth founder-member, the Transcaucasian Federation.<sup>175</sup>

Additionally, it is vitiated due to both general international law and the 1922 Union Treaty. In particular, the Union Treaty of 1922 on foundation of the USSR was initially signed by four Soviet Socialist Republics- the Russian, Ukrainian, Belarusian and Transcaucasian.<sup>176</sup> For this reason these four signatory parts of the Union Treaty were considered original founders of the USSR. The Union Treaty provided that even though these three Slavic republics were the founding and most powerful members they could exercise only limited competence with regard to the status of the Soviet Union. That is, (1) they could withdraw from the USSR, and (2) they could set up any other association or union of sovereign States. It is hard to say definitely what motivated this decision: an intentional political manoeuvre on the part of the three leaders, or rather an error of their legal advisors.<sup>177</sup>

To sum up, in the light of this the Declaration of three presidents on December 8th can only be regarded as an unconstitutional coup. Indeed, firstly the Union Soviet republics were still to be considered as parts of a federal State and, therefore, they could not conclude international treaties among themselves. Secondly the three Slavic Republics did not have the power to dissolve the USSR, it was, consequently, impossible for three out of twelve members to dissolve the Union. Additionally, a number of republics (notably, Central Asian ones) continued to be a member of the USSR after December 8th. Finally, the Union continued to function *de jure* and *de facto* after December 8th through activities of various agencies (President, Supreme Soviet, ministers).

<sup>173</sup> Ferdinand Joseph Maria Feldbrugg, *Law in Eastern Europe Russian Law: The End of the Soviet System and the Role of Law*, Martinus Nijhoff Publishers, 1993, p.134.

<sup>174</sup> *Соглашение о создании Содружества Независимых Государств* (8 декабря 1991 года, г.Минск), <http://cis.minsk.by/page.php?id=176>

<sup>175</sup> *Декларация и Договор об образовании Союза Советских Социалистических Республик*, at <http://doc.histrf.ru/20/deklaratsiya-i-dogovor-ob-obrazovanii-soyuza-sovetskikh-sotsialisticheskikh-respublik/>

<sup>176</sup> *Ibidem*.

<sup>177</sup> *Ibidem*.

Only Alma-Ata decisions of eleven States seems to smooth the legal deficiency of the Minsk arrangements. The function of the Protocol, which was also signed by Slavic Republics, would consider retroactively the status of founder member of CIS on the signatory states, by agreeing to regard the Protocol as a part of the original Minsk Agreement.

Moreover, the signing of the Protocol by Slavic republics, was recognized by the Soviet of Nationalities.<sup>178</sup> However, legality of the USSR ceasing remained arguable because of voting of the Soviet people for preservation of the USSR in an all-Union referendum. The dissolution of the USSR should be legally preferable only by means of a referendum procedure. Nonetheless, the leaders of eleven Member States of the USSR approved the political decision on the USSR dissolution, which was also subsequently *de facto* recognized by the international community. The recognition of the USSR extinction was confirmed officially by the admission of the former Soviet Republics to the Conference on Security and Cooperation in Europe and the United Nations, as well as by the recognition of Russia's continuity to the USSR as a member of the United Nations, including permanent membership of the Security Council.

##### 5. The Russian Federation as successor/continuator to the USSR

It is frequently observed that few areas of international law are as fraught with ambiguities and uncertainties as those relating to the extinction or continuity of States. In this domain, the interplay of objective and subjective factors is, indeed, highly influential. Legal certainty appears to bend to self-perceptions, and those of others, or to parochial interests. The quest for stability in international legal relations often leads to defining events in the light of the desired outcome. Therefore, agreements or acts of recognition mainly inspired by political or financial considerations play a guiding role.

The devolutionary instruments through which ten of the Soviet<sup>179</sup> republics became independent States seemed to exclude continuity, posting that the USSR had come to an end and that its extinction, politically uncontroversial, extended to the juridical realm. The Minsk Agreement provided that ‘the Union of Soviet Socialist Republics as a subject of international law and a geopolitical reality no longer exists’; the Alma Ata Agreement that, ‘with the establishment of the Commonwealth of Independent States, the [USSR] ceases to exist.’<sup>180</sup>

<sup>178</sup> The Soviet of Nationalities (Совет Национальностей, *Sovyet Natsionalnostey*) was one of the two chambers of the Supreme Soviet of the URSS, elected on the basis of universal, equal and direct suffrage by secret ballot in accordance with the principles of Soviet democracy.

<sup>179</sup> James R Crawford, *The creation of States in international law*, Part IV Issues of Commencement, Continuity and Extinction, Ch.16 Problems of Identity, Continuity and Reversion, <http://opil.ouplaw.com/view/10.1093/law/9780199228423.001.0001/law-9780199228423-chapter-16?rskey=Wu9rpH&result=102&prd=OPIL#law-9780199228423-note-3151>

<sup>180</sup> *Ibid.*, p. 677, at <http://opil.ouplaw.com/view/10.1093/law/9780199228423.001.0001/law-9780199228423-chapter-16?rskey=Wu9rpH&result=102&prd=OPIL#law-9780199228423-note-3151>



Indeed, a number of writers consider the USSR as a subject of international law has completely disappeared because of dismemberment (Dismemberment of States).<sup>181</sup> In this case the fifteen republics would all be successor States.

Despite the approach taken in December 1991 CIS documentation excluding Russian's continuity, the Russian Federation was recognized by the other constituent republics as continuing its legal personality. It was clearly expressed in the resolute part of the Decision the CIS States, where these republics supported Russia's continuance of the membership of the Union of Soviet Socialist Republics in the United Nations, including permanent membership in the Security Council, and in other international organizations.<sup>182</sup>

Furthermore, in this regard, Russia advanced the thesis of its continuity to the USSR that is *gosudarstvo prodolzhatel'*, which describes itself as a 'continuator State', but not as legally identical. The term a 'continuator State' coined by the RF in order to describe the fact that it does not 'automatically' but 'consciously' accepted the rights and obligations of the former Soviet Union. In fact, from the very beginning it was clear that the position of the RSFSR was not completely identical with that of the USSR. The RSFSR was not 'automatically' subject to the same rights and obligations as before, but it was 'generally accepted' that it should have the same rights and obligations. The rights and obligations were not transferred to a new subject of international law, but to a partially identical one. Also the thesis on the continuity between the USSR and the Russian Federation based on the idea that State succession cannot explain the process of disintegration of the USSR in a satisfactory way. In this way the apparent extinction of a political system was made to coincide with legal continuity<sup>183</sup>.

Therefore, on 24 December 1991, the Permanent Representative of the Union of Soviet Socialist Republics transmitted a letter from the President of the Russian Federation, Boris Yeltsin to the UN Secretary-General, in which the President informed the UN Secretary-General that membership of the USSR in the UN and all its associated organs, including the UN Security Council, was being continued by the Russian Federation with the support of the 11 Member States of the CIS:

*[T]he membership of the Union of Soviet Socialist Republics in the United Nations, including the Security Council and all other organs and organizations of the United Nations system is being continued by the Russian Federation (RSFSR) with the support of the countries of the Commonwealth of Independent States. In this connection, I request that the name 'Russian Federation' should be used in the United Nations in place of the name ['USSR']. The Russian*

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<sup>181</sup> Ibid..

<sup>182</sup> Ibidem.

<sup>183</sup> Ibidem.

*Federation maintains full responsibility for all the rights and obligations of the USSR under the Charter of the United Nations, including the financial obligations.*<sup>184</sup>

Russia was admitted by the UN without going through the procedure otherwise required of the other new states, emerged from the USSR (except Byelorussia and Ukraine, original members of the UN that continued their respective status).

Thus, in this connection the Russian Federation declared to assume full responsibility for all the rights and obligations of the USSR under the Charter of the United Nations, including the financial obligations. Indeed, the RF assumed all the legal responsibilities in relation to third States by the end of 1993. For Marek, identity and continuity have to be defined by reference to the legal obligations of the State in question rather than by reference to criteria for statehood. In other words, the identity of a State lies in the identity of its international rights and duties, before and after the events that called the identity into question.

This thesis was supported also by the European Community in the guidelines on recognition the new states emerged from the USSR. In particular, the recognition of the successor states of the USSR was made dependent on the fulfilment by them of the obligations settle by agreement all questions concerning state succession and regional disputes. The EC members recognized these new states on the assumption that the obligation would be met. In fact, Russia and successor states signed agreement apportioning state property and liabilities of the former Soviet Union, including its debts, with the 61.34% for the RF, 16.37% for the Ukrainian, Belarus 4.13% and so on. However, the implementations of these agreements encountered resistance on the part of the successor republics which refused to assume their respective share of the Soviet debts. Eventually, it appears that solely Russia became responsible for the debts hence claiming all Soviet property situated outside the former Soviet Union, instead of dividing in equitable proportion among all the republics. The former republics renounced their rights, except Ukraine. Indeed, the Ukrainian Parliament has never ratified a treaty between Ukraine and Russia of 9 December 1994 on the transfer of the Ukrainian shares to Russia. At the same time, Ukraine has declined the fulfillment of its share of legal and financial obligations of the USSR.

Through accepting the Russian's continuity in the international rights and obligations of the USSR, may still be automatically preserved, thus bypassing the many inconveniences of a rupture or uncertainty in legal relationships.<sup>185</sup> In fact, the recognizing the continuity of the USSR was a solution to a number of succession problems.

Another criteria to assess the continuity of the international legal personality is maintaining of constitutive elements of statehood. Crawford sustains that State's social reality has not been

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<sup>184</sup> Ibidem.

<sup>185</sup> Koskenniemi, Studien, p.155

destroyed, when the constitutive elements of statehood are substantially retained, notwithstanding any changes.<sup>186</sup> Accordingly, international legal personality is only the juridical consequence of statehood. The RF practice seems to satisfy this thesis. In fact, the RF claim to continue the statehood and the personality of the former USSR, was based on the following argument: significant portions of the territory which continues its existence, a major portion of the population; an independent government and organization of authority operating in accordance with the country's constitution. In particular, Russia represented the majority of the population (51.7%) and the territory (76.3%) of the USSR, and its primary economic force (60% of GNP). It appeared, therefore, to be in a position to consider itself the core of the former USSR, surviving after the secession of the other constituent republics.

To sum up concordant element of the successor states, recognition of the international community, the preponderance of Russia within the USSR, in territory and other respects (Russian share of 61.34%), combined with honouring financial obligations and fulfilment liabilities of the Soviet Union were the basic criteria for recognizing Russia as continuator of the statehood and the personality of the former USSR. This explains the acceptance of the continuity of Russia to the USSR by the international community almost unanimously.

## **6. The legal basis of boundary delimitation between the new States**

Upon the USSR's dissolution the new independent States of the area faced several significant problems regarding determination of the boundaries among themselves. Clashes between new born states and *de facto* entities led to the sanguinary conflicts, some of them are still awaiting for a final solution.

Indeed, the main controversial issue is the same determination of applicable rules. To solve the problem, the starting point should be a close analysis of the law and practice relating to secession of the former Soviet entities from the former USSR. In particular, it is necessary to examine Soviet law pertaining secession of the former sub-units and CIS agreements.

### ***a. The right to external self-determination under Soviet legislation***

The Soviet law allowed the Soviet sub-units a right of secession, and the external self-determination by means of several acts. Firstly, the USSR Constitution of 1977, enshrined a formal (non-effective) right to secession from the URSS.<sup>187</sup> Secondly, the 1990 Law *on the delineation powers between the USSR and the subjects of the federation*, put *de facto* the first and

<sup>186</sup> James R Crawford, *The creation of States in international law, Part IV Issues of Commencement, Continuity and Extinction, Ch.16 Problems of Identity, Continuity and Reversion*, <http://opil.ouplaw.com/view/10.1093/law/9780199228423.001.0001/law-9780199228423-chapter-16?rskey=Wu9rpH&result=102&prd=OPIL#law-9780199228423-note-3151>

<sup>187</sup> See, *Chapter II Legal basis for secession and creation of the new States*, pp .30-40.

second level sub-units at the same level.<sup>188</sup> As a consequence, from 1990 the second-level sub-units enjoyed the same rights of the first-level sub-units, including the right of external self-determination.

The same law *on Secession* of 1990 established the rules to be followed by sub-units to exercise such right of self-determination, providing for the possibility of referendums, which would be held separately in each Soviet sub-units. This possibility was granted to first, second, third levels sub-units and *in densely populated areas by ethnic groups constituting a majority of the population*). This last provision, in particular, shows that this law had the clear purpose of endorsing the supremacy of the principle of self-determination of peoples, that was meant to prevail over to the principle of territorial-administrative boundaries within the USSR, in the case of the USSR's division or dissolution.<sup>189</sup>

### ***b. Territorial Referendum***

The Art. 5 of the 1977 USSR<sup>190</sup> Constitution required direct democracy or popular vote (All-Union referendum) for matters of major national importance. Gorbachev appealing to Art. 5 proposed the All-Union Referendum as an essential tool of democracy to decide in practice the destiny of the Soviet Union, that is the Soviet people were asked whether they were in favour of keeping the USSR alive, or not. In fact, citizens of the Soviet entities were asked whether they wanted to secede from the USSR and to set up a new independent state. Accordingly, an obligatory All-Union referendum was held on March 17, 1991, so to give evidence and confirm the supremacy of the principle of self-determination in the division of the USSR.

Indeed, referendum is a major instrument for granting the principle of self-determination. The provisions of Advisory Opinion on Western Sahara of 1975<sup>191</sup>, in particular paragraph 2 [defining self-determination], emphasized that *the application of the right of self-determination requires a free and genuine expression of the will of the peoples concerned (at para. 55) and [t]he validity of the principle of self-determination, defined as the need to pay regard to the freely expressed will of the peoples.*<sup>192</sup> Hence, the referendum was a means to enhance democracy by giving a voice to the Soviet people: political decisions are then made openly and are clearly legitimate.

<sup>188</sup> See., *Ibid.*, 2. *The Law On the delineation of powers between the USSR and the subjects of the federation*", pp.34-36

<sup>189</sup> *Ibid.*.

<sup>190</sup> The 1977 USSR Constitution, at <http://www.hist.msu.ru/ER/EText/cnst1977.htm#9>

<sup>191</sup> Cassese 88–9; South West Africa/Namibia, Advisory Opinions and Judgments, p.47.

<sup>192</sup> The referendum was never held yet and the issue is still highly controversial: for a deeper analysis, see M. Valenti,

As provided by the law on the All-Union referendum, such Referendum was obligatory and the whole Soviet electorate was called to vote.<sup>193</sup> The All-Union referendum had to be run in each republic (first and second levels) separately.<sup>194</sup>

However, six Soviet Republics (Estonia, Latvia, Lithuania, Armenia, Georgia, Moldavia) boycotted the All-Union referendum (as this was based on the USSR law) and held their own referendum. Such self-proclaimed referendum in Estonia, Latvia, Lithuania, Armenia were held only with regard to first level sub-units.

Even in the Georgia SSR, local authorities convened a separate referendum: that was boycotted, in turn, by the Abkhazian ASSR (second level sub-unit) and the South Ossetian Autonomous Region (third-level sub-unit). Indeed, these two entities wanted to comply with the USSR law and held a referendum based on such law.

So, the law providing for the All-Union Referendum was disregarded in Georgia: but, at the same time, was respected in each of the two entities that were included – at the time – in the the Georgian SSR.

In the Moldavian SSR was held only the All-Union referendums *in densely populated areas by ethnic groups constituting a majority of the population* (Transdnistria).

The results of the All Union referendum had binding effect in the whole territory of the USSR. Before the official USSR dissolution in 1991, the Baltic SSRs, the Armenian SSR, the Moldavian and Georgian SSRs proclaimed their independence and as new States, while the former SSR ceased to exist.

However, at the same time the South Ossetian SSR, the Abkhazian SSR, the Transdnestrian SSR decided to remain part of the USSR.

As a consequence, while the new independent States were leaving the USSR, the remaining regions were actually up-graded, to become first-level units within the USSR, and the corresponding internal boundaries became international borders. Through these referendums the Soviet legislator confirmed the supremacy of self-determination over territorial-administrative boundaries.

### *c. The CIS treaties*

Even the CIS treaties can provide elements for determining the boundaries of the new independent entities in the area.

The CIS formation should be divided in two distinct periods. At the first stage of this process are the Minsk and Alma-Ata agreements. In Article 5 of the Minsk agreement, Russia

<sup>193</sup> at <http://ppt.ru/newstext.phtml?id=16598>

<sup>194</sup> See, Chapter II *The legal basis for separation and creation of the new States* 3. *The All-Union Referendum*, Paragraph , pp. 38-40

(acting as the successor of the USSR) and two new-born states Ukraine and Byelorussia agreed that:

*the High Contracting Parties acknowledge and respect each other's territorial integrity and the inviolability of existing borders within the Commonwealth.*<sup>195</sup>

Then, in the Alma Ata Declaration of the 21st of December 1991, the same rule was established between Russia and ten new States emerging from the former Soviet Union (Azerbaijan, Armenia, Belarus, Kazakhstan, Kyrgyzstan, Moldova, Tajikistan, Turkmenistan, Uzbekistan and Ukraine): that formally recognized:

*each other's territorial integrity and the inviolability of existing borders.*<sup>196</sup>

It has to be noted that Georgia and Baltic countries did not participate in the process of formation of the CIS and did not access to the Minsk and Alma-Ata agreements.

The parties of the Minsk and Alma-Ata agreements simply agreed to respect the *existing boundaries* between themselves: however, such Agreements do not specify *where* the boundaries are to be traced. No reference is made to the *uti possidetis* principle, nor to some 'administrative line' or 'internal line.' As a conclusion, it seems possible to assume that the former intra-USSR administrative boundaries were not considered as a relevant element at this stage.

What precisely the parties to the Minsk and Alma Ata agreements precisely meant by *existing boundaries* is still unclear. Actually, at the time of the foundation the CIS, Moldavia did not exercise effective control over Transdnistria; Azerbaijan did not control Nagorno-Karabakh; Georgia was not able to establish control over Ajaria, Abkhazia and South Ossetia; while Crimea and South East were out of control of Ukraine. Hence the real issue would be to ascertain *whether* there should be new boundaries between the CIS members (so to let other new independent States emerge) , before determining where these should run.

While absent in the first phase, Georgia took part in the second stage of the formation of the CIS. At that moment, Abkhazia and South Ossetia were actually out of reach for Georgia's jurisdiction. During the entire process, the Georgian Republic had never been able to exercise effective control over these two regions.

So, the declarations made in the said agreements - proclaiming inviolability of the *existing* borders cannot be material to the determination of a large extent of the new borders: simply because they were not clearly traced at the moment in which their inviolability was proclaimed.<sup>197</sup>

<sup>195</sup> *Commonwealth of the Independent States Agreement*, 8 December 1991, in *International legal materials* 34 (1995): 1298

<sup>196</sup> Documents of Alma Ata of December 21, 1991, *Diplomaticheskii Vestnik* 1992, No. 1, p. 6 et seq, English translation in *ILM* 31, 1992, at 147-154

<sup>197</sup> Particularly, art. 3 of the Charter of the Commonwealth of the Independent States (adopted on the Minsk summit of 22 January 1993) enshrined the principle of the 'inviolability of frontiers' and territorial integrity:

*For the achievement of the Commonwealth's objectives, the Member States shall, proceeding from the universally recognized norms of international law and the Helsinki Final Act, organize their relationships in accordance with the following interlinked and equipollent principles: - the inviolability of States' boundaries, the recognition of existing borders and the rejection of unlawful territorial acquisitions;*

## CHAPTER IV

### APPLICABILITY OF THE UTI POSSIDETIS PRINCIPLE TO THE STATES EMERGED FROM THE SOVIET UNION

#### 1. The *uti possidetis* doctrine and its extension beyond the colonial context

The Soviet internal legislation and the CIS treaties made no reference to a possible “upgrading” of the internal administrative boundaries into international ones, and they did not even mention the *uti possidetis* principle. Despite this, the majority of post –factum observers interpreted the secession and creation of new States - which took place in 1991-1992 - at the light of that principle. Prominent scholars such as Malcolm Shaw, Steven Ratner, Alan Pellet, Ian Brownlie, James Crawford and many others assume that the *uti possidetis* principle was applicable to the new States seceded from the former Soviet Union.

However, other commentators seems doubtful, as they wonder whether the principle is truly applicable or – more precisely – they underline how a preliminary issue would be solved, i.e. the determination of what *kind of border* would have to be considered to ground application of that principle. In other words, there are different options: the first would be to consider - as a reference for the *uti possidetis* rule - the boundaries between the first-level entities of the Soviet Union; but a different equally viable option would be to consider the former internal borders of the second or even of the third level units.

On the opposite side, other scholars maintain that the *uti possidetis* is not applicable the CIS boundaries, nor to new States seceded from the former Soviet Union.

So, the divergent opinions call for a closer examination of the *uti possidetis* principle. In its classical terms, it would support the automatic transformation of any kind of administrative units’ borders into international frontiers. *Uti possidetis* was previously used and proved successful to support a peaceful decolonization process in Latin America and Africa. Its further extension beyond the colonial context (Yugoslavia, Czechoslovakia) was based on the ICJ Chamber Judgment in the *Burkina Faso/Mali Frontier Dispute* of 1986, stating that:

*...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 territorial integrity of States and rejection of any actions to split another's territory...*

Finally, the Declaration on Observance of the Sovereignty, Territorial Integrity and Immunity of Borders of the States-Members of the Commonwealth of Independent States of 15 April 1994 states:

*Heads of States-participants of the Commonwealth of Independent States ... confirming territorial integrity, inviolability of borders of each other, refusal of illegal territorial acquisitions and of any actions directed on the partition of another's territory ... 1. Provide accomplishment in the relations of principles of the sovereignty, territorial integrity and inviolability of frontiers. 2. Confirm that, building the relations as friendly, the states will abstain from military, political, economic or any other uniform of pressure... and also supports ... political independence any of the states-members of Commonwealth. See at <http://cis-legislation.com/document.fwx?rgn=4132>>accessed; English translation provided on Russian website, emphases added*

*the obtaining of independence, wherever it occurs.*<sup>198</sup>

A second significant endorsement to the acknowledgment of the *uti possidetis* as a general rule came from the commission chaired by Judge Robert Badinter, established by the European Communities in November 1991, after the dissolution of Yugoslavia).<sup>199</sup> Indeed, the non-binding opinion issued by the Badinter Commission has contributed to further developing the law in direction of the applicability of *uti possidetis* beyond the process of decolonization.<sup>200</sup> Particularly, in opinion N.3 Badinter Commission referring to boundaries between Croatia and Serbia and between Bosnia-Herzegovina and Serbia stated:

*Third - 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. Uti possidetis, though initially applied in settling decolonisation issues in America and Africa, is today recognized as a general principle*<sup>201</sup>

The Commission grounded its opinion by reference to the above mentioned ICJ Judgement:

*whatever the circumstances, the right to self-determination must not involve changes to existing frontiers at the time of independence (uti possidetis juris) except where the states concerned agree otherwise.*<sup>202</sup>

The Commission in their rapport recommended follows:

*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.*

Hence the application of the principle was extended to cases of State breakups not related to colonialism.

However, the Commission's opinions were far from to being accepted unanimously. A number of commentators thought that the reference to the ICJ's decision was not appropriate for the following reasons. Firstly, if even the provisions of the same definition<sup>203</sup> sound as if *uti*

<sup>198</sup> *Frontier Dispute*, Case of Burkina Faso and Mali, 1986.

<sup>199</sup> Cf. Opinion No. 2 (20 November 1991), in which the Badinter Commission advocated the internal right to self-determination of the Serbian population in Croatia and Bosnia-Herzegovina, but did not admit a right to secession: "... it is well established that, whatever the circumstances, the right to self-determination must not involve changes to existing frontiers at the time of independence (uti possidetis juris) except where the States concerned agree otherwise." (reprinted in EJIL 3 (1992), at 182 et seq.)

<sup>200</sup> Conference on Yugoslavia, Arbitration Commission Opinion No. 3 (Jan. 11, 1992), 31 ILM 1499 (1992) [hereinafter Opinion No. 3]

<sup>201</sup> Conference on Yugoslavia, Arbitration Commission Opinion No. 3 (Jan. 11, 1992), 31 ILM 1499 (1992), The Opinions of the Badinter Arbitration Committee: A Second Breath for the Self-Determination of Peoples Appendix: Opinions of the Arbitration Committee [http://www.thomasfleiner.ch/files/categories/IntensivkursII/Badinter\\_Badi.pdf](http://www.thomasfleiner.ch/files/categories/IntensivkursII/Badinter_Badi.pdf)

<sup>202</sup> *Frontier Dispute Case (Burkina Faso v Mali)* (note 9) para 20 (the preceding sentences of para 20 refer only to decolonization).

<sup>203</sup> It is a general principle, which is logically connected with the phenomenon of the obtaining of independence wherever it occurs. *Frontier Dispute, Case of Burkina Faso and Mali* (1986), para 24 .



*possidetis* were applicable outside the context of decolonization, they were referring solely to decolonization context:

*A firmly established principle of international law where decolonization is concerned*<sup>204</sup>...*uti possidetis as a principle which upgraded former administrative delimitations, established during the colonial period, to international frontiers, is therefore a principle of general kind which is logically connected with this form of decolonization wherever it occurs*<sup>205</sup>

Another controversial point, in Opinion No 3, is that the Commission did not call for an automatic transformation of all the internal lines into international boundaries, but ‘*more readily to the Republics...*’<sup>206</sup>. This is not in line with the doctrine of *uti possidetis* in classical terms, which presumes the automatic transformation of all kind of administrative lines into international frontiers.

Furthermore, the opinions of the Commission are not binding on any of the States concerned. The Commission itself was not created by virtue of an international arbitration agreement between disputing parties and did not have treaty base.

However, despite the weak formal status of these decisions, a number of commentators, supporting the application of *uti possidetis* the USSR, considered these opinions as having a certain authority.

## **2. *Uti possidetis juris* in relation to the USSR secession**

The principle of *uti possidetis juris* constitutes that part of the concept of territorial stability that concerns the mechanism and process of the transmission of sovereignty to a new State.<sup>207</sup>

It provides for the maintenance of pre-existing internal or international boundaries when a new State is created. With reference to *uti possidetis iuris* the new States adopt as their international boundaries the delimitations traced by the colonial authorities and existing at the date of independence. In other word, *uti possidetis juris* referred to a legal line founded upon legal title as was the rule adopted by the successor States. It is antonymous to the principle of effectiveness, to the effect that an actual display of authority cannot in itself represent a better title to territory.<sup>208</sup>

As M. Shaw :

*this principle developed as an attempt to obviate territorial disputes by fixing the territorial heritage of new States at the moment of independence and converting existing lines into*

<sup>204</sup> Ibid., para 20.

<sup>205</sup> Ibid., para 23

<sup>206</sup> *Conference on Yugoslavia, Arbitration Commission Opinion No. 3* (Jan. 11, 1992), 31 ILM 1499 (1992), The Opinions of the Badinter Arbitration Committee: A Second Breath for the Self-Determination of Peoples Appendix: Opinions of the Arbitration Committee [http://www.thomasfleiner.ch/files/categories/IntensivkursII/Badinter\\_Badi.pdf](http://www.thomasfleiner.ch/files/categories/IntensivkursII/Badinter_Badi.pdf)

<sup>207</sup> M.Shaw, *The heritage of States : the principle of "uti possidetis juris" today* p.151

<sup>208</sup> E. Milano, *Unlawful Territorial Situations: Reconciling Effectiveness, Legality and Legitimacy in International Law*, op.cit., p.114

*internationally recognized borders, and can thus be seen as a specific legal package, anchored in space and time, with crucial legitimating functions.*<sup>209</sup>

Newly independent States emerging out of colonialism led to the evolution of the doctrine of *uti possidetis* contributed to the consolidation of the norm, which has been slowly mutating over time as an attempt to obviate territorial disputes.<sup>210</sup> In particular, through *uti possidetis juris* the newly decolonized States declared independence from the former Spanish Empire adopted the administrative divisions imposed by the Spanish<sup>211</sup> as the borders of the new States that emerged in the region. Colonial law, therefore, constitutes simply one fact among others in the process of determining the line.<sup>212</sup>

In the context of the Latin America *uti possidetis* appears essentially in two manifestations: first, a *sui generis* instrument covering the succession of new States to colonial powers and a derogation to effectiveness as a condition for acquiring territorial sovereignty; secondly, as a prevention of any renewal of European colonization on the basis that parts of the continent constituted *terrae nullius* implied acquisition of sovereignty by effective occupation by any State.<sup>213</sup>

From Latin America, the doctrine moved to Africa. In the 1960s in the African continent, States born from decolonization determined the frontiers among them with reference to the colonial legislation (title).<sup>214</sup> In fact, Chamber in Burkina Faso-Mali noted that the determination of the relevant frontier line had to be appraised in the light of French colonial law, since the line in question had been an entirely internal administrative border within French West Africa.<sup>215</sup>

In both Latin America and Africa, *uti possidetis juris* was deemed to satisfy the necessity of boundary determining, where it was as a point of departure in order to reach specific delimitation agreements or in order to defer the issue of the boundary determination to an arbitrator.<sup>216</sup>

A number of experts considered the break-up of the former Yugoslavia as revival the *uti possidetis juris* practice.<sup>217</sup> By analogy with the Yugoslavian dissolution, a group of the legal

<sup>209</sup> M. Shaw, *The heritage of States : the principle of "uti possidetis juris" today*, op. cit., p. 76.

<sup>210</sup> Oppenheim's International Law, vol. 1 (oth edn., 1992), chapter 5 (n. 1), p. 670.

<sup>211</sup> The principle involves implied agreement to base territorial settlement on a rule of presumed possession by the previous Spanish administrative unit in 1821, in Central America, or in 1810, in South America.

<sup>212</sup> ICJ Reports, 1986, p. 568. See also the separate opinion of Judge Abi-Saab, who agreed with the Chamber's formulation, but disagreed with its application in the circumstances: p. 659.

<sup>213</sup> G. Nesi, *Uti possidetis iuris nel Diritto Internazionale*, Padova, CEDAM, 1996, p.3

<sup>214</sup> *Ibid.*, pp. 3-7.

<sup>215</sup> Frontier Dispute, (1986) ICY Reports 554 at 565

<sup>216</sup> G. Nesi, *Uti possidetis Doctrine*, Max Planck Encyclopedia of Public International Law, 2018 <http://opil.ouplaw.com/view/10.1093/law:epil/9780199231690/law-9780199231690-e1125#>

<sup>217</sup> See Craven, 'The European Community Arbitration Commission on Yugoslavia' 66 BYIL (1995), 333, at 385-390; Shaw, 'The Heritage of States: the Principle of Uti Possidetis Juris Today' 67 BYIL (1996), 75; G. Nesi, *Uti Possidetis Iuris nel diritto internazionale* (1996); Kohen, M. Kohen (ed.), *Secession: International Law Perspectives*, 2006, 176 et seq.; Sanchez-Rodriguez, 'L'uti possidetis et les effectives dans les contentieux territoriaux et frontaliers' 263 Recueil des Cours (1997), p. 151.

commentators extended the application of this principle to Czechoslovakia and the USSR.<sup>218</sup> However, *the commentators supporting this thesis disagree* with regard to the USSR secession (dissolution).<sup>219</sup>

In the post-colonial context, under their view *uti possidetis juris* functions only where, on one side, delimitations fixed before the independence of the newly independent States can be singled out and, on the other, a "new" delimitation has not been reached on the basis of other principles or criteria.

In line with both colonial<sup>220</sup> and non-colonial practice (the dissolution of a federal State Yugoslavia<sup>221</sup>), many jurists argue that *uti possidetis* in the URSS should be applied using as point of reference the Soviet law.<sup>222</sup> In particular, making reference to the Badinter Commission's decision<sup>223</sup> some legal experts believe that *uti possidetis iuris* was assumed by the CIS parties as a starting point, though admitting that delimitation, by means of specific boundary agreements. In other words, they have interpreted the affirmation the borders within the former first level sub-units of the Soviet Union, as acceptance of *uti possidetis juris*.<sup>224</sup>

By analogy with the Yugoslavian case, some authors appeal to the '*constitutional guarantees of secession*' to the 1977 USSR constitution.<sup>225</sup> In that sense, according to them, new international boundaries were delimited within constitutionally-defined units in terms of the Soviet law. The main concentration of the commentators favouring to *selective* application of *uti-possidetis* focus on article 72 and article 78 of the 1977 USSR Constitution. The 72 Article of 1978 granted to the fifteen Soviet republics (the first-level sub-units) from the USSR a formal (not real) right to secession. However, as has been examined before,<sup>226</sup> the right to external self-determination enshrined in the 72 Article of 1977 Constitution is very ambiguous. On one the hand, art. 72 enables to '*Each Union Republic shall retain the right freely to secede from the USSR*'. On the other hand, Soviet republics were not allowed to freely exercise this right. In fact, art. 73 (2) provides: '*The jurisdiction of the Union of Soviet Socialist Republics, shall cover:...*

<sup>218</sup> Ibid..

<sup>219</sup> S. N. Lalonde, *Determining Boundaries in a Conflicted World: The Role of Uti Possidetis*. Montreal, QC: McGill-Queen's University Press, 2003; G. Nesi, *Uti possidetis Doctrine*, Max Planck Encyclopedia of Public International Law, 2018 <http://opil.ouplaw.com/view/10.1093/law:epil/9780199231690/law-9780199231690-e1125#>; S. Lalonde (n 9) 237,

<sup>220</sup> See for example ICJ in *El Salvador v. Honduras* stating '[i]t should be recalled that when the principle of *uti possidetis iuris* is involved the *ius* referred to is not international law but the constitutional or administrative law of the pre-independence sovereign, in this case Spanish colonial law.

<sup>221</sup> The Badinter Commission, Opinion, <http://www.dsg.univr.it/documenti/OccorrenzaIns/matdid/matdid685031.doc>

<sup>222</sup> E. Hasani, *Uti Possidetis Juris: From Rome to Kosovo*, Fletcher Forum of World Affairs, 27 (2003), 85 (92); Malcolm N Shaw, *The heritage of States : the principle of "uti possidetis juris"*. Article. English. 1997. Publication: British year book of international law. Vol. 67 1996 : 23-28 pp; J. Vidmar, *Confining New International Borders in the Practice of Post-1990 State Creations*, pp.339-342, [http://www.zaoerv.de/70\\_2010/70\\_2010\\_2\\_a\\_319\\_356.pdf](http://www.zaoerv.de/70_2010/70_2010_2_a_319_356.pdf); A. H. Tagliavini, head of the mission support the analogous considerations in the Report of the Fact-Finding Mission, p. 154. [https://www.echr.coe.int/Documents/HUDOC\\_38263\\_08\\_Annexes\\_ENG.pdf](https://www.echr.coe.int/Documents/HUDOC_38263_08_Annexes_ENG.pdf)

<sup>223</sup> The Badinter Commission, Opinion, <http://www.dsg.univr.it/documenti/OccorrenzaIns/matdid/matdid685031.doc>

<sup>224</sup> E. Hasani, *Uti Possidetis Juris: From Rome to Kosovo*, Fletcher Forum of World Affairs, 27 (2003), 85 (92); Malcolm N Shaw, *The heritage of States : the principle of "uti possidetis juris"*. Article. English. 1997. Publication: British year book of international law. Vol. 67 1996 : 23-28 pp; J. Vidmar, *Confining New International Borders in the Practice of Post-1990 State Creations*, pp.339-342, [http://www.zaoerv.de/70\\_2010/70\\_2010\\_2\\_a\\_319\\_356.pdf](http://www.zaoerv.de/70_2010/70_2010_2_a_319_356.pdf);

<sup>225</sup> Ibidem.

<sup>226</sup> See, *Chapter II, The legal basis for separation and creation of the new States, Law on Secession*, pp.30-40.

*determination of the state boundaries of the USSR and approval of changes in the boundaries between Soviet republics*'. It follows that the right to secede of *Soviet republics* (first-level entities) from the Soviet Union was limited by authorization of the Union of Soviet Socialist Republics' government.<sup>227</sup>

Moreover, Soviet laws did not furnish any adequate tools for exercising external right to self-determination until 1990.

With regard to article 78, Buhruz Balayev making reference to the Badinter Commission's Statement 'The principle [*uti possidetis*] applies all the more readily to the Republics since the second and fourth paragraphs of Article 5 of the Constitution of the SFRY stipulated that the Republics' territories and boundaries could not be altered without their consent',<sup>228</sup> extended the *Uti possidetis* application to the first-level sub-units. In particular he remarks that:

*this principle [of uti possidetis] has also direct relation to the situation concerning the dissolution of the USSR whose Constitution, which included a provision that the territory and borders of a Union republic could not be changed without its consent.*<sup>229</sup>

However, the Soviet Constitution of 1977 prohibited the alteration of the territory and borders not only of *the Soviet republics* (the USSR first-level sub-units) (Art. 78), but also those of the *Autonomous republics* (the USSR second-level sub-units) (Art.84).<sup>230</sup>

It can be concluded that since the art. 72 provides only the formal right, moreover, limited by authorisation the USSR that the first-level units were not legitimate to exercise the external self-determination. Moreover, the provisions that prohibited alteration of both the first and second-level of sub-units put *de facto* them on the same level. Indeed, unique distinction in status between these former sub-units is the right of the first-level sub-units to external self-determination, encompassed in the art. 72 that only formally conceded secession. In other words, it *de facto* did not establish in essence different regime for the former first and second level entities within the Soviet Union.

As has been examined in the previous paragraphs, a part the 1977 Constitution endorsing ambiguous points, there are other Soviet laws important for determining of the Soviet administrative units' status, which clearly entitled other level sub-units to external self-determination, including second-level sub-units such as the Abkhazian republic.<sup>231</sup> But the commentators pointing to selective *Uti possidetis* application in connection of the Soviet legislation, limit their analysis to the Soviet Constitution of 1977, without paying attention to the

<sup>227</sup> Ibid..

<sup>228</sup> Opinion No. 3, The principle (of *uti possidetis*) applies all the more readily to the Republics since the second and fourth paragraphs of Article 5 of the Constitution of the SFRY stipulated that the Republics' territories and boundaries could not be altered without their consent'.

<sup>229</sup> B. Balayev, *The Right to Self-Determination in the South Caucasus: Nagorno Karabakh in Context*, Lexington Books; 1 edition, 2013, p.57.

<sup>230</sup> The USSR Constitution of 1977, <http://www.hist.msu.ru/ER/Text/cnst1977.htm>

<sup>231</sup> See., *Chapter II, The legal basis for separation and creation of the new States, Law on Secession*, pp.30-40.

legislative and administrative acts relating to the determination of administrative boundaries.<sup>232</sup> For these reasons the conclusions of these observers are not convincing.

### 3. Following: *Utī possidetis juris* and effectiveness

From the perspective of *uti possidetis* the preference seems to be given to legality rather than effectiveness,<sup>233</sup> in order to ensure stability in international relations.<sup>234</sup> However, that does not mean that material effectiveness does not play any role in determining a certain boundary.<sup>235</sup>

It only means that it will play a subsidiary role, as made clear by a passage of the decision of the ICJ in *Burkina Faso/Mali* on the relation between *uti possidetis* and effectiveness:

*The uti possidetis line is not itself a line of actual possession as such, but rather the line (of whatever status at the time) established in law by the previous sovereign by virtue of a positive act of legislative or administrative authority or as a consequence of a series of relevant and authoritative acts.*

*However, such a line may need to be demonstrated or proved by recourse to effectivités, including actual possession, or with regard to subsequent practice. It may indeed be an ex post facto rationalization in the light of activities undertaken or views expressed at various relevant times.*<sup>236</sup>

Hence, the only role of *effectivité* is to confirm the exercise of the right derived from a legal title. At the moment of its declaration of independence, in Abkhazia there was an independent government which exercised effective sovereign control over the same territory, that historically belonged to Abkhazia when it was an independent State. The government was able to establish international relations on the international scene as an entity *superiorem non recognoscens*. The *status* of Abkhazia remained and still is independent and effective thus consolidated over 27 years.<sup>237</sup>

As can be seen, being the holder of the right to external self-determination, Abkhazian *effectivité* further confirms the exercise of the right derived from this legal title provided by Soviet law.

To sum up the principle of *uti possidetis juris* was not indeed applied to the secession of the Soviet Union. Otherwise in the case of its application non only the internal line of the former first level Soviet sub-units, that is of Georgia, should be upgraded to the *status* of international

<sup>232</sup> See: Chapter III, *The Commonwealth of the independent States*, 6. *The legal basis of boundary delimitation between the new States in the post-Soviet area*, a. *The right to external self-determination under Soviet legislation*, pp. 49-50.

<sup>233</sup> See for example ICJ in *El Salvador v. Honduras* stating '[i]t should be recalled that when the principle of *uti possidetis juris* is involved the ius referred to is not international law but the constitutional or administrative law of the pre-independence sovereign, in this case Spanish colonial law.'

<sup>234</sup> Enrico Milano, *Unlawful Territorial Situations: Reconciling Effectiveness, Legality and Legitimacy in International Law*, op.cit., p.116

<sup>235</sup> *Ibid.*, p.117.

<sup>236</sup> Frontier Dispute (Burkina Faso/Mali), ICJ Reports 1986, 554, at 558

<sup>237</sup> This issue will be examined in detail later in the Part Three *An Assessment of the present legal status of Abkhazia*, Chapter II *The right to secession*, pp.163-218

one, but also administrative boundaries of some former second level sub-units, such as Abkhazia should become international as well as other sub-units, which were entitled to secede under the domestic law of the Soviet Union.

#### 4. Application of *uti possidetis* to all types of boundaries

A group of commentators basing on a uniform colonial practice interpreted the recent events in Europe, including the USSR division, as a general practice of the application of *uti possidetis*, which would crystallize this principle into an international customary norm. In other words, it was qualified as evidence of a general practice accepted as law.

In other words, the observers<sup>238</sup> affirmed the applicability of *uti possidetis* beyond colonial context and, as a consequence, its automatic application even to the USSR secession. They consider the situation of the secession from the Soviet Union similar to that of decolonization and *uti possidetis* as a general principle connecting to attaining independence, no matter where and how occurs.

If the principle in such a broad is applicable to the former USSR case, then it would be inconsistent to limit its application only to first level units. In fact, supporting the thesis of its customary nature, some scholars underlined that *uti possidetis* was applicable to the former USSR territories, in such a way as to favour the upgrade of all levels of Soviet entities struggling for independence. Actually, even in its first historical practice in Latin America, the *uti possidetis* rule was applied to all types of boundaries. Historically, in Latin America, quite diverse types of territorial entities existed: provinces, *vice-royautés*, *alcaldías mayores*, *corregimientos*, *intencias*, and the jurisdictions of a higher court (*audiencias*)<sup>239</sup>. Importantly, in Latin America *uti possidetis juris* was not only applied to the boundaries between *vice-royautés* (vice-kingdoms), but was likewise applied to administrative subdivisions within a single vice-kingdom. It was also applied to subordinated entities of different types within one Captaincy-General. For instance, until 1803 the Captaincy-General of Guatemala encompassed the Government of Honduras and the General Command of Nicaragua, which later became sovereign States.<sup>240</sup> As another example can be given the cases of Paraguay and Bolivia: within their international boundaries emerged from the province of Paraguay on the one hand and on the other hand from the *audiencia of*

<sup>238</sup> For instance, MG Kohen, *Le problème des frontières en cas de dissolution et de séparation d'Etats: Quelles alternatives?* in O Corten et. Al (eds), *Demembrements d'Etats et delimitations territoriales. L'uti possidetis en question(s)*, Bruylant 1999, pp. 365, 283. For a contextualisation discussion of whether *uti possidetis* transferrable at all to the boundaries in the former Soviet Union see O Luchterhandt. '*Grenzen in Mittelalten und uti possidetis Prinzip: der Fall "Fergana-Tal"*' in Nußberger and Cvon Gall (eds) *Bewusstes Erinnern und bewusstes Vergessen*, Mohr Siebeck, 2011 51, 58-60, 105-106. The author concludes that despite differences between classical colonialism and the Soviet Union, and despite uneven status and legitimacy of internal Soviet boundaries, *uti possidetis* is applicable to the territory of the USSR.

<sup>239</sup> Cf. Frontier Dispute Case (El Salvador v Honduras, Nicaragua intervening), n.25 para.

<sup>240</sup> *Ibid.*, (n21) para161.

*Charcas*. Both had been part of the vice-kingdom of Rio de la Plata, but were assigned to the “United Provinces of Rio de la Plata’ (which later became Argentina).<sup>241</sup>

Lalonde and Kohen underlined that the USSR Constitution is irrelevant for the application of *uti possidetis*. They asserted that it is unpersuasive to ascribe any importance to a constitutional guarantee when its effect only becomes relevant after a breakdown of the constitutional order.<sup>242</sup>

Moreover, Anna Peters underlined that it is not in line with the historical practice of colonial *uti possidetis* to limit the application of the principle to entities entitled by domestic law to secede. The colonies had no right to secede under domestic law of their time, and still their frontiers were upgraded by *uti possidetis*.<sup>243</sup>

Moreover, several States commented in their written statements in the *Kosovo* Advisory Opinion proceedings on the type of boundaries suitable for upgrading through *uti possidetis*. The Netherlands named all ‘former internal boundaries’.<sup>244</sup> Slovenia seemed to insinuate that all kinds of administrative line could be taken into account.<sup>245</sup>

Therefore, the authors drew conclusion that *uti possidetis* is applicable to all kinds of internal boundaries regardless their *status* under domestic law and meaning of boundaries. In fact, *uti possidetis* in itself does not identify which administrative divisions and lines are to be preserved and which are not.<sup>246</sup>

Consequently, each sub-unit of the USSR could rely on that principle to upgrade its boundaries, transforming its administrative lines into international borders.<sup>247</sup> In other words, it would mean that *uti possidetis* should be applicable to all kinds of internal boundary lines, namely, both the former Soviet republics and sub-units of the former Soviet Union within them.

## **5. Is the situation of secession (*de facto* dismemberment) from the USSR similar to other situations where the *uti possidetis* was applied?**

According to some commentators, by analogy with Yugoslavia, the USSR secession can be paragoned to the colonial situation, therefore, it could possible to apply the same *uti possidetis* rule.

<sup>241</sup> MG Kohen, *Le problème des frontières en cas de dissolution et de séparation d'Etats: Quelles alternatives?* In O Corten et. Al (eds), *Demembrements d'Etats et delimitations territoriales. L'uti possidetis en question(s)*, Bruylant 1999, n5, p. 372 and n.14.

<sup>242</sup> Suzanne N. Lalonde, *Determining Boundaries in a Conflicted World: The Role of Uti Possidetis*, Montreal, QC: McGill-Queen's University Press, 2003, n 9, p. 235; MG Kohen, *Le problème des frontières en cas de dissolution et de séparation d'Etats: Quelles alternatives?* In O Corten et. Al (eds), *Demembrements d'Etats et delimitations territoriales. L'uti possidetis en question(s)*, Bruylant 1999, n5, 372, n5, p. 394.

<sup>243</sup> Anna Peters, *Self-determination and Secession in International law*, op.cit., p.122.

<sup>244</sup> Written Statement of 17 July 2009, see [www.icj-cij.org/docket/files/141/15652.pdf](http://www.icj-cij.org/docket/files/141/15652.pdf), para 3,8.

<sup>245</sup> Written Comment of 17 July 2009, see [www.icj-cij.org/docket/files/141/15696.pdf](http://www.icj-cij.org/docket/files/141/15696.pdf), 4.

<sup>246</sup> S. Lalonde, op.cit., n.9, p. 237.

<sup>247</sup> MG Kohen, *Le problème des frontières en cas de dissolution et de séparation d'Etats: Quelles alternatives?* In O Corten et. Al (eds), *Demembrements d'Etats et delimitations territoriales. L'uti possidetis en question(s)*, Bruylant 1999, 365, 283; O Luchterhandt, *Grenzen in Mittelalten und uti possidetis Prinzip: der Fall "Fergana-Tal"* in Nußberger and Cvon Gall (eds) *Bewusstess Erinnern und bewusstes Vergessen* (Mohr Siebeck 2011) 51, 58-60, 105-106.

These authors underline several similarities between the USSR secession and colonial context. According to them, even in case of non-colonial secession *uti possidetis* should apply because the purpose to be pursued is the same, that is attainment of independence and securing stability.<sup>248</sup> Moreover, some observers affirm that there are some similarities even between the factual context of decolonization and the dissolution of the USSR. In particular, they assume that the Soviet Union was a modern quasi-colonial empire. According to them Russia pursued a policy of hegemony and transfer of populations in order to secure Russian domination and rules.<sup>249</sup> However this opinion is isolated and seems groundless, taking into account the different unprecedented nature of the Soviet Union as it shows the analysis the Soviet law<sup>250</sup> and the fact that the All-Union government was multinational.<sup>251</sup>

However, arguments in favour of *uti possidetis* application as customary source to the USSR secession by analogy with colonial context are far from being shared among jurists. To the contrary, a huge number of legal experts assume that decolonization is not paragonable to non-colonial secession and, in this perspective, *uti possidetis* cannot be applied to rule the USSR secession, due to some crucial differences that will be now examined one by one.

The first is the issue of legality as opposed to effectiveness. According to Oliver Corten the decolonisation and non-colonial secession are two different modes of acquiring independence. They follow different distinct logics.<sup>252</sup> The first was an exercise of self-determination, therefore the attainment of independence was based on legitimacy. While in contrast, in the situation of secession, independence is attained on the basis of effectiveness as opposed to legitimacy. Given this substantial difference, *uti possidetis* cannot be reasonably transferred from one context to the other. At least, not without any specific agreement.<sup>253</sup> Secession occurs in an international law free realm. Since 'no right' to have certain boundaries.<sup>254</sup> The territorial title and delineation of the boundaries cannot be separated from the mode in which the new State came into existence. The new State is a matter of fact and its existence depends on effectiveness<sup>255</sup> without any room for reliance on the pre-existing boundaries in the predecessor State. The distinction between them can be also framed in terms of lawfulness. Decolonization was allowed by international law.

<sup>248</sup> M. G. Kohen, *Le problème des frontières en cas de dissolution et séparation d'Etats: quelles alternatives?* in O. Corten, et al., *Démembrement d'Etats et délimitations territoriales: L'uti possidetis en question(s)*, Brussels, Bruylant, 1999, p. 433.

<sup>249</sup> For instance, see J. Isterhammel, *Colonialism*, Markus Wiener Publishing 1997, p. 17

<sup>250</sup> See Chapter III *Legal status of Georgia and Abkhazia under the Soviet Union legislation*, 3. *The Treaty of 1921 between the Georgian Soviet Socialist Republic and the Abkhazian Soviet Socialist Republic and their access to the Union of Transcaucasian Federative Republics*, pp. 102-105; the Soviet Constitutions of 1977 and 1978.

<sup>251</sup> Part Two *Analysis of the Abkhazian case*, Chapter IV *The secessionist movements after perestroika*, 2 *The War of laws and Georgian unilateral abolition of Soviet law*

<sup>252</sup> O. Corten, *Droit des peuples à disposer d'eux-mêmes et uti possidetis: deux ... (eds), Démembrements d'Etats et délimitations territoriales: L'uti possidetis en question(s)*, Bruylant, 1999, n 23, p.432

<sup>253</sup> Anna Peters, *Self-determination and Secession in International law*, Christian Walter; Antje von Ungern-Sternberg; Kavus Abushov, Oxford University Press, 2014, p.104.

<sup>254</sup> O. Corten, *Droit des peuples à disposer d'eux-mêmes et uti possidetis: deux ... (eds), Démembrements d'Etats et délimitations territoriales: L'uti possidetis en question(s)*, op.cit., n.23 p. 408

<sup>255</sup> See G. Arangio-Ruiz, *La persona internazionale dello Stato*, Emerito di Diritto internazionale Università "La Sapienza", Utet Giuridica, Roma, 2014, pp. 29-30.



Colonization had, by the 1950s, come to be seen as wrongful act, there was an international legal obligation to decolonize.<sup>256</sup> Jörg Fish underlined that decolonization started from the perception of the illegitimacy, illegal character of colonial rule. In contrast, a comparable illegal character cannot be attributed to the Soviet Union. Nobody ever maintained that the Soviet Union were contrary to international law. Therefore the USSR secession (as well as Yugoslavian dissolution) and decolonization occurred within a totally different legal framework.<sup>257</sup>

Other factor that distinguishes decolonization from non-colonial secession and so prevents the transfer customary *uti possidetis* to the non-colonial context is the implication of the events for territorial integrity. In decolonisation, peoples were fighting against distant powers, and the new States were formed over land outside the territory of the colonial power. For instance, the independence of Mali from France did not involve the neighbouring State or the people of Burkina Faso. In contrast, in a secession situation, the breaking away of territories from the USSR led to a significant shrinking of Russia and from SFRY led to full dismemberment. Other criteria, in colonial situation the principle secured the equal treatment of all geographical entities.

Last but not least, *uti possidetis* could not work as a general rule for all cases of secession outside the decolonization context. It does not provide any solution to secessions involving unitary States, which do not possess any internal administrative dividing lines. This would actually penalize secession attempts of minorities, thus leading strongly centralized States to undesirable political strategy for accommodating minority issues .<sup>258</sup>

All these arguments against applicability of *uti possidetis* must be taken seriously.

## 6. Is it possible to affirm that the principle of *uti possidetis* is a general customary rule?

Under opinion of some observers pointing to general application of *uti possidetis*, the practice of the Soviet Union was a result a firm belief that such outcome was dictated by customary law.<sup>259</sup>

By contrast, other scholars refuse to see *uti possidetis* as taking part of general customary law. In particular, they emphasize that the ICJ in its decision<sup>260</sup> recognised this principle as a customary rule exclusively in the colonial context. In fact, the Court have not made any reference to the application of this principle outside decolonization. There is only non-binding the Badinter Commission's (interpreting ICJ Judgement<sup>261</sup> in favour of the *uti possidetis* as a general principle), which supported its extension. However, this non-binding decision cannot generate international

<sup>256</sup> Anna Peters, *Self-determination and Secession in International law*, op.cit., p.104.

<sup>257</sup> J.Fisch, *Das Selbstbestimmungsrecht der Völker: die Domestizierung einer illusion*, Beck 2010, p. 284.

<sup>258</sup> S.N.Lalonde, *Determining Boundaries in a Conflicted World: The Role of Uti Possidetis*, n. 9 Queen's University, Brill, 2008, p. 237

<sup>259</sup> *Determining Boundaries in a Conflicted World: The Role of "Uti Possidetis"* by Suzanne N. Lalonde Review by: Marcelo G. Kohen

<sup>260</sup> Frontier Dispute, *Case of Burkina Faso v Mali*, 1986, para 20.

<sup>261</sup> *Ibidem*.

custom rule. As is known that in order to ascertain that new customary rule of international law to be formed it is necessary the existence of two constitutive elements *diuturnitas* (usus) – namely consistent and uniform practice by the part of the generality of States. This element is objective. Second, *opinio juris*, that is a belief that such practice is (required, prohibited or allowed, depending on the nature of the rule) accepted as a law (*opinio juris sive necessitates*). This is psychologic or subjective element customary law.<sup>262</sup>

Nowadays the *opinio juris* in favour of *uti possidetis* as a general custom rule of international law does not result to be diffused. In particular, in the occasion of declaration of Kosovo's independence the Court does not mention *uti possidetis*, but pronounced itself only on the corollary principle of territorial integrity.<sup>263</sup> Moreover, the written statements filed by 37 State, are relevant indicators of the prevailing *opinio juris* on this matter. Eight only of these 37 States mentioned *uti possidetis*.<sup>264</sup> Only 5 (Republic of Cyprus<sup>265</sup>, Ireland<sup>266</sup>, Romania<sup>267</sup>, Serbia<sup>268</sup> e Netherlands<sup>269</sup>) implicitly and explicitly considered *uti possidetis* applicable to the Kosovo case. Of those five, only two States, namely, Serbia and Cypress, espoused explicitly the legal position that the secession of Kosovo, *inter alia*, violated the principle of *uti possidetis*.<sup>270</sup> Leaving out Serbia, which obviously was self-interested party, only single Cyprus<sup>271</sup> out of the entire community found the separation of Kosovo from Serbia to be in violation of *uti possidetis*.

Therefore, it does not seem that application of *uti possidetis* rule outside the colonial context can be considered as corresponding to a consolidated State practice accepted as a law.

## 7. The interpretation of the CIS treaties as involving application of *uti possidetis*: critiques

According to other observers though *uti-possidetis* cannot be transferred automatically to the USSR secession, a consensual ground for the application of the same principle could be found in the CIS agreement.<sup>272</sup>

<sup>262</sup> See, Article 38 (b) of the *Statute of the International Court of Justice*; A/CN.4/672 GA, Second report on identification of customary international law by Michael Wood, Special Rapporteur, 2014 [http://legal.un.org/ilc/documentation/english/a\\_cn4\\_672.pdf](http://legal.un.org/ilc/documentation/english/a_cn4_672.pdf)

<sup>263</sup> ICJ Advisory Opinion of 22 July 2010, *Accordance with international law of the unilateral declaration of independence in respect of Kosovo*, 403

<sup>264</sup> Written Comment, 17 July 2009, <<http://www.icj-cij.org/docket/files/141/15696.pdf>>4

<sup>265</sup> Written Statement of the Republic of Cyprus of 3 April 2009, <http://www.icj-cij.org/docket/files/141/15616.pdf>, paras 85-86, 118, 156.

<sup>266</sup> Ireland concluded that the declaration of independence was not unlawful, see Written Statement of Ireland of 17 April 2009, <http://www.icj-cij.org/docket/files/141/15662.pdf>, para 20

<sup>267</sup> Romania maintained that the declaration constituted a violation of international law, see Written Statement of Romania of 14 April 2009, <http://www.icj-cij.org/docket/files/141/15616.pdf>, paras 85-87

<sup>268</sup> Written Statement of Serbia of 17 April 2009, <http://www.icj-cij.org/docket/files/141/15642.pdf>, paras 499, 575, 577.

<sup>269</sup> Written Statement of Kingdom of the Netherlands of 17 April 2009, <http://www.icj-cij.org/docket/files/141/15692.pdf>, para 3.

<sup>270</sup> See written Statement of the Republic of Cyprus of 3 April 2009, <http://www.icj-cij.org/docket/files/141/15616.pdf>, paras 85-86, 118, 156; Written Statement of Serbia of 17 April 2009, <http://www.icj-cij.org/docket/files/141/15642.pdf>, paras 499, 575, 577.

<sup>271</sup> Written Statement of the Republic of Cyprus of 3 April 2009, <http://www.icj-cij.org/docket/files/141/15616.pdf>, paras 85-86, 118, 156.

<sup>272</sup> For instance, G. NESI, *L'uti possidetis iuris nel diritto internazionale*, Padova, CEDAM, 1996; Malcolm N Shaw, *The heritage of States : the principle of "uti possidetis juris"*. Article. English. 1997. Publication: British year book of international law. Vol. 67 1996 : 75-154;F. Mirzaev *Uti possidetis v self-determination: the lessons of the post-Soviet practice* <https://ira.le.ac.uk/bitstream/2381/29331/1/2014mirzayevfphd.pdf>; O Corten, 'Droit dei peoples à disposer d'eux-mêmes et uti possidetis: deux faces d'une même médaille?' in O Corten et. al. (eds), *Démembrements d'Etats et délimitations territoriales: L'uti possidetis en question(s)*, Bruylant 1999, pp. 403, 432

For instance, Santiago Torres Bernardez stated that in the context of secession *uti possidetis* could only be applied *through a 'contracting-in' consent of the parties concerned... Uti possidetis juris qua* norm of international law is not directly applicable to territorial problems arising in relations between new States which were formerly constituent territorial units of a given sovereign State.<sup>273</sup>

Alain Pellet argued that nothing in the reasoning of the Court's reference to the generality of the principle of *uti possidetis juris* in the Frontier Dispute<sup>274</sup> suggests that the *uti possidetis* principle would apply in situations other than those dealing with decolonization.<sup>275</sup> J. Vidmar also observed that *uti possidetis* is a firmly established principle of international law in the process of decolonization underlining its strong indication of the 'colonial scope' in the Frontier Dispute.<sup>276</sup> In absence of the sufficient legal tools for the boundary determining in international law, however, the commentators admitted the applicability of *uti possidetis* beyond the colonial context but only on the consensual basis that is by virtue of the Agreement. For instance Mirzaev argues:

*However, even if a general and automatic application of uti possidetis to cases of non-colonial is rejected, uti possidetis can always be applied, also in the context of secession, by virtue of an agreement which refers to it.*<sup>277</sup>

In confirmation of this, the scholars, making reference to the opinion of the Arbitration Commission headed by Badinter, opined<sup>278</sup> that although its statement on the generality of the *uti possidetis* principle, the Commission advised to apply the *uti possidetis* exclusively to the former first-level subunits of Yugoslavia.<sup>279</sup> Under their opinion, legal basis of such upgrade of administrative boundaries to international frontiers was the territorial arrangement of the interested parties.<sup>280</sup>

In particular, they interpreted the political declarations of the former first-level sub-units of Yugoslavia and the CIS treaties as a territorial arrangement for applying of *uti possidetis* in the non-colonial context. In fact, by analogy with the Yugoslavian secession, the scholars suggest the

<sup>273</sup> Santiago Torres Bernárdez, *the Uti Possidetis Juris Principle in historical perspective.*, Duncker & Humblot, 1994, p. 15.

<sup>274</sup> '[Uti possidetis] a general principle, which logically connected with the phenomenon of obtaining independence, wherever it occurs', Frontier Dispute, Case of Burkina Faso and Mali (1986)

<sup>275</sup> Pellet Alain, *The Opinions of the Badinter Arbitration Committee: A Second Breath for the Self-Determination of Peoples*, 3EJIL, 182(1992), p. 180

<sup>276</sup> J. Vidmar, *Democratic Statehood in International Law The Emergence of New States in Post-Cold War Practice*, Studies in International law, Hart Publishing; UK ed. edition, 2013, p.68.

<sup>277</sup> F. Mirzaev, *Uti possidetis v self-determination: the lessons of the post-Soviet practice* <https://ira.le.ac.uk/bitstream/2381/29331/1/2014mirzayevfphd.pdf>;

<sup>278</sup> For instance, see Hasani, *Uti Possidetis Juris: From Rome to Kosovo*; Malcolm N Shaw, *The heritage of States : the principle of "uti possidetis juris"*; Independent International Fact-Finding Mission on the Conflict in Georgia [http://news.bbc.co.uk/2/shared/bsp/hi/pdfs/30\\_09\\_09\\_iiffmgc\\_report.pdf](http://news.bbc.co.uk/2/shared/bsp/hi/pdfs/30_09_09_iiffmgc_report.pdf); J. Vidmar, *Democratic Statehood in International Law The Emergence of New States in Post-Cold War Practice*, Studies in International law, Hart Publishing; UK ed. edition, 2013, p.68 and so on.

<sup>279</sup> Cf. Opinion No. 2 (20 November 1991), in which the Badinter Commission advocated the internal right to self-determination of the Serbian population in Croatia and Bosnia-Herzegovina, but did not admit a right to secession: "... it is well established that, whatever the circumstances, the right to self-determination must not involve changes to existing frontiers at the time of independence (uti possidetis juris) except where the States concerned agree otherwise." (reprinted in EJIL 3 (1992), at 182 et seq.)

<sup>280</sup> Corten Olivier, Barbara Delcourt, Pierre Klein et Nicolas Levrat, *Démembrements d'Etats et délimitations territoriales : l'uti possidetis en question(s)*, Bruylant 1999, p. 430.

selective application of *uti possidetis* to the USSR basing on the CIS treaties.

Actually, the relevant documents on the formation of the CIS do not endorse the application of *uti possidetis*, but rather aim at proclaiming the intangibility of borders and territorial integrity of the parties. Some jurists, however, interpreted the CIS treaties as involving implicit adherence to the principle of *uti possidetis juris*.<sup>281</sup>

For instance, Farhad Mirzayev highlights that the main intention of the CIS members was to approve and strengthen the principle of *uti possidetis*, but only with reference to the boundaries of the first level units.<sup>282</sup>

Under the view of Malcolm Shaw:

*it is clear that the intention was to assert a uti possidetis doctrine, not least since this would provide international and regional (as well as crucial national) legitimation for the new borders. In addition, and once established, the classical rules of international law would sustain those borders as existing, unless the relevant parties agreed to a change*".<sup>283</sup>

The same view has been endorsed by Enver Hasani, who affirms that these 'CIS instruments do not specially differentiate between *uti possidetis* as turning internal boundaries into international boundaries and territorial integrity as the principle of international law protecting recognized international boundaries'.<sup>284</sup>

Such analysis, is based on the presumption that CIS members - which in pre-independence time were the former *Soviet republics* (first-level Soviet sub-units) - would intend to maintain Soviet administrative delimitation of the former first-level units until 1990-1991. This presumption could explain the commitment by the CIS members to '*respect each other's territorial integrity and inviolability of existing borders,*' without indicating what they intended under '*existing*' boundaries. Thus, the agreements were interpreted as necessarily involving the implicit intention of the contracting parties to maintain pre-existing boundaries, namely those of the first-level Soviet entities. In other words, the explicit mention of territorial integrity and inviolability of frontiers in the documents relating to the CIS has been interpreted by them as amounting to an indirect endorsement of *uti possidetis*.

<sup>281</sup> Indeed, logical links between those principles would warrant such inference. It is true that once *uti possidetis* has been applied, one consequence is the intangibility of the boundary. However, while *uti possidetis* refers to the creation of boundaries, intangibility/inviolability refers to their preservation. In that sense, application of the principles of territorial integrity, intangibility, and non-intervention necessary comes after *uti possidetis*. Therefore, just endorsing the inviolability of boundaries in international legal texts does not in itself manifest the legal opinion that these borders must be defined on the basis of *uti possidetis*, intangibility is no veiled substitute for *uti possidetis*. Indeed, the application of territorial integrity is not conditioned upon having used *uti possidetis*. This application presupposes determination of a boundary, but this can take place through various principles or procedures; either *uti possidetis* or, a territorial referendum. Thus, it is not clear how the equation of the presumptive *uti possidetis* principle with the inviolability the preexisting frontiers present *uti possidetis*. G., NESI *L'uti possidetis iuris nel diritto internazionale*, Padova, CEDAM, 1996.

<sup>282</sup> F. Mirzaev *Uti possidetis v self-determination: the lessons of the post-Soviet practice*, <https://ira.le.ac.uk/bitstream/2381/29331/1/2014mirzayevfphd.pdf>

<sup>283</sup> Malcolm N Shaw, *The heritage of States : the principle of "uti possidetis juris"*, Article. English. 1997. Publication: British year book of international law. Vol. 67 1996 : 75-154.

<sup>284</sup> E. Hasani, *Uti Possidetis Juris: From Rome to Kosovo*, Fletcher Forum of World Affairs, 27 (2003), 85 (92)

In fact, an agreement providing for application of the *uti possidetis* can be explicit or implicit. An implicit agreement could lie in the simple act of applying the principle.<sup>285</sup>

Shaw recalls the European Community guidelines on Recognition,<sup>286</sup> which set the requirements for recognition of new States emerged from the former Yugoslavia and USSR (excluding the former Baltic Republics<sup>287</sup> and Russia<sup>288</sup>). In particular, the professor affirms that the European Community intended to apply the *uti possidetis* principle exclusively to the former Soviet republics through calling for '*respect for the inviolability of all frontiers, which can only be changed by peaceful means and by common*'.<sup>289</sup> In his opinion '[such approach of the European Community] "*provides important evidential support for international acceptance of the uti possidetis principle in this particular context*".<sup>290</sup>

Moreover, the matter regarding the selective applicability of *uti possidetis* in the context of the Soviet Union was also faced, in the Report of the EU Fact-Finding Mission (written by Swiss diplomat Heidi Tagliavini, with the help of 30 European military, legal and history experts), which investigated the armed conflict in Georgia in 2008.<sup>291</sup> In particular, the Report of the Fact-Finding Mission seems to support only the upgrading of the former first-level Soviet entities' boundary to international<sup>292</sup>:

*only former constituent republics [first-level sub-units] such as Georgia but not territorial sub-units [of second, third and four-levels] such as South Ossetia or Abkhazia are granted independence in case of dismemberment<sup>293</sup> of a larger entity such as the former Soviet Union.*<sup>294</sup>

Heidi Tagliavini assumes: [*uti possidetis*] was confirmed by the founding documents of

<sup>285</sup> O Corten, *Droit dei peoples à disposer d'eux-mêmes et uti possidetis: deux faces d'une même médaille?* in O Corten et. al. (eds), *Démembrements d'Etats et délimitations territoriales: L'uti possidetis en question(s)*, Bruylant 1999, pp. 403, 432

<sup>286</sup> The Declaration on the Guidelines on the Recognition of the New States in Eastern Europe and in the Soviet Union were designed by the European Community (now, the European Union) on 16 December 1991. The Declaration begins by referring to the Helsinki Final Act and the Charter of Paris, 'in particular the principle of self-determination'. It then affirms the readiness of the EC countries to recognize new states 'subject to the normal standards of international practice and the political realities in each case.' The Guidelines describe the candidates for recognition as those new states which 'have constituted themselves on a democratic basis, have accepted the appropriate international obligations and have committed themselves in good faith to a peaceful process and to negotiations'. The Guidelines warn also that the EC countries 'will not recognize entities which are the result of aggression' and, that 'they would take account of the effects of recognition on neighboring states.' Although the Guidelines claiming to retain the 'normal standards of international practice' added a new regime for recognition of states in 'Eastern Europe and the Soviet Union' and supplanted the previous practice which was largely based on meeting the traditional criteria for statehood. Thus this document was to influence international reactions on the issue of recognition of the new emerging states of Eastern Europe and, arguably, transform recognition law. This method of requiring for recognition is virtually unprecedented in recognition practice. Declaration on the Guidelines on the Recognition of the New States in Eastern Europe and in the Soviet Union (Annex1), 16 December 1991, International legal materials 31 (1992): 1486-87

<sup>287</sup> The EC countries recognized the three Baltic states as states before the disintegration of the USSR. The Guidelines on Recognition had not extended recognition to any new States in Eastern Europe. The former Union Baltic Republics were recognized as states before the disintegration of the USSR.

<sup>288</sup> The continuity of Russia to the USSR was accepted by the international community, therefore the Guidelines on Recognition had not extended to the Russian Federation.

<sup>289</sup> Declaration on the Guidelines on the Recognition of the New States in Eastern Europe and in the Soviet Union, (Annex1), 16 December 1991, International legal materials 31 (1992): 1486-87.

<sup>290</sup> Malcolm N Shaw, *The heritage of States: the principle of "uti possidetis juris"*. Article. English. 1997. Publication: British year book of international law. Vol. 67 1996 : 75-154.

<sup>291</sup> Independent International Fact-Finding Mission on the Conflict in Georgia at [http://news.bbc.co.uk/2/shared/bsp/hi/pdfs/30\\_09\\_09\\_iiffmge\\_report.pdf](http://news.bbc.co.uk/2/shared/bsp/hi/pdfs/30_09_09_iiffmge_report.pdf)

<sup>292</sup> E. Hasani, *Uti Possidetis Juris: From Rome to Kosovo*, Fletcher Forum of World Affairs, 27 (2003), 85 (92)

<sup>293</sup> Here the Commission headed by Tagliavini used the term 'dismemberment' in the way non appropriated. According to the overwhelmingly accepted the continuity between the USSR and Russia Russian it deal with secession and not with dismemberment.

<sup>294</sup> The Report of the Fact-Finding Mission, 154, <http://rt.com/files/politics/georgia-started-ossetian-war/iiffmge-volume-ii.pdf>;

*the CIS*.<sup>295</sup> Hence, similar to M. Show and other scholars, H. Tagliavini interpreted the CIS tools as an implicit acceptance of *uti possidetis* by the CIS Members, meant at transforming the former first-level units' boundaries into international frontiers.

However, such interpretation of the CIS treaties arises serious objections. These arguments ignore the fact that no single reference to this principle appears in the Minsk Agreement, in the Alma Ata Declaration, in the Alma Ata Protocol, in the Charter of the CIS or in any other relevant document. It is difficult to imagine that a reference to it was omitted accidentally. How can these clear and unambiguous references to such fundamental legal principles as territorial integrity and the inviolability of frontiers, made in the CIS treaties, be treated as the application of the *uti possidetis* principle?<sup>296</sup>

The principle of *uti possidetis* is not equal to the principle of territorial integrity. The first principle envisages transformation of former internal administrative borders into international boundaries, while the second provides for the protection/preservation of the territorial integrity: therefore, the second principle applies *once territorial borders are set*, but does not provide for any criteria concerning the way in which they should be set.

The opposite opinion disregards fundamental rules on treaty interpretation as codified in the 1969 *Vienna Convention on the Law of Treaties*. In particular, art. 31 of Section 3 [General rule of interpretation that take part of the customary law] provides:

*A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose.*

The purpose of the CIS agreements was the foundation of the Commonwealth of Independent States and was not defining of the State-members' boundaries. This perfectly explains why the boundaries were not determined by the CIS documents.

In addition, the CIS contracting parties explicitly made reference to the fundamental principles of international law, one of them was the principle of self-determination. As is well known, this principle is acknowledged as *jus cogens*. Therefore, it prevails over the principle of *uti possidetis*, that can be considered – at the most - only as a customary norm.

It can be concluded that there are no reasonable grounds for an interpretation of the CIS treaties as involving an application or even as an endorsement of *uti possidetis*.

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<sup>295</sup>Ibidem;

<sup>296</sup>S. Lalonde, *Determining Boundaries in a Conflicted World: The Role of Uti Possidetis*, McGill-Queen's University Press, 2002, p. 156.

## 8. *Uti possidetis* and self-determination

Some scholars even affirmed that the selective application of *uti possidetis* was in line with self-determination. J. Vidmar, for instance, pointed out:

*the former Soviet republics did not agree to “upgrade” all internal boundaries to the status of international borders but only those delimiting the republics (i.e. constitutionally-recognized self-determination units).*

*...[I]n non-colonial situations a plausible claim to independence can only be made by a territorial unit whose population qualifies as a people for the purpose of the right of self-determination. Consequently, only internal boundaries of such units are capable of becoming international borders. The case of the dissolution of the Soviet Union also affirms that where the exact boundaries of historically-realized self-determination units have been subject to change, the latest internal boundary will be considered very important when new international borders are confined.*<sup>297</sup>

The same opinion was shared by F. Mirzaev:

*[U]pon the exercising by the former USSR republics the right to self-determination, the principle of uti possidetis was applied in order to define the territorial frameworks of these newly independent states. It may be argued that it was a point when the two principles were in co-operation.*<sup>298</sup>

However, it is difficult to agree with these opinions. As is known due to arbitrary territorial rearrangements of V. Lenin, I. Stalin and N. Khrushchev, many boundaries of the Soviet units were determined against the will of peoples without taking into consideration their historical, cultural and social peculiarities. In particular, the administrative boundaries of many *Soviet Union Republics* (the first level sub-units) and other sub-units were changed in line with the “nationality question” policy, which aimed to prevent ethno-national antagonism. Under this policy was deemed:

*"A nation is a historically constituted, stable community of people, formed on the basis of a common language, territory, economic life, and psychological make-up manifested in a common culture."*<sup>299</sup>

<sup>297</sup> J. Vidmar, *Confining New International Borders in the Practice of Post-1990 State Creations*, pp.339-342, [http://www.zaoerv.de/70\\_2010/70\\_2010\\_2\\_a\\_319\\_356.pdf](http://www.zaoerv.de/70_2010/70_2010_2_a_319_356.pdf);

<sup>298</sup> Mirzaev, op.cit., <https://ira.le.ac.uk/bitstream/2381/29331/1/2014mirzayevfphd.pdf>

<sup>299</sup> А. А. Чернобаев, *Сталин Иосиф Виссарионович / Политические деятели России 1917 г.*, Биографический словарь, М.: Большая Российская энциклопедия, 1993. — 432 с. А.А. Chernobaev, *Stalin Iosif Vissarionovich/Politicheskie dejateli Rossii 1917 g.* Biographicheskij slovar', M. Bol'shaja Rossijskaja enziklopedia, 1993, p. 432

Hence the Soviet government encouraged the cultural-social and ethno-national amalgamation between various ethnic groups and promoted multi-ethnic values in order to ensure a solid unitary union between Soviet sub-units and eradicate ethno-national antagonism.

One of the consequences of the Bolsheviks' national policy was partition of a large ethnic group into a small one, thus creating 'virtual nationalities'. An example of this is found in the case of the Russian ethnicity: a big Russian ethnic group was divided into Russian, Belorussian, and Ukrainian, Ossetia into South and Nord.<sup>300</sup>

In line with this national policy, the former part of Armenia Nagorno-Karabakh, bringing an overwhelming majority of Armenians, was incorporated into Azerbaijan. As stated by Krüger with regard to Nagorno-Karabakh:

*the affiliation of a number of the former second and third level subunits to the first level one was conditioned exclusively by the formation and existence of the Soviet Union.*<sup>301</sup>

In practice, this trend concerned not only Nagorno-Karabakh, but also many other former entities of the Soviet Union. For instance, Transdnestria,<sup>302</sup> Abkhazia, South Ossetia,<sup>303</sup> Crimea, were embodied in the first level unit, exclusively in connection with the formation and existence of the Soviet Union.

In addition, the arbitrarily revision of some administrative boundaries of the Soviet Union was in contrast with URSS legislation. Examples of this are again Abkhazia (as can be seen in the previous charters a short-lived as a Socialist Soviet Republic from 1921 to 1931, thereafter downgraded to an Autonomous Republic within the Soviet Union Republic of Georgia<sup>304</sup>) and Crimea (transferred from the Russian Union Republic to the Ukrainian Union Republic in 1954<sup>305</sup>).

As a result, under the Soviet period various peoples – even hostile between each other – had to coexist within the same administrative unit, (e.g. Abkhazia and the South Ossetia that were included against the will of the peoples into Georgia, and Transdnestria into Moldavia, as well the Armenian of Nagorno-Karabakh).

Hence determining the administrative boundaries between the USSR subordinated entities in accordance with "the national question" and other authoritarian politics does not reflect historical, national realities, and can be regarded as unjust and against the *self-determination* principle. For this reason, such boundary delimitation caused the eruption of armed conflict within

<sup>300</sup> Roman Szporluk, *Communism And Nationalism. Karl Marx Versus Friedrich List*, Harvard Ukrainian Research Institute, 1992, Vol. 16, No. 3/4 (December 1992), pp. 451-453

<sup>301</sup> Heiko Krüger, *The Nagorno-Karabakh conflict*, Original German edition published by Springer Berlin Heidelberg 2009 2010, XII, 155 p.

<sup>302</sup> Transdnestria was included in Moldavian Union Republic

<sup>303</sup> Abkhazia, South Ossetia were incorporated into Georgian Union Republic

<sup>304</sup> See, this matter forward in Part Two *Analysis of the Abkhazian case*, Charter III *Legal Status of Georgia and Abkhazia under the Soviet Union Legislation*.

<sup>305</sup> <https://russian.rt.com/science/article/386354-25-let-akt-gosudarstvennaya-samostoyatel'nost-krym>



new States emerged from the Soviet Union, which was accompanied with widespread illegalities and egregious human rights violations.

### 9. The value of recognition

As a further argument, scholars supporting elective application of *uti-possidetis* in the context of the USSR secession underline the importance of the recognition by the international community of the new States established within the former first-level sub-units of the Soviet Union's internal lines, now considered as international boundaries.

However, despite its political relevance, *de iure* recognition, has no constitutive value and does not affect existence or non-existence of a new State. The State is a *de facto* entity and its existence does not come as a consequence of political or legal acts. The unique operative criterion is effectiveness.<sup>306</sup> Therefore, notwithstanding Georgia's recognition with boundaries including Abkhazia, all that matters is effective control of Abkhazia over its territory. Recognition cannot constitute the territorial title over Abkhazia. Abkhazia is independent and effective entity: and its effectiveness is not questionable.<sup>307</sup>

### 10. Concluding remarks

Under my opinion the *uti possidetis* was not applicable the Soviet Union secession for following reasons: a) This principle does not form part of general customary law; b) in any case, the USSR secession's context differs from cases where *uti possidetis* traditionally has been recalled.

However, even if we admit its application to the USSR secession, the principle cannot operate at the level of the *Soviet Union* republic. It should have regard to not only to the Soviet Constitution but also to other Soviet legal and administrative acts clarifying the issue of the boundary delimitation between the former sub-units of the Soviet Union. Constitutional norms, were left ambiguous on the matter (just because they did not have the purpose of ruling such issue).

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<sup>306</sup> See G. Arangio-Ruiz, *La persona internazionale dello Stato*, Emerito di Diritto internazionale Università "La Sapienza", Utet Giuridica, Roma, 2014, pp. 29-30.

<sup>307</sup> This issue will examine in details in the Part Three *An Assessment of the present legal status of Abkhazia, Chapter II The right to secession*, pp.163-218

**PART TWO**  
**ANALYSIS OF THE ABKHAZIAN CASE**

**CHAPTER I**  
**HISTORICAL DEVELOPMENTS EARLIER TIMES**

**1. The Kartli-Kakheti Kingdoms**

The conflict between Georgia and Abkhazia has a particularly long and complicated history going back to the post- Russian Empire dissolution and Soviet period, which culminated in armed conflict after the collapse of the Union Soviet. According the Georgian view the military actions were undertaken in 1992-1993 in order to suppress separatist movements ‘orchestrated by the ‘long arm’ of Moscow’ and establish control over Abkhazia as the latter would be an integral part of its territory. While the Abkhazian unanimously view the same tragic events as a culmination of the national liberation struggle of the Abkhazian people and the realization of their legitimate right to self-determination. One of the aspects of the conflict is the ongoing rivalry between Georgians and Abkhazians that stemmed from the claims about priority of settlement in the region and the Georgian ambitions for predominance there. Each party has its own interpretation of past events which, far from converging, are in fact completely at odds with each other. In fact, both Georgian and Abkhazian scholars claim that their respective nations, or at least proto-nations, emerged in antiquity and gained mention in the chronicles of Greek travellers, and each denies the status of the other.

Their rivalry explains their totally different and often mutually exclusive interpretations of the history of that region from the Classical period and Middle Ages, different expectations, conflicting vectors of political development, barely compatible nation-building projects led to increasingly mental incompatibility. Moreover, it clarifies the Georgian ambitions and its territorial claims to Abkhazia, which resulted in the occupation of Abkhazia from 1918 to 1921 by part of Georgia with direct support of the external forces; the Georgian discriminatory, oppressive policy of 1937-53 against the Abkhazians and the escalation of the Georgian-Abkhazian conflict in the post-Soviet period. Thus, it led to their alienation and the impossibility of the coexistence of these nationalities within new post-Soviet realities, that is, within the framework of the new-born Georgian State.

Among other factors of the Georgian-Abkhazian conflicts, the Russian policy towards these nationalities can be mentioned. In fact, the Russian Empire and especially the Soviet Union

advantaged the Georgian peoples at the expense of the Abkhazians. Thus the Russian Tsar saw the Georgians as loyal nationalities, while it viewed the Abkhazians as potential allies of Ottoman Turkey. For this reason the imperial government encouraged the resettlement of the Georgians into Abkhazian lands, while a great number of the Abkhazians immigrated to Turkey after the Russian-Turkish and Caucasian wars. In fact in 1886 ethnic Abkhazians made up 85.7% of population of Abkhazia, while in 1897 their percentage had dropped to just 55.3%. At the same time the 6.0% of the Georgians (in 1886) rose to 24.4% (in 1897) in the Abkhazian lands. The Soviet Government, namely Stalin, assured the privileged status of Georgia within the Soviet Union at expense of other ethnic groups, especially the ethnic Abkhazians. This explains how came about that the Abkhazian republic (the first level sub-unit) was included in another first level one, the Georgian republic, in 1931 and permitted the Georgian authorities to undertake the discriminatory, unconstitutional policy against the Abkhazians. The changes in the Transcaucasian demographic situation and policy of the Soviet government, which advantaged the Georgian nationalities at expense of the Abkhazians ones, led to Georgian political importance and its playing an increasingly significant role in Transcaucasia, and its imperialist ambitions. As a result, after the dissolution of the Union Soviet the new-born state of Georgia demanded the boundaries be fixed by Stalin, at the same time rejecting the national identity of the Abkhazians. A greater part of the arguments of the parties is based on arcane arguments and slippery archeological evidence, with which they claimed their priority of settlement in Transcaucasia and partially justified actual territorial demands to the Abkhazian territory. According to international law these argumentations are not relevant for the title to the Abkhazian territory and are therefore outside my field of research. For this reason I will deal only with the legal grounds of the Georgian-Abkhazian conflict.

The Abkhazian *status* is at the core of the Georgian-Abkhazian conflict. Georgia advances territorial claims on the Abkhazian territories affirming that Abkhazia is its integral part. On the other hand, the Abkhazian Republic states to be an independent and sovereign entity, which exercised sovereign rights on the mentioned territory. Both parties are referring to titles back in different historic periods, even back to the Russian Empire (XVIII) (*tempus regit actum*).

Hereafter the sources on which each party based its own reasons.<sup>308</sup>

In order to justify its territorial claims to the Abkhazian territory Georgia refers to the following legislative acts and agreements:

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<sup>308</sup> А. Сазонов, М.Зоценко, Ю. Томашевск, *Под стягом России: сборник архивных документов*, М., Русская книга, 1992; Я.З. Цинцадзе, *Материалы к истории русско-грузинских взаимоотношений 1782-1791 гг.*; Тамаз Диасамидзе, *Статус Автономных Регионов Абхазии и Юго-Осетии в составе Грузии (1917-1988)*, Центр по Исследованию Регионализма, Тбилиси, 2004; Я.З. Цинцадзе, *Материалы к истории русско-грузинских взаимоотношений 1782-1791 гг.*; Б.Е. Сагария, Т.А. Ачугба, В.М Пачулия, *Сборник материалов. Абхазия: Документы свидетельствуют, 1937-1953 гг.*, Сухум: Алашара, 1991; А. Г. Аршев, В.А.Захаров, Е. Г. Семерикова, В.В. Дегоев, *Кавказский сборник*; МГИМО (У), Центр Кавказских исслед. Т. 6 (38). М., 2010.

- *The 1783 Treaty of Georgevsk*
- *The 1918 Declaration of Independence of the Georgian Democratic Republic*
- *The 1920 Moscow treaty (signed between the Georgian Democratic Republic and the Russian Socialist Federal Soviet Republic);*
- *La Costituzione della Repubblica Democratica Georgiana del 1921,*
- *The USSR Constitution of 1936 and 1977,*
- *The 9 Aprile 1991 Act on the Restore of independence,*
- *The 1995 Constitution of the Georgian Democratic Republic.*

Abkhazia instead, in order to prove its own sovereign rights on the mentioned territory is based on the following laws and agreements:

- The 1810 'Gramota' on the Protectorate of the Russian Empire,
- The Treaty of 9 February 1918 concluded between the Abkhazian National Council and the Georgian National Council,
- The Treaty of 11 June 1918 concluded between the Georgian Democratic Republic and the Abkhazian National Council,
- The Treaty on military, financial-economic and political collaboration, signed on the 15 December 1921 between the Abkhazian Socialist Republic and Georgian Socialist Republic,
- The All-Union Treaty of 30 December 1922,
- The USSR Constitution of 1977,
- The USSR Law "On the delineation of powers between the USSR and the subjects of the federation of 26 Aprile 1990,
- The Law on the Procedure for Resolving Questions Connected with a Union Republic's Secession from the USSR of 3 April 1990,
- The Constitution of the Abkhazian Soviet Republic of 1925,
- The Constitution of the Abkhazian Democratic Republic of 1994
- The Declaration on measures for a political settlement of the Georgian and Abkhazian conflict of 4 April 1994

- Legal opinion on the validity and interpretation of the 1994 Agreement la valutazione e interpretazione giuridica di questo accordo proposta dagli esperti del diritto internazionale.

Since both Georgia and Abkhazia are basing their different legal arguments on documents issued by the Tsar regime, it is necessary to examine these sources.

The Russian Empire not only contributed to the formation of the Georgian State, but also created the denomination "Georgia". In 1771, the term "Georgia" was first mentioned in a Russian Empire's document named "Plan of operations of the troops of Major-General Sukhotin in Asia in the campaign of 1771", which concerns the Kartli-Kakheti Kingdoms.<sup>309</sup> Here it is necessary to precise that Georgia is considered as the successor of the Kartly-Kakheti Kindoms. From the document is understandable that the territories of these Kingdoms were located in the central Transcaucasia and that their extension was not going beyond 280 *Versta*<sup>310</sup> from east to west and 300 *Versta* from north to south. Moreover, as follows from this map, neither Imeretia, Guria, Mingrelia, nor especially Abkhazia had anything in common with Kartli-Kakheti Kingdoms [Georgia]. Before accepting the Russian protectorate the Kartli-Kakheti Kingdoms had been under the Persian domain for several centuries.<sup>311</sup> Consequently Russia eventually transformed them in a new territorial entity giving them the official name of Georgia.

## 2. The Georgievsk Agreement of 1783 on the Protectorate

As historic study reveals that in the years 1783-1784 under Kartli-Kakheti Kingdoms was meant not one unitary country, but several Kingdoms that named differently. This plurality of Kingdoms were disunited and often in war between them. To prevent any foreign threats, in 1783 all the Kings of the disunited kingdoms represented by King Irakli appealed to the Russian Empire for a protectorate.<sup>312</sup> Outcome of the request of Russian protectorate was signing the Georgievsk treaty of on 24July 1783<sup>313</sup> between Irakli and the Russian Empress, Great Katerina II, which contained the formal request of Russian protectorate.<sup>314</sup> According to this document, the Kingdoms of Kartli-Kakheti recognized the supremacy of the Russian Empire, while the Great Ekaterina pledged to safeguard protection of the Kingdoms against the Persian King and Osman aggression and any other aggression in case of war.

<sup>309</sup> А. Сазонов, М. Зошенко, Ю. Томашевск, *Плана операции корпуса генерал-майора Сухотина в Азии в компании 1771 году* in Под стягом России: сборник архивных документов, М., Русская книга, 1992, pp. 238-239; Шамба Т.М., Непрошин А.Ю., Абхазия. Правовые основы государственности и суверенитета, М.: Изд-во РГТЭУ, 2004, Грамоты и другие исторические документы XVIII в., относящиеся к Грузии, СПб., 1891. Т. 1. (с 1768 по 1774 г.). С картой Закавказья 1771 г., pp.64-65

<sup>310</sup> A Russian measure of length, about 1.1 km (0.66 mile).

<sup>311</sup> З. Д. Авалов. *Присоединение Грузии к России*, М.: Вече, 2011, p.79; pp.26-47, 70-75.

<sup>312</sup> М.Н. Зуев, *История России с древнейших времен до конца XX века: Учеб. пособие*, М., Дрофа, 2001, p. 110-115; Головин А. Историческое обозрение Грузии. Тифлис, 1864, pp. 97-99.

<sup>313</sup> А. Сазонов, М. Зошенко, Ю. Томашевск, *Под стягом России: сборник архивных документов*, [Georgievskij traktat (I article)], М., Русская книга, 1992, p. 240.

<sup>314</sup> *Ibid*, p.240; А. А. Цагарели, *Грамоты и другие исторические документы XVIII в., относящиеся к Грузии*, Т. 1. (с 1768 по 1774 г.), СПб., 1891, С картой Закавказья 1771 г., Рипол Классик, М. pp.120-126

In particular, under terms of the Articles One:

*Царь карталинский и кахетинский именем своим, наследников и преемников своих торжественно навсегда отрицается ... от всякой зависимости от Персии или иной державы и сим объявляет перед лицом всего света, что он не признает над собой и преемниками иного самодержавия, кроме верховной власти и покровительства е.и.в. и ее высоких наследников и преемников престола всероссийского императорского, обещая тому престолу верность и готовность пособствовать пользе государства во всяком случае, где от него то требуется будет.*<sup>315</sup>

[Tsar Irakli of Kartli and Kakhetia, in his name and in that of his heirs and successors, solemnly rejected... dependence on Persia or any other power; and [declared] before the face of all the world that he and his successors recognized over themselves no other Authority except the supreme power and protection of 'the All-Russian Throne of Her Imperial Majesty and of Her August Heirs and Successors, promising to said Throne fidelity and readiness to render aid on behalf of the State on any occasion when such aid be required from him].

Art. Two provides:

*Ekaterina II дает императорское свое ручательство на сохранение целостности настоящих владений [Картли-Кахети], предполагая распространить таковое ручательство и на такие владения, кои в течение времени по обстоятельствам приобретены и прочным образом за ним утверждены будут.*<sup>316</sup>

[gives an Imperial guarantee of the territorial integrity of the present realm of [Kartli-Kakheti], proposing to extend such guarantee also to such territories which in the course of time and by circumstances would come to be acquired]

The treaty, Ekaterina II: had to consider enemies of Kartli-Kakheti as her own enemies; became the only Empress of the Kartli-Kakheti Kingdoms, guaranteeing the internal autonomy and the territorial integrity of the Kingdoms themselves and Art. Four establishes:

*Для доказательства, что намерения его светлости в рассуждении толь тесного его соединения со Всероссийской империей и признания верховной власти и покровительства всепресветлейших той империи обладателей суть непорочны, обещает его светлость без предварительного соглашения с главным пограничным начальником и министром е.и.в., при нем аккредитуемым, не иметь сношения с окрестными владетелями.*

[For proof [the King Irakli] with regards to [Kartli-Kakheti] close union with the All-Russian Empire and recognition of the supreme power and protection of the Most All Serene

<sup>315</sup> Под стягом России: сборник архивных документов, р. 239.

<sup>316</sup> Ibid, р. 240.

Rulers of that Empire, His Serene Highness promised not to have relations with the neighboring Sovereigns without the previous agreement of the Chief of the Border and Minister assigned by The Russian Imperial Majesty to Kartli-Kakheti affairs].

(Art. Seven) Every Kingdom's Tsar had to swear allegiance to the Russian Emperors and could not undertake any diplomatic agreement with other nations without their consent:

*[Картли-Кахетский] царь ... обещает за себя и потомков своих: 1. Быть всегда готовым на службу е.в. с войсками своими. 2. С начальниками российскими обращаясь во всегдашнем сношении по всем делам, до службы е.и.в. касающимся, удовлетворять их требованиям и подданных е.в. охранять от всяких обид и притеснений. 3. В определении людей к местам и возвышении их в чины отменное оказывать уважение на заслуги перед Всероссийской империей, от покровительства коей зависит спокойствие и благоденствие царств Карталинского и Кахетинского.*<sup>317</sup>

[[The Kartli-Kakheti] Tsar promised on his own behalf and that of his descendants: 1) to be ready at all times to serve Her Majesty with his military forces; 2) to meet the needs of the Russian Authorities, being in constant contact with them regarding all affairs relating to service to Her Imperial Majesty, and to protect [Her] subjects from all offenses and oppression; 3) in the appointment of persons to offices and in their promotions in rank, to show respect for their services before the Russian Empire, on which depends the peace and prosperity of the Kingdoms of Kartli and Kakhetia].

Other obligations of the treaty regarded the open boundaries for travelers, immigrants and merchants, while Russia had the right to intervene politically or militarily in the Kartli-Kakheti internal affairs (Art.Ten).<sup>318</sup>

Consequently, on the base of this international agreement, a particular relation was established between Russia and the Kartli-Kakheti Kingdoms, where the first (the protector) had the obligation of protecting the Kingdoms, while the second (protected), in exchange of the protection, accepted some forms of meddling from the protecting country in its internal affairs. This international juridical institute, the Protectorate, was typical of the colonial era and it was largely used in the relations between European nations and extra-European territories to maintain the influence, without reaching their annexation. The institution of the Protectorate has legally disappeared with the decolonization<sup>319</sup>.

<sup>317</sup> Ibid, p.241.

<sup>318</sup> Ibid, p.244.

<sup>319</sup> The protectorate is distinct by the colony, since the colony doesn't have an independent national identity, where the protectorate defines a relations between countries (the protector and the protected) at least formally sovereign. The institution of a protectorate relation is founded on the agreement of the protected nation, so for the international rights, the protectorates imposed with an unilateral act are not considered valid. Anyhow, the interference of the protecting Nation in the protected Nation internal and international affairs could be so penetrating to configure a real annexion. A Anghie, *Imperialism, Sovereignty and the Making of International Law*, CUP Cambridge 2005, 87–90; J Crawford, *The Creation of States in International Law*, 2nd edn Clarendon Press Oxford 2006, pp. 282–320.

Here it is necessary to clear up that since there was not any unitary state, but several disunited kingdoms therefore they accepted Russian protectorate separately in different time during 1783-1784.<sup>320</sup>

In the preamble Georgievsk Treaty are mentioned for the first time terms as: "Georgian people", "Georgian Tsar"<sup>321</sup> and "Georgian Church" (art. 8). Not even King Irakli, representative of the rulers of the Kartli-Kakheti, ever hinted to something that could be somehow related to "Georgia" or to the "Georgians" and there was no trace of these terms in any document before the abovementioned treaty<sup>322</sup>. It is not sure what the Russian diplomats meant with "Georgian people" and "Georgian Tsar". The term seems used by the Russians rather as generalising or collective term concerned the Kartli-Kakheti people, since on the territory of the Kartli-Kakheti Kingdoms there were several Kingdoms named differently. In this way, the people of the Kartli-Kakheti Kingdoms was united under the name of "Georgian People" to simplify the administration of Transcaucasian territories.<sup>323</sup>

At the moment of the acceptance separately of these disunited Kingdoms under the Russian Protectorate, Abkhazia was an independent state, was not part of the Russian Empire and even less was part of the Kartli-Kakheti Kingdoms.

### 3. The extinction of the Karli-Kakheti Kingdoms and the birth of Georgia

On January 18 (30), 1801 Russian Tsar Paul I signed a decree-manifest on the abolition of the Kartli-Kakheti Kingdoms and transformed them into in a unitary entity, formally independent, denominated "Georgian Kingdom". In this document Kartli and Kakhetia were named the "Georgian kingdom" for the first time.<sup>324</sup>

### 4. The official transformation of Georgia into a Russian province

On September 12th, 1801, with his decree "His Majesty Manifesto on Georgia incorporation to Russia", Alexander I, Russian Tsar, transformed Georgia in a Russian province – *Georgian Gubernia*.<sup>325</sup> "His Majesty Manifesto" delimited the borders of the *Georgian Gubernia*, which was comprehensive of the territories of the former Kingdoms: Kartli (divided in three

<sup>320</sup> А. Сазонов, М. Зоценко, Ю. Томашевск, *Под стягом России: сборник архивных документов*, op.cit., pp.238-239

<sup>321</sup> The All-Russian Empire, on account of its same faith as the Georgian people, has served as the defense, ... against the oppression of their neighbours, to which they were susceptible. The protection given by the All-Russian Autocrats to the Tsars of Georgia, their family and their subjects, has produced this dependence of the latter on the former, which dependence is indicated even in the very Imperial title [of the Russian Autocrat], *Georgievskij traktat*, А. Сазонов, М. Зоценко, Ю. Томашевск, *Под стягом России: сборник архивных документов*, op.cit., p. 242.

<sup>322</sup> *Georgievskij traktat*, (preamble) *Sbornik arkhivnyh dokumentov*, А. Сазонов, М. Зоценко, Ю. Томашевск, *Под стягом России: сборник архивных документов*, op.cit., pp. 242-239.

<sup>323</sup> Я. З. Цинцадзе, *Материалы к истории русско-грузинских взаимоотношений 1782-1791 гг.*, Исторический вестник, № 23. Тбилиси. 1970, p.37.

<sup>324</sup> О. Маркова, Присоединение Грузии к России в 1801 г. // Историк-марксист. 1940. №3; *Под стягом России: Сборник архивных документов*. М., 1992, p.50;

<sup>325</sup> Высочайший Манифест о присоединении Грузии к России //АВПР. Ф. 161. ГА. 1 - 7. 06. Д. 1. п. 3.



districts: Gorijsky, Lorijsky and Duscetsky) and Kakheti (divided in two districts: Telavcky and Signakhsky). On 10 (22) April 1840, for administrative reasons, *Georgian Gubernia* was abolished and with the territories of some other former Kingdoms (that were not part of the Kartli-Kakheti Kingdoms, e.g. Imeretia, some territories of Armenia) formed *Georgian-Imeretian Gubernia*.<sup>326</sup> While the Abkhazian kingdom was not part of this Russian Empire's administrative unit. For that time Abkhazia continued to be an independent and sovereign entity. In 1846 *Georgian-Imeretian Gubernia* was divided into two provinces *Tiflis Gubernia* and *Kutais Gubernia* and included into *Caucasian Kraj* (large administrative unit, which made up of a number of provinces and regions). With time, the Russian Emperors included other territories of the former Kingdoms of Caucasus into *Caucasian Kraj*. In particular, the *Caucasian Kraj* was formed by the territories of other Caucasian provinces and regions/districts (now the territories of Armenia, Azerbaijan, Georgia, Abkhazia (1866), South Ossetia, Dagestan and some others). The former different Caucasian kingdoms, among of which were also Kartli and Kakheti, were represented in the form of Russian provinces of the *Caucasian Kraj* were ruled by *Kavkazskoe Namestnichestvo* (Caucasus Viceroyalty<sup>327</sup>).

Thus, above examined documents revealed that Georgia (Kartli-Kakheti kingdoms) ceased to be a subject of international law in 1801.

## 5. The legal status of Abkhazia under the Russian Empire

The Abkhazian Kingdom was under a protectorate of the Osman Empire up until February 17th, 1810, when the Abkhazian Tsar stipulated the treaty, called '*Gramota*' with which he accepted, as Abkhazian ruler, the Russian Empire Protectorate :

[мы] утверждаем и признаем Вас нашего любезно верноподданного наследственным Князем Абхазского владения и под Верховным покровительством державою и защитою Российской империи, и включая Вас и дом Ваш и всех Абхазских владений жителей в число наших верноподданных<sup>328</sup>

[we are happy to recognize the faithful liege as Prince and heir of the Abkhazian lands and to accept among our faithful lieges You, your Kingdom and the whole Abkhazian People under the protection of the Great Power of the Russian Empire].

The '*Gramota*' was in force up to 1864; the Abkhazian Kingdom kept its sovereignty up to the end of the Caucasian War (1864) and continued to be considered as an independent state from the

<sup>326</sup> С.Г. Агаджанов, В.В. Трепавлов. *Национальные окраины Российской империи: становление и развитие системы управления*. М., Славянский диалог, 1998, p. 412

<sup>327</sup> Caucasus Viceroyalty was an administrative and political authority appointed by the Russian Emperors

<sup>328</sup> А. Сазонов, М. Зоценко, Ю. Томашевск, *Под стягом России: сборник архивных документов*, op.cit., pp.250-251.

point of the international law. From 1864 to 1917, Abkhazia was entirely submitted and directly managed by the Caucasian Tsarist administration. Thus passing under the domain of the Russian Empire Abkhazia lost its international subjectivity. In 1866 Abkhazia was renamed Sukhum *Uezd* (district) and included into Kutais *Gubernia* within *Caucasian Kraj* for a brief time. Very soon the Sukhum district was given a special status equated to the status of the *Gubernia*.<sup>329</sup>

The above examined documents witness that Abkhazia was a sovereign before becoming a part of the Russian as Sukhum *uezd*. It was never part of the Georgia (back then the Georgian State did not exist yet), nor was part of the administrative units which would be called Georgia. During this period the Georgian state did not exist on world maps. Moreover, there are no documents at that time that disciplined the relations between Georgia and Abkhazia. Indeed, Abkhazia had no relation to Tiflis *Gubernia* or even Kutais *Gubernia*, or to other provinces of the Empire, or especially to any entity that called "Georgia."

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<sup>329</sup> А. Г. Арешев, В.А.Захаров, Е. Г. Семерикова, В.В. Дегоев, *Кавказский сборник*; МГИМО (У), Центр Кавказских исследований. Т. 6 (38). М., 2010, p.64.

## CHAPTER II

### THE DISSOLUTION OF THE RUSSIAN EMPIRE AND THE ORIGIN OF THE GEORGIAN-ABKHAZIAN CONFLICT

#### 1 The collapse of the Russian Empire and the birth of the Russian Republic

Since Georgia advanced their claims to the Abkhazian territories basing them exclusively on documents of the post Tsarist period (1918-1921). It is necessary to examine these sources in order to identify the legal aspects of its territorial demands, including all the documents that reflect the status of Georgia and of Abkhazia in background of the ongoing events.

In 1914 the First World War erupted. The conflict involved the major powers of the time, divided in two major opposing factions: the Alliance of the Central Empires (Germany, Austria-Hungary and later Ottoman Empire and others) versus the allied powers of the *Entente Cordiale*, represented mainly by France, Great Britain and the Russian Empire<sup>330</sup>. Tsarist Russia fell during this war, mostly because of strong internal tensions, namely the February and October revolutions. These dramatic events marked the end of the monarchy and determined important social-political and legal changes.

On 27 February 1917 the February revolution began, which overthrew the imperial government. In the period of the 16-19 of March, the Duma (the Russian parliament), in coordination with the Petrograd Council established the Provisional Government (*Временное правительство России - Vremennoye pravitel'stvo Rossii*).<sup>331</sup> Between 25 August and 7 September 1917, the Provisional Government declared Russia a Republic.<sup>332</sup> The period of the Russian Republic lasted only eight months: from 16 March until 7 November. Nevertheless, in its short period of rule, the Provisional Government could change the situation in Transcaucasia decisively.<sup>333</sup>

In particular, on March 10<sup>th</sup> the Provisional Government replaced the Tsarist organ (through which the Caucasian Region-*Kraj* was run) with the newly established Transcaucasian Special Committee for managing the Caucasian region. Moreover, the new government issued a law, which just similar to the previous imperial government considered the Sukhum district *Uezd* (Abkhazia) as a separate administrative unit, without any connection with the former

<sup>330</sup> М. Н. Зуев, *История России с древнейших времен до конца XX века*, учеб. пособие, М., Дрофа, 2001, с. 137.

<sup>331</sup> Л.С.Гапоненко, *Великая Октябрьская социалистическая революция. Документы и материалы*, приводится по изданию: *Революционное движение в России после свержения самодержавия*, Изд-во АН СССР, 1957, pp. 424 - 426.

<sup>332</sup> Ibid; *Постановление Временного правительства о провозглашении Российской республики*, <http://www.rusconstitution.ru/library/constitution/articles/9478/>

<sup>333</sup> А. Г. Аршев, В.А.Захаров, Е. Г. Семерикова, В.В. Дегоев, *Кавказский сборник*; МГИМО (У), Центр Кавказских исслед. Т. 6 (38). М., 2010, p.74.

Transcaucasian provinces of the Russian Empire, of which the current territories of Georgia, Armenia and Azerbaijan were part. In particular, on the occasion of the establishment of the Constituent Assembly of the Russian Republic, for which the citizens<sup>334</sup> of the Russian Republic were called to vote, on September 23rd, 1917 *Election Regulation for the Constituent Assembly of the Russian Republic* was issued, where in section V, item 152 the list of the election commissions for the Transcaucasian district was given, including: Subsection 2) Baku, Elisavetopolsk, Kutais, Tiflis<sup>335</sup> and Erivan provinces, and also Batumi and Karsk...; Subsection 3) ...and also Sukhum [Abkhazia] and Zakatal *uezd*.<sup>336</sup> The same document confirms the continuity between the old and new government of Russia, and the transfer of all powers of the Russian Monarchy to the Provisional government.<sup>337</sup>

## 2 The birth of the Russian Socialist Federative Republic

### a. *The Russian Soviet Republic*

Between the 6th and the 7th of November 1917 (October 24th-25th of the orthodox calendar), Lenin's communist revolution ignited, which brought the Bolsheviks into power. An important political consequence of the October Revolution was the extinction of the First Russian Republic and the institution of Soviet Republic, also called, Russian Soviet Federative Socialist Republic (RSFSR)<sup>338</sup>. The RSFSR was consequently recognized (1921-1938) as a continuation of the Tsarist Empire.

### b. *The Declaration of the Rights of the Peoples of 1918 and its consequences*

On November 2nd (15th), 1917, the Soviet government adopted one of the first documents of Soviet rule, *the Declaration of the rights of the peoples of Russia*.<sup>339</sup> The document was signed by the Soviet of Peoples' Commissars<sup>340</sup> on the nationalities affairs I.V.Stalin and the president of the Soviet of Peoples' Commissars V.I. Lenin. The Declaration set up the following principles of the state system of Soviet Russia and its national policy: equality and sovereignty of the peoples of Russia, their right for a free self-determination up to separation and forming of independent states

<sup>334</sup> The term of citizen was mentioned the first time by the Provisional Government on the occasion the election for the Constituent Assembly.

<sup>335</sup> Kutais and Tiflis are actual territories of Georgia

<sup>336</sup> О. И. Чистяков, Российское законодательство X-XX веков, vol.IX, Законодательство эпохи буржуазно-демократических революций р.136,164; О.Н. Знаменский, *Всероссийское учредительное собрание*. Л., 1976, р. 8.

<sup>337</sup> Развитие русского права во второй половине XIX- начале XX вв. –М., 1997, с. 251, 265. [Development of Russian legislation of XIX-XX, Moscow, 1997, pp 251, 265]; . Г. Арешев, В.А.Захаров, Е. Г. Семерикова, В.В. Дегоев, *Кавказский сборник*; МГИМО (У), op.cit., pp.75-77; *Постановление Временного правительства "Об утверждении положения о выборах в Учредительное собрание"*, <http://www.rusconstitution.ru/library/constitution/articles/9478/>

<sup>338</sup> Firstly on 8 Novembre (26 October of the orthodox calendar) 1917, the official name of the Russian Republic was *the Russian Soviet republic*, later in January of 1918 the Russian Soviet Republic was named the Russian Soviet Federative Socialist Republic (RSFSR), Чистяков О.И. Конституция СССР 1924 года. Учебное пособие - "Зерцало-М", 2004 г.

<sup>339</sup> *Декларация прав трудящегося и эксплуатируемого народа*, утвержденная III Всероссийским съездом Советов рабочих, солдатских и крестьянских депутатов, <http://www.rusconstitution.ru/library/constitution/articles/9500/>

<sup>340</sup> The Government of the Russian Soviet Federative Socialist Republic was known officially as the Council of People's Commissars (1917–1946).

(art. 2) and the abolition of all national and national-religious limitations and privileges. The authors of the declaration condemned the national policy of Imperial government as a policy of national oppression and proclaimed the liberation of all the populations of the Russian Empire, from the "slavery" of the Russian Empire. Article 4 sanctioned a free development of national minorities and ethnographic groups inhabiting the territory of Russia.<sup>341</sup>

Thus, all the populations of the former Russian Empire, whether Russian or not, were given the chance to decide autonomously with regard to their own social-political regime. In this way, the principle of peoples' rights to self-determination, which has its roots in the 1776 American Independence Declaration, was, for the first time, proclaimed in Russia by Lenin in 1917.<sup>342</sup> In addition, the *Declaration of the rights of the peoples of Russia* had become the basis the subsequent disintegration of the former Russian empire and the formation of an independent statehood by the minor peoples that had been a part of the empire before. Based on this Declaration as well, was a new policy of voluntary union of the peoples of Russia. Indeed, the principles of the Declaration became a part of the Constitution of the RSFSR (1918) and then the USSR (1924, 1936, 1977).<sup>343</sup>

Moreover, Soviet legislation was first established Citizenship in Russia.<sup>344</sup> In particular, on 7 November 1917 Vladimir Lenin's issued a Proclamation 'To the Citizens of Russia!', which was the first official document which defined the people of the former Russian Empire as citizens.<sup>345</sup> In this way the inhabitants of Transcaucasia, including Abkhazia and Georgia, were proclaimed the citizens of the Russian Soviet Republic too. The first Soviet *lex specialis* regarding citizenship was the Decree of the VTsIK10 from 23 November 1917, 'About the abolition of social classes and civil ranks'.<sup>346</sup> As a result of this document, all existing civil ranks and titles in the Russian Empire were abolished and instead one universal term was established - 'a citizen of the Russian Republic'. On 5 April 1918 the Soviet Government issued a Decree "On obtaining of the Russian citizenship."<sup>347</sup> At a later date Soviet citizenship was codified in the Constitution of the Russian Soviet Federative Socialist Republic (RSFSR) after 10 July 1918 (Art. 22, 49, 64).<sup>348</sup> Hence, the

<sup>341</sup> *Декларация прав трудящегося и эксплуатируемого народа*, утвержденная III Всероссийским съездом Советов рабочих, солдатских и крестьянских депутатов, <http://www.rusconstitution.ru/library/constitution/articles/9500/>

P. Biscaretti di Ruffia – G. Crespi Reghizzi, *Dichiarazioni dei diritti dei popoli della Russia*, November 15 (2), 1917 Giuffrè, Milan, 1990, p. 15.

<sup>342</sup> D. Raic, *Statehood and the Law of Self-Determination*, Kluwer Law International, The Hague, London, New York, 2002, pp. 184-188.

<sup>343</sup> *Ibid.*, pp. 186.

<sup>344</sup> В.С. Шевцов, *Гражданство в Советском Союзном Государстве*, Москва. Юридическая литература 1969, P.5 [V.S. SHEVTSOV, (1969), *Citizenship in the SOVIET Union State. MOSCOW*]

<sup>345</sup> В. И. Ленин, *Обращение Военно-революционного комитета при Петроградском совете «К гражданам России!»*, написанное В. И. Лениным, 1917 г., октября 25 (ноября 7), Рабочий и Солдат, Сочинения, изд. 4-Е, Т. 26, СТР. 207. [Proclamation of the Revolutionary Military Committee of the Petrograd Soviet of Workers' and Soldiers' Deputies from 25 October 1917 (7 November using the West's Gregorian calendar) 'To the Citizens of Russia!' // Lenin's Collected Works, Progress Publishers, Moscow, Volume 26, 1972, pp. 236].

<sup>346</sup> Декрет ВЦИК, СНК от 10 (23) ноября 1917 года *Об уничтожении сословий и гражданских чинов*, Газета Временного Рабочего и Крестьянского Правительства., №9 , 12 (25) ноября 1917 года

<sup>347</sup> Декрет ВЦИК от 5 апреля 1918 года, *О приобретении прав российского гражданства*, Известия ВЦИК, № 66, 5 апреля 1918 года.

<sup>348</sup> The Constitution of the Russian Soviet Federative Socialist Republic (RSFSR), at <http://constitution.garant.ru/history/ussr-rsfsr/1918/>

RSFSR confirmed its continuity both from Imperial Russia, and from the first Russian Republic.<sup>349</sup>

### c. *Civil war and foreign military intervention*

After coming to power of the Bolsheviks, in 1918, the civil war sparked off between the Bolsheviks (the "Reds") and various groups that opposed to the results of the October Revolution, namely the "Whites"<sup>350</sup>, supported by a coalition of Entente countries, such as, the French, British, Japanese, and the USA<sup>351</sup>. Moreover, other countries intervened militarily, such as the Turkey, Romania, Germany and others<sup>352</sup>. Indeed, 3/4 of Russia was invaded by foreign armies.<sup>353</sup> These forces started the re-partitioning of the collapsing Russian Empire. One of the part of the Russian territories were occupied by the Entente countries and other part of Russian territories were occupied by the alliance of the Central powers (Germany, Austro-Hungary, Turkey and others).<sup>354</sup> Thus, firstly, in 1918 a great part of Caucasian region and other former territories of the Russian Empire were occupied by the German and Turkish troops and their allies. Then in 1919 a great part of Caucasian region and other Tsarist territories passed under control of Entente countries.<sup>355</sup>

The occupation of Russia by the part of the alliance of the Central powers was possible also thanks to a chain of unpredictable and dramatic events, after the Bolsheviks refused to continue the war, dismantling the Russian army, thus giving free access to Germany and its allies. The unilateral retirement of the Bolsheviks from war did not allow Russia to properly face the German troops and other foreign aggressors.<sup>356</sup> Hence, on March 3rd, 1918, the Soviet Republic was forced to sign the highly penalizing Brest-Litovsk Treaty<sup>357</sup>, with which, aside from having to pay conspicuous war reparations to Germany, they had to renounce to East Poland, Lithuania, Courland, Livonia, Estonia, Finland and Ukraine in favour of Germany and Austria-Hungary, whilst a part of the Transcaucasian region (Ardahan district<sup>358</sup>, Kars region<sup>359</sup> and Batumi

<sup>349</sup> Т.М Шамба., А.Ю Непрошин., *Абхазия. Правовые основы государственности и суверенитета*, М.: Изд-во РГТЭУ, 2004; at [http://www.hrono.ru/libris/lib\\_sh/shamba00.php](http://www.hrono.ru/libris/lib_sh/shamba00.php)

<sup>350</sup> The White army was formed from czarist officers, and members of the Cadet party (the members of the Constitutional-Democratic Party, and also known as the "Party of the People's Freedom), right-wing Mensheviks (Meaning "minority" in Russian, the party was formed in 1903 from a split in the Russian Social Democratic which believed that Socialism should only be achieved firstly through a bourgeois revolution, and right-wing Socialist revolutionarie (they believed that revolution would be borne through terrorism and in the creating of the Socialism they stressed on the peasantry and not labour class). Hronos, *Istorichskie istochniki* at [http://www.hrono.ru/dokum/191\\_dok/19190628versal.php](http://www.hrono.ru/dokum/191_dok/19190628versal.php); *Всемирная история. В 10 т., Новая история от английской революции XVII в. до Великой Октябрьской социалистической революции. VIII т;* Академия Наук СССР, М., 1961, сс.40-52

<sup>351</sup> Japan and USA invaded a part of Siberia. Hronos, *Istorichskie istochniki* at [http://www.hrono.ru/dokum/191\\_dok/19190628versal.php](http://www.hrono.ru/dokum/191_dok/19190628versal.php); *Всемирная история. В 10 т., op.cit.*, p.78

<sup>352</sup> Romania occupied Bessarabia, the Volga region, Turkey and Germany South Caucasus. *Всемирная история. В 10 т., Новая история от английской революции XVII в. до Великой Октябрьской социалистической революции. VIII т;* Академия Наук СССР, М., 1961, p.44

<sup>353</sup> *Ibid.*, p.50

<sup>354</sup> С.Т. Аркомед, *Материалы по истории отпадения Закавказья от России. Тифлис*, 1931, pp. 34-38.. *Всемирная история. В 10 т., Новая история от английской революции XVII в. до Великой Октябрьской социалистической революции.*, VIII т; Академия Наук СССР, М., 1961, сс.40-52

<sup>355</sup> Hronos, *Istorichskie istochniki* at [http://www.hrono.ru/dokum/191\\_dok/19190628versal.php](http://www.hrono.ru/dokum/191_dok/19190628versal.php); *Всемирная история*, op.cit. 45.

<sup>356</sup> *Ibidem.*

<sup>357</sup> Brest-Litovsk, Хрестоматия по отечественной истории (1914-1945 гг.). М., 1996. С. 640-642.

<sup>358</sup> The District of the Russian Empire (the South Transcaucasia)

<sup>359</sup> The Region of the Russian Empire (the South Transcaucasia)

region<sup>360</sup>) in favour of Turkey.<sup>361</sup> The total losses constituted some 1 million square miles of Russia's former territory; a third of its population or around 55 million people; a majority of its coal, oil and iron stores; and much of its industry. However, the German Empire and its allies violated the agreement and continued the invasion of Russian territories until 1919.<sup>362</sup>

On November 11, 1918, the treaty of Brest-Litovsk was annulled by Entente Allies' victory over Germany.<sup>363</sup> In 1919 Treaty of Versailles between the Entente countries and Germany was signed.<sup>364</sup> By the terms of the Treaty, Germany was forced to give up its territorial gains from the Treaty of Brest-Litovsk.<sup>365</sup> After the withdrawal of the German troops in 1919 from the Caucasian territories of the former Russian Empire, they came under control of the Entente Countries, mostly England and USA.<sup>366</sup> In response to foreign military intervention, the Bolsheviks, who enjoyed the mass support of peoples (independently their nationality and social status), formed the "Red Army" in order to oppose to the foreign aggressors.<sup>367</sup> Indeed, the key to the victory of the Bolsheviks, was the foreign military intervention that contributed to mobilization and unification of the population of the former Russian Empire against it. In 1921 – 1923 the Red Army expelled the Entente troops and liberated a part of the former Russian Empire.<sup>368</sup>

### 3 The status of Georgia in 1917-1918

#### *a The Transcaucasian Republic and the Georgian Democratic Republic*

In 1917-1918 Georgia and Abkhazia participated in the process of state-building of separate entities.

After the February Revolution the Transcaucasian region (the actual territories of Armenia, Azerbaijan, Georgia and Abkhazia) was under control of the Special Transcaucasian Committee (STC), organ of the Russian Provisional Government. After the Revolution of October on 15<sup>th</sup> (28<sup>th</sup>) 1917, the forces of the Entente countries and the *White* army did not allowed the Bolsheviks to establish control over the South Caucasus, that is over Karsk region and Erivansk provinces (currently the territories of Armenia), Elisavetpolsk and Bakinsk provinces (at the present time these are territories of Azerbaijan), and Kutais, Tiflis provinces and Batum region

<sup>360</sup> The Russian Empire's Region of the South Transcaucasia, which actually a part of Georgia.

<sup>361</sup> *Всемирная история. Новая история от английской революции XVII в. до Великой Октябрьской социалистической революции.* VIII, В 10 т.; Академия Наук СССР, М., 1961, pp.76-78

<sup>362</sup> *Ibid*, p.68

<sup>363</sup> *Ibid*, pp. 95-96, 111

<sup>364</sup> *Ibid*, p. 131.

<sup>365</sup> Hronos, Istoricheskie istochniki at [http://www.hrono.ru/dokum/191\\_dok/19190628versal.php](http://www.hrono.ru/dokum/191_dok/19190628versal.php); *Всемирная история.* В 10 т, op.cit., p.106.

<sup>366</sup> *Всемирная история.* В 10 т, op.cit., p.100.

<sup>367</sup> *Декрет Совета Народных Комиссаров "О Рабоче-Крестьянской Красной Армии"*, <http://www.rusconstitution.ru/library/constitution/articles/9502/>

<sup>368</sup> *Всемирная история.* В 10 т., p. 108. *Новая история от английской революции XVII в. до Великой Октябрьской социалистической революции.* VIII т; Академия Наук СССР, М., 1961, сс.76-78

(now territories of Georgia). With the direct participation of Entente countries the Special Transcaucasian Committee was disbanded and the *Transcaucasian Commissariat* was formed to run the South Caucasus, excluding Abkhazia. The *Transcaucasian Commissariat*, a coalition authority (Mensheviks, Esser, Dashnaks, and Musavatists), was appointed to manage the territories of present day Armenia, Azerbaijan and Georgia.<sup>369</sup> The Transcaucasian Commissariat pursued the following: secession of Transcaucasia from Russia and struggle the Bolsheviks. With encouragement from the Entente countries on the 26 March 1918 *Transcaucasian Commissariat* was disbanded and on 9<sup>th</sup> (22<sup>th</sup>) April the *Transcaucasian Federative Republic* was proclaimed, which formed part of the territories of present day Armenia, Azerbaijan and Georgia.<sup>370</sup> While Abkhazia (Sukhum *uezd*) did not join this Republic, because at that time it was a part of the Mountain Republic (which examined ahead<sup>371</sup>).

### ***b The Brest-Litovsk agreement and the occupation of the Transcaucasian Republic***

In order to stop the invasion of Russian territories on March 3, 1918 the Soviet Government was forced to conclude the Brest-Litovsk agreement with Germany and its allies. According to the Agreement, Russia had to cede a part of the Transcaucasian region to Turkey; in particular, under art. VI the *Batum* region (now Georgia), was conceded to Turkey.<sup>372</sup> Thus, Russian Soviet government renounced its sovereign rights on a part of Transcaucasia (Batum region, Kars region and Arhan), in its turn Germany and its allies promised to not invade other parts of the Transcaucasia, which the Soviet government considered a sphere of own influence, namely, Sukhum *uezd* (Abkhazia), Tiflis province (now Georgia) and North Caucasus.<sup>373</sup> It is important to specify that at that time the Soviet government did not *de facto* exercise control over the Transcaucasia. Therefore, the *Transcaucasian Federative Republic* refused to recognise the Brest-Litovsk agreement.<sup>374</sup> However military support of the Entente countries was not sufficient to protect the Republic and the latter was invaded by Turkish troops and then by the German army.<sup>375</sup> Indeed, Turkey and German broke the Brest-Litovsk Agreement and occupied other former Russian Empires' provinces in Transcaucasia, which on the basis of the Treaty were subject to the sovereignty of the RSFSR. So, Turkey invaded Akhaltsikhe and Akhalkalaki (parts

<sup>369</sup> А. В. Кадисhev, *Interventstia i grazhdanskaia voina v Zakavkazze*, Moscow, 1960; С. Т. Аркомед, *Материалы по истории отпадения Закавказья от России*, 2-е изд. - Тифлис : Госиздат Грузии, 1931, pp. 9-40, at <http://libr.msu.mogilev.by/handle/123456789/1213>

<sup>370</sup> N. B. Makharadze, *Pobeda sotsialisticheskoi revoliutsii v Gruzii*, Tbilisi, 1965, pp. 50-55.

<sup>371</sup> See, *Part Two Analysis of the Abkhazian case, Chapter II The Dissolution of the Russian Empire and the origin of the Georgian-Abkhazian conflict, 4. The Status of Abkhazia in 1917-1918*, pp.

<sup>372</sup> С. Т. Аркомед, *Материалы по истории отпадения Закавказья от России*, op.cit., pp. 35-37, at <http://libr.msu.mogilev.by/handle/123456789/1213>

<sup>373</sup> Хронос, *Мирный договор, между Советской Россией, с одной стороны, и Германией, Австро-Венгрией, Болгарией и Турцией, с другой стороны, («БРЕСТСКИЙ МИР»)*, 3 марта 1918 г., [http://www.hrono.ru/dokum/191\\_dok/19180303brest.php](http://www.hrono.ru/dokum/191_dok/19180303brest.php)

<sup>374</sup> J. D. Smele, *Historical Dictionary of the Russian Civil Wars, 1916-1926*, Rowman & Littlefield, 2015, p. 1172

<sup>375</sup> С. Т. Аркомед, *Материалы по истории отпадения Закавказья от России*, 2-е изд. - Тифлис : Госиздат Грузии, 1931, pp. 9-12, at <http://libr.msu.mogilev.by/handle/123456789/1213>



of the Tiflis province),<sup>376</sup> while Germany occupied the remaining territories of current Georgia. The Turkish-German occupation of Transcaucasia led to the disbandment of the Transcaucasian Republic.<sup>377</sup>

### *c The Georgian Democratic Republic under German-Turkish occupation*

On 15 May 1918 German troops anchored at the port of Poti, which was then the Caucasus's main gateway to Europe, and the town of Poti was linked by rail to other cities in Georgia in the 1910s. Poti was strategically important for gaining control over other Georgian territories and its natural resources (manganese and minerals). After occupation of the Transcaucasian territories on 26 May (8 June) 1918 Germany disbanded the Transcaucasian Republic and formed the *Georgian Democratic Republic* with a pro-Menshevik government. The creation of the Republic was confirmed by the Declaration of Georgian Independence. The government of the Georgian Republic was *de facto* totally dependent on the German Empire.<sup>378</sup> Consequently, the Georgian Republic did not exercise effective control on the territory. Georgia kept the appearance of a certain amount of sovereignty, the real power resided in the hands of the German Empire.<sup>379</sup> Hence, the criterion of an effective government was missing. Moreover, the new Georgian state was not recognised by other States. Most states, including Entente countries, continued to consider the Transcaucasian region as an integral part of the Russian Empire.

Two days later, on the 28 May 1918, General Otto von Lossow for the German Empire, signed the provisional "Treaty of Poti" with Noe Ramishvili and Akaki Chkhenkeli for the Democratic Republic of Georgia, at the Black Sea port of Poti.<sup>380</sup> It contained five articles which can be summarized as follows: Georgia should export free all its raw materials, consumer goods and basic goods to Germany; concede to Germany a right to use Georgian railways and the port of Poti for 60 years<sup>381</sup>, as well as all railroad stations for 40 years; concede the establishment of a German monopoly over mining companies on the exploitation of mineral wealth for 30 years (article 2).<sup>382</sup> Additionally, under terms of this treaty Turkey had right to exploit Tiflis railroads and bring out raw materials from the Tiflis and Kutais provinces (now Georgian territories).<sup>383</sup> Thus Turkey and Germany divided between each other the territories of the Georgian Democratic

<sup>376</sup> A part of Tiflisk governorate (administrative region of the Russian Empire).

<sup>377</sup> *Ibid*, pp.37-45

<sup>378</sup> А. Г. Арешев, В.А.Захаров, Е. Г. Семерицова, *Абхазия и Южная Осетия после признания. Исторический и современный контекст*, М.: Изд-во Русская панорама, 2010, p. 84.

<sup>379</sup> Г. В. Пипия, *Германский империализм в Закавказье в 1910–1918 гг.* Издательство «НАУКА», М., 1978, pp.53-58.

<sup>380</sup> А. Г. Арешев, В.А.Захаров, Е. Г. Семерицова, *Абхазия и Южная Осетия после признания. Исторический и современный контекст*, cit., p. 85; Хрестоматия по отечественной истории (1914-1945 гг.). М., 1996. С. 645.

<sup>381</sup> La Georgia è priva di risorse naturali come gas e petrolio, ma vi sono minerali metallici, manganese, rame ed ecc.. В.А. Захаров, А.Г. Арешев, Е.Г. Семерицова, *Абхазия и Южная Осетия после признания. Исторический и современный контекст*, op.cit., c.58-59.

<sup>382</sup> A. L.P. Burdett, *Caucasian Boundaries. Documents and Maps. 1802-1946, XXIV*, London: Archive Editions, 1996, p.491.

<sup>383</sup> L'allegato al trattato di Poti, firmato dall'Impero tedesco e dalla Repubblica Democratica Georgiana, del 28 maggio 1918, l'art. III, В.А. Захаров, А.Г. Арешев, Е.Г. Семерицова, *Абхазия и Южная Осетия после признания. Исторический и современный контекст*, М., Русская панорама, 2010, c.58-59.

Republic. It should be noted that, at that moment Abkhazia was outside the borders of the puppet state GDR. It formed a constituent part of the Mountain Republic (which had been in existence for about a year)<sup>384</sup>. A month later Germany invaded Abkhazia.<sup>385</sup>

However, the occupation of German empire did last a long. In 1919 the Entente forces with White army forced Germany to give up Transcaucasia.<sup>386</sup> In particular, by the terms of art.116 of the Treaty of Versailles, Germany was forced to give up its territorial gains from the Treaty of Brest-Litovsk, that is Transcaucasia.<sup>387</sup>

After the expulsion of German troops, England and US established control over a great part of Transcaucasia. The official pretext for military intervention of the Entente forces (the French, British, Japanese, and US) in Russia was described as their intention to sustain of the *White* army in the fighting against the Bolsheviks.<sup>388</sup> Although the Entente countries repeatedly declared their respect of the territorial integrity of the Russian Empire, their troops *de facto* partitioned the collapsing Russian Empire.<sup>389</sup> In consequence, Transcaucasia, including a great part of territories of the Georgian Democratic Republic (Tiflis and Batum) and Abkhazia, passed under control England and US. However, they did not established continuous control but rather, control in rotation; that is, England and US were in power for short time, then briefly the 'Red Army', again the Entente countries obtained control and again they were expelled by the Bolsheviks an so on.<sup>390</sup> Thus the Transcaucasia became the scene of a struggle between the Red Army and the Entente countries, which with varying degrees of success defeated each other. Hence this region was object of instability and chaos. Such situation lasted for two years until the victory of *Red Army* over the Entente Countries and the proclamation of the Georgian Soviet Republic.<sup>391</sup>

<sup>384</sup> See, 4. The Status of Abkhazia in 1917-1918, pp.16-18

<sup>385</sup> *Сборник правовых актов Демократической республики Грузии. 1918-1921*, АУ МВД, Тб., 1990, p.57

<sup>386</sup> *Всемирная история. В 10 т., Новая история от английской революции XVII в. до Великой Октябрьской социалистической революции.* VIII т; Академия Наук СССР, М., 1961, pp.70-73.

<sup>387</sup> Hronos, Istorichskie istochniki at [http://www.hrono.ru/dokum/191\\_dok/19190628versal.php](http://www.hrono.ru/dokum/191_dok/19190628versal.php)

<sup>388</sup> The White army was formed from czarist officers, and members of the Cadet party (the members of the Constitutional-Democratic Party, and also known as the "Party of the People's Freedom), right-wing Mensheviks (Meaning "minority" in Russian, the party was formed in 1903 from a split in the Russian Social Democratic which believed that Socialism should only be achieved firstly through a bourgeois revolution, and right-wing Socialist revolutionarie (they believed that revolution would be borne through terrorism and in the creating of the Socialism they stressed on the peasantry and not labour class); Hronos, Istorichskie istochniki at [http://www.hrono.ru/dokum/191\\_dok/19190628versal.php](http://www.hrono.ru/dokum/191_dok/19190628versal.php);

<sup>389</sup> *Всемирная история. В 10 т., Новая история от английской революции XVII в. до Великой Октябрьской социалистической революции.* VIII т; Академия Наук СССР, М., 1961, с. 57.

<sup>390</sup> Т. Диасамидзе, *Статус автономных регионов Абхазии и Юго-осетии в составе Грузии (1917-1988)*, op.cit., p.90; *Всемирная история. В 10 т., Новая история от английской революции XVII в. до Великой Октябрьской социалистической революции.* VIII т; op.cit., pp. 105-106.

<sup>391</sup> *Новая история от английской революции XVII в. до Великой Октябрьской социалистической революции.* VIII т; op.cit., pp. 105-106.

#### 4 The status of Abkhazia in 1917-1918

##### a. *The access Abkhazia to the Union of Mountain Peoples of Caucasus*

After the February Revolution, on March 10th, 1917 a meeting of representatives of the population of the Sukhum Uezd (Abkhazia) took place, where Abkhazians formed their own local Provisional Abkhazian Government – the Committee of Public Safety under the presidency of the Abkhazian prince A. Sharvashidze (Chachba). The militia led by Tatash Marshania was simultaneously created. Next step of the Abkhazian provisional government was accession to the Mountain Republic (the Union of Mountaineers of Caucasus) on May 1, 1917.<sup>392</sup> Under terms of the Agreement the Union was based on confederative basis. Thus Art. 5 provided:

*Субъекты Конфедерации равноправны в рамках ассоциации независимо от численности народов. [Subjects of the Confederation are enjoying equal rights independently of number of peoples].*<sup>393</sup>

The Union treaty had no time limit, and exit from it was regulated by a certain procedure.<sup>394</sup> The Union of Mountaineers of Caucasus was ratified by the General Congress of the Abkhazian people, which took place in the city of Sukhum”. The creation of the Republic was confirmed by the Constitution and a control body - the Central Executive Committee. The Mountain Peoples' Government was formed in November 1917 with the participation of the Abkhazian leadership. The Mountain Republic comprised Abkhazia, Adyghea, Kabarda, Chechnya, (South and North) Ossetia, Dagestan and others.<sup>395</sup> Hence Georgia did not join this Union. The Mountain Republic conducted very active work towards obtaining recognition by western countries. Thus the independence of the Mountain Republic within the territory from the Caspian Sea to the Black Sea was officially proclaimed and *de jure* recognised by Turkey, Austria-Hungary and Germany on May 11th, 1918 at the Batumi peace conference. This follows from the treaties signed between these states and the self-proclaimed Mountain Republic.<sup>396</sup>

Under the terms of the treaty “*On an establishment of friendly relations between the Imperial German government and the government of the Mountain Republic*” the German government not

<sup>392</sup> С. Лакоба, *Очерки политической истории Абхазии*. Алашара, Сухум, 1990, р.62; А. Г. Аршев, В.А.Захаров, Е. Г. Семерикова, *Абхазия и Южная Осетия после признания*. Исторический и современный контекст», op.cit., p.74

<sup>393</sup> Договор о Конфедеративном Союзе горских народов Кавказа, at [http://old.nasledie.ru/oborg/2\\_4/0002/agnk\\_17.html](http://old.nasledie.ru/oborg/2_4/0002/agnk_17.html)

<sup>394</sup> Договор о Конфедеративном Союзе горских народов Кавказа, [http://old.nasledie.ru/oborg/2\\_4/0002/agnk\\_17.html](http://old.nasledie.ru/oborg/2_4/0002/agnk_17.html); Шамба Т.М., А.Ю. Непрошин, *Абхазия. Правовые основы государственности и суверенитета*, 2.4. 2.4. Экспансия Грузии и борьба абхазов за независимость, М.: Изд-во РГТЭУ, 2004, at [http://www.apsuara.ru/lib\\_sh/shamba24.php](http://www.apsuara.ru/lib_sh/shamba24.php); *The union of incorporated mountaineers.*, collection, pp. 23-50, 50-53

<sup>395</sup> А.Г. Аршев, Е.Г. Семерикова, *Абхазия и Южная Осетия после признания*. Исторический и современный контекст, op.cit., p. 60;

<sup>396</sup> Т.М. Шамба, А.Ю. Непрошин, *Абхазия. Правовые основы государственности и суверенитета*, op.cit., at [http://www.apsuara.ru/lib\\_sh/shamba24.php](http://www.apsuara.ru/lib_sh/shamba24.php)

only recognised the independence of the Mountain people of the Caucasus but also promised to the Republic in the recognition of this independence by other states (p. 5).<sup>397</sup>

Moreover, Germany assured the Mountain people of the Caucasus of its support, by diplomatic means, for an establishment of the borders of their Republic on the basis of national principles, in the north of the border which passes through Gelendjik - Kuban (20 versts to the north of Armavir), Stavropol, the Sacred Cross (Karabalik), and along the river Kuma until its mouth, and in the south, of the border which passes along the river Ingur, on the main ridge of the Caucasian mountains (on a watershed) and including within it the Zakatal *Uezd* and the Dagestan region” (Point 6).<sup>398</sup>

Further, on the 20 October 1917, Abkhazia became a member of the “*South-East Union of the Cossack Armies, Mountaineers of the Caucasus and Free people of the Steppes*” on the confederative basis mostly for military reasons.<sup>399</sup> Indeed, it was a kind of military alliance against hostile forces and aimed to create the ‘new’ Russia on the democratic basis. Georgia was not included in these Unions (the Mountain Republic, South-East Union of the Cossack Armies, Mountaineers of the Caucasus and Free people of the Steppes).

After the coming into power of Bolshevik government, who proclaimed free self-determination of the Russian Empire’s peoples up to separation and forming of independent states, on 8 November, 1917 the Abkhazian people established the Abkhazian National Congress (ANC), the first Abkhazian independent parliament.<sup>400</sup>

The Declaration of the Abkhaz National Congress and the Constitution of the National Council were adopted at the first session of the ANC. In the Declaration and the Constitution the Abkhazian lawmakers confirmed the previously adopted decisions on Abkhazian accession to the Republic of the Union of Mountaineers and to the “*South-East Union of the Cossack Armies, Mountaineers of the Caucasus and Free people of the Steppes*.”<sup>401</sup> Hence, Abkhazia assumed behavior of an entity, whose existence derives by itself. Indeed, since a state is a physical existence and its formation is a matter of fact, and not of law<sup>402</sup> it can be affirmed that Abkhazia operated as a sovereign and independent state. Indeed, by virtue of Abkhazian mere existence, be classified as a state.

<sup>397</sup> Ibid, at [http://www.apsuara.ru/lib\\_sh/shamba24.php](http://www.apsuara.ru/lib_sh/shamba24.php)

<sup>398</sup> Ibid, at [http://www.apsuara.ru/lib\\_sh/shamba24.php](http://www.apsuara.ru/lib_sh/shamba24.php)

<sup>399</sup> Тамаз Диасамидзе, *Статус автономных регионов Абхазии и Юго-осетии в составе Грузии (1917-1988)*. Сборник политико-правовых актов, Центр по Исследованию Регионализма, Тбилиси 2004, p. 15.

<sup>400</sup> Т. Диасамидзе, *Статус автономных регионов Абхазии и Юго-осетии в составе Грузии (1917-1988)*, p.16; Т.М. Шамба, *Россия - Абхазия: история и современность*, № 3, Вестник МГИМО-Университета, 2010, с. 9-13.

<sup>401</sup> Т.М. Шамба, А.Ю. Непрошин, *Абхазия. Правовые основы государственности и суверенитета*, op.cit., at [http://www.apsuara.ru/lib\\_sh/shamba24.php](http://www.apsuara.ru/lib_sh/shamba24.php)

<sup>402</sup> L. Oppenheim, *International Law* (1st edn), vol 1, Longmans, 1905, London, §209(1) p. 264, at <https://archive.org/stream/internationall1oppe#page/n29/mode/2up>; Arangio-Ruiz (1975–6) 26 *OzfoR* pp. 265, 284–5, 332; W. Willoughby, *Nature of the State*, New York: Macmillan, 1896, p. 195

b. *The Treaty between Abkhazian National Congress and Georgian National Congress*

On 9 February 1918 Abkhazian National Congress (ANC) signed a treaty with Georgian national Congress (GNC), which represented the Special Transcaucasian Committee. At that time of the signing of the agreement Georgia was, *de facto* under control of the Transcaucasian Commissariat.<sup>403</sup> While Abkhazia was a part of the self-proclaimed confederative Mountain Republic.<sup>404</sup> This agreement contained only three articles:

- I) *Воссоздать единую нераздельную Абхазию, в пределах от реки Ингур до реки Мзымта, в состав которой войдет собственно Абхазия и Самурзакан – нынешний Сухумский Округ [Абхазия].*<sup>405</sup>

[(Art. I) to re-establish a single, undivided Abkhazia within frontiers from the R.Ingur to the R. Mzymta, into the composition of which enter Abkhazia proper and Samurzaq'ano, or that which is today's Sukhum District/Abkhazia] ;

- II) *Форма будущего политического устройства единой Абхазии должна быть выработана на основе принципа национального определения Учредительным Собранием Абхазии: избранного на демократических началах.*<sup>406</sup>

[ (Art. II) The form of the future political construction of united Abkhazia must be worked out in accordance with the principle of national self-determination in the Constituent Assembly of Abkhazia, convened on democratic principles;]

- III) *В случае: если Абхазия и Грузия пожелают вступить с другими национальными государствами в договорные отношения, то взаимно обязываются иметь предварительные между собой по этому поводу переговоры.*<sup>407</sup>

[(Art. III) In case Abkhazia and Georgia should wish to enter into political treaty relations with other national states, they are mutually obliged to hold preliminary discussions with each other in this regard].

Hence this document signed between GNC on the behalf of the Special Transcaucasian Committee and ANC identifies the territory Abkhazia within frontiers from the R.Ingur to the R.

<sup>403</sup> See *Part Two Analysis of the Abkhazian case, Chapter II The Dissolution of the Russian Empire and the origin of the Georgian-Abkhazian conflict, 3 The status of Georgia in 1917-1918, a. The Transcaucasian Republic and the Georgian Democratic Republic*, pp. 85-86

<sup>404</sup> Шамба С. К вопросу о правовом, историческом и моральном обосновании права Абхазии на независимость// *Международное право*. 1999. № 4. С. 225.

<sup>405</sup> А. Г. Арешев, В.А.Захаров, Е. Г. Семерикова, *Абхазия и Южная Осетия после признания. Исторический и современный контекст*, op.cit., p. 78.

<sup>406</sup> Ibid., p. 78.

<sup>407</sup> Ibid., p. 78.

Mzymta. Moreover, this document is evidence the existence of Abkhazia as an independent and sovereign entity.

Thus, the documents examined show that Abkhazia formed the Republic of the *Union of Mountaineers* and the *South-East Union of the Cossack Armies, Mountaineers of the Caucasus and Free people of the Steppes* after dissolution of the Russian Empire in 1917, while Georgia was not a members any of these Unions. Additionally, there is an accord of 1918 signed by GNC on behalf of the Special Transcaucasian Committee and ANC, which implied the equality of the contracting parties (Special Transcaucasian Committee and Abkhazia), mutual respect for territorial integrity. As can be seen, Georgia as a sovereign and independent entity did not exist.

### c. *The German-Georgian aggression and occupation of Abkhazia*

Germany did not limit itself to the occupation of Georgian territories and continued the invasion of other Caucasian territories.<sup>408</sup> To this purpose, Germany formed the Georgian army, which was used for the occupation of Abkhazia. In May 1918 the German-Georgian troops invaded Sukhumi (the capital of Abkhazia).<sup>409</sup>

Since Abkhazia was a part of the Mountain Republic (which had been in existence for about a year) an official protest of the Republican government followed. In particular, June 13th, 1918 the Minister for Foreign Affairs of the Mountain Republic, Gaydar Bammat, sent a Note to the head of the German diplomatic mission in the Caucasus. In the letter the Government of the Mountain Republic qualified the action by Germany and Georgia as an act of aggression, illegal intervention and occupation demanded the immediate disengagement of their troops from Abkhazia.<sup>410</sup>

Germany answered that the treaty ‘*On an establishment of friendly relations between the Imperial German government and the government of the Mountain Republic*<sup>411</sup>’, would not come into force due to its not being ratified on the part of Germany and announced that it no longer intended to ratify it. Therefore, they recognised neither the Mountain Republic nor Abkhazia as part of the Republic.<sup>412</sup>

However, irrespectively of the ratification or non-ratification of the treaty “*On an establishment of friendly relations between the Imperial German government and the government of the Mountain Republic*<sup>413</sup>” by the part of Germany, just the fact of the participation of

<sup>408</sup> Д. Авалов. *Присоединение Грузии к России*, op.cit., at <http://www.hist.msu.ru/ER/Etext/georgia.htm>

<sup>409</sup> А. Г. Арешев, В.А.Захаров, Е. Г. Семерикова, *Абхазия и Южная Осетия после признания*. Исторический и современный контекст», op.cit., p. 79.

<sup>410</sup> С. Т. Аркомед, *Материалы по истории отпадения Закавказья от России*, 2-е изд. - Тифлис : Госиздат Грузии, 1931, p. 119.

<sup>411</sup> Л.А. Алексидзе, *Правовые аспекты абхазской проблемы в свете документально подтвержденного нефальсифицированного исторического опыта и международного права*, Московский журнал международного права. 1998, p.13; Г.А. Дзидзария, *Очерки истории Абхазии (1910-1921)*. И.-во Академии наук Грузинской ССР- Тб., 1963; pp.70-73.

<sup>412</sup> Т.М. Шамба, А.Ю. Непрошин, *Абхазия. Правовые Основы Государственности И Суверенитета*, op.cit., [http://www.apsuara.ru/lib\\_sh/shamba24.php](http://www.apsuara.ru/lib_sh/shamba24.php)

<sup>413</sup> Ibid., at [http://www.apsuara.ru/lib\\_sh/shamba24.php](http://www.apsuara.ru/lib_sh/shamba24.php)

Abkhazia, with other member of the Mountain Confederation in the negotiations with Germany on the equal footing characterised it as an independent entity.

The reaction of the Mountain Republic was recourse to Turkey calling on it to undertake measures towards the withdrawal of the German-Georgian armies from Abkhazia.<sup>414</sup> However, Turkey was not able to stand up to German military force. Abkhazia remained alone, fighting hand to hand with the aggressors. The German-Georgian troops continued their invasion and in the second half of June 1918 Abkhazian territories were occupied. The military occupation of Abkhazia accompanied with violent change of political power and system.<sup>415</sup>

## 5 The relationships between Georgia and Abkhazia under German occupation 1918-1919

On 8 June 1918, Abkhazian National Congress signed a treaty with the Georgian Democratic Republic's government, by means of which the Germany and Georgia tried to legalise the deploy of their troops in Abkhazia.<sup>416</sup> In particular, under terms of the Treaty the international militaries were to put under control of the Abkhazian National Congress for establishing the order in Abkhazia and prevention eventual aggression of Turkey and the Bolsheviks (items 4, 5).<sup>417</sup> In particular, the official pretext of the deploy of 'international' troops, that is Georgian-German, in the Abkhazian territory was described as a '*necessary measure to liberate Abkhazia from the prospective aggression of Turkey and the Bolsheviks*'.<sup>418</sup> However, the treaty was broken. The foreign troops were submitted exclusively to Germany, which pursued the occupations of the Abkhazian territories. Consequently in the second half of June Abkhazian territory was invaded by foreign forces.<sup>419</sup>

In response, the Parliament of Abkhazia ANC came out with a strong protest against such actions, qualifying the activity of the German-Georgian troops of May-June of 1918 as "aggression and illegal occupation exercised against Abkhazian sovereignty and its people".<sup>420</sup> In its return, occupying authority twice, in August and October of 1918, dismissed the ANC and arrested the Abkhazian deputies and imprisoned them in Met'ekhi castle in Tbilisi. Thus, the

<sup>414</sup> Ibid., at [http://www.apsuara.ru/lib\\_sh/shamba24.php](http://www.apsuara.ru/lib_sh/shamba24.php)

<sup>415</sup> Ibid., at [http://www.apsuara.ru/lib\\_sh/shamba24.php](http://www.apsuara.ru/lib_sh/shamba24.php) ; C. E. Bechhofer Roberts, *In Denikin's Russia and the Caucasus, 1919-1920: Being a Record of a Journey to South Russia, the Crimea, Armenia, Georgia, and Baku in 1919 and 1920*, London W. Collins sons & Company, Limited, 1921, pp. 16-17.

<sup>416</sup> Т.М. Шамба, А.Ю. Непрошин, *Абхазия. Правовые основы государственности и суверенитета, Глава 2. Государственность Абхазии*, [op.cit., arpsnyteka.org/225-abkhazia\\_pravovye\\_osnovy\\_gosudarstvennosti\\_i\\_suvereniteta.html](http://op.cit., arpsnyteka.org/225-abkhazia_pravovye_osnovy_gosudarstvennosti_i_suvereniteta.html)

<sup>417</sup> Автандил Ментешашвили, *Исторические предпосылки современного сепаратизма в Грузии*, Тб., 1998, стр. 75-76; ЦГИАГ, ф. 1938, оп. 1, д. 278, л. 7; там же, ф. 1861, оп. 2, д. 37, л. 54-58; Т. Диасамидзе, *Статус Автономных Регионов Абхазии и Юго-Осетии в составе Грузии (1917-1988)*, [op.cit., p.15](http://op.cit., p.15).

<sup>418</sup> К. Казенин, *Грузино-абхазский конфликт 1917-1922*, М. Европа, с. 16-17

<sup>419</sup> *Всемирная история. В 10 т., Новая история от английской революции XVII в. до Великой Октябрьской социалистической революции.* VIII т; [op.cit., p. 104](http://op.cit., p. 104).

<sup>420</sup> А. Захаров, А.Г. Арешев, *Признание независимости Южной Осетии и Абхазии: История, политика, право*, М. МГИМО МИД России, 2008, с. 169.

deputies of the Abkhazian Parliament became subject of political persecutions. On August 15th, 1918 the existence of the legitimate Abkhazian authority, ANC, had ceased to exist.

During the occupation of Abkhazia a reign of terror was established against the local population. It caused the Abkhazian peoples' discontent at all levels of society, which turned out to battle against the aggressors. In order to suffocate the Abkhazian national liberation movement the aggressors undertook the cruel punishing expeditions, which were implemented by the Georgian militaries under rule of Mazniev. These expeditions turned into ethnic cleansing of the civilian population.<sup>421</sup> Genocide of Abkhazians was followed by a mass resettlement of ethnic Georgians into the Abkhazian lands for the purpose of change to the demographic situation. As a consequence the numerous atrocities, ethnic cleansing committed mostly by the Georgian troops and the Georgian resettlement, the 55,3 4% of Abkhazian ethnic group was down to 26,4%, while the Georgians from 24.4% grew up to 31,8% in Abkhazia. Hence by 1921 in Abkhazia the "titular" ethnic group did longer constitute a numerical majority. The cruelty of the Georgians left an indelible stain on the relationships between the latter and Abkhazians and contributed to the antagonism and alienation between these peoples, which persists up to the present time.<sup>422</sup>

At the same time the Georgian politicians, in order to justify the illegal occupation of Abkhazia, advanced a thesis on Georgian priority of settlement in Abkhazia, fabricated by the expert in Georgian literature P'avle Ingorok'va.<sup>423</sup> Thus, under this theory the Abkhazian territories were originally the historical homelands of Georgia. In other words, Georgia advanced territorial claims to the Abkhazian territories basing their arguments on disputable historic grounds. While the Abkhazian historical sources affirmed that Abkhazians constitute one of the most ancient autochthonous inhabitants, and the actual Abkhazian territories are *their homeland*, which have belonged to them since time immemorial<sup>424</sup>.

## 6. The Georgian-Abkhazian relationship in 1919-1921

After expelling of German troops, similar to Georgia, Abkhazia became a focal point of armed confrontation between the Red Army and the Entente countries. Parallel to this, the Abkhaz National liberation movement, which was cruelly oppressed by Georgia with support of Germany in 1918, newly emerged. The Abkhaz National Liberation war continued up to the victory of the Red Army and the disbanding of the Georgian Democratic Republic (21 February, 1921).<sup>425</sup>

<sup>421</sup> C. E. Bechhofer Roberts, *In Denikin's Russia and the Caucasus, 1919-1920: Being a Record of a Journey to South Russia, the Crimea, Armenia, Georgia, and Baku in 1919 and 1920*, London W. Collins sons & Company, Limited, 1921, pp. 16-17.

<sup>422</sup> Т.М. Шамба, А.Ю. Непрошин, *Абхазия. Правовые основы государственности и суверенитета*, 2-е изд., М., Ин-Октаво, 2004. с. 90.

<sup>423</sup> П. Ингороква, *Георгии Мерчуле - грузинский писатель X века*", Тб., 1954 р. 15-19; П.И. Ингороква, *О границах территории Грузии*, Тб., 1 990 р. 35.

<sup>424</sup> З.В. Анчабадзе, *Очерки этнической истории абхазского народа*. Сухуми. 1976., 10-15.

<sup>425</sup> Д. Авалов. *Присоединение Грузии к России*, op.cit., at <http://www.hist.msu.ru/ER/Etext/georgia.htm>



The Abkhazian resistance did not enable the Georgian Menshevik authorities to obtain effective control over the entirety of Abkhazian territory.<sup>426</sup> Additionally, the internal crisis affected the Georgian Republic, namely, the pro-Soviet movements among the local Georgians put the Georgian Menshevik authorities at risk.<sup>427</sup> All these factors permitted Abkhazia to remain outside of the Georgian control and its jurisdiction. In fact, there were no treaties or domestic laws which established Abkhazian incorporation into Georgia. All the bilateral agreements concluded between Abkhazia and Georgia in the 1918-1921, established the independence of Abkhazia from Georgia and its sovereignty over its territory.<sup>428</sup> Nor was there any reference concerning the annexation of Abkhazian to Georgia in Abkhazian and Georgian domestic legislation. Indeed, it was only during the last days of the Georgian Republic's existence, on February 21st, 1921, that the legislative organ of Georgia (whose elections the Abkhazian population boycotted) issued the Constitution of Georgia, which transformed Abkhazia into its autonomous Republic. However, the Constitution of Georgia did not come into force due to the establishing of Soviet power in Transcaucasia on February 25th, 1921; so the Constitution had no effect in this regard. In 1921 Abkhazia was liberated by the Georgian Menshevik and Entente forces and proclaimed the Abkhazian Soviet Republic.<sup>429</sup>

## 7. The background of the 1920 Agreement of Moscow

Since the current Georgian government mostly bases their territorial demands to Abkhazia on the Treaty of Moscow signed in 1920 on the Abkhazian territory, it is necessary to examine the Treaty closely.

At the moment of the conclusion of the Treaty, Georgia was the focal point in a clash of interests between the Red Army and the Entente Countries. A huge part of Georgia Democratic Republic was under control of England and America, which refused to recognise it. No one state recognised the GDR. Moreover, the Georgian local authorities enjoyed little popular support and their authority was seriously compromised by internal pro-Soviet revolts. For this reason the Georgian Menshevik authority sought support from the government of the RSFSR.<sup>430</sup>

In 1919-1920 the Soviet Government was in a difficult situation. The Red army suffered severe military defeats inflicted by the White armies and Entente troops. In order to assure neutrality of hostile Menshevik authorities, Lenin's government undertook the policy of

<sup>426</sup> В.А. Захаров, А.Г. Арешев, *Признание независимости Южной Осетии и Абхазии: История, политика, право*, М. МГИМО МИД России, 2008, с. 161.

<sup>427</sup> *Всемирная история. В 10 т., Новая история от английской революции XVII в. до Великой Октябрьской социалистической революции*, VIII т; op.cit., pp.110-115.

<sup>428</sup> Т. Диасамидзе, *Статус Автономных Регионов Абхазии и Юго-Осетии в составе Грузии (1917-1988)*, Центр по Исследованию Регионализма, Тбилиси, 2004, pp. 13, 15.

<sup>429</sup> Т.М. Шамба, А.Ю. Непрошин, *Абхазия. Правовые основы государственности и суверенитета*, Глава 2. Государственность Абхазии, М.: Изд-во РГТЭУ, 2004, pp.; psnyteka.org/225-abkhazia\_pravovoye\_osnovy\_gosudarstvennosti\_i\_suvereniteta.html

<sup>430</sup> Д. Авалов. *Присоединение Грузии к России*, op.cit., at <http://www.hist.msu.ru/ER/Text/georgia.htm>

recognition of the puppet government, formed under the German occupation.<sup>431</sup> In fact, in 1920 Soviet Government signed a treaty with many puppet local authorities, among which were also, the Georgian Menshevik ‘government’.<sup>432</sup> Hence, in these circumstances, on May 7, 1920 the Treaty of Moscow (Московский договор, *Moskovskiy dogovor*, მოსკოვის ხელშეკრულება, *moskovis khelshekruleba*), was signed between Soviet Russia (RSFSR) and the Democratic Republic of Georgia (DRG) in Moscow.

The RSFSR was the first that *de jure* recognised the independence of Georgia;<sup>433</sup> in exchange Georgia had to refrain from punishing and prosecuting all persons for actions committed on behalf of the RSFSR or of the communist party (actually those people who aimed at overthrowing the existing Menshevik authority).<sup>434</sup> (Art.X).

In particular, art. X established: While art. X prescribed:

*Грузия обязуется освободить от наказания и от дальнейшего преследования, судебного или административного, всех лиц, подвергшихся на территории Грузии, таковому преследованию за действия, совершенные в пользу Российской Социалистической Федеративной Советской Республики или в пользу коммунистической партии. ПРИМЕЧАНИЕ: Грузия обязуется немедленно освободить лиц, находящихся в тюремном заключении за деяния указанного выше рода.*<sup>435</sup>

[Georgia undertakes to exempt from punishment and from any further judicial or administrative prosecution all persons who were subject to such prosecution in Georgia for offenses committed in behalf of the RSFSR or of the communist party. Note: Georgia undertakes to liberate immediately all persons under imprisonment for offenses as mentioned above].

Moreover, Georgia should not collaborate with troops of powers hostile to the RSFSR (e.g. England, America and the White Army). Thus Art. V prescribed:

*Признавая справедливость требований России о недопущении отныне на территории Грузии никаких военных операций, пребывания военных сил и прочих действий, могущих создать на территории Грузии условия, угрожающие ее независимости или могущих превратить территорию Грузии в базу для операций, направленных против Российской Социалистической Федеративной Советской Республики или союзных с ней государств и установленного в ней государственного правопорядка...*<sup>436</sup>

<sup>431</sup> *Всемирная история. В 10 т., Новая история от английской революции XVII в. до Великой Октябрьской социалистической революции*, VIII т; op.cit., pp.110-115.

<sup>432</sup> Ibid., <http://www.hist.msu.ru/ER/Text/georgia.htm>

<sup>433</sup> Шамба Т.М., Непрошин А.Ю., *Абхазия. Правовые основы государственности и суверенитета*, 2.4. 2.4. Экспансия Грузии и борьба абхазов за независимость, op.cit., [http://www.apsuara.ru/lib\\_sh/shamba24.php](http://www.apsuara.ru/lib_sh/shamba24.php)

<sup>434</sup> *Договор между Грузией и Россией от 7 мая 1920 года*, <http://abkhazeti.info/history/1304990401.php>

<sup>435</sup> Ibid., <http://abkhazeti.info/history/1304990401.php>

<sup>436</sup> Ibid., <http://abkhazeti.info/history/1304990401.php>

[Recognizing the justice of Russia's request that within the territory of Georgia henceforth there shall not be permitted any military operations, the presence of military forces, or, generally, activities which may create within the territory of Georgia conditions likely to endanger Russia's independence or to establish in Georgia a base of military operations directed against the RSFSR or against states allied with the latter].

In this way the Treaty created preparative basis for eventual introducing Red Army into Georgia.

## 8. The Georgian legal evaluation of the Treaty

The current Georgian Government when it put forward territorial claims to Abkhazian territory, based its claims precisely on Art. IV.

*Россия обязуется признать безусловно входящими в состав Грузинского Государства, ... нижеследующие губернии и области бывшей Российской империи – Тифлисскую, Кутаисскую и Батумскую со всеми уездами и округами, составляющими означенные губернии и области, а также округа Закатальский и Сухумский.*

[Article IV. 1. Russia undertakes to recognise unconditionally as entering into the state of Georgia, in addition to those parts of the province of Chernomorsk transferred to Georgia in accordance with paragraph 1 of article 3 of the present treaty, the following provinces and regions of the former Russian Empire: Tiflis, Kutais and Batum with all districts and circuits forming the said provinces and regions, and, in addition, the circuits of Zakatalsk and Sukhum].

However, the provisions embodied in the Art. VI on which Georgia based, were in contrast with the provisions of Art. I:

*Исходя из провозглашенного Российской Социалистической Федеративной Советской Республикой права всех народов на самоопределение вплоть до полного отделения от Государства, в состав которого они входят, Россия безоговорочно признает независимость и самостоятельность Грузинского Государства отказывается добровольно от всяких суверенных прав, кои принадлежали России в отношении к грузинскому народу и земле”.*

[Article I. Recognizing the principles proclaimed by the RSFSR concerning the right of all peoples to self-determination, including complete secession from the state to which they belong, Russia recognises unconditionally the existence and independence of the Georgian state, and voluntarily renounces all sovereign rights which belonged to Russia with respect to the Georgian people and territory].

In particular, the Soviet Government renounced all sovereign rights that *belonged to Russia* in relation to Georgian territories. But under Georgian territories there were understood, those territories with which Karli-Kakheti (Georgia) accessed to the Russian Empire, that is, the territories of Kartli and Kakhetia that included the Tiflis *Gubernia* (province) and a small part of Kutais *Gubernia* (province). They were, therefore, the territories which did not include the territory of Abkhazian kingdom. From this derives the fact that the Abkhazian territory was not recognised as a part of the Georgian Democratic Republic. Moreover, here the Soviet Russia made a reference to the *Declaration of the rights of the peoples of Russia* (2nd (15th), 1917), which “*set up the principle of free self-determination of the Russian Empire’s peoples*” and conceded the right to self-determination not only to Georgia, but also to Abkhazia.<sup>437</sup>

Therefore, the analysis of the Moscow Treaty reveals the contradiction: one the hand Art. IV established that as a part of the GDR would be not only the territories of Kartli-Kakheti (Georgia), but also the territories of other Caucasian Kingdoms, not relating to the latter, among them Sukhumi (Abkhazian kingdom) were also enumerated. On the other hand Art. I contradicts to Art. IV recognising the sovereign rights of the GDR solely under the the Kartli Kakhetian territories, with which Georgia passed under the protectorate of the Russian Empire, that is without Abkhazia.

## 9. The Abkhazian legal evaluation of the treaty

During the stipulation of this Treaty the Abkhazian authorities were not informed in this regard, and not invited to participate in negotiations<sup>438</sup>. Therefore, Abkhazia did not ratify the Treaty and did not have access to it. On the basis of the Roman principle *pacta tertiis neque prosunt neque nocent* (treaties do not impose any obligations, nor confer any rights, on third), this Treaty could not produce any effect on Abkhazia. IThe principle of *pacta tertiis neque prosunt neque nocent* has been recognised in states' practice as fundamental, and its existence has never been questioned.<sup>439</sup> It has been reflected in numerous cases before the World Court. For example, in the German Interests in Polish Upper Silesia Case, the PCIJ observed that: “[a] treaty only creates law as between States which are parties to it; in case of doubt, no rights can be deduced from it in favour of third States.”<sup>440</sup> Hence the Treaty may not impose obligations upon a

<sup>437</sup> See: *Part Two Analysis of the Abkhazian case, Chapter II The Dissolution of the Russian Empire and the origin of the Georgian-Abkhazian conflict*, 2. *The birth of the Russian Socialist Federative Republic, The Declaration of the Rights of the Peoples 1917 and its consequences*, p.84.

<sup>438</sup> Т.М. Шамба, А.Ю. Непрошин, *Абхазия. Правовые основы государственности и суверенитета*, 2-е изд., М., Ин-Октаво, 2004. с. 90.

<sup>439</sup> Lord McNair, *The Law of Treaties*, 1961, 309; R. Roxborough, *International Conventions and Third States*, 1917,453.

<sup>440</sup> PCIJ Ser. A, No.7, 28; see also Chorzow Factory Case, PCIJ Ser. A, No.17,45; Austro-German Customs Union Case, PCIJ Ser. A/B, No. 41, 48

Abkhazia which is not party thereon.<sup>441</sup> Indeed, for states non-parties to the treaty, the treaty is *res inter alios acta*, that is does not harm or benefit thirds who are not a party to the contract.

Moreover, Abkhazia affirmed that at that time did not form part of Russia, therefore it could not be object of Russian sovereign rights neither *de facto* nor *de jure*. Its official secession from Russia was recognised at the Conference of Batumi (11 May 1918), when it was recognised as a member of the Mountain Republics. Furthermore, its secession was in line with the principles declared by the Soviet Government in the *Declaration of the rights of the peoples of Russia* (2nd (15th), 1917).

Since Abkhazia was not object of the sovereignty of Russia, therefore the latter had no rights to cede Abkhazian territory to Georgia by the force of the principle *nemo dat quod non habet* (the transferee cannot receive any greater rights than those possessed by the transferor: *nemo dat quod non habet*<sup>442</sup>).<sup>443</sup> It is evident that Russia could not transfer more rights than itself possessed.

## 10. The treaty in the light of modern international law and *jus cogens*

The Treaty of Moscow actually encouraged and recognised illegal occupation of Abkhazia on the part of Georgia. Indeed, Abkhazia at the time of the conclusion was the subject of Georgian illegal occupation. By force of Art. 53, 64 of the Convention of Vienna (1969) these kind of treaties have now *become void and terminated as conflicting with the peremptory norm of general international law* (*jus cogens*).<sup>444</sup> The force of a powerful prohibition on the use of force operates here, which is contained in Article 2(4) of the UN Charter.<sup>445</sup> From this imperative norm derives the forbidding of territorial acquisition resulting from the threat or use of force. The occupation by foreign military force can never bring about by itself a valid transfer of sovereignty the occupation, does not transfer sovereignty over the territory to the occupying power.<sup>446</sup>

The terms of SC Resolution 242 (1967)<sup>447</sup> highlighted the inadmissibility of the acquisition of territory by force, and more emphatically, the Friendly Relations Declaration of 1970<sup>448</sup> established that: *the territory of a state shall not be the object of acquisition by another state*

<sup>441</sup> G. G. Fitzmaurice, *Third Report on the Law of Treaties*, YILC, 1958, vol. II, p 25; C. Chinkin, *Third Parties in International Law*, 1993, 7 et seq.

<sup>442</sup> This principle, is rather a familiar feature of English law, but the principle is undoubtedly part of international law also. In fact, in *Island of Palmas*, Arbitrator Huber stated: The title alleged by the United States of America as constituting the immediate foundation of its claim is that of cession, brought about by the Treaty of Paris, which cession transferred all rights of sovereignty which Spain may have possessed in the region.... It is evident that Spain could not transfer more rights than she herself possessed. *Island of Palmas (Netherlands v US)* (1928) 2 RIAA 829, 842.

<sup>443</sup> James R Crawford, *Part III Territorial Sovereignty, 9 Acquisition and Transfer of Territorial Sovereignty*, Brownlie's Principles of Public International Law (8th Edition), Oxford University press, 2012, pp.9-13

<sup>444</sup> R. Luzzatto e F. Pocar, *Codice di diritto internazionale pubblico*, art. 53, Torino: Giappichelli, 2010.

<sup>445</sup> James R Crawford, *Part III Territorial Sovereignty, 9 Acquisition and Transfer of Territorial Sovereignty*, Brownlie's Principles of Public International Law (8th Edition), Oxford University press, 2012, pp. 13-15

<sup>446</sup> Eyal Benvenisti, *The International Law of Occupation*, Oxford, Oxford University Press, 2nd edn, 2012, p.6

<sup>447</sup> 242 (S/RES/242) was approved unanimously by the UN SC on November 22, 1967. It was adopted under Chapter VI of the UN Charter, at <http://web.archive.org/web/20030414213210/at http://www.un.org/russian/document/scresol/1967/res242.pdf>

<sup>448</sup> *The General Assembly, A/RES/25/2625, 24 October 1970*, <http://www.un-documents.net/a25r2625.htm>

resulting from the threat or use of force.<sup>449</sup> Therefore, Georgia is thus precluded from annexing the Abkhazian territory or otherwise unilaterally changing its political status and is bound to respect and maintain the political and other institutions that exist in that territory. Additionally, this vice (illegal occupation) could not be cured by recognition by third states. That is to say, the recognition of Georgia's boundaries, which included Abkhazia by the part of the RSFSR, did not transfer the title to Abkhazian territory. On the basis above mentioned legal grounds the Treaty of Moscow is to be qualified null and void therefore it is deprived of its legal effect from the outset. In other words, the declaration of nullity thus operates with a retroactive effect (*ex tunc*)<sup>450</sup>.

Additionally, the Georgian authorities did not exercise effective and continuous control on the Abkhazian territory;<sup>451</sup> nor did it have legal title to Abkhazian territory. There was no bilateral treaty to provide for the incorporation of Abkhazia into Georgia. There are only two treaties of 1918, where Georgia recognised Abkhazian territorial integrity and guaranteed respect for its political system.

### 11. The effects of the Moscow Treaty

However, since the GDR's authorities did not exercise effective control over its territories, they were therefore, unable to satisfy the obligations derived from the Treaty, namely Art. V, X. In particular, they were unable to stop military operations and expel military forces of the Entente countries from their territories. The treaty *de facto* was never implemented. Therefore, according to some experts the RSFSR considered itself free of any Treaty obligation.<sup>452</sup>

### 12. The reaction of third States

The Great Britain, the USA protested against the Treaty declaring it invalid due to the absence of Georgian Democratic Republic's effectivity.<sup>453</sup> Indeed, the Georgian Menshevik did not exercise effective control over the territory of the GDR. Additionally the RSFSR itself had not yet been recognised by the States.

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<sup>449</sup> Ibid.

<sup>450</sup> James R Crawford, *Part III Territorial Sovereignty, 9 Acquisition and Transfer of Territorial Sovereignty*, pp.20-25.

<sup>451</sup> The Mountain Republic ceased to exist in June of 1920.

<sup>452</sup> А.Г. Аршев, Е.Г. Семерикова, *Абхазия и Южная Осетия после признания. Исторический и современный контекст*, op.cit., p. 58-59.

<sup>453</sup> Ibid., p. 60; *Всемирная история. В 10 т., Новая история от английской революции XVII в. до Великой Октябрьской социалистической революции*. VIII т; Академия Наук СССР, М., 1961, pp.72-79.

## CHAPTER III

### LEGAL STATUS OF GEORGIA AND ABKHAZIA UNDER SOVIET UNION

#### LEGISLATION

##### 1. The foundation of the Georgian Socialist Soviet Republic

The predatory actions of the external foreign troops and the Georgian Menshevik policy aggravated the living conditions of the Georgian people, and their impoverishment thus provoked mass discontent. In 1921 mass protest of local peoples, which turned into open rebellion against the Georgian Menshevik authorities and foreign forces of England and the US, mostly contributed to the victory of the Red Army and facilitated the establishment of Soviet power.<sup>454</sup> Indeed, thanks to support of the inhabitants, the Red Army defeated the Entente countries and expelled them from Transcaucasia.<sup>455</sup> In particular, in February of 1921 under direction of two Georgian Bolsheviks (Joseph Stalin and Grigorij Ordžonikidze) the Red Army was introduced in Tiflis and the pro-Soviet regime was established, thus disbanding the Georgian Democratic Republic. On the basis of *Declaration of the rights of the people of Russia* on 25 February 1921 the Georgian Soviet Socialist Republic was proclaimed.<sup>456</sup>

It is important to underline that the Soviet government was multinational. In particular it was composed by all of the nationalities of the former Russian Empire. However, a big part of the Bolshevik authorities were Georgians. It explains how come, in January of 1924 (after the death of Vladimir Lenin), a Georgian became Leader of the Soviet Government, Iosif Vissarionovič Džugašvili, who passed into history under nickname Stalin and ruled the Soviet Union in the period of 1924-1953.<sup>457</sup>

##### 2. The liberation of Abkhazia, the creation of the Abkhazian Socialist Soviet Republic

On 4 March of 1921 Abkhazian troops “Kyaraz”, with military support of the Red Army, liberated the Abkhazian territories from the Georgian Mensheviks and foreign soldiers. According to the *Declaration of the rights of the people of Russia* on 31 March 1921 the Abkhazian Soviet Socialist Republic was proclaimed. On 21 May 1921 the Revolutionary Committee<sup>458</sup> of the

<sup>454</sup> А.Г. Арешев, Е.Г. Семерикова, *Абхазия и Южная Осетия после признания. Исторический и современный контекст*, op.cit., p. 62.

<sup>455</sup> G. Khačjapuridze, *Vor'ba gruzinskogo naroda za ustanovlenie sovetsoj vlasti*, Moskva, 1956, p. 211

<sup>456</sup> А.Г. Арешев, Е.Г. Семерикова, *Абхазия и Южная Осетия после признания. Исторический и современный контекст*, op.cit., p. 61.

<sup>457</sup> Всемирная история. В 10 т., *Новая история от английской революции XVII в. до Великой Октябрьской социалистической революции*. VIII т; Академия Наук СССР, М., 1961, сс.40-52

<sup>458</sup> The Government of the Georgian Soviet Socialist Republic

Georgian Soviet Republic produced an Act, which provided for the recognition of independence of the Abkhazian Soviet Republic.<sup>459</sup> In particular, the Declaration stated:

*“Меньшевицкая власть ... силой подавляла всякое проявление революционной самостоятельности национальных меньшинств, что создавало страшный антагонизм между отдельными национальностями ... Исходя из этого, Революционный комитет Социалистической Советской Республики Грузии признает и приветствует образование независимой Социалистической Советской Республики Абхазии...”*<sup>460</sup>

[The Menshevik power ... suppress with force any manifestation of revolutionary initiative and activity, which led to strong antagonism between some nationalities [in Transcaucasia]. Hence, the Revolutionary Committee of the Georgian Soviet Socialist Republic recognised and cheered the proclamation of the Independent Abkhazia Soviet Socialist Republic].

Thus Georgia renounced its territorial claims to Abkhazian territory. Moreover, it recognised that their events of 1918-1921 were an act of illegal occupation of Abkhazia.

Hence, in 1921, after coming into power, the Soviet government proclaimed the Georgian Soviet Socialist Republic and the Abkhazian Soviet Socialist Republic. Whether, at that time their effectivity remained, is an open question.

### **3. The Treaty of 1921 between the Georgian Soviet Socialist Republic and the Abkhazian Soviet Socialist Republic and their access to the Union of Transcaucasian Federative Republics**

Until December of 1921, the Soviet government considered the Abkhazian and Georgian Republics independent; although other States did not recognise these Republics putting under doubts their effectiveness.

Under initiative of J. Stalin and G. Ordzhonikidze<sup>461</sup>, on the 16 December 1921 the Abkhazian SSR (the Abkhazian Soviet Socialist Republic) and the Georgian SSR (the Georgian Soviet Socialist Republic) concluded a treaty concerning military, financial-economic and political collaboration (Art. 1). The preamble of the Union treaty of 1921 provides:

*Правительство Социалистической Советской Республики Грузии, с одной стороны, и Правительство Социалистической Советской Республики Абхазии, – с другой, исходя из глубокой общности национальных уз, связывающих трудящиеся массы Грузии и Абхазии и принимая во внимание, что только полное объединение всех сил обеих братских республик*

<sup>459</sup> Декларация Революционного Комитета Социалистической Советской Республики Грузии о независимости Социалистической Советской Республики Абхазии, 21 мая 1921, Джемал Гамахария, Бадри Гогия, *Абхазия – историческая область Грузии*, стр. 473-474

<sup>460</sup> Декларация Революционного Комитета Социалистической Советской Республики Грузии о независимости Социалистической Советской Республики Абхазии, 21 мая 1921, Джемал Гамахария, Бадри Гогия, *Абхазия – историческая область Грузии*, стр. 473-474

<sup>461</sup> Grigory Konstantinovich Ordzhonikidze was one of the noted Bolsheviks, member of the CPSU (Politburo Political Bureau of the Central Committee of the Communist Party of the Soviet Union) and close associate of Joseph Stalin, at [http://hrono.ru/biograf/bio\\_o/orzonikidze.php](http://hrono.ru/biograf/bio_o/orzonikidze.php)



*может обеспечить как интересы великой пролетарской революции, решили заключить настоящий договор, для чего назначили своими уполномоченными Правительство Социалистической Советской Республики Грузии Сергея Ивановича Кавтарадзе и Правительство Социалистической Советской Республики Абхазии Николая Ивановича Акиртава.*<sup>462</sup>

[The Government of the Soviet Socialist Republic of Georgia on the one hand and the Soviet Socialist Republic of Abkhazia on the other, proceeding from the national unity that exists between the working classes of Georgia and Abkhazia, and with respect of effective protection of the interests of both Republics, as well as of the interests of the Revolution through the joint effort, decided to conclude this Treaty; for this purpose the Government of the Soviet Socialist Republic of Georgia nominated its plenipotentiary representative Sergi Kavtaradze and the Soviet Socialist Republic of Abkhazia – Nikoloz Akirtava].

Under terms of Art.1 was agreed that:

*Социалистическая Советская Республика Грузии и Социалистическая Советская Республика Абхазии вступают между собой в военный, политический и финансово-экономический союз.*

[The Soviet Socialist Republic of Georgia and the Soviet Socialist Republic of Abkhazia are founding the military, political and financial-economic union].

Under the terms of Art. 2, the Georgian and Abkhazian Republics created joint organs with following competences:

*а) военный, б) финансовый, в) народного хозяйства, г) почт и телеграфов, д) чрезвычайную комиссию, е) рабоче-крестьянскую инспекцию, ж) наркомюст, з) мортран*

[a) Military, b) Finances, c) Public Economy, d) Post and Telegraph, e) Extraordinary commission, g) Workers and Peasant Inspectorate, h) Public Commissariat of Justice, i) Maritime transportation].

Hence, the member parties enjoyed equal rights within the framework of this Union.

The Georgian SSR Constitution of 1922 made reference to the Union treaty between Georgia and Abkhazia. In particular, Preamble of the Georgian SSR's Constitution provides:

*Примечание: ... Социалистическая Советская Республика Абхазии, которая объединяется с Социалистической Советской Республикой Грузии на основе особого союзного между этими республиками договора.*

[Nota: ... Socialist Soviet Republic of Abkhazia joins to the Socialist Soviet Republic on the basis the union treaty signed between these both].

<sup>462</sup> *Борьба за упрочение советской власти в Грузии, Сборник документов и материалов, Тб., 1959, pp.177-178.*

Therefore, it should be clear that this does not deal with the incorporation of one Republic into other, but the union of two Republics on the equal basis.

Only external affairs of the Georgian-Abkhazian Union were competence of Georgia.

The Note of the Union Treaty of 1921 provides as follows:

1. *Иностранные дела ... в ведении Социалистической Советской Республики Грузии.*

[the foreign affairs shall ... within the competence of the Soviet Socialist Republic of Georgia]

2. *Во все краевые объединения в частности, в Федерацию Закавказских республик, Абхазия входит через Грузию, которая предоставляет ей одну третью часть своих мест.*

[In every regional union, namely within the Federation of the Trans-Caucasus Republics, Abkhazia enters through Georgia, which renders one third of its seats].

As a result, Abkhazia was access to the Transcaucasian Federative Republic formed by Armenia and Azerbaijan together wuth Georgia. In particular, following a proposal by Vladimir Ilyich Lenin on December 12-13, 1922 the Armenian, Azerbaijan SSRs and the Georgian-Abkhazian *Agreed Republic* formed the Transcaucasian Federative Soviet Republic, especially for military reasons. In the preamble, it was motivated by the threat of occupation on the part of the Entente countries:

*признавая независимость и суверенность каждой из договаривающихся сторон и сознавая необходимость сплотить свои силы в целях обороны и в интересах хозяйственного строительства, – постановила, что отныне Социалистические Советские Республики Азербайджана, Армении и Грузии [объединенной с Социалистической Советской Республикой Абхазии на основе особого союзного между этими республиками договора<sup>463</sup>] вступают между собой в тесный военный, политический и экономический союз ...*

recognizing independence and sovereignty each contracting parties and being aware of necessity to consolidate forces in defense and for economy building purposes decided that Soviet Socialist Republic of Azerbaijan, Armenia and of Georgia [united with Soviet Socialist Republic of Abkhazia on the basis of special union treaty] are creating tight military, politic and economic union...

Consequently, the Abkhazian SSR's Constitution of 1925 confirms the assession of Abkhazia to the Transcaucasian Republic:

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<sup>463</sup> *Борьба за упрочение советской власти в Грузии*, Тб., 1959, pp. 88-105.

"ССР Абхазия есть суверенное государство, осуществляющее государственную власть на своей территории самостоятельно и независимо от другой какой-либо власти. Суверенитет ССР Абхазии, ввиду ее добровольного вхождения в Закавказскую Социалистическую Федеративную Советскую республику (ЗСФСР) ограничен только в пределах и по предметам, указанным в конституциях этих Союзов".

[The Abkhazian SSR is a *sovereign state*, which exercises its power independently on its own territory ... Since the Abkhazian SSR accessed to the Transcaucasian Socialist Federal Soviet Republic (TSFSR) on voluntary basis, its *sovereignty* is limited only within the matters mentioned in the Constitutions of these Unions].<sup>464</sup>

The representatives of Abkhazia signed together with Georgian the Transcaucasian Union Treaty on the equal basis. Only one difference was: Georgia and Abkhazia divided their quote of places between each other. In particular, within the Transcaucasian Republic Georgia had two third of places of third part of all the places, while Abkhazia one third of places of third part of all the places.<sup>465</sup> Hence, although Abkhazia accessed to the Transcaucasian Union through Georgia, Abkhazian Republic *per se* enjoyed the same degree of autonomy of other constituent members within this Union and maintained a capacity to conclude the international treaties.<sup>466</sup> It witnesses the fact that Abkhazia on on the 29 December 1922 was one of Republics, which founded the Soviet Union. Indeed, the representatives of the Abkhazian SSR signed the Soviet Union Treaty together with other the Transcaucasian Republics (see forward in the next paragraph). Thus, in this period the Abkhazian SSR's status was exactly the same of Georgian SSR and other Transcaucasian Republics.

However, according to some experts effectivity of not only Abkhazia but all the Trancaucasian Republics, including Georgia remained an open question.<sup>467</sup> Indeed, under the decision of the government of the RSFSR was established the *Agreed Republic* and then the Transcaucasian Republic.

<sup>464</sup> Т.М.Шамба, А.Ю.Непрошин, *Абхазия. Правовые основы государственности и суверенитета*. Издание 2-е переработанное. М.: Изд-во РГТЭУ, 2004, с.103.

<sup>465</sup> Борьба за упрочение советской власти в Грузии, *Сборник документов и материалов*, Тб., 1959, стр. 177-178

<sup>466</sup> Т.М.Шамба, А.Ю.Непрошин, *Абхазия. Правовые основы государственности и суверенитета*. Издание 2-е переработанное. М.: Изд-во РГТЭУ, 2004, р.105.

<sup>467</sup> С. Т. Аркомед, *Материалы по истории отпадения Закавказья от России*, 2-е изд. - Тифлис : Госиздат Грузии, 1931, р.76.

#### 4. The foundation of the Union of Soviet Socialist Republics and legal status of the Georgian and Abkhazian Soviet Socialist Republics

All the four the Transcaucasian Republics (Armenia, Azerbaijan, Georgia and Abkhazia) together with the Ukrainian and Belarussian SSRs headed by the RSFSR participated in the drawing up of the Union Treaty of the Soviet Socialist Republics USSR.<sup>468</sup> Thus Abkhazia as well as Georgia were among the founders of the USSR. On the 29 December 1922 the All-Union agreement was officially approved by the RSFSR. A day later, on 30<sup>th</sup> December 1922 the Soviet government issued a Declaration on the foundation of the Union of Soviet Socialist Republics.<sup>469</sup> On 31 January of 1924 the first Soviet Union's Constitution was adopted based on a principle of voluntary union of the peoples of Russia, which was set up by the *Declaration of the rights of the peoples of Russia*. The Constitution was composed of the Declaration on the foundation of the USSR (I) and the All Union Treaty (II).<sup>470</sup> Although the Abkhazian Republic participated in all the process of negotiation and foundation the Soviet Union in the text of the Constitution amongst the founders there is not mention the Abkhazian Republic, there is reference only to the Georgian Republic. Indeed, the preamble to the II Chapter of the USSR Constitution the constituent Republics of the Union were enumerated:

*“Российская социалистическая федеративная советская республика (РСФСР), Украинская социалистическая советская республика (УССР), Белорусская социалистическая советская республика (БССР), Закавказская социалистическая федеративная советская республика (ЗСФСР: советская социалистическая республика Азербейджан, советская социалистическая республика Грузии [объединенная с Социалистической Советской Республикой Абхазии на основе особого союзного между этими республиками договора] - и советская социалистическая республика Армения), Туркменская социалистическая советская республика (ТуркССР), Узбекская социалистическая советская республика (УзССР) и Таджикская социалистическая советская республика (ТадССР) объединяются в одно союзное государство - Союз советских социалистических республик”.*

[The Russian Socialist Federal Soviet Republic, the Socialist Soviet Republic of Ukraine, the Socialist Soviet Republic of Byelorussia, and the Socialist Soviet Republic of Transcaucasia (including the Socialist Soviet Republic of Azerbaijan, the Socialist Soviet Republic of Georgia

<sup>468</sup>Т.М. Шамба, *Россия - Абхазия: история и современность*, № 3, Вестник МГИМО, 2010, с. 15.

<sup>469</sup> Д. Авалов. *Присоединение Грузии к России*, М.: Вече, 2011, р.79 — 306 с. — (Огнем и мечом) at <http://www.hist.msu.ru/ER/Etext/georgia.htm>

<sup>470</sup> Ю.С.Кукушкин, О.И.Чистяков. *Очерк истории Советской Конституции*. М., Политиздат, 1987.

[united with Abkhazian SSR on the basis special Union accord], and the Socialist Soviet Republic of Armenia) united themselves in one federal state" The Union of Socialist Soviet Republics.]<sup>471</sup>

Nonetheless, under the Georgian SSR was meant, as can be seen before, the confederative union of Georgia and Abkhazia. It puts in evidence the Constitutions of the Georgian SSR and Abkhazian SSR. These Constitutions provide that Abkhazia like Georgia became a part of the USSR in quality of the Soviet Republic (the first-level Soviet sub-unit).<sup>472</sup> The status as the first sub-unit was reflected by the Georgian and Abkhazian constitutions. Indeed, the first level subunits of the Soviet Union called *Soviet Socialist Republics (SSR)* and in these Constitutions Abkhazia was named as *the Abkhazian Soviet Socialist Republics (SSR)*.

In particular, the Georgian SSR's Constitution provides:

Статья 9. ... Социалистическая Советская Республика Абхазии входит в Социалистическую Советскую Республику Грузии в силу особого между ними договора.<sup>473</sup>

[Art. 9 Socialist Soviet Republic of Abkhazia joins the Georgian SSR on the basis special agreement concluded between them]

Furthermore, in April 1 of 1925 the Abkhazian SSR adopted the Constitution that confirmed it:

*ССР Абхазия есть суверенное государство, осуществляющее государственную власть на своей территории самостоятельно и независимо от другой какой-либо власти. Суверенитет ССР Абхазии, ввиду ее добровольного вхождения в Закавказскую Социалистическую Федеративную Советскую республику (ЗСФСР) ограничен только в пределах и по предметам, указанным в конституциях этих Союзов.*

[The Abkhazian SSR is a *sovereign state*, which exercises its power independently on its own territory ... Since the Abkhazian SSR accessed to the Transcaucasian Socialist Federal Soviet Republic (TSFSR) and then to the Soviet Union on voluntary basis, its *sovereignty* is limited only within the matters mentioned in the Constitutions of these Unions].<sup>474</sup>

Until 1931, Abkhazia was a full union Republic within the USSR, and it had a special treaty-based relationship with Georgia.

On the basis of these materials it can be affirmed that Abkhazia and Georgia had the same status within the USSR, namely the status of the first-level sub-unit of the Soviet Union. In this period Abkhazia and Georgia enjoyed a period of stability and interethnic tolerance.

<sup>471</sup> Ю.С.Кукушкин, О.И.Чистяков. *Очерк истории Советской Конституции*. М., Политиздат, 1987.

<sup>472</sup> Конституция (Основной Закон) Союза Советских Социалистических Республик (утверждена II Съездом Советов Союза ССР от 31 января 1924 г.) (с изменениями и дополнениями) (прекратила действие), at [http://constitution.garant.ru/history/ussr-rsfsr/1924/red\\_1924/185480/chapter/1/](http://constitution.garant.ru/history/ussr-rsfsr/1924/red_1924/185480/chapter/1/)

<sup>473</sup> *Съезды Советов Союза СССР, союзных и автономных Советских Социалистических Республик*, т. 6., стр. 497-519

<sup>474</sup> Т.М.Шамба, А.Ю.Непрошин, *Абхазия. Правовые основы государственности и суверенитета*. Издание 2-е переработанное. М.: Изд-во РГТЭУ, 2004, p.103.

## 5. Downgrading of the Abkhazian Republic's status and forced deportation of the Abkhazians during the Stalin epoch

Nine years later, on February 19, 1931, under Stalin's government the *Abkhazian Soviet Republic* (the first-level Soviet sub-unit) was transformed into the *Abkhazia Autonomous Soviet Socialist Republic* (the second level Soviet sub-unit) inside the *Georgian Soviet Socialist Republic* (the first-level Soviet sub-unit) within the USSR. The reduction of the status of the Abkhazian Republic was in conflict with the principles proclaimed by the *Declaration of the rights of the peoples of Russia*, embodied in the USSR Constitution of 1924. Making Abkhazia a part of the Georgian Soviet Socialist Republic within the USSR reflected the predominantly pro-Georgian position of Moscow, especially under Stalin. As a consequence, the Abkhaz national intelligentsia prepared appeals to the leadership of the USSR in favour of secession from the Georgian SSR in order either to join the RSFSR or to form a separate Abkhaz Union Republic. However, these Abkhazians demands were declined. It triggered Abkhazian mass protests, which expressed their "non-confidence" in the All-Union Soviet government and held mass meetings for several days (from 18 to 26 February 1931), which were accounted of little importance. This was the first manifestation of protest against the Soviet central government.<sup>475</sup>

The status of Abkhazia as a second-level sub-unit of the Soviet Union was endorsed in the USSR Constitution of 1936 (Art.25):

*В Грузинской Советской Социалистической Республике состоят: Абхазская АССР, Аджарская АССР, Юго-Осетинская автономная область.*<sup>476</sup>

[The Georgian Soviet Socialist Republic includes the Abkhazian Autonomous Soviet Socialist Republic, the Adjar Autonomous Soviet Socialist Republic and the South Ossetian Autonomous Region].

After the downgrading of Abkhazia in 1937-1953 the Abkhazian and non-Abkhazian peoples of the *Abkhazian Autonomous SSR* were the object of continuous repression and discrimination by the Georgian SSR's authorities. This was possible because the Georgian Soviet Socialist Republic (GSSR) enjoyed a rather privileged position within the USSR (under the government of Stalin). Indeed, although all major decisions were made in Moscow, the Georgian authorities were able to pursue their own discriminatory and unconstitutional policy in Abkhazia.

<sup>475</sup> В.А. Захаров, А.Г. Арешев, *Признание независимости Южной Осетии и Абхазии: История, политика, право*. М.: МГИМО МИД России, 2008, с. 103.

<sup>476</sup> Конституция (Основной закон) Союза Советских Социалистических Республик, утверждена постановлением Чрезвычайного VIII Съезда Советов Союза Советских Социалистических Республик от 5 декабря 1936 г., at [http://constitution.garant.ru/history/ussr-rsfsr/1936/red\\_1936/3958676/chapter/2/#block\\_1200](http://constitution.garant.ru/history/ussr-rsfsr/1936/red_1936/3958676/chapter/2/#block_1200)

Georgia undertook the national discriminatory policy of ‘*the double standard*’ on the social, political, economic and cultural level.

In particular, in the period of 1949-1953, only the Georgians were allowed to settle down in the big Abkhazian cities, whilst the Abkhazians, the Russians, the Armenians, the Jews and other non-Georgians could live only in the small towns or the rural areas. In all the prestige places of employment solely Georgians were appointed, and only the local Georgians could benefit various social programs. Hence, a great number of non-Georgians inhabitants were forced to leave their own homes and own towns. Approximately one thousand five hundred of the non-Georgian families left the Abkhazian Autonomous SSR due to unsustainable living conditions.<sup>477</sup>

Additionally, in 1937 the Georgian authorities effected the forcible resettlement of Abkhazians from the native birth places into infertile lands, e.g. Siberia, North Kazakhstan. While the native Abkhazian cities and villages were populated by the Georgians. The forced removal of the Abkhazians from their homelands was accompanied by a series of repressions, which took place with aim of eliminating the intellectual non-Georgian classes, especially, the Abkhazian ones.<sup>478</sup>

Therefore, the Georgian SSR policy’s aim was to change the ethno-demographic balance in the Abkhazian ASSR to the detriment of non-Georgians, especially the Abkhaz people. A consequence of this discriminatory and oppressive policy was the artificial modification of the demographic situation in the period from 1937 - 1953: the 26,4% of ethnic Abkhazs in Abkhazia had fallen to 18,0%.<sup>479</sup> At the same time, the 24.4% of Georgians had gone up to 39,1%. In this way, the ethnic Abkhazians became the ‘*numerical minority*’ in the own homeland. The repressions and the forced resettlements of the Abkhazians were accomplished under the control of Lavrentij Beria.<sup>480</sup>

## 6 Georgianization

At the same time, the authority of the Georgian SSR attempted to establish the hegemony of Georgian culture to the detriment of other cultures. With this aim Georgian authorities undertook the policy of Georgianization, that is the forced assimilation directed towards eliminating any cultural, religious, linguistic and traditional particularity of the non-Georgians. To be exact, the Georgianization policy consisted of the prohibition of teaching in Abkhazian and

<sup>477</sup> С.М. Шамба, *Россия - Абхазия: история и современность*, № 3, Вестник МГИМО, 2010, с. 17.

<sup>478</sup> С.М. Шамба, *Россия - Абхазия: история и современность*, op.cit. с. 17.

<sup>479</sup> at <http://www.ethno-kavkaz.narod.ru/rnabkhazia.html>

<sup>480</sup> Berija, uno dei sottoposti più fidati di Stalin, nell'1926 divenne il capo dell'OGPU georgiano. In seguito fu nominato segretario di partito in Georgia nel 1931 e per l'intera regione transcaucasica nel 1932, infine divenne membro del Comitato Centrale del Partito Comunista nel 1934. Anche dopo essersi trasferito dalla Georgia, continuò a controllare effettivamente il Partito Comunista della Repubblica, fino a quando venne epurato nel luglio 1953.

Russian languages and the use of native languages in the Abkhazian Republic. Although the non-Georgian children did not speak Georgian they were allowed to study only in the Georgian schools. In fact, Georgian became the primary language of instruction in Abkhazian schools. The Abkhazian orthography was substituted for by Georgian.<sup>481</sup> As a result, from 1938 the Abkhazian population was deprived of the possibility to read in their original language books, newspapers, publishing. Moreover, the writing of toponymal names of the Abkhazian Republic were replaced with Georgian ones.<sup>482</sup> By changing demographic balance, introducing new values, which were different from the original traits, the Georgian authorities attempted to eradicate Abkhazian culture and its national identity. All this anti-Abkhazian discriminatory policy was justified, similar to the Menshevik authorities (1918-1921) by local Georgian Soviet authority with the theory fabricated in 1919-1920 by P'avle Ingoroq'va.

According to Abkhazian scholars the actions the Georgian authorities implemented, step-by-step in 1937-1953, qualifies as a *cultural genocide*. This term was conceived in 1944 by Raphael Lemkin and qualified as one of (his) eight dimensions genocide.<sup>483</sup> However, the 1948 *Convention on the Prevention and Punishment of the Crime of Genocide*<sup>484</sup> did not envisage this. In fact, Articles II and III of the 1948 Convention prohibit physical and biological genocide but makes no mention of *cultural genocide*. In order to be called "genocide" a crime must include *both elements*: 1) the *mental element*, meaning the "*intent to destroy, in whole or in part, a national, ethnical, racial or religious group, as such*" (Art. II), and 2) the *physical element*, that is destroying of members of such a group (art. III).<sup>485</sup> Hence the 1948 Convention deliberately omitted it.<sup>486</sup> In 1994 it was to revisit in the early drafts of the *UN Declaration on the Rights of Indigenous Peoples*, which directly prohibited cultural genocide.<sup>487</sup> However, it was ultimately excluded from the final *Declaration*<sup>488</sup> (except for a limited prohibition on the forcible transfer of a group's children) for a debate emerged over its proper scope. Under international law, genocide is only limited to physical and biological manifestations. In other words, the present understanding of genocide refers to the body of the group and not culture or traditions. The cultural genocide was put aside by the Convention's drafters. Cultural genocide plays only a subsidiary role in our present understanding of genocide and group destruction. Even though the *UN Declaration on the*

<sup>481</sup> С.М. Шамба, *Россия - Абхазия: история и современность*, № 3, Вестник МГИМО, 2010, с. 17.

<sup>482</sup> Ibid..

<sup>483</sup> Political, social, cultural, economic, biological, physical, religious, and moral dimensions; D. Nersessian, *Rethinking Cultural Genocide under International Law in Human Rights Dialogue Series 2* (SPRING 2005)12, at [https://www.carnegiecouncil.org/publications/archive/dialogue/2\\_12/section\\_1/5139.html#:pf\\_printable](https://www.carnegiecouncil.org/publications/archive/dialogue/2_12/section_1/5139.html#:pf_printable)

<sup>484</sup> GA NU Convention *on the Prevention and Punishment of the Crime of Genocide* on 9 December 1948, at <https://treaties.un.org/doc/publication/unts/volume%2078/volume-78-i-1021-english.pdf>

<sup>485</sup> Ibid..

<sup>486</sup> D. Nersessian, *Rethinking Cultural Genocide under International Law in Human Rights Dialogue Series 2* (SPRING 2005)12, at

<sup>487</sup> Ibid..

<sup>488</sup> L. Davidson, *Cultural Genocide*, New Brunswick, NJ, Rutgers University Press, 2012, p.101-102.



*Rights of Indigenous Peoples*<sup>489</sup> made no reference to the *cultural genocide*, it is a significant tool towards eliminating human rights violations and discrimination against indigenous peoples and their marginalization. Thus, the Declaration recognizes the following rights of indigenous peoples: 1. *Indigenous peoples and individuals have the right not to be subjected to forced assimilation or destruction of their culture.* 2. *States shall provide effective mechanisms for prevention of, and redress for:* (a) *Any action which has the aim or effect of depriving them of their integrity as distinct peoples, or of their cultural values or ethnic identities;* (b) *Any action which has the aim or effect of dispossessing them of their lands, territories or resources;* (c) *Any form of forced population transfer which has the aim or effect of violating or undermining any of their rights;* (d) *Any form of forced assimilation or integration;* (e) *Any form of propaganda designed to promote or incite racial or ethnic discrimination directed against them.*<sup>490</sup>

Hence, terms of the *UN Declaration on the Rights of Indigenous Peoples* prohibits the actions of Georgia undertaken in 1937-1953 against the Abkhazians such as ‘*georgianization*’, their forced deportation and discrimination.

Moreover, there are other important international instruments, such as the *Universal Declaration of Human Rights*,<sup>491</sup> *International Covenant on Economic, Social and Cultural Rights*,<sup>492</sup> towards eliminating human rights violations and discrimination undertaken by the Georgian SSR in 1937-1953 against the Ethnic Abkhaz.

The experience of being the Autonomous Republic of the Georgian SSR within the USSR, especially in the period of 1937-53, had far-reaching consequences for Abkhazia and aggravated mutual alienation. With time Abkhaz protests took the form of open opposition against Tbilisi’s authorities, which resulted in repeated protest rallies against Georgian policy of suppression of Abkhazian national and cultural identity. The Abkhaz, were the only nation in the Soviet Union, which continuously (in 1931, 1957, 1967, 1977 and 1989) expressed discontent against its inclusion into the Georgian SSR and appealed for the restoration its status prior of 1931.<sup>493</sup>

<sup>489</sup> Although the General Assembly Declaration is not a legally binding instrument under international law, it represents setting an important standard for the treatment of indigenous peoples.

<sup>490</sup> The GA NU Declaration on *The rights of indigenous*, of 13 Sept. 2007, [http://www.un.org/esa/socdev/unpfii/documents/DRIPS\\_en.pdf](http://www.un.org/esa/socdev/unpfii/documents/DRIPS_en.pdf)

<sup>491</sup> Part A of General Assembly resolution 217 (III). International Bill of Human rights, at <http://www.un-documents.net/a3r217a.htm>

<sup>492</sup> *International Covenant on Economic, Social and Cultural Rights*, GA 2200A (XXI) of 16 December 1966, entry into force 3 January 1976, at <http://www.ohchr.org/EN/ProfessionalInterest/Pages/CESCR.aspx>

<sup>493</sup> А.Г. Арешев, Е.Г. Семерикова, *Абхазия и Южная Осетия после признания. Исторический и современный контекст*, op.cit., с.58-73; Шамба Т.М., Непрошин А.Ю., *Абхазия. Правовые основы государственности и суверенитета*, 2.4. 2.4. Экспансия Грузии и борьба абхазов за независимость, М.: Изд-во РГТЭУ, 2004, at [http://www.apsuara.ru/lib\\_sh/shamba24.php](http://www.apsuara.ru/lib_sh/shamba24.php)

## 7 The death of Stalin and the legal status of Abkhazia under the URSS Constitution 1977

After the death of Stalin, Nikita Khrushchev carried out the policy of Abkhazian rehabilitation. The discriminatory measures against the Abkhazian population were substantially mitigated, and education in Abkhaz and the Abkhaz media were revived.<sup>494</sup>

However, the most notable changes are associated with the period of Leonid Brezhnev's government (1964 -1982). These changes were endorsed in the USSR Constitution of 7 October 1977.<sup>495</sup> In comparison with the previous USSR constitution of 1936<sup>496</sup>, the USSR of 1977 provided for larger autonomy to the Soviet sub-units of the second-level. Under terms of Chapter 10, Article 84 of 1977 USSR Constitution the second-level sub-units that is, the Autonomous Republics:

*Статья 84. Территория автономной республики не может быть изменена без ее согласия.*<sup>497</sup>

[The territory of an Autonomous Republic may not be altered without its consent.]

In this way, the territory of the Autonomous Republics, similar to the Soviet (Union) Republics would not be altered without their consent (Art. 84).<sup>498</sup>

Moreover, similar to the previous USSR Constitution of 1936 (Art. 92, 89), the USSR Constitution of 1977 consolidated the right of the second level sub-units to own constitution (Art. 82) and own parliament:

*Статья 82. Автономная республика находится в составе союзной республики. Автономная республика вне пределов прав Союза ССР и союзной республики самостоятельно решает вопросы, относящиеся к ее ведению. Автономная республика имеет свою Конституцию, соответствующую Конституции СССР и Конституции союзной республики и учитывающую особенности автономной республики.*

[Article 82. An Autonomous Republic is a constituent part of a Union Republic. In spheres not within the jurisdiction of the Union of Soviet Socialist Republics and the Union Republic, an Autonomous Republic shall deal independently with matters within its jurisdiction. An autonomous Republic shall have its own Constitution conforming to the Constitutions of the

<sup>494</sup> А.Г. Аршев, Е.Г. Семерикова, *Абхазия и Южная Осетия после признания. Исторический и современный контекст*, op.cit., с.58-73

<sup>495</sup> Конституция (Основной закон) Союза Советских Социалистических Республик, 7 октября 1977 г., at [http://constitution.garant.ru/history/ussr-rsfsr/1977/red\\_1977/5478732/chapter/10/#block\\_1000](http://constitution.garant.ru/history/ussr-rsfsr/1977/red_1977/5478732/chapter/10/#block_1000)

<sup>496</sup> Ibid., at [http://constitution.garant.ru/history/ussr-rsfsr/1977/red\\_1977/5478732/chapter/10/#block\\_1000](http://constitution.garant.ru/history/ussr-rsfsr/1977/red_1977/5478732/chapter/10/#block_1000)

<sup>497</sup> Ibid., [http://constitution.garant.ru/history/ussr-rsfsr/1977/red\\_1977/5478732/chapter/10/#block\\_1000](http://constitution.garant.ru/history/ussr-rsfsr/1977/red_1977/5478732/chapter/10/#block_1000)

<sup>498</sup> Конституция (Основной закон) Союза Советских Социалистических Республик, 5 декабря 1936 г., at <http://www.hist.msu.ru/ER/Etext/cnst1936.htm>

USSR and the Union Republic with the specific features of the Autonomous Republic being taken into account.]

*Статья 143. Высшим органом государственной власти автономной республики является Верховный Совет автономной республики. Принятие Конституции автономной республики, внесение в нее изменений; утверждение государственных планов экономического и социального развития, а также государственного бюджета автономной республики; образование подотчетных ему органов осуществляется исключительно Верховным Советом автономной республики. Законы автономной республики принимаются Верховным Советом автономной республики.<sup>499</sup>*

[Article 143. The highest body of state authority of an Autonomous Republic shall be the Supreme Soviet<sup>500</sup> of that Republic. Adoption and amendment of the Constitution of an Autonomous Republic; endorsement of state plans for economic and social development, and of the Republic's Budget; and the formation of bodies accountable to the Supreme Soviet of the Autonomous Republic are the exclusive prerogative of that Supreme Soviet. Laws of an Autonomous Republic shall be enacted by the Supreme Soviet of the Autonomous Republic.]

Under terms of the 1977 USSR Constitution the unique deference was the right to secede from the USSR with authorization of the USSR government, which granted only to the Soviet (Union) Republic, that is, to the first-level sub-units (Article 72). Therefore, the Soviet (Union) Republics could not legally secede from the Soviet Union without consent of the USSR government.<sup>501</sup> Moreover, the Soviet legislation did not provide the effective tools to realize this right.

Another important change was endorsed in the Abkhaz ASSR Constitution of 1978, Art. 70:

*Государственными языками Абхазской АССР являются абхазский, грузинский и русский языки. Абхазской АССР осуществляет государственную заботу о всемерном развитии абхазского языка и обеспечивает его употребление его и других государственных языков в государственных и общественных органах, в учреждениях культуры, просвещения и других.*

[The state languages of the Abkhazian ASSR are Abkhaz, Georgian and Russian. The Abkhazian ASSR provides state care about all possible development of Abkhaz language and guarantees its usage and other official languages in national and public organizations and in institutions of culture and education].

<sup>499</sup> Конституция (Основной закон) Союза Советских Социалистических Республик, 7 октября 1977 г., at <http://www.hist.msu.ru/ER/Etext/cnst1977.htm#18>

<sup>500</sup> The name of parliament of the second level sub-units of the Soviet Union.

<sup>501</sup> P. Biscaretti di Ruffia, G. Crespi Reghizzi, The USSR Constitution of 1977, art. 75, op.cit., p.44.

The Abkhaz language became with Georgian and Russian a state language in the autonomous territory.<sup>502</sup>

Thus, under the government of Brezhnev Abkhazia enjoyed larger autonomy than under previous Soviet leader, however, the antagonism that exists between the Georgians and the Abkhazians has hindered their mediation and cooperation.

## CHAPTER IV

### THE SECESSIONIST MOVEMENTS AFTER PERESTROIKA

#### 1. The National front and its role

##### a. *The Popular front of Georgia*

The impact of the reforms launched by Gorbachev beginning in April 1985, soon stirred up the Georgian Republic also. The secessionist process affected all three Soviet sub-units. It started on the first-level sub-unit that is on the level of the Georgian Soviet Republic (the first-level sub-unit of the USSR) and then it involved the second-level sub-unit of the USSR – the Abkhazian Autonomous Republic and the third-level sub-unit of the USSR the Autonomous region of South Ossetia.

In Georgia, as in other Soviet Republics, the Glasnost policy created an unprecedented platform for separatist forces to emerge.<sup>503</sup> Indeed, in 1980-1989 it led to the appearance of the pro-separatist forces the so-called *Popular Front of Georgia*. The *Popular Front of Georgia* was encouraged and supported by the pro-*Perestroika* central fronts of Gorbachev's team.<sup>504</sup> The *Popular Front of Georgia*, officially called the "*Committee for National Salvation*" was formed on the 5<sup>th</sup> November 1989, and was composed by several informal nationalist organisations in the Georgian SSR. The most radical among these groups was the Round Table/Free Georgia coalition, headed by Zviad Gamzakhurdia. From the outset, the Gamzakhurdia platform unequivocally included Georgian secession from the USSR and the building up the Georgian independent state within the boundaries of the Georgian SSR, that is, with the boundaries fixed by Stalin. This radical informal organization also considered Georgian as the only state language, espoused extreme anti-minority, ethnocentric and chauvinist positions and demanded expulsion of the non-

<sup>502</sup> Конституция (Основной Закон) Абхазской Автономной Советской Социалистической Республики. Сухуми, 1979, at [http://apsnyteka.org/2022-konstitutsiya\\_abkhazskoy\\_ASSR\\_1979.html](http://apsnyteka.org/2022-konstitutsiya_abkhazskoy_ASSR_1979.html)

<sup>503</sup> В.А. Печенев, *Смутное время в новейшей истории России, 1985 - 2003: Исторические свидетельства и размышления участника событий*, Норма М., 2007; В.А. Печенев, *Распад СССР: историческая случайность или спланированная акция? Представительная власть: мониторинг, анализ, информация*. 1998. Спец. выпуск., <http://рустрана.рф/article.php?nid=12735>

<sup>504</sup> В.А. Печенев, .А. Печенев, *Смутное время в новейшей истории России, 1985 - 2003: Исторические свидетельства и размышления участника событий*, Норма М., 2007, p. 127.

Georgians living in the Georgian Republic, particularly the South Ossetians, the Abkhazians, the Russians and others. In the 1980s Popular Front's delegates were able to bring pressure on the Georgian parliament, the *Georgian Supreme Soviet*. Indeed, under pressure of these nationalist forces the Georgian SSR undertook a new policy of *Georgianization*, directed to assure the hegemony of the Georgian nation at the expense of non-Georgians in all of the spheres of society life.<sup>505</sup>

In November 1988 the Georgian Supreme Soviet published a *State Program for the Georgian language* and in August 1989 adopted it.<sup>506</sup> This law 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. It led to rising fears among Abkhazians of a renewed attempt at *Georgianization* of them also.<sup>507</sup> Parallel to this informal organization and nationalist forces of Round Table/Free Georgia by means of mass media spread anti-non-Georgian propaganda.<sup>508</sup> Namely, they called for abolition of the autonomous status of the Abkhazian ASSR and other Soviet sub-units forming the Georgian SSR within the Soviet Union. They also advanced one of the slogans “Georgia for the Georgians” and propagandized the expulsion of so-called ‘*guests*’ non-Georgians.<sup>509</sup> Among the measures of *Georgianization*, which infringed the rights and lawful interests of non-Georgians, namely Abkhazians, was the Georgian Supreme Soviet's decision to open a branch of the Tbilisi State University on the grounds of the Georgian sector of the Abkhaz State University in the Abkhazian capital Sukhumi, which was deemed to be a threat to the viability of Abkhazia's own university.<sup>510</sup> It provoked the protest of the Abkhazians, which resulted in ethnic clashes between the Georgians and the Abkhazians of 15 July 1989.<sup>511</sup> Moreover, on 20 September 1989 two drafts of the Georgian Supreme Soviet laws were published: first was “On election of the Georgian SSR's deputies of peoples,” which was approved on 18 August 1990<sup>512</sup>; and another one “On amendments and annex to the Georgian

<sup>505</sup> Ю. Д. Анчабадзе, *Национальные истории в советском и постсоветских государствах*, М.: АИРО-XX, 1999. p. 166.

<sup>506</sup> *Хроника событий грузино-осетинского конфликта с 1988 по 1994 годы*, [https://ria.ru/osetia\\_spravki/20080811/150283008.html](https://ria.ru/osetia_spravki/20080811/150283008.html); *Государственная программа развития грузинского языка. Законы и постановления*, Изд-во ЦК КП Грузии, Тбилиси, 1990, at [http://нэб.рф/catalog/000202\\_000006\\_1769177|B0125952-0088-454F-A5CA-B6AB5E350A92/viewer/](http://нэб.рф/catalog/000202_000006_1769177|B0125952-0088-454F-A5CA-B6AB5E350A92/viewer/)

<sup>507</sup> Т.М. Шамба, А.Ю. Непрошин, *Абхазия. Правовые основы государственности и суверенитета, Глава 2. Государственность Абхазии*, op.cit.; at [apsnyteka.org/225-abkhazia\\_pravovye\\_osnovy\\_gosudarstvennosti\\_i\\_suvereniteta.html](https://ria.ru/osetia_spravki/20080811/150283008.html); *Хроника событий грузино-осетинского конфликта с 1988 по 1994 годы*, at [https://ria.ru/osetia\\_spravki/20080811/150283008.html](https://ria.ru/osetia_spravki/20080811/150283008.html)

<sup>508</sup> А.Г. Арешев, Е.Г. Семерицова, *Абхазия и Южная Осетия после признания. Исторический и современный контекст*, op.cit., p. 101-103.

<sup>509</sup> Т.М. Шамба, А.Ю. Непрошин, *Абхазия. Правовые основы государственности и суверенитета, Глава 2. Государственность Абхазии*, op.cit.; [apsnyteka.org/225-abkhazia\\_pravovye\\_osnovy\\_gosudarstvennosti\\_i\\_suvereniteta.html](https://ria.ru/osetia_spravki/20080811/150283008.html)

<sup>510</sup> *Распоряжение Совета министров Грузинской ССР о создании в Сухуми филиала Тбилисского государственного университета*. 14 мая 1989 г.; *Постановление Совета министров Грузинской ССР об объединении Абхазского государственного университета им. А.М. Горького и Сухумского филиала Тбилисского государственного университета им. И. Джавахишвили*. 2 ноября 1989 г.. Региональные конфликты в Грузии – Юго-Осетинская автономная область, Абхазская АССР (1989 – 2005). Сборник политико-правовых актов. Тбилиси, 2005. pp. 5, 12 – 13

<sup>511</sup> М. Шамба, А.Ю. Непрошин, *Абхазия. Правовые основы государственности и суверенитета, Глава 2. Государственность Абхазии*, op.cit.; [apsnyteka.org/225-abkhazia\\_pravovye\\_osnovy\\_gosudarstvennosti\\_i\\_suvereniteta.html](https://ria.ru/osetia_spravki/20080811/150283008.html)

<sup>512</sup> 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: 12.04.2015]

SSR's Constitution (Basic Law),” which entered in force on 18 November 1989<sup>513</sup>. The law *On election of the Georgian SSR's deputies of peoples* banned regional parties from the upcoming Georgian parliamentary elections.<sup>514</sup> Hence, with outlawing regionally-based parties from Georgian parliamentary election, the Abkhazian Autonomous SSR was deprived to the possibility of participating in the running of the Georgian SSR. In other words, enactment by the Georgian Supreme Soviet of a new electoral law, Abkhazia was prevented from fielding candidates for the posts of deputies.

While, according to the law *On amendments to the Constitution* the Georgian SSR would reserve the right to secede freely from the USSR as this was a sacred and inviolable right (Article 69).<sup>515</sup> In other words, in practice, Georgia affirmed that it was free to secede from the Soviet Union with territory of the Georgian SSR, comprising the Soviet sub-units forming it, namely with Abkhazia.

In 1990 under pressure of the national front of Georgia the Georgian Supreme Soviet also produced two laws: the 9 March 1990 Decree *on Guarantees for Protection of State Sovereignty of Georgia* and a Decree of the 20 June 1990 *'On the introduction of a supplement to the Decree of 9 March 1990 'on Guarantees for Protection of State Sovereignty of Georgia'*, with which it declared the Soviet law pertinent to Georgia null and void.<sup>516</sup> This meant *de facto* unilateral secession from the Soviet Union. These laws will be closely examined in later in the paragraph ‘War of laws.’ These secessionist laws triggered the reaction of the Abkhazian ASSR, which resulted in the war of laws between Georgia and Abkhazia.<sup>517</sup>

On 28 October 1990 parliamentary elections with a second round on 11 November 1990 were held in the Georgian SSR, through which was selected a government.<sup>518</sup> Since Abkhazia and other autonomous entities within the Georgian SSR were outlawed from the Georgian parliamentary election the Georgian parliamentary election was vitiated. Thus Georgian parliamentarians did not represent the interest of the population of non-Georgians at large – only that of a few clans of Georgians. On 14 November *Round Table-Free Georgia* elected Zviad Gamsakhurdia as Chairman of the Presidium of the Supreme Soviet, who became effective leader of Georgia. *Round Table-Free Georgia* headed by Gamsakhurdia through these elections

<sup>513</sup> Article 14 (26) of the Law of the Georgian SSR on amendments and annex to the Georgian SSR's Constitution (Basic Law), available on the official website of the Parliament of Georgia, at: <http://www.parliament.ge/archive/3784g/3784g-01.pdf> [accessed: 12.04.2015]

<sup>514</sup> Article 8 of the Law of the Georgian SSR on Elections to the Supreme Soviet of Georgia (18 August 1990), op.cit., <http://www.parliament.ge/archive/3784g/3784g-01.pdf> [accessed: 12.04.2015]

<sup>515</sup> Article 14 (26) of the Law of the Georgian SSR on amendments and annex to the Georgian SSR's Constitution (Basic Law), op.cit., <http://www.parliament.ge/archive/3784g/3784g-01.pdf> [accessed: 12.04.2015]

<sup>516</sup> М. Волхонский, В. Захаров, Н. Силаев, *Конфликты в Абхазии и Южной Осетии: документы 1989 – 2006 гг.*, М.: ИП ИД «Русская панорама», 2008, pp. 20-22.

<sup>517</sup> See, *Part Two Analysis of the Abkhazian case, Chapter IV The secessionist movements after perestroika, 3 The reaction of the Abkhazian Autonomous Soviet Socialist Republic to the 1990 legislative acts of the Georgian Soviet Socialist Republic*

<sup>518</sup> В.А. Печенев, *Смутное время в новейшей истории России, 1985 - 2003: Исторические свидетельства и размышления участника событий*, Норма М., 2007, p. 127; the *Europa World Year Book*, Di Taylor & Francis Group, 2004

definitely moved into the commanding positions in the political life of the Republic. The newly appointed Georgian parliament confirmed its intention to lead the Georgian SSR to full separation from the Soviet Union. Moreover, they carried on radical nationalist policy aimed at the *Georgianization* of the populations of the Georgian SSR, characterized by slogan “Georgia for Georgians.” Parallel to this, Zviad Gamsakhurdia with its team attempted to revive Ingoroq’va’s hypothesis on that Georgians are the most ancient autochthonous inhabitants in the Caucasus and rehabilitate its author.<sup>519</sup> All this nationalist policy reawaked regional tensions, kept in a semi-dormant state under government of Brezhnev, especially in Abkhazia and South Ossetia. Therefore, after official coming in power of the members of the Popular Front of Georgia ethno-national tensions were deteriorated in the Republic, which consequently turned into the ethno-national armed conflicts. It is to be stressed, in multi-ethnic and heterogeneous Republic such as the national chauvinist policy adopted by the Georgian bureaucracy was one of the main causes of ethno-national conflict between Georgia and Abkhazia.

To sum up, Georgian separatist demands, twisted by nationalist policy, exacerbated inter-ethnic antagonism, thus destabilizing the situation in the Republic and putting basic civil and political rights in jeopardy.

### ***b. The Popular Forum of Abkhazia “Aydylara”***

Mikhail Gorbachev’s slogans *Glasnost* and *Perestroika* also had repercussions in the Abkhazian SSR. In particular, the leader of the Soviet Union promised substantial readjustments to the existed system devised by Lenin and Stalin. Namely, he promised to adjust the injustices imposed by Stalin in the suppression of nationalities.<sup>520</sup> Thus, Gorbachev encouraged the beliefs of the Abkhazians that the injustices imposed by Stalin upon them could be put right, that is, the downgrading of Abkhazian status could be adjusted. Gorbachev’s promises and Georgian ultra nationalist policy with the slogan “Georgia for Georgians” in the late 1980s and 1990s, induced Abkhazians, to appeal for the restoration of their status of 1921.

In 1988 the 60 leading Abkhaz politicians made an appeal to the USSR government through the so-called “Abkhaz Letter” requesting the restoration of Abkhazia’s 1921-1931 status<sup>521</sup>, which remained without response. *The State Program for the Georgian Language* (1989), which made the teaching of the Georgian language obligatory in all Abkhazian schools, and required Georgian language and literature tests as prerequisites for entry into higher

<sup>519</sup> Т.М. Шамба, А.Ю. Непрошин, *Абхазия. Правовые основы государственности и суверенитета, Глава 2. Государственность Абхазии*, op.cit.; at [apsnyteka.org/225-abkhazia\\_pravovye\\_osnovy\\_gosudarstvennosti\\_i\\_suvereniteta.html](http://apsnyteka.org/225-abkhazia_pravovye_osnovy_gosudarstvennosti_i_suvereniteta.html);

<sup>520</sup> Документальные и печатные материалы собрания Горбачев-Фонда, at <http://www.gorby.ru/archival/expocenter/vnutrpolitika/>

<sup>521</sup> T. Potier, *Conflict in Nagorno-Karabakh, Abkhazia and South Ossetia, A Legal Appraisal*, The Hague et al., 2001, p. 10; А. Г. Арешев, В.А.Захаров, Е. Г. Семерикова, *Абхазия и Южная Осетия после признания. Исторический и современный контекст*, op.cit., p. 84

education<sup>522</sup>, infringing the Abkhaz rights and interests, provoked new reaction from the Abkhazians. The Abkhazians with other non-Georgians of the Abkhazian ASSR formed the public movement called Aydgylara (National Front/National forum), which played a mobilizing and unifying role of peoples of the Abkhazian ASSR and aimed at defending their interests in the face of the growing dangers emanating from Tbilisi.<sup>523</sup> In fact, on the 22-27 June 1989, in the village of Lykhny in the Gudauta district<sup>524</sup>, on the initiative of the Abkhazian National front “Aydgylara,” a rally of 30.000 Abkhazian people, took place, among whom were members of the Abkhazian Supreme Soviet (the Abkhazian ASSR parliament) and the Abkhazian Counsel of Ministers (the Abkhazian ASSR government) and other Abkhazian local organs. This rally was initiated for secession from the Georgian SSR. At the Lykhny rally the Abkhazians addressed a new appeal to the Gorbachev’s government on the restoration of the Abkhazian ASSR status of 1921.<sup>525</sup> In 1921 the Abkhazian Republic was at least a formally independent and sovereign entity. In other words the Abkhazians demanded not only the secession from the Georgia SSR, but also secession from the USSR. It is necessary to precise that Abkhazia, however, did not intended to secede from the USSR, but only break up definitely with Georgia. Abkhazia called for the restore of its status of 1921 because in 1921 Abkhazia and Georgia were two separate Republics without any inter-state links between them. At the same time, Abkhazia manifested the intention to remain within the USSR with subsequent activities, (which will be closely examined forward). Indeed, the separation from Georgia, was the issue in question. In the letter the Abkhaz laid stress on the fact that the Abkhazian Republic was included in the Georgian SSR under the totalitarian decision of Stalin which was not the will of corresponding populations and not based on democratic procedures. They asserted that in order to avoid the ethno-national catastrophe the status of Abkhazia was to be restored; moreover, the petition-makers drew particular attention to the demographic problem. And, by indicating the numbers, they described the policies of the Georgian local authority that led to the drop of the ethnic Abkhazians in the Abkhazian Republic. In addition, they correctly underlined that their petition would be not only in line with the principles set out by Lenin, but also in line with Gorbachev’s policy.<sup>526</sup>

Although this petition of the Abkhazians was in full accordance with the new policy proclaimed by Gorbachev, the Soviet leader assumed an ambivalent stance and did not adopt any legislative act, which would satisfy or decline the Abkhazian request. The Georgians used this

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<sup>522</sup> А. Г. Арешев, В.А.Захаров, Е. Г. Семерикова, *Абхазия и Южная Осетия после признания. Исторический и современный контекст*, op.cit., p. 84

<sup>523</sup> Ibid., p.84.

<sup>524</sup> The former residence of the Abkhazian princes

<sup>525</sup> Шамба Т.М., Непрошин А.Ю., Абхазия. *Правовые основы государственности и суверенитета*, op.cit., [http://www.apsuara.ru/lib\\_sh/shamba24.php](http://www.apsuara.ru/lib_sh/shamba24.php); Михаил Волхонский, Владимир Захаров, Николай Силаев, *Конфликты в Абхазии и Южной Осетии: документы 1989 – 2006 гг.*, М.: НП ИД «Русская панорама», 2008, pp. 86-87.

<sup>526</sup> М. Волхонский, В. Захаров, Н. Силаев, *Конфликты в Абхазии и Южной Осетии: документы 1989 – 2006 гг.*, pp. 86-87.



ambivalent stance of the Soviet leadership to launch a ferocious media campaign against the Abkhazians, which resulted in the first violent confrontations between Georgians and Abkhazians in 1989.<sup>527</sup>

The continuing Georgian policy was aimed at Georgianization of the Abkhazians and separation from the Soviet Union without accounting the rights and interests of the population of the Abkhazian ASSR and resulted in the so-called *war of laws*.<sup>528</sup>

## 2. The War of laws and the abolition of Soviet law by Georgia

### a. *The secessionist Laws of the Georgian SSR*

In 1989-1990 the Georgian parliament started producing laws aimed at providing a legal basis for unilateral separation from the Soviet Union, in contrast with the Soviet laws which were then in force.<sup>529</sup> Here it is necessary to closely examine one of these legislative acts. One the most notable of these acts is Decree *on Guarantees for Protection of State Sovereignty of Georgia* issued by the Supreme Soviet of the Georgian SSR on 9 March 1990.<sup>530</sup> In the Decree the Georgian legislators proclaimed the supremacy of the Georgian laws over the All-Union laws and the sovereignty of the Republic. In particular, in the Georgian Decree stated that, at the variance with new policy *Perestroika*, which conceded greater autonomy to the first-level sub-units (the Soviet Republics), the USSR leader could no longer guarantee the rights and freedoms of the Soviet citizens since that should be the prerogative of the leaders of the Soviet Republics (of the first-level sub-units) (Item 3). The USSR President could only be guarantor of non-interference of the All-Union government in the affairs of the *Soviet Republics* (Item 4). The Georgian Republic considering itself as a 'sovereign' entity stated that, determination of its own national structure would be its own exclusive right (4 Item). The sovereign rights of the Georgian government were not to be replaced with the elective body of the first-level sub-units' representatives, that is, the *Soviet Republics* (Item 5)<sup>531</sup>. It is to be noted, that this was in contrast to Art. 73, item 8, 9 of the 1977 USSR Constitution<sup>532</sup>, which was in force at that time. Additionally, Items 7, 8 endorsed the supremacy Republican law over All-Union law<sup>533</sup>, which also conflicted with art.74, 75 of the 1977 URSS Constitution<sup>534</sup>. Hence in the Decree the Georgian Republic considered its laws as sovereign, while according All-Union legislation Georgian laws were a legal system with derivate

<sup>527</sup> Шамба Т.М., Непрошин А.Ю., *Абхазия. Правовые основы государственности и суверенитета*, op.cit., at [http://www.apsuara.ru/lib\\_sh/shamba24.php](http://www.apsuara.ru/lib_sh/shamba24.php)

<sup>528</sup> Ibid..

<sup>529</sup> М. Волконский, В. Захаров, Н. Силаев,, *Конфликты в Абхазии и Южной Осетии: документы 1989 – 2006 гг.*, Ведомости Верховного Совета Грузинской ССР. 1990. № 3, Op.cit., pp.20-23

<sup>530</sup> Ibid., p. 86.

<sup>531</sup> Ibid., p. 20

<sup>532</sup> The 1977 USSR Constitution, at <http://www.hist.msu.ru/ER/Etext/cnst1977.htm#9>

<sup>533</sup> Ibid., p. 21

<sup>534</sup> Ibid., p. 21

character, that is were not the fundamental norms of an independent legal system, whose powers lay in its own sovereignty.

In the Decree (Item 9) *on Guarantees for Protection of State Sovereignty of Georgia*<sup>535</sup>, in order to justify the unilateral secession of Georgia from the Soviet Union, the Georgian lawmakers followed the lead of the Baltic Republic of Estonia in making a unilateral claim to ‘*restoration of a state of independence*’.<sup>536</sup> In of the Decree (9), the Georgian legislative body recalled the assessment on *the violation of the 1920 Moscow treaty* (1989).<sup>537</sup>

It has to clear that Georgia invoking the Moscow treaty openly advanced the territorial claims to the Abkhazian territory. Under terms of Article IV. 1. Russia undertakes to recognise unconditionally as entering into the state of Georgia, ..., the following provinces and regions of the former Russian Empire: Tiflis, Kutais and Batum with all districts and circuits forming the said provinces and regions, and, in addition, the circuits of Zakatalsk and Sukhum [Abkhazia].<sup>538</sup>

Making reference to the Treaty of Moscow, the Georgian legislative body accused Soviet Russia of illegal occupation and annexation of Georgian territory.<sup>539</sup> In particular, Georgia affirmed that the Soviet Government would had violated the Moscow Treaty of 7 May 1920 through ‘illegally’ sending the Soviet troops to Georgia in February 1921, which would has resulted in occupation of the Georgian territory. These actions were qualified as ‘*sheer military intervention and occupation aimed at toppling the then existing political regime*’, ‘*de facto annexation of Georgia*’ and ‘*the international crime*’.<sup>540</sup> (Item 9).

The Georgian SSR Decree declared the document legalizing Georgian accessed to the Soviet Union, null and void (Item 10)<sup>541</sup>. In particular: Georgian lawmakers announced null and void *All-Union treaty of 22 December 1922 On creation of the Union of the Soviet Socialist Republics all-Union* and the *Union Treaty of 12 March 1922 On creation of Federation of Trans-Caucasus Soviet Socialist Republic* and some others.<sup>542</sup> This meant a *de facto* unilateral declaration of secession from the Soviet Union. Consequently, the Supreme Council of the Georgians demanded the restoration of those rights of Georgia that according to the Georgian politicians, had been recognized by Soviet Russia by the virtue of the aforementioned Moscow Treaty and abolition the ‘*dire consequences*’ for Georgia.<sup>543</sup> Hence, Georgia’s accusation Soviet

<sup>535</sup> Ibid., p. 21

<sup>536</sup> Estonian lawmakers moved for its unilateral secession from the USSR giving a historic and legal assessment to the Treaty of Tartu and the Molotov-Ribbentrop pact., see, Chapter I, *Unilateral Declarations of independence* 3, p.18

<sup>537</sup> Михаил Волхонский, Владимир Захаров, Николай Силаев, *Конфликты в Абхазии и Южной Осетии: документы 1989 – 2006 гг.*, op.cit., pp. 20-22

<sup>538</sup> See, *The Analysis of the 1920 Agreement of Moscow*, Chapter II, 7 Paragraph,

<sup>539</sup> Михаил Волхонский, Владимир Захаров, Николай Силаев, *Конфликты в Абхазии и Южной Осетии: документы 1989 – 2006 гг.*, Ведомости Верховного Совета Грузинской ССР. 1990. № 3. pp. 38 – 40, op.cit., pp. 20-22

<sup>540</sup> Ibid., p. 21.

<sup>541</sup> Ibid., p. 21.

<sup>542</sup> Ibid., p. 21.

<sup>543</sup> Ibid., p. 21.

Russia's '*illegal occupation and annexation*' was based exclusively on the 1920 Moscow Treaty, which *de facto* did not come in force.<sup>544</sup> The Georgian SSR concluded with a request to open negotiations '*on the restoration of the independence of Georgia*' and the removal of all proposed Soviet presidential power that would violate republican '*sovereignty*' (Item 11).<sup>545</sup>

Furthermore, the Georgian legislative body adopted on the 20 June 1990 a Decree "On the introduction of a supplement to the Decree of 9 March 1990 *on Guarantees for Protection of State Sovereignty of Georgia*".<sup>546</sup> The Decree provided that, since the Georgian Soviet government was not an elected authority, but was a result of illegal occupation of Georgia it did not express the genuine, free will of the Georgian people, declared illegal and void all acts that abolished the political and other institutions of the *Democratic Republic of Georgia*, substituting for them political and judicial institutions that relied on a foreign power.<sup>547</sup> In other words, by so doing the Georgian SSR declared illegal, null and void all the Soviet legislation pertinent to Georgia.

Moreover, Georgia declared itself a *legal continuator* of the Democratic Republic of Georgia (1918-1921) and the end of the Georgian SSR. Similar to these Decrees, other legislative acts issued in 1990 by the Georgian legislative organ, also threatened the territorial integrity of the USSR<sup>548</sup> justifying this with the thesis of their '*illegal occupation*' by Soviet Russia. Producing these legislative acts, which were in conflict with the USSR Constitution of 1977 and other Soviet laws, the Georgian SSR started a period, which was called "War of laws."

### ***b. Remarks on the Decrees of 9 March and 20 June 1990***

Firstly, here it is necessary to say that the thesis of the '*illegal occupation of Georgia*' by the part of Soviet Russia is difficult to accept, because of the events of 1921, that is the overthrow of Menshevik authority and the establishment of pro-Soviet Georgian government in 1921, were possible where there were preconditions for this<sup>549</sup>. In fact, the Soviet regime was founded with support of the local people, who were discontent and had no confidence in the Georgian Menshevik authority and foreign external forces.<sup>550</sup> Furthermore, a huge number of Georgians struggled in the civil war on behalf of Soviet Russia and participated in the establishment of the Soviet power not only in Georgia, but also in other former Russian Empire provinces.<sup>551</sup>

<sup>544</sup> See, *Chapter II The dissolution of the Russian Empire and the origin of the Georgian –Abkhazian conflict*, 10. *The treaty at the light of the modern international law and jus cogens*, pp.99-100

<sup>545</sup> М. Волхонский, В. Захаров, Н. Силаев, *Конфликты в Абхазии и Южной Осетии: документы 1989 – 2006 гг.*, op.cit., p. 21.

<sup>546</sup> *Ibid.*, p. 22.

<sup>547</sup> *Ibid.*, p. 22.

<sup>548</sup> *Ibid.*, pp. 27-41.

<sup>549</sup> G. Khačjapuridze, *Bor'ba gruzinskogo naroda za ustanovlenie sovetsoj vlasti*, Moskva, 1956, pp. 209-235

<sup>550</sup> See, *Part Two Analysis of the Abkhazian case*, III Chapter *Legal status of Georgia and Abkhazia under the Soviet Union legislation*, 4. *The foundation of Georgian Socialist Soviet Republic and Legal statuses of the Georgian and Abkhazian Soviet Socialist Republics within it*, p. 105

<sup>551</sup> G. Khačjapuridze, *Bor'ba gruzinskogo naroda za ustanovlenie sovetsoj vlasti*, op.cit., pp. 209-235

Therefore according some observers it doesn't deal with illegal occupation of Georgia, but with its voluntary accession to Soviet Russia<sup>552</sup>.

The Georgians had a huge role in the ruling of the Soviet Union. During the first three decades the All-Union government was formed mainly by Georgians, not to mention that J. Stalin was the leader of the USSR (1922-1953). This explains the privileged status of the Georgian SSR within the USSR from 1918 to 1957.

Georgia, imitating the Baltic Soviet Republics,<sup>553</sup> advanced the thesis of the 'continuity of statehood' of the Georgian Democratic Republic (1918-1921). In other words, the Georgian SSR demanded restoration of its legal situation prior of 'its occupation', when Georgia maintained the appearance of statehood, but was, *de facto* under control of the external forces. Moreover, the GDR at the time of its formal existence was not recognised by a majority of states. Therefore, the Georgian politicians advancing an appeal on the restoration of the political and legal continuity of the Georgian Democratic Republic claiming the status of entity, which was nevertheless deprived of international personality.<sup>554</sup>

Thereon the thesis of its statehood continuity is unconvincing and was not shared by legal scholars.

As can be seen in the paragraph on the Moscow treaty<sup>555</sup> this kind of agreement would now be invalid as being in contrast with the norms of *jus cogens*.

### c. *The qualification of the Georgian legislative acts of 1990*

The Georgian legislative acts at that time should be qualified as separatist because it offended against the territorial integrity of the Soviet Union. The principle of territorial integrity is considered to be of primary importance in respect of achieving international security and preserving stability in the world.<sup>556</sup>

<sup>552</sup> Likewise, it is difficult to qualify the consequence of the events of 1921, such as the proclamation of the Georgian Soviet Republic and its subsequent juncture to the Soviet Union in 1922, 'dire consequences' for Georgia. During the Soviet period the Georgian national income grew by 90% in comparison with the period after the dissolution of the Russian Empire. The USSR government invested more than 14 billion rubles in the economy of Georgia, for the development of the tea industry and building the infrastructure. However, the figures of the Georgian industrial and production potential were below the average of other developed Soviet Republics. This may be explained by the fact that the Georgian SSR did not possess any important industries and was quite poor in natural resources (it has only manganese, minerals and coal fields). Nevertheless, thanks to the All-Union subsidies the standard of living of the local Georgians was higher than in the RSFSR and other Soviet Republic. In fact, the Georgian SSR was one of the richest Soviet Republics within the USSR with a Gross Domestic Product *per capita* of approximately 15 billion dollars. By contrast, after the Georgian secession the GDP dropped 70%, that is, from 10 billion GDP per capita to 2.8 billion. Up to present time Georgia has remained one of the poorest States. *Ibid.*, pp. 209-235. Likewise, it is difficult to qualify the consequence of the events of 1921, such as the proclamation of the Georgian Soviet Republic and its subsequent juncture to the Soviet Union in 1922, 'dire consequences' for Georgia. During the Soviet period the Georgian national income grew by 90% in comparison with the period after the dissolution of the Russian Empire. The USSR government invested more than 14 billion rubles in the economy of Georgia, for the development of the tea industry and building the infrastructure, whose economy depends mostly on the foreign investments and subsidies derived from the international financial organization and a certain number of States. The unemployment rate is also high at 84%. Central Intelligence Agency, at <https://www.cia.gov/library/publications/the-world-factbook/geos/gg.html>; А.Силагадзе, *Современные финансовые и монетарные тенденции в Грузии* CA&CC Press, 2010, at [http://www.ca-c.org/c-g/2010/journal\\_rus/c-g-1-2/06.shtml](http://www.ca-c.org/c-g/2010/journal_rus/c-g-1-2/06.shtml)

<sup>553</sup> The continuity of the Baltic countries was shared a number of scholars of International law.

<sup>554</sup> Ведомости Верховного Совета Грузинской ССР. 1990. № 3. pp. 38 – 40.

<sup>555</sup> See, See, *Part Two Analysis of the Abkhazian case*, 10. *The treaty at the light of modern international law and jus cogens*, p.99-100.

<sup>556</sup> See V. Gudelevičiūtė, *Does the Principle of Self-Determination Prevail Over the Principle of Territorial Integrity?*, in: IJBL, Vol. 2, 2005, p. 50

It is important to clarify concepts of secession and right to secession. Secession represents an expression of the external dimension of the right of peoples to self-determination. The principle of self-determination, applies beyond the colonial context, but within the territorial framework of independent States. It cannot be utilized as a legal tool for the dismantling of sovereign States. Outside the colonial context, the principle of self-determination is not recognized as giving rise to unilateral rights of secession by parts of independent States.<sup>557</sup>

Self-determination outside the colonial context is primarily a process by which the peoples of the various States determine their future through constitutional processes without external interference. Faced with an expressed desire of part of its people to secede, it is for the government of the State to decide how to respond. State practice since 1945 shows the extreme reluctance of States to recognize or accept unilateral secession outside the colonial context. That practice has not changed since 1989, despite the emergence during that period of twenty-three new States.<sup>558</sup> Indeed, in principle, self-determination for peoples or groups within the State is to be achieved by participation in its constitutional system, and on the basis of respect for its territorial integrity. The right to participation in the USSR constitutional system was guaranteed to the Georgian SSR through the internal self-determination, namely by its status of the first level sub-units, which enjoyed considerable autonomy within the Soviet Union.

Self-determination was in the first instance a matter for the colonial authority to implement; only if it was blocked by the colonial authority did the United Nations support unilateral secession. Outside the colonial context, the United Nations is extremely reluctant to admit a seceding entity to membership against the wishes of the government of the State from which it has purported to secede.<sup>559</sup>

Where the parent State agrees to allow a territory to separate and become independent, the terms on which separation is agreed between the parties concerned will be respected, whether it involves continued association with that State (Faroës) or emergence to independence (Eritrea). If independence is achieved under such an agreement, rapid admission to the United Nations will follow. But where the government of the State concerned has maintained its opposition to an attempted unilateral secession, such secession has in modern practice attracted virtually no international support or recognition.

This pattern is reflected in the Friendly Relations Declaration of 1970<sup>560</sup>, as restated by the 1993 Declaration of the Vienna World Conference on Human Rights<sup>561</sup>.

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<sup>557</sup> Lee C. Buchheit, *Secession: The Legitimacy of Self-Determination*, Yale University Press New Haven 1978, p. 47.

<sup>558</sup> Lee C. Dordrecht, *Modern Law Of Self-Determination*, Martinus Nijhoff, 1993, p. 311

<sup>559</sup> *Ibid.*

<sup>560</sup> *The Friendly Relations Declaration*, at <http://www.un-documents.net/a25r2625.htm>

<sup>561</sup> <http://www.ohchr.org/EN/ProfessionalInterest/Pages/Vienna.aspx>

Hence in non-colonial context unilateral secession it is permitted through consent of state. At the time of the Georgian declaration of unilateral secession of March 9, 1990<sup>562</sup> the Soviet legislation did not grant the external right of self-determination to its sub-units. Soviet laws did not provide any effective tool for lawfully exercising the right to unilateral secession. It has to be noted that the 1977 Soviet constitution provided for right to secession, assigned to the Soviet (union) Republics (first-level sub-units), which was subject to authorization by the USSR government (Art.78)<sup>563</sup> and at that time Georgian secession was not agreed by the USSR Government. Later, when the Georgian lawmakers adopted on 20 June of 1990<sup>564</sup> another resolution on Georgian unilateral secession, the USSR government granted the external self-determination to its autonomous sub-units, but through specific procedures. However, the Georgian secessionist leaders refused to follow this procedure. Therefore, under terms of Soviet domestic law the Georgian secessionist laws from the USSR were qualified as unlawful.

Moreover, the Georgian separatist's demands of independence put at the risk the rights of non-Georgians and Georgians. Indeed, the separatist legislative acts of the Georgian authority were accompanied by the national chauvinist policy of *Georgianization* with slogan 'Georgia for Georgians', which left no doubts regarding the intention of Georgian authority to build a homogeneous republic. The policy of *Georgianization* triggered the mass-protests of non-Georgians (e.g. the Abkhazians, South Ossetians, Ajars, Russians, Armenians, and others) and Georgians of Adjara.<sup>565</sup>

### **3. The reaction of Abkhazian Autonomous Soviet Socialist Republic to the 1990 legislative acts of the Georgian Soviet Socialist Republic**

#### ***a. The Decree "On the Legal Guarantees of Abkhazian Statehood"***

The unilateral decision of Tbilisi to abolish the Soviet legislation, which meant unilateral secession *tout court* from the USSR with the territory of the Georgian SSR, that is with territory of Abkhazia, directly infringed the latter's interests and rights. Georgian demands to restore the legal situation of 1918-1921 and the rights of Georgia, recognized by Soviet Russia by the virtue of the 1920 Moscow Treaty, confirmed the Georgian territorial claims on the Abkhazian territory. Firstly, in the period 1918-1921 Abkhazia was the object of illegal occupation and aggression by Georgian troops with support external forces. Secondly Georgia, invoking the Moscow treaty,

<sup>562</sup> М.Волхонский, В. Захаров, Н. Силаев, *Конфликты в Абхазии и Южной Осетии: документы 1989 – 2006 гг.*, op.cit., pp. 20-22.

<sup>563</sup> The 1977 USSR Constitution, at <http://www.hist.msu.ru/ER/Text/cnst1977.htm#9>

<sup>564</sup> М.Волхонский, В. Захаров, Н. Силаев, *Конфликты в Абхазии и Южной Осетии: документы 1989 – 2006 гг.*, op.cit., pp. 20-22.

<sup>565</sup> La politica di secessione è stata contestata dalla resistenza della maggioranza dei popoli non-georgiani ne facenti parte (sudosseti, abkhazi, armeni, adzerbajgiani, degestani, russi, greci e gli altri) tramite il boicottaggio del referendum sul restauro della sovranità dello Stato georgiano. Inoltre, è stato svolto il referendum ai fini del mantenimento dell'URSS in Abkhazia e in Ossezia del Sud rivela che essi erano in contrario alla politica separatista del governo georgiano.

openly advanced the territorial claims to the Abkhazian territory. Moreover, the legislative acts of the Georgian Soviet Supreme was accompanied by a discriminatory policy of *Georgianization* towards population of Abkhazia, which further aggravated ethno-national tensions between Georgia and Abkhazia in 1990. As was to be expected, the reaction of the Abkhazian side was not slow in coming. In particular, on 20 June 1990 the Supreme Soviet of the Abkhazian Autonomous Republic adopted a Decree “On the Legal Guarantees of Abkhazian Statehood”.<sup>566</sup> The preamble of this Decree established that the Georgian aspiration to withdraw from the Soviet Union would not involve that other Soviet units forming the Georgian SSR would follow Georgia and secede with it from the USSR.<sup>567</sup>

The Abkhaz legislative body affirmed that the secession of Georgia from the Soviet Union did not include the secession of Abkhazia from the Union because there was no legal or historical foundation for this. In fact, Abkhazia formed part of the Georgian SSR only as an outcome of the use of force of Stalin’s totalitarian decision and not the will of the population of Abkhazia.<sup>568</sup>

In order to argue the illegal Abkhazian incorporation into Georgia the Abkhazian Supreme Soviet, in the preamble gave legal-historical summary with reference to the history of Abkhazian-Georgian relations at the period from Russian Empire until the period of *Perestroika*, which can be summed up as follows. From the past Abkhazia was independent state, which in 18<sup>th</sup> century accepted protectorate status from Russia. Later Abkhazia was transformed into a Russian province. After the Russian Empire’s collapse Abkhazia restored its sovereignty. In particular in 1917 it aligned itself as a sovereign subject the Confederation of the Mountain Republics. The treaties of 1918 signed between Abkhazia and Georgia recognised Abkhazia’s independent status, which was subsequently violated by Georgia through illegal occupation and annexation of Abkhazia against the will of the population of Abkhazia. Thereafter, the period of occupation of 1918-1921 was qualified by Abkhazian lawmakers as an illegal occupation on the part of Georgia. In 1921 Abkhazia expelled the Georgian troops and proclaimed an independent Republic. In 1922 the Abkhazian Republic, together with other Transcaucasian Republics (Georgia, Armenia, Azerbaijan) had access to the Soviet Union on an equal basis.

However, in 1931 Abkhazia was soon the victim of a totalitarian decision by Stalin and Beria, and against the Abkhazian people’s will was illegally incorporated into the Georgian SSR. The Abkhazian population never accepted this incorporation and during the whole period of its coexistence with Georgia, within the Georgian SSR, they appealed for secession from this.<sup>569</sup>

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<sup>566</sup> М. Волхонский, В. Захаров, Н. Силаев, *Конфликты в Абхазии и Южной Осетии: документы 1989 – 2006 гг.*, М.: НП ИД «Русская панорама», 2008, р. 97.

<sup>567</sup> *Ibid.*, p. 97.

<sup>568</sup> *Ibidem.*

<sup>569</sup> *Ibid.*, p. 98.

Additionally, the legislative body denounced Georgian discriminatory oppressive policy towards non-Georgians, undertaken in 1931-1957. Also Abkhazian authority gave negative assessment to the discriminatory policy and forced assimilation accomplished by the Georgian SSR of 1985-1990. In Item 1 of the Decree “On the Legal Guarantees of Abkhazian Statehood” the Abkhazian Soviet Supreme established that Georgia violated the agreements of 1918<sup>570</sup> signed between Abkhazia and Georgian authorities due to its aggression and illegal occupation in the period 1918-1921. This act violated the international norm, which prohibits occupation by means of use of force. Text of the Degree (Item 2) condemning the Treaty of Moscow invoked the invalidity of the Moscow Treaty, in part regarding Abkhazia. Item 3 can be summarised as follows. Since the Decrees of the Supreme Soviet of the Georgian SSR of November 18, 1989<sup>571</sup>, March 9 and June 20, 1990<sup>572</sup> declared all Soviet law pertinent to Georgia, issued from February 1921, null and void, from which it logically follows that the Georgian lawmakers abrogated all legal grounds, on the basis of which Abkhazia could be considered part of Georgia within the USSR.<sup>573</sup> In particular, the Georgian side, by means of Decrees<sup>574</sup> of March 9 and June 20, 1990, abrogated the Treaty-Union on *Agreed Republic*,” on the basis of which the Georgia-Abkhazia had formed the *Agreed Republic*.

Hence, when Georgia unilaterally seceded from this agreement, it terminated the Abkhazian-Georgian contractual relations deriving from it. Since the whole Georgian-Abkhazian relations were founded on the Treaty-Union their relations had a consensual nature, therefore Georgia could not alter their relations without the Abkhazian consent.<sup>575</sup>

Apart from this agreement the Abkhazian-Georgian relations were legitimised by the USSR legislation. From this it follows that in declaring these laws null and void, the Georgian authorities also voided the legal grounds for Abkhazian forming part of the Georgian SSR.<sup>576</sup> In fact, Abkhazian-Georgian coexistence within the same framework was due to the existence of the USSR. As a result Abkhazian Supreme Soviet was left with no choice but to invoke Art.73 of the 1977 USSR Constitution<sup>577</sup> and request that the status which was proclaimed on 31 March 1921 be restored its initial status, when Abkhazia was independent Republic (Item 4) (*restitutio in*

<sup>570</sup> Under agreement of January 9, 1918 and Agreement of June 11, 1918 Georgia and Abkhazia recognized each other independency and sovereignty over the corresponding territories. See, *Part two Analysis of the Abkhazian case, 4. The status of Abkhazi in 1917-1918, b. The treaty between Abkhazian National Congress and Georgian National Congress*, p. 91, М. Волхонский, В. Захаров, Н. Силаев, *Конфликты в Абхазии и Южной Осетии: документы 1989 – 2006 гг.*, op.cit., 2008, p. 98.

<sup>571</sup> *Ведомости Верховного Совета Грузинской ССР*. 1990. № 3. pp. 38 – 40.

<sup>572</sup> *Ibidem*.

<sup>573</sup> М. Волхонский, В. Захаров, Н. Силаев, *Конфликты в Абхазии и Южной Осетии: документы 1989 – 2006 гг.*, op.cit., 2008, p. 98.

<sup>574</sup> *Ведомости Верховного Совета Грузинской ССР*. 1990. № 3. pp. 38 – 40.

<sup>575</sup> М. Волхонский, В. Захаров, Н. Силаев., *Конфликты в Абхазии и Южной Осетии: документы 1989 – 2006 гг.*, op.cit., p. 98.

<sup>576</sup> *Ibid.*, p. 98.

<sup>577</sup> Article 73. *The jurisdiction of the Union of Soviet Socialist Republics, as represented by its highest bodies of state authority and administration, shall cover: ...determination of the state boundaries of the USSR and approval of changes in the boundaries between Union Republics:* <http://www.hist.msu.ru/ER/Text/cnst1977.htm#iii>



integrum).<sup>578</sup> However, it declared Abkhazia's readiness to enter negotiations with Georgia on their future relations. It noted that this would in essence mean a return to their interstate relations established in 1922, that is, on an equal basis (in Item 5).<sup>579</sup> It can be concluded that with this Decree Abkhazia demanded full secession from the Georgian SSR.

#### **b. The Declaration “*On the Sovereignty of Abkhazia*”**

On 20 June 1990 together with the Decree On the Legal Guarantees of Abkhazian Statehood the Abkhazian Supreme Soviet approved a Declaration On the Sovereignty of Abkhazia.<sup>580</sup> This declaration established the supremacy of local laws over the Georgian SSR and the Soviet Union laws in its territory. It declared all the laws undermining Abkhazian sovereignty null and void. In the case of laws' divergence between Abkhazian laws and other Soviet legislation (the All Union Soviet and Georgian laws), Abkhazian laws would apply; it would suspend the effect of Soviet laws.<sup>581</sup> At the same time Abkhazia expressed the intention of establishing its relations with the Soviet Union on new basis, where Abkhazia enjoyed greater autonomy. The Abkhazian lawmakers stated also that the Declaration would be the basis for the new All Union treaty.<sup>582</sup> In conclusion, Abkhazia stated that as being founding subject of the USSR, it had right to participate in the negotiations on the new All Union agreement. Thus, the Autonomous Republic (Abkhazia) appealed for secession from the Georgian SSR, and to become part of the reformed Soviet Union.

In response, the Georgian SSR produced a resolution of August 26, 1990 “On the decisions of the Abkhazian Autonomous SSR of August 25, 1990”, which declared the laws of Abkhazia<sup>583</sup> lacked any legal basis, and to alter the national-state and administrative-territorial structure of the Georgian SSR, would be a gross violation of the Constitution of the USSR.<sup>584</sup> This Georgian Resolution appeared to be totally inconsistent with the previous decision of Georgia's Supreme Soviet to annul all Soviet legislation pertaining to Georgia. Georgia maintained such a contradictory position until the USSR's collapse in order to justify its territorial claims to the Abkhazian territory.

<sup>578</sup> М. Волхонский, В. Захаров, Н. Силаев, *Конфликты в Абхазии и Южной Осетии: документы 1989 – 2006 гг.*, op.cit., p. 99

<sup>579</sup> Ibid., p. 99.

<sup>580</sup> Ibid., p. 101.

<sup>581</sup> Ibid., p.101.

<sup>582</sup> Ibid, pp. 87-103.

<sup>583</sup> Постановление президиума Верховного Совета Грузинской ССР о решениях Верховного Совета Абхазской АССР от 25 августа 1990 г.. Печатается по изданию: Ведомости Верховного Совета Грузинской ССР. 1990. № 8. С. 97 – 98. Ibid., p. 23.

<sup>584</sup> The Georgian Supreme Soviet's Resolution of August 26, 1990 “On the decisions of the Abkhazian Autonomous SSR of August 25, 1990 ”г. Печатается по изданию: Ведомости Верховного Совета Грузинской ССР. 1990. № 8. С. 97 – 98. Ibid., p. 23.

### c. The qualification of Abkhazian legislative acts of 1990

The Abkhazian acts on separation from the Georgian SSR cannot be qualified as secessionist for the following reasons. First of all, these acts were in line with a Law on Secession and Law of the 26 April 1990 “*On the delineation of powers between the USSR and the subjects of the federation*”<sup>585</sup> which put Abkhazia and Georgia on the same level, and granted them both the right to external self-determination through determined procedure. Second, Abkhazia demanded separation from the separatist Soviet sub-units *the Georgian SSR* and not from the USSR. Indeed, the Abkhazia authorities claimed *per se* major autonomy within the USSR and had no intention to secede from the USSR. It is to be noted that at the time only the USSR was the subject of international law, while the Georgian SSR was a federate entity and did not enjoy international personality.

### 4. The response of the President of the Soviet Union to the legislative acts of Georgia and Abkhazia

With regard to “the War of laws” between Georgia and Abkhazia, on hand, the President of the USSR took an ambivalent position and did not approve any legislative act, which would condemn or approve Georgian-Abkhazian decisions, issued in 1990.

As an answer to separatists acts of the Georgian authority of 9 March and 20 June 1990 and request of Abkhazia to secede from the Georgian SSR and have greater autonomy within the USSR there the following solutions were provided by the Soviet laws. In particular, the first solution was, establishment of a new Union based on decentralized federation, where Soviet sub-units would enjoy much more autonomy within the Soviet Union.<sup>586</sup> In other words the drawing up of a new All-Union Treaty was proposed whereby the replacement of the Union of Soviet Socialist Republics’ treaty of 1922 would grant greater political, economic and other autonomies to Georgia and Abkhazia.<sup>587</sup> By the force of the Law of the 26 April 1990 “*On the delineation powers between the USSR and the subjects of the federation*”<sup>588</sup>, which put both Georgia as a first level sub-unit and Abkhazia as a second level sub-unit on the same level within the multi-level Soviet structure; thus, Georgia and Abkhazia were allowed to participate directly in the process of negotiations on new All-Union Treaty on an equal basis. The second solution was concession to

<sup>585</sup> Закон СССР от 3 апреля 1990 г. «О порядке решения вопросов, связанных с выходом союзной республики из СССР», at <http://constitutions.ru/?p=2973>.

<sup>586</sup> See: *Chapter II, The legal basis for separation and creation of the new States, Law on Secession*, pp.30-34.

<sup>587</sup> *К Союзу Суверенных народов*. Сборник документов КПСС, законодательных актов, деклараций, обращений и президентских указов, посвященных проблеме национально-государственного суверенитета. М., 1991, <http://soveticus5.narod.ru/85/sborn91.htm>

<sup>588</sup> Закон СССР от 26 апреля 1990 г. *О разграничении полномочий между Союзом ССР и субъектами федерации*, at <http://constitutions.ru/?p=2965>

the aspiring Soviet Republic, Georgia and the units it comprised (Abkhazia, South Ossetia, Adjara) to secede from the Soviet Union with the right to external self-determination through agreed procedures. In particular, on 3 April 1990, the USSR Supreme Soviet issued a “*Law on the Procedure for Resolving Questions Connected with a Union Republic's Secession from the USSR*,”<sup>589</sup> which established the procedures for effecting secession from the USSR.<sup>590</sup> This was the first law<sup>591</sup> that made it possible, at least legally, for *Soviet Republics* (first-level sub-units) to exercise right of secession from the USSR. Likewise the Law on secession conceded the right of the second and third-levels sub-units to secede with the right to external self-determination.<sup>592</sup> In particular, to secede, a Union (Soviet) Republic (Georgia) and the units it comprised (Abkhazia) would have to hold separate referendums on the question of remaining within the USSR or within the seceding *Soviet Republic* (Georgia) or to build its own state.<sup>593</sup>

In other words, the high legislative body of the USSR permitted both Georgia and Abkhazia decide their own legal status, freely and independently, up to secession and creation new state. In this way the Soviet law envisaged peaceful solutions, which aimed at avoiding ‘painful’ secession and safeguarding the rights and interests of both the Georgian and Abkhazian sides and prevention of the further escalation of Georgian-Abkhazian ethno-national tensions.

Apart from these two alternatives: greater autonomy within the reformed Soviet Union or secession according to the procedure set by the 1990 Law on Secession; M. Gorbachev initiated the All-Union referendum on 24 December 1990 at the IV Congress of People's Deputies. In particular, on 17 March 1991 the USSR government fixed the All-Union Referendum for ‘the USSR preserving it as a Federation of the equal Republics,’<sup>594</sup> at which all Soviet citizens were asked to vote “yes” or “no” to the following question: “Do you think that the Union of Soviet Socialist Republics should be preserved as a renewed federation of equal sovereign Republics, in which the rights and freedoms of the people of any nationality should be fully guaranteed?” The issue of referendum is directly connected with an attempt by the central government aimed at reforming the USSR on the basis of the new Union Treaty and finding a peaceful solution to separatist movements within the USSR.

<sup>589</sup> Закон СССР от 3 апреля 1990 г., *О порядке решения вопросов, связанных с выходом союзной республики из СССР*, at <http://constitutions.ru/?p=2973>.

<sup>590</sup> See: *Chapter II, The legal basis for separation and creation of the new States, Law on Secession*, p.30.

<sup>591</sup> Before the foundation of the USSR the Russian Republic guided by V. Lenin conceded to all the Russian and not-Russian people (who had made up part of the Russian Empire) the right to self-determination up to secession, see *Chapter two, The Abkhazian case, 2. The birth of the Russian Socialist Federative republic, b. Declaration of the Rights of the Peoples 1918*, pp. 84-85.

<sup>592</sup> See: *Chapter II, The legal basis for separation and creation of the new States, Law on Secession*, pp.30-34.

<sup>593</sup> See: *Ibid*, p.20.

<sup>594</sup> Art. 1, Верховный Совет СССР Постановление от 16 января 1991 г. N 1910-1 об Организации и мерах по обеспечению проведения референдума СССР по вопросу о сохранении союза советских социалистических республик, at <http://ppt.ru/newstext.phtml?id=16598>

## 5. The unilateral secession of Georgian from the USSR

### a. Georgian rejection of peaceful solutions and interim period

Although the formulated Draft of All-Union Treaty granted a unprecedented degree of authority to the Georgian SSR and the other first-level sub-units, Georgia refused to participate in the drawing up of the new USSR treaty, thus refusing to remain in the reformed the Soviet Union. At the same time the Georgian authorities refused also to follow the procedure pre-agreed by the Laws on Secession of 1990 and broke away unilaterally from the Soviet Union and, indeed, rejected solutions proposed by Gorbachev. Through its separatist activities, Georgia continued to justify the so-like ‘*unlawful*’ occupation and annexation; advancing the thesis of the rebirth of a state claiming that its occupation by the part of another State it did not affect its international personality.

In the meantime, the Georgian separatist leader, admitting a legal vacuum caused by the voiding the Soviet laws, issued a law of 14 November 1990<sup>595</sup>, which set an interim period, during which the Soviet law would be provisionally applied. Under terms of this law, during this period, some Soviet laws, namely the GSSR Constitution of 1987 would be applied partially on the Georgian territory. The interim period was necessary to create an independent legislative basis for its application after the ‘restoring of Georgian independence.’ However, the term of the interim period was not indicated. At the same time the Georgian lawmakers continued to adopt other laws<sup>596</sup>, which were in the conflict with the USSR Constitution of 1977, the Georgian SSR Constitution of 1978, the Abkhazian ASSR Constitution, the 1990 Law *on the delineation powers between the USSR and the subjects of the federation* and the 1990 Law *on the Procedure for Resolving Questions Connected with a Union Republic's Secession from the USSR*<sup>597</sup>. In order to justify these Georgian contradictory laws the Georgian legislative body stated that it would consider above-mentioned Soviet laws null and void because these prejudiced the sovereign rights of Georgia.<sup>597</sup>

<sup>595</sup> А.И.Доронченков, *Сборник документов КПСС, законодательных актов, деклараций, обращений и президентских указов, посвященных проблеме национально-государственного суверенитета*, Институт теории и истории социализма ЦК КПСС, Москва 1991

<sup>596</sup> The Laws of the Supreme Soviet of the GSSR on *Appointment of the Georgian government, on Amendments to the GSSR Constitution of 1978*, Ведомости Верховного Совета Республики Грузия. 1991. Тб., № 2. pp. 223 – 235.

<sup>597</sup> А.И.Доронченков, *Сборник документов КПСС, законодательных актов, деклараций, обращений и президентских указов, посвященных проблеме национально-государственного суверенитета*, op.cit., Москва 1991

### ***b. Boycotting of the All-Union referendum***

The Georgian authorities, headed by Zviad Gamsakhurdia, who provided for a nationalist, isolationist policy on 28 February 1991 adopted a resolution on *Holding the All-Union Referendum on USSR preservation and the measures on its implementing*,<sup>598</sup> in which they announced their intention to boycott the *All-Union Referendum* fixed for 17 March 1991<sup>599</sup>.

In the text of this resolution Russia is accused, in essence, of double occupation and annexation of Georgia. In particular, it affirmed that first time, as the Georgian [Kartli-Kakheti] Kingdom, Georgia it was annexed by Tsarist Russia in XIX century; and was again the subject of annexation for the second time by Soviet Russia. Therefore, according to the Georgians, Russia had no right of conducting the All-Union referendum. Based on this line of argument the Georgians determined that they would not hold the All-Union referendum but rather held conduct their own referendum on ‘*Restoration of the statehood of Georgia*’ on 31 March 1991.<sup>600</sup>

Moreover, the Georgian authorities not only refused to hold the All-Union referendum but also attempted to prohibit the implementation of the All-Union referendum in its autonomous entities: the Abkhazian ASSR, the Adjarian ASSR and in the South Ossetian *Autonomous region*. Despite the threats of the Georgian local authorities the Abkhazian Autonomous Republic participated in the All-Union referendum.<sup>601</sup>

In line with the resolution ‘*Holding the All-Union Referendum on USSR preservation and the measures on its implementing*’ 31 March 1991 Georgia conducted its own separatist local referendum on so-called ‘*the restoration of the independence of Georgia*’. This referendum was boycotted by Abkhazia. At this local referendum there were no USSR or international observers.<sup>602</sup> Therefore, according to the figures published by the Georgian authorities, 98% of voters (minus South Ossetia and Abkhazia<sup>603</sup>) chose independence.<sup>604</sup>

<sup>598</sup> М. Волхонский, В. Захаров, Н. Силаев, *Конфликты в Абхазии и Южной Осетии: документы 1989 – 2006 гг.*, op.cit., p. 42.

<sup>599</sup> Референдум СССР по вопросу о сохранении Союза Советских Социалистических республик, at <https://ria.ru/spravka/20160317/1390101948.html>

<sup>600</sup> Ведомости Верховного Совета Республики Грузия. 1991. № 2. С. 234 – 235. М. Волхонский, В. Захаров, Н. Силаев, *Конфликты в Абхазии и Южной Осетии: документы 1989 – 2006 гг.*, op.cit., p. 42

<sup>601</sup> А.Г. Аршев, Е.Г. Семерикова, *Абхазия и Южная Осетия после признания. Исторический и современный контекст*, op.cit., p. 61

<sup>602</sup> Шамба Т.М., Непрошин А.Ю., *Абхазия. Правовые основы государственности и суверенитета*, op.cit., [http://www.apsuara.ru/lib\\_sh/shamba24.php](http://www.apsuara.ru/lib_sh/shamba24.php)

<sup>603</sup> While South Ossetia and Abkhazia in full respect of the Soviet laws, which were in force at that time, boycotted the Georgian referendum and had participated at the All-Union Referendum.

<sup>604</sup> Шамба Т.М., Непрошин А.Ю., *Абхазия. Правовые основы государственности и суверенитета*, 2.4. 2.4. Экспансия Грузии и борьба Абхазов за независимость, op.cit., at [http://www.apsuara.ru/lib\\_sh/shamba24.php](http://www.apsuara.ru/lib_sh/shamba24.php)

### c. The Declaration on “*Restoration of the statehood of Georgia*”

On 9 April, 1991, the Georgian authorities, based on the results of separatist referendum, declared Georgia fully independent from the USSR claiming to be continuator the *Georgian Democratic Republic* (1918-1921).<sup>605</sup> The text of the Declaration on ‘*Restoration of the statehood of Georgia*’ again accused Russia (Tsarist and Soviet Russia) of the occupation and annexation of Georgia.<sup>606</sup> According to the lawmakers the outcomes of the Georgian separatist referendum of 31 March of 1991 confirmed the unwillingness of the Georgians to continue to be part of the USSR. With this Declaration Georgia intended to inform the international community about its ‘rebirth’ as an independent state, based on the 1918 Declaration of Independence. The Act of ‘Reviving the state-independence of Georgia’ declares the territory of the Sovereign Republic of Georgia is one and indivisible. There being no mention of any autonomous entities. It was natural for the Abkhazians to draw the conclusion that Georgia’s intention was to create a unitary state, devoid any such entities. The Declaration on ‘*Restoration of the statehood of Georgia*’ concluded that Georgian secession from the USSR would be in line with the principle of *self-determination* embodied in the United Nations Charter and with the Vienna Accords and Helsinki Final Act.<sup>607</sup>

A month later, in an election, also boycotted by the Abkhazians, Gamsakhurdia became president of the self-declared Georgia, with 86.5 percent of the vote.<sup>608</sup>

## 6. The pro-Soviet Union preservation approach of Abkhazia

In contrast to Georgia, Abkhazia participated in the drawing up of the draft of new All-Union treaty together with other nine Soviet Republics (first-level sub-units) and Autonomous Republics (second-levels). Subsequently Abkhazia expressed its intention to sign the newly formulated All-Union Treaty and participated in the All-Union referendum, which was held separately in each of the second-level sub-units of the USSR. Of 318,317 registered voters in Abkhazia, 166,544 (52.3-%) participated, and of these 164,231 (98.6%) voted in favour.<sup>609</sup> It follows from these figures that an absolute majority of those eligible to vote chose to remain part a reformed Union and, given ethnic mix and balance of Abkhazia's population. According to

<sup>605</sup> М. Волхонский, В. Захаров, Н. Силаев, *Конфликты в Абхазии и Южной Осетии: документы 1989 – 2006 гг.*, cit.op., p. 44.

<sup>606</sup> М. Волхонский, В. Захаров, Н. Силаев, *Конфликты в Абхазии и Южной Осетии: документы 1989 – 2006 гг.*, М.: ИП ИД «Русская панорама», 2008, p. 44. Ведомости Верховного Совета Республики Грузия, №4. Тб., 1991. с. 136 – 137.

<sup>607</sup> Ibid., p. 44.

<sup>608</sup> Шамба Т.М., Непрошин А.Ю., *Абхазия. Правовые основы государственности и суверенитета*, op.cit., [http://www.apsuara.ru/lib\\_sh/shamba24.php](http://www.apsuara.ru/lib_sh/shamba24.php)

<sup>609</sup> Volkhonskij et al. 2008, p.118

Vladislav Ardzinba<sup>610</sup> and other experts, preserving the unity of the Soviet Union was seen in Sukhumi as a guarantor against ethno-political conflict and as a potential opportunity through which loyalty to Moscow could be parlayed into support for a higher status for Abkhazia.<sup>611</sup>

The All-Union referendum complies with domestic and international standards in regard to its modalities, therefore the Abkhazian vote in favour of the USSR preserving is beyond dispute. Given this voting outcome, in the All-Union Referendum, Abkhazia had no legal links to Georgia. In fact, voting in favor of preserving the USSR legitimated the Abkhazian right to secede from secessionist Georgia and to be outside Georgian state framework after the dissolution of the Soviet state in December 1991.<sup>37</sup> It has to be stressed that a vote of population of Abkhazia at *the All-Union Referendum* had legal force and legal consequence. The All-Union Referendum's results in Abkhazia amounted to the secession of the latter from Georgia. In particular, Abkhazia remained under the jurisdiction of the Soviet Union in the quality of the first-level sub-unit. Indeed, it participated in all the processes of reformation of the USSR on the equal basis with other Soviet sub-units and then in October an official ceremony was fixed for Abkhazia and some others for the signing of the new All-Union agreement in the Great Kremlin Palace. However, this ceremony never took place and the hopes invested by the Abkhazians in the associated reformation of the Union were not destined to be realised. In fact the signing of new All-Union agreement was stopped by August putsch and then by the anti-constitutional coup d'état of 8 December 1991 on the part of Yeltsin, Shushkevich and Kravchuk's with the signing of the treaty on the dissolution of the USSR (de jure secession of the USSR of 21st of December).

Hence the secession of Abkhazia from the USSR was as a result of the *dissolution* of the USSR.

## 7. Concluding remarks

To sum up, analysis of the last two years of the USSR (1989-1991) shows parallel movements in Abkhazia and Georgia that contradicted one another. The Georgian movements are characterized by pro-separatist attitudes, which resulted in unilateral secession from the USSR and could qualify as separatist.<sup>612</sup> Simultaneously, the Abkhazians sought to upgrade their *status* to the first level sub-units, outside the framework of the first-level Georgian SSR and, within the USSR that is it had pro-preservation approach towards the USSR. The separation of Abkhazia from Georgia due to Georgia's unilateral withdrawal from the USSR cannot be qualified as separatist acts or act contrary to Soviet domestic law. It should be noted that, at that time Georgia

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<sup>610</sup> Vladislav Ardzinba (1945-2010), the leader of the Abkhaz national movement and since 1990 the Chairman of the Supreme Council of the Abkhaz ASSR, was a member of the parliamentary group "Union that Opposed the Secession of the National-State Formations

<sup>611</sup> I.Tekushev, S. Markedonov, K. Shevchenko, *Abkhazia: Between the Past and the Future*, Prague Medium Orient, 2013, p. 16.

<sup>612</sup> Now this secession can be considered as successful.

had no international personality, but was a constituent part of the USSR. Georgia did not have the capacity to be the bearer of rights and duties under international law.<sup>613</sup> The secession of Abkhazia, confirmed by vote of Abkhazians, from the first-level sub-units of the Georgian SSR was in line with Soviet internal law in force. Indeed, the status of Abkhazia has been altered on the ground of the all-union referendum in combination with the developments concerning the Union Treaty. Therefore, the Abkhazian movement could clearly not be classified as separatist in that period. In fact, in 1989-1991 most Georgians were opposed to the Soviet Union state and thereby undermining the territorial integrity of the USSR, while the Abkhaz movement supported the Soviet territorial integrity and followed all procedures in its pro-preservation stance on an equal basis with other Soviet sub-units. Separation of Abkhazia from previous sovereign power the USSR came about as a result of the dissolution of the USSR, and not unilateral secession.

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<sup>613</sup> Georg Schwarzenberger and E. D. Brown, *A Manual of International Law, The University of Toronto Law Journal* Vol. 28, No. 2 (Spring, 1978), p. 53.



**PART THREE**  
**AN ASSESSMENT OF THE PRESENT LEGAL STATUS OF ABKHAZIA**  
**CHAPTER I**

**THE ASSESSMENT OF EFFECTIVENESS**

**1. The notion of effectiveness**

The role of effectiveness in international law is crucial to clarify the status of territorial entities: therefore, this concept is to be examined.

Generally, effectiveness is attributable to a particular structural aspect of the international community. Unlike domestic law, the international legal order has no central organ that is empowered to apply and enforce law, and such functions are entrusted to the States concerned. Consequently, in the international legal order, the subjects of international law must rely on means of self-enforcement to protect and enforce their own individual rights. Therefore, if international law is not to be mere speculation, but to be significantly efficacious, it has to come to terms with reality to some extent. In other words, legal fictions are discouraged in international law.<sup>614</sup>

With regard effectiveness the doctrinal debate arose, mostly in the three decades following the end of World War II.<sup>615</sup> The disputatious arguments surrounding the concept of effectiveness have tended to move between normativity and concreteness,<sup>616</sup> that is to be re-shaped in legality and effectiveness.

On the one hand, according to some experts, effectiveness is phenomenon in which a factual situation corresponds to legal status and legal rights. In this regard the idea of Verdross and Simma can be recalled, who discerned the principle of effectiveness in rules of international law as requirements for legal status and legal rights<sup>617</sup> and do not give any kind of normative value to

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<sup>614</sup> C. Focarelli, *Diritto Internazionale*, 2 Edizione, Wolters Kluwer Cedam, Padova, 2012, pp. 33-40

<sup>615</sup> Kelsen, *Principles of International Law*, 1952; Kelsen, *General theory of the Law and State*, 1961; Ottolenghi, *Il principio di effettività e la sua funzione nell'ordinamento internazionale*, 15, *Rivista di Diritto internazionale* (1936), 3, 151, 363; Sperduti, *L'individuo nel diritto internazionale: contributo all'interpretazione del diritto internazionale secondo il principio dell'effettività*, 1950; Bellini, *Il principio generale dell'effettività*, 27 *Annuario di diritto internazionale comparato e di studi legislativi*, 1951, p. 225; Tucker, *The Principle of Effectiveness in International Law*, in Lipsky (ed.), *Law and Politics in the World Community*, 1953, Bouchez, *The Concept of effectiveness is applied to territorial sovereignty over sea areas, air space and outer space*, 4 *Nederlands Tijdschrift voor International Recht*, 1957, 151; H. Krüger, 'Das Prinzip der Effektivität, oder: über die besondere Wirklichkeitsnähe des Völkerrechts' in *Festschrift für Jean Spiropolus* 1957, 265; Jennings, *Nullity and Effectiveness in International Law*, in *Cambridge Essay in International Law*, 1965, p.64. Miele, *La Comunità internazionale*, 2000, 3d ed.; Cassese, *International Law*, 2001; Kreijen, *State Failure, Sovereignty and Effectiveness*, 2004; E. Milano, *Unlawful Territorial Situations in International Law: Reconciling Effectiveness, Legality And Legitimacy*. Martinus Nijhoff Publishers, Leiden/Boston, 2006, pp. 21-55.

<sup>616</sup> Koskenniemi, *From Apology to Utopia: the Structure of the International Legal Argument*, 1989.

<sup>617</sup> A Verdross and B Simma, *Universelles Völkerrecht: Theorie und Praxis* (3<sup>rd</sup> edn Duncker & Humblot Berlin 1984, p. 51; Verdross, *Universelles völkerrecht*; Ed. 3, 1984, p. 37.

it. They refuse the domination of effectiveness in international law as tantamount to the negation of the latter as a legal order.<sup>618</sup>

As a further example of this approach Sereni's discourse on the rule of precedent in the common law tradition in common law systems can be recalled, which, in his view, shows normativity of effectiveness. In particular, the idea itself of doctrine of precedent was grounded in the impossibility that the pre-existent law can be modified by new factual situations.<sup>619</sup>

Balekjian and Ottolenghi believe that the principle of effectiveness does not have any positive normative nature, but is only a qualification of a certain fact. This qualification can entail a normative function insofar as it is 'recognised' either by an existing norm of positive law or by a new norm in the process of creation through states' willingness. The effectiveness's unlimited application would replace the rule of law in international relations with the rule of power.<sup>620</sup>

On the other hand, effectiveness was to reduce norm to reality. In particular, some legal experts hold that effectiveness refers to all phenomena in which the factual situation affects the legal norm. In confirmation of this standpoint, some writers<sup>621</sup> refer to the codification of new areas of activity of States. For instance, De Visscher speaks about the need to regulate them in a prompt manner leading States to conclude multilateral treaties, which have a decisive impact on the establishment of international law; such as new multilateral treaties which may be formed rapidly by a sudden change of social reality.<sup>622</sup> Similar to De Visscher, Touscoz also maintains that multilateral regimes were negotiated as a consequence of rapid changes in social realities.<sup>623</sup>

The Kelsen idea can be given as another example. According to him, the sphere of validity of a legal order is determined by the principle of effectiveness, which is a positive norm of international law. He discerns the prevalence of effectiveness over law in territorial matters.<sup>624</sup> He explains it by drawing a parallel between international law and a horizontal system without any centralisation of power, which always confers a right on the holder of effective power when deciding on a conflict with a nominal title. In fact, in his view, validity of the legal order is dependent on the effective coercive power underlying its very existence. In particular, the norm operates when the State is effectively displaying a stable order and State boundaries are determined according to the extent to which their legal orders are firmly established and obeyed; and acquisition of territories could occur as a result of an illegal act, as far they are effective.<sup>625</sup>

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<sup>618</sup> *Ibidem.*

<sup>619</sup> Sereni, *Dottrine italiane di diritto internazionale*, in *Scritti di diritto internazionale in onore di Tommaso Perassi*, 1950, Vol. 2, p. 281.

<sup>620</sup> W. Balekjian, *Effektivität und DIE*, *Stellung Nichtanerkannter Staaten im Völkerrecht*, 1970, p. 104; Ottolenghi, *Il principio di effettività e la sua funzione nell'ordinamento internazionale*, 15, *Rivista di Diritto internazionale* (1936), 3, p. 151, p. 363.

<sup>621</sup> See H. Krüger, *Das Prinzip der Effektivität, oder: über die besondere Wirklichkeitsnähe des Völkerrechts* in *Festschrift für Jean Spiropolus* 1957, p. 265; C. De Visscher, *Les effectivités du droit international public*, Pedone Paris, 1967, pp. 15-16.

<sup>622</sup> C. De Visscher, *Les effectivités du droit international public*, *op.cit.*, pp. 15-16.

<sup>623</sup> J. Touscoz, *Le principe d'effectivité dans l'ordre international*, Pichon et Durand-Auzias Paris, 1964, pp. 49-50.

<sup>624</sup> Kelsen, *Principles of International Law*, 1952; Kelsen, *General theory of the Law and State*, 1961, p.208.

<sup>625</sup> *Ibid.*, p.211

Moreover, Wildeman asserts that the emergence of legal principle from factual reality is a given in common law systems, since the judge is continuously legislating by departing from the concrete cases.<sup>626</sup> In particular, the author maintains that in the Anglo-American tradition there was a practical belief that *ius ex facto oritur*, and it was the duty of the judge to find it.

There are some jurists who even propose a completely new vision of effectiveness, in criticising it, they re-shaped the concept effectiveness in contemporary international law into justice and legitimacy rather than legality and effectiveness.<sup>627</sup> According to these authors the form of government of a particular State should become one of the main priorities to be addressed by international law, according to a concept of justice that would not recognise non-democratic States.<sup>628</sup> Teson<sup>629</sup> and Reisman<sup>630</sup> even propose a unilateral right of intervention in order to bring democratic legitimacy. The duty of non-intervention should be only directed to States, who are formally and genuinely committed to liberal democracy, the rule of law and human rights.<sup>631</sup> Furthermore, Teson's premises based on a new Kantian international law, advanced a hypothesis under which the State appears like an agent of the individuals' will.<sup>632</sup> The problematic aspect of the process of this concept is its translation into reality that is the empirical determination of substantive democracy.<sup>633</sup> Furthermore, the unilateral intervention on other States' internal affairs in order to bring back democratic legitimacy, if not negotiated and decided within multilateral organisations, can become easy to enforce national political agendas. In fact, the case of Iraq shows the dangers inherent in the unilateralist formulations of the democratic entitlement theory. It is crucial for tackling matters of public policy that cannot be addressed from the outside. More specifically, it is crucial for the protection of human rights, whose primary responsibility lies with the sovereign government: the current situations in Somalia and Iraq are dramatic evidence of how the lack of effective governments leads to a situation of anarchy and general disrespect for the most fundamental of the human rights, such as the right to life.<sup>634</sup>

<sup>626</sup> Wildeman, *The Philosophical Background of Effectiveness*, 24 Netherlands International Law Journal, 1977, p. 335.

<sup>627</sup> Teson, *The Kantian Theory of International Law*, 92, Columbia Law Review, 1992, p.53; Slaughter, *The Real New World Order*, 76, Foreign Affairs, 1997, p.183; Simpson, *Two liberalisms*, 12 EJIL, 2001, p. 537.

<sup>628</sup> E.g. Slaughter, *International Law in a World of Liberal States*, 6 EJIL, 1995, p. 503.

<sup>629</sup> Teson proposes the effectiveness criterion as a result of applying the political philosophy of Thomas Hobbes regarding legitimacy, which consists in the citizens' obedience towards the sovereign, based on fear, as the only effective means of ending the internal State of nature. See, F. Teson, *Humanitarian Intervention: an Inquiry into Law and Morality*, 1988, p. 79.

<sup>630</sup> M.Reisman, *Humanitarian Intervention and Fledgling Intervention*, 18 Fordham International Law Journal, 1995, p. 795;

<sup>631</sup> M.Reisman, *Humanitarian Intervention and Fledgling Intervention*, op.cit., p. 795; F. Teson, *Humanitarian Intervention: an Inquiry into Law and Morality*, op.cit., p. 79.

<sup>632</sup> F. Teson, op.cit., p. 80.

<sup>633</sup> Franck says that indicator of democracy is the domestic legal commitment to open and periodical elections. However, elections can in some cases become a periodical safe-conduct for oligarchic regimes, where two or three elites struggle for power. The situation in some African and Asian countries confirms this danger. See T.M. Franck, *Legitimacy and the Democratic Entitlement*, in Fox and Roth, eds. *Democratic Governance and International Law*, 2000, 25, at 46.

<sup>634</sup> E. Milano, *Unlawful Territorial Situations in International Law: Reconciling Effectiveness, Legality and Legitimacy*, Martinus Nijhoff Publishers, Leiden/Boston, 2006, p. 48.

However, the debates regarding the concept of effectiveness did not bring a conclusive argument. Nevertheless, this theoretical discussion contributes to fuller understanding of the concept of effectiveness and its role in international law.

Recently, effectiveness is intended as a balancing norm, of which physical existence of a fact or *rasa*, cannot be easily altered without putting at risk one or both of these terms.<sup>635</sup> It can be also argued that effectiveness goes straight to the heart of the relationships between reality and norm, and the validity of the latter.<sup>636</sup> Effectiveness has important functions in the international legal order, but is not dominant in international law. Otherwise, it would lead to the negation in international legal order.<sup>637</sup> In fact, confronting the conflict between the law and the fact, the latter cannot prevail over the title. Since the fact is external to the legal order therefore its prevalence over the law is to be considered unlawful. Conversely, the fact can become a part of the legal system in the case of its consideration as a legal fact. In this way the fact (e.g. the effective control) is a source of the concrete norms, which adequate the law to situation *de facto*.<sup>638</sup> Therefore the situation of the fact itself can have legal value.<sup>639</sup> The fact is able to produce a new norm in order to resolve the tension between the reality and the legal system.<sup>640</sup>

To conclude the role of effectiveness in international law is a evidence of the strongly realist nature of international law, which can afford legal function only to a limited extent. The effectiveness's impact on the law can be determined through three main functions: constitutive, modificative and adjudicative.<sup>641</sup>

Through its constitutive function the concept of effectiveness allows the adaptation of the law to the factual order established, to the *fait accompli*. It has in this respect a conservative function, because it 'freezes' a certain sociological situation and brings it into the legal sphere, therefore legitimising it. This function can be seen traditionally in the following aspects: the concept of State under international law, as this requires the effective power of governmental organ over a certain territory and population; the fact that a government is recognised as long as it wields effective power through habitual obedience/support by its population; the fact that a State is entitled to sovereignty over unoccupied territories when it exerts its actual authority over them.<sup>642</sup>

Effectiveness has a modificative function when it allows the modification of the law as a result of social change: that is, it allows the adaptation of the law to the new social situation. For

<sup>635</sup> A. Miele, *La Comunità internazionale, i Caratteri originali, III ed.*, G. Giappichelli editore, Torino, 2000, p. 62.

<sup>636</sup> E. Milano, *Unlawful Territorial Situations in International Law: Reconciling Effectiveness, Legality and Legitimacy*, op.cit., p. 48

<sup>637</sup> A. Miele, *La Comunità internazionale, i Caratteri originali*, p. 62; E. Milano, *Unlawful Territorial Situations in International Law: Reconciling Effectiveness, Legality and Legitimacy*, op.cit., p. 48.

<sup>638</sup> G. Arangio Ruiz, *La persona internazionale dello Stato*, Utet Giuridica, Emerito di Diritto internazionale Università "La Sapienza", Roma, 2008, p. 29

<sup>639</sup> A. Miele, *La Comunità internazionale, i Caratteri originali, III ed.*, G. Giappichelli editore, Torino, 2000, p. 62.

<sup>640</sup> G. Arangio Ruiz, *La persona internazionale dello Stato*, Utet Giuridica, Emerito di Diritto internazionale Università "La Sapienza", Roma, 2008, p. 29

<sup>641</sup> E. Milano, *Unlawful Territorial Situations in International Law: Reconciling Effectiveness, Legality and Legitimacy*, op.cit., p. 45

<sup>642</sup> *Ibidem.*

instance, the new creation of States was carried out through national liberation movements and the new exigencies of regulation of the international society in respect of maritime delimitation and cosmic navigation. This role of effectiveness can be seen as progressive.<sup>643</sup>

A third function affected by effectiveness is adjudicative. It has been used by international courts and arbitration tribunals as a principle of solution to legal disputes involving competing claims.<sup>644</sup> For instance, in regard to this function, reference can be made to cases of conflicts of nationality both for individuals<sup>645</sup> and ships<sup>646</sup> and the cases of territorial delimitation.<sup>647</sup>

## 2. Effectiveness in relation to statehood and territorial sovereignty

Effectiveness lies at the core of some fundamental issues of international law, especially, statehood and territorial sovereignty.

To such regards its role has been determined through two contrasting positions on the nature of State - the *pure fact* approach and the *legal approach* - within which different arguments have been advanced.<sup>648</sup>

In particular, Crawford and Kelsen's idea that the principle of effectiveness in a positive customary rule.<sup>649</sup> Only Kelsen sees the nature of effectiveness as sociological,<sup>650</sup> which automatically becomes accepted by international law, while Crawford considers it as the result of a process of recognition by certain rules.<sup>651</sup> In particular, he affirms:

*A State is not a fact, it is a fact in the sense in which it may be said treaty is a fact: that is, a legal status attaching to a certain state of affairs by virtue of certain rules.*<sup>652</sup>

These different approaches are dictated by different outcomes: Kelsen explains through a juridical presupposition and Crawford refers to a positive norm.<sup>653</sup>

A series of judicial decisions, both international and national,<sup>654</sup> and State practice through the 20<sup>th</sup> century, seems to point to a 'sociological' approach to effectiveness in the creation of States and their recognition.<sup>655</sup> In the *Aaland Islands* case (1920) one of the questions that the

<sup>643</sup> Ibidem..

<sup>644</sup> Ibidem..

<sup>645</sup> Security Council Resolution 1483, 2003, Preamble. Nottebohm,

<sup>646</sup> The M/V Saiga, no. 2 Case, 38 ILM, 1999, 1323.

<sup>647</sup> E.g. arbitration between Yemen and Eritrea, S/1999/1265 and the commentary by Despeaux Das Scheidsurteil 'Jemen gegen Eritrea' II, vom 17.

<sup>648</sup> E. Milano, *Unlawful Territorial Situations in International Law: Reconciling Effectiveness, Legality and Legitimacy*, op.cit., p. 56.

<sup>649</sup> H.Kelsen, *General Theory of Law and State*, 1961, pp. 115-119; Crawford, *The Creation of States*, 1976, p.76.

<sup>650</sup> H. Kelsen, *General Theory of Law and State*, 1961, pp. 115-119.

<sup>651</sup> Crawford, *The Creation of States*, op.cit., p.76.

<sup>652</sup> Ibid., p.4.

<sup>653</sup> E. Milano, *Unlawful Territorial Situations in International Law: Reconciling Effectiveness, Legality and Legitimacy*, op.cit., p. 56.

<sup>654</sup> E.g. Tribunal of Bolzano, *Kweton c. Ulman*, in 55 Rivista di Diritto Internazionale, 1972, p. 12; Italian Court Cassation, *Warenzeichenverband Regelungstechnik c. Ministero dell'Industria, del commercio e dell'artigianato*, Judgment n. 468, 7 February 1975, in 12 Rivista di diritto Internazionale privato e processuale, 1976, p. 354; House of Lords, *Carl Zeiss Stiftung v. Rainer and Keeler LTD*, n.2, 1967 AC, p. 853.

<sup>655</sup> See Verhoeven, *La Réconnaissance internationale dans la pratique contemporaine*, 1975; Arangio Ruiz, *L'État Dans le sens du droit des gens et la notion du droit international*, 26 Österreichische Zeitschrift für öffentliches Recht und Völkerrecht, 1975-1976, 3, p. 265.

International Commission of Jurists needed to answer was, at which stage did Finland become a State. The commission held that:

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 been strong enough to assert themselves throughout the territories of the State without the assistance of foreign troops.<sup>656</sup>

It is clear how the ‘factual’ approach to statehood prevailed. In 1921 the Polish-German arbitration tribunal in the case of *Deutsche Continental Gas Gesellschaft v. Poland* stated that according to the opinion rightly admitted by the great majority of writers on international law, the recognition of a State is not constitutive but merely declaratory. The State exists by itself and the recognition is nothing else than a declaration of this existence, recognised by the State from which it emanates.<sup>657</sup>

The 1948 Bogotá Treaty creating the Organisation of American States re-asserts the material nature of statehood and a declaratory view on recognition. Article 6 states that:

*the right of each State depends not upon its power to ensure the exercise thereof, but upon the mere fact of its existence as a person under international law.*

Article 10 asserts that:

*recognition implies that the State granting it accepts the personality of the new State.*<sup>658</sup>

More recently the EC Arbitration Commission on Yugoslavia has held in its Opinion n.1 that: ‘the existence or disappearance of the State is a question of the fact and effects of recognition are purely declaratory.’<sup>659</sup>

This judicial and State practice can reconcile Crawford and Kelsen’s ideas<sup>660</sup> through definition of the principle of effectiveness as a general norm of international law.

To sum up, both these approaches are fundamental for determining the role of effectiveness in the definition of statehood, which justify State sovereignty and its independence, insofar as international law allows for effectiveness to display its fullest effects.<sup>661</sup>

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<sup>656</sup> *Aaland Islands Case*, 1920, League of Nations Official Journal, Special Supplement, No.3, p.3.

<sup>657</sup> *Deutsche Continental Gas Gesellschaft v. Polish State*, 1929, AD 11, at 13.

<sup>658</sup> *Charter of the Organisation of the American States*, reprinted in 46 AJIL, Documents, 1952, p. 44.

<sup>659</sup> Arbitration Commission, EC Conference on Yugoslavia, Opinion n.1, 29 November 1991, 92 ILR, 1993, p. 162.

<sup>660</sup> H.Kelsen, *General Theory of Law and State*, 1961, pp. 115-119; Crawford, *The Creation of States*, 1976, p.76.

<sup>661</sup> E. Milano, *Unlawful Territorial Situations in International Law: Reconciling Effectiveness, Legality And Legitimacy*, op.cit., p. 61.

### 3. Effectiveness in relation to legality and legitimacy

During decolonisation (a period which saw the birth of nearly one hundred new sovereign countries), the creation of States was for the first time transformed into a legal matter through an international norm, the principle of self-determination, directly pertaining to the *substance* of these processes, leaving out any effectiveness rule. Peoples who were in a condition of foreign subjugation could claim to constitute themselves as independent States, relying on a norm directly constitutive of statehood.<sup>662</sup> Thus, this novel rule served as a legal basis for statehood, being confined to the specific case of decolonisation and to this specific historical period.

Another direction along the doctrine on *legality*, proposed particularly in the 1970s, is closely linked to the general debate regarding the criteria for statehood. This has been mainly inspired by the practice concerning *de facto* regimes, whose statehood and legal personality have been questioned owing to their unlawful origin. In particular, the reference was made to the cases of Southern Rhodesia, South-African Bantustans and Northern Cyprus. The stand taken by the international community through the non-recognition of these entities, according to some writers, would show that whether an event of secession occurs in breach of the ban on the use of force against a State's territorial integrity and/or of the principle of self-determination, the resulting illegitimacy would prevent an otherwise effective entity from being regarded as a State or as a subject of international law endowed with full legal capacity.<sup>663</sup>

In particular, according to some legal experts, the doctrine on legality, affirms the existence, in addition to the statehood criteria examined in the previous chapter, of a fourth element, namely the *lawfulness* of the process of State creation. If this process is the product of a breach of cogent norms, then the *de facto* entity would be prohibited from claiming statehood.<sup>664</sup>

<sup>662</sup> See M. Kohen, *Possession contestée et souveraineté territoriale*, Paris: Presse Universitaire de France, 1997, pp. 422–423 and 467–468.

<sup>663</sup> Such a current of doctrine finds its origin mainly in the works of Lauterpacht, *Recognition in International Law*, p. 409, according to whom, in very general terms, '... facts, however undisputed, which are the result of conduct violative of international law cannot claim the same right to be incorporated automatically as part of the law of nations', p. 410; in the same sense, see Lauterpacht (ed.), *Oppenheim's International Law: A Treatise*, vol. I, London, New York, Toronto: Longmans, 1948, p. 137. The idea put forward in these works is that every unlawful situation or act is *ipso iure* null and void; therefore, the emphasis is always placed on the legal consequences arising from the violation. Only subsequently did the doctrine start to investigate the problem of statehood directly. Thus, analysing the international community's reaction towards Southern Rhodesia, J. E. Fawcett, in *The Law of Nations: An Introduction to International Law*, London: Penguin Press, 1968, pp. 38–9, argued that the respect for self-determination was an indispensable criterion for statehood, and that where 'there is a systematic denial to a substantial minority, and still more to a majority of the people, of a place and a say in the government, the criterion of organized government is not met'. The question regarding the existence of a 'legal regulation of statehood on a basis other than that of effectiveness' was positively answered by Crawford, albeit only with reference to 'self-determination units' (the dependent territories falling under Chapter XI of the UN Charter), and therefore excluding States already formed, in *The Creation of States*, at pp. 77–8, 83–4 and 103–6 (where, dealing with the status of Southern Rhodesia, he argues that 'the principle of self-determination in this situation prevents an otherwise effective entity from being regarded as a State', so that '[i]t appears then a new rule has come into existence, prohibiting entities from claiming statehood if their creation is in violation of an applicable right to self-determination'). An analogous position has more recently been upheld by Shaw, *Title to Territory in Africa*, p. 159, and by the same author, *International Law* (Cambridge: Cambridge University Press, 2003), p. 177, p. 185.

<sup>664</sup> H. Krieger, *Das Effektivitätsprinzip im Völkerrecht*, Berlin: Duncker und Humblot, 2000, p. 102, p. 176; T. D. Grant, *The Recognition of States: Law and Practice in Debate and Evolution*, Westport: Praeger, 1999, p. 83. This latter work analyses the existence of 'what might be called addenda to the Montevideo criteria – additional elements in what makes a state', taking into consideration as 'new criteria for statehood' the respect for the principles of self-determination and democracy, the rights of minorities and the principle of constitutional legitimacy. Only in the case of self-determination does the author deem it acceptable to affirm the emergence of a new criterion for statehood (particularly on the basis of the practice regarding Southern Rhodesia and South-African Bantustans). As to the other rules (democracy, rights of minorities, constitutional legitimacy), they are evidence of the existence of mere trends.

The argument that an unlawful process of State creation results in a denial of statehood is also maintained by other writers, who base this result on different reasoning.<sup>665</sup> Distinguishing between acts or situations *non-existent* due to the lack of the essential constitutive requirements and acts or situations *null and void* by reason of contrast with legal norms, these writers criticise the assumption of lawfulness as a fourth requirement for statehood (so that the unlawful regime would not be inexistent because of the lack of a constitutive element), asserting that the birth of a *de facto* entity, even in the presence of the traditional elements of statehood, would be null owing to the breach of peremptory norms.<sup>666</sup>

Under opinion of other authors from the violation of the norms pointed out above, there could even derive consequences different from the denial of statehood. According to this third position, indeed, the birth of a State remains a fact, even if it is attained unlawfully. On this premise, the violation of principles of *jus cogens* would play a role in evaluating the effectiveness of its legal existence, that is to say, with reference not to statehood but to the legal personality of the *de facto* entity.<sup>667</sup>

However, under each of these reconstructions, unlike the traditional doctrine, the process of the birth of new sovereign entities would fall under the discipline of international law: any violation of *jus cogens* norms would result in the denial of statehood or personality of the unlawful entity. In other words, the unlawful formation of a *de facto* sovereign entity would prevent it from claiming statehood or legal personality. In this way peremptory norms could also play a negative role, since their violation would obviate statehood by *prohibiting* secession.

In regard to abovementioned opinions it can be affirmed the following. Firstly, since the State is pure fact entity - a real (and not a juridical) person<sup>668</sup> - the international law's rules neither provoke nor prevent the birth of new States, nor can cancel its very existence; they simply 'guide' these processes. Consequently, international law might determine the legal consequences arising from that event, and therefore its legal personality. In fact, it cannot do away with a fact. In other words, international law, like every other juridical order, cannot create or suppress the facts of social life.<sup>669</sup> Only another fact (such as the dissolution of the illegitimate entity) could achieve this result. From this derives that the lawfulness of State creation could not be considered as the fourth requirement of statehood. Neither the UN General Assembly nor the UN Security Council

<sup>665</sup> See J. Dugard, *Recognition and the United Nations*, Cambridge: Cambridge University Press, 1987, p. 127, at p. 147 and, by the same author, 'Collective Non-Recognition: The Failure of South Africa's Bantustan States', in Boutros Boutros-Ghali *Amicorum Discipulorumque Liber*, vol. I, Brussels: Bruylant, 1998, p. 383, p. 400. A similar view is held by V. Gowlland-Debbas, *Collective Responses to Illegal Acts in International Law - United Nations Action in the Question of Southern Rhodesia*, Dordrecht, Boston, London: M. Nijhoff, 1990, p. 237.

<sup>666</sup> Ibidem

<sup>667</sup> See in this sense Georges Abi-Saab's report in the *Reference Re Secession of Quebec, Re: Order in Council P. C. 1996-1497* of 30 September 1996, 'p. 4, para. 2(b)', English text reproduced in Bayefsky (ed.), *Self-Determination in International Law*, pp. 69 ff.. See also C. Hillgruber, *Die Aufnahme neuer Staaten in die Völkergemeinschaft*, (Frankfurt am Main, etc.: Lang, 1998), p. 746.

<sup>668</sup> I share here the authoritative view of G. Arangio-Ruiz, 'Stati e altri enti (sogettività internazionale)', *Novissimo Digesto Italiano*, vol. XVIII, Turin, 1971, p. 157.

<sup>669</sup> In this regard, see Abi-Saab, *Cours général de droit international public*, Volume:207, Brill/Nijhoff, Leiden/Boston, 1987, p. 68



is vested with the power to eliminate the factual existence of an entity (albeit unlawfully created) by a resolution. Accordingly, it is not possible to share the opinion of those who argue that a secession carried out in breach of self-determination or of the prohibition of the use of force would prevent the thereby illegitimate entity from becoming a new State.<sup>670</sup>

Secondly, one of the legal consequences under which international law intervenes (once the entity formed in breach of the *jus cogens* norms, that is secession is a fact ) can be non-recognition.<sup>671</sup>

Non-recognition does not determine either the inexistence of the unlawful entity, or absolute or partial loss of its personality, but simply represents a cause of factual limitation of its legal sphere and of the effects deriving from the acts performed by its organs.<sup>672</sup>

Consequently, this entity is not exempted from the duty to comply with generally binding norms customary duty.<sup>673</sup> In fact, this will be the addressee of a lesser number of norms (being part of a lesser number of relations, transactions or acts), having especially a conventional origin, nevertheless remaining the addressee of (and therefore both protected by and bound to comply with) the fundamental norms which regulate the life of the international community.<sup>674</sup> No territorial vacuum in the validity of fundamental norms (e.g. genocide, mass murders, torture or apartheid to the detriment of the local population) of international coexistence can be tolerated. As State practice shows, even that regime shall abstain from using force against other States and will be obliged to respect human rights prescriptions and the self-determination of its people. Local inhabitants cannot be deprived of the minimum standard of protection of the rights guaranteed by the Convention of Rome. As a practical consequence, the duty to exhaust local remedies (i.e. the remedies existing before the Courts of Northern Cyprus) had to be fulfilled..<sup>675</sup>

Thirdly, it can be affirmed that although such measure as non-recognition even aims to deprive the illegitimate entity of this capacity cannot annul wrongful act. Since the illegitimate entity is qualitatively a subject equal to every State; its legal capacity will be only factually limited due to non-recognition. International personality remains a unitary status, not susceptible of

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<sup>670</sup> See, T. Christakis, *The State as a 'primary fact': some thoughts on the principle of effectiveness*, and O. Corten, *Are there gaps in the international law of secession?* in *Secession: International Law Perspectives* edited by M. Cohen, Cambridge: Cambridge University Press, New York, 2006, pp. 138-171, 231-255.

<sup>671</sup> Arangio-Ruiz, *Stati e altri enti (soggettività internazionale)*, p. 175.

<sup>672</sup> R. H. Sharp, *Non-recognition as a Legal Obligation 1775–1934*, Geneva: Thone, 1934, p. 152; A. Cassese, *International Law*, Oxford: Oxford University Press, 2001, p. 51.

<sup>673</sup> See R. Quadri, *Diritto internazionale pubblico*, Napoli: Liguori, 1968, pp. 460–461.

<sup>674</sup> See Lauterpacht, *Recognition in International Law*, p. 420; Crawford, *The Creation of States*, p. 222 and Dugard, *Recognition and the United Nations*, p. 393.

<sup>675</sup> See for instance, SC Res. 445 of 8 March 1979. In this Resolution the UN Security Council directly condemned the cross-border raids carried out by Rhodesian armed forces against the territories of Angola, Mozambique and Zambia, characterising these acts as '*a flagrant violation of the sovereignty and territorial integrity of these countries*'; General Assembly Official Record, 20th year, Plen., 1367th meeting, for the intervention of Costa Rica, para. 70; Mexico, para. 149–51; the United States of America, para. 171. See also General Assembly Official Record., 4th Committee, 1540th meeting, for the intervention of Ireland, para. 17; Chile, para. 22; Colombia, *ibid.*, 1541st meeting, para. 14; Greece, para. 27; Australia, para. 35; Argentina, para. 45; the Netherlands, para. 52; Venezuela, para. 68; the United Kingdom, *ibid.*, 1544th meeting, para. 4; Canada, para. 20; Uruguay, para. 22; Italy, para. 34; South Africa, para. 36; Belgium, para. 44; Norway, para. 46; Denmark, *ibid.*, 1545th meeting, para. 3; France, para. 5; Costa Rica, para. 11 and so on.

special qualifications. There is no organ having compulsory jurisdiction, endowed with the power to annul wrongful acts or situations (and certainly the UN organs are not empowered to do so). A void character does not represent the automatic effect of the resolution which contains the declaration of invalidity and the demand for non-recognition.<sup>676</sup> Non-recognition *per se* neither automatically determines the inexistence (factual or legal) of the unlawful regime nor the absolute nullity of all its acts; it simply obliges third subjects to deny the effect of these acts through their conduct, in compliance with a collective (and political) decision of behaviour.<sup>677</sup>

That is to say, the act, order or law enacted by the unlawful authority will be deprived of legal effect only if other international subjects do not recognise such an effect through their concrete behaviour. And sometimes third States fail to comply with the policy of non-recognition, breaking down the veil of factual and legal inexistence that the international community had tried to erect against the unlawful entity. Even when one State decides to disregard the call for non-recognition by, for example, concluding a treaty, exchanging diplomatic representatives or, simply, recognising in a single case the effect of an act adopted by the authorities of the illegitimate regime, then the acts performed by the latter will have some legal effect, obviously with a sphere of validity limited to the State that decided to establish the relations.

Therefore, the acts adopted by the unlawful regime will not be null and void, but only deprived of the possibility to display their effect in single cases, remaining effective in different contexts before different authorities.<sup>678</sup>

Hereon some authors have concluded that the existence of a State is matter of fact, the creation of which should be in line with customary law. In other words, the creation of a State cannot contravene international law; therefore, non-compliance with fundamental principles of the international community can lead to a lack of legitimacy of that State on the international plane.<sup>679</sup>

With regard to legitimacy, it can be affirmed that its concept provides the legal assessment of a certain factual situation, which can require application of different, and perhaps opposing principles, for purpose of justifying one choice, rather than another<sup>680</sup> For instance self-

<sup>676</sup> See Antonello Tancredi, *A normative 'due process' in the creation of States through secession in Secession: International Law Perspectives* edited by M. Cohen, Cambridge: Cambridge University Press, New York, 2006, p. 200.

<sup>677</sup> G. Ziccardi Capaldo, *Le situazioni territoriali illegittime nel diritto internazionale*, Napoli: Editoriale Scientifica, 1977, p. 102.

<sup>678</sup> See S. Talmon, *The Cyprus Question Before the European Court of Justice*, EJIL 12 (2001), p. 727, who notes that, according to State practice (including cases of non-recognition of unlawful entities such as Manchukuo or Northern Cyprus), informal or administrative cooperation (i.e. not of an intergovernmental or diplomatic character) with the authorities of an unrecognised entity is not excluded.

<sup>679</sup> For instance, see J. Crawford, *The creation of states in international law*, cit.; D. Caron, *The Legitimacy of the Collective Authority of the Security Council*, 87 AJIL (1993), 552, p. 557; Fassbender B., *Uncertain Steps into a Post-Cold War World: the Role and Functioning of the UN Security Council after a Decade of Measures against Iraq*, 13 EJIL (2002), 273, p. 292

This level of legitimacy analysis is particularly useful to assess the action of the SC within its broad powers under Chapter VII of the Charter with regard to territorial issues. In fact, a more specific analysis of 'legitimate decision-making' in international law has been concerned with the legitimacy of SC's actions, as a way to enhance its credibility and effectiveness as a major actor in the field of international peace and security.

<sup>680</sup> The concept of legitimacy has attracted much attention in the fields of law, political theory and international relations in the course of the 20<sup>th</sup>, e.g. see B. Roth, *Governmental Illegitimacy in International Law* (1999), pp.17-35; see also I. Hurd, an international relations theorist, who defines legitimacy as 'the normative belief by an actor that a rule or institution ought to be obeyed', see I. Hurd 'Legitimacy and Authority in International Politics' 53 *International Organization* (1999), p. 379. Whereas Franck provided the most original contribution on legitimacy in positive rules, see, T.M.Franck, *Legitimacy in the International System*, 82 AJIL, 1988, 705. Georgiev, for instance, addressed the question of reconciling potentially

determination and the prohibition of the use force, makes their application potentially contradictory, thus the legitimacy discourse becomes important in this respect.

According to Enrico Milano, an important level where legitimacy acts is the – accommodation - of the legal order to certain actions that, despite representing violations of an international norm, produce effects or situations which are perceived as legitimate by a part of the international community. In such case, where the international community, as a whole, acquiesces it may, therefore be more or less reluctantly accepted. This does not mean that that particular act does not represent a violation of international law, it only means that the system ‘tolerates’ and ‘recognises’ the legal effects of the factual situation even though produced by violation. In the view of the same author the function of legitimacy can even be defined as *trait d’union* between effectiveness and legality.<sup>681</sup> Again, the concept of legitimacy would represent the link between those two gaps; between violation and legality.

He clarifies this point, giving an example of the Indian occupation of Goa. He affirms that this case highlights such a legalisation of unlawful territorial situations, and, in particular, the way in which such unlawfulness can be cured by its legitimacy. In this example, on 17-18 December 1961 Indian military forces invaded the Portuguese territories of Goa, Danoa and Diu on the Indian subcontinent. On December 18, Portugal asked the Security Council to put a stop to ‘*the condemnable act of aggression of the Indian Union*’, and called for the immediate withdrawal of ‘*the invading forces of the Indian Union*.’<sup>682</sup> However, a draft resolution was rejected because of the veto of the USSR<sup>683</sup> The discussion that ensued at the SC is interesting because whereas Western States underlined the violation of the international norms on the use of force by India and the refusal to accept any unilateral change through the use of force, India and those countries supporting its territorial claims cited the existence of a right of self-determination of those people under colonial domination to have international support in their struggle for liberation. The invasion of Goa was not condemned by the UN political organs, and Portugal recognised Indian sovereignty in 1974 followed by the whole international community. Hence, basing on this he affirmed that widespread recognition by other States can legitimise the existence of that State despite its illegal origins.

Another example to be considered is the case of Kosovo where legitimacy was conferred upon an, originally, unlawful situation - the NATO’s military illegal intervention in Kosovo

contradicting legal principles and norms through legitimate decision-making. While he refers to the legitimacy of rules or behaviours in the following passage, it is clear that he is also referring to the legitimacy of specific decisions within a certain positive legal framework, see, D.Georgiev, *Politics or Rule of Law: Deconstruction and Legitimacy in International Law*, 4 *EJIL*, 1993, 1, pp. 13-14. A similar point is made by Brad Roth, who talks about ‘legal legitimacy’, see, B. Roth, *Governmental Illegitimacy in International Law* (1999), pp.17-35.

<sup>681</sup> See, E. Milano, *Unlawful territorial situations in international law*, cit., p.192

<sup>682</sup> S/5030, 18 December 1961

<sup>683</sup> SCOR, 987th Meeting (1961).

through widespread recognition of Kosovo. In particular, NATO's military intervention was justified by the protection of ethnic Albanians' human rights and their right to self-government.<sup>684</sup> Furthermore, as in the case of Goa, also in the case of Kosovo SC resolution condemning the action of NATO was defeated.<sup>685</sup>

According to Crawford '[t]he significance of self-determination in this context is not so much that it cures illegality as that it may allow illegality to be more readily *accommodated* through the processes of recognition and prescription; whereas, in other circumstances violations represent a breach of *jus cogens*, it is not, or not readily, curable by prescription, lapse of time or acquiescence.'<sup>686</sup>

In conclusion, it is undeniable that legitimacy, compared to legality, provides for looser, less transparent and less objective devices of power acceptance. Likewise, it is undeniable that the legitimacy discourse can be easily manipulated, and it is one of the most sophisticated forms of 'soft power' exercised by the hegemon, in the sense that it can perfectly complement the 'hard power' of effectiveness. However, legitimacy has at least been constructed, starting from a general normative framework provided by the fundamental norms of international society and by the institutions mandated to uphold and enforce these fundamental norms. Moreover, explaining the process of recognition of unlawful territorial situations through legitimacy helps us to maintain the integrity of the international rule of law, by denying the possibility that an illegal act produces *per se* legal effects considered in accordance with international law in contradiction to the principle *ex iniuria jus non oritur*<sup>687</sup>

#### 4. The elements of statehood in relation to Abkhazia

Therefore, it is necessary to determine the status of Abkhazia under international law, which is decisive for determining the international rights and obligations of this entity. For this purpose, the issues regarding the statehood of the Abkhazian entity and the possession of a legal title to territorial sovereignty will be investigated from the period of the collapse of the USSR to present.

Despite its importance, statehood 'in the sense of international law' has not always been a clearly defined concept. In fact, there is no authoritative definition of the relevant criteria of statehood. It is explained by the fact that the current theoretical writing on international law and on

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<sup>684</sup> *The Independent International Commission on Kosovo*, The Kosovo Report, 2000, pp. 163-198.

<sup>685</sup> S/1999/328

<sup>686</sup> Crawford, *The Creation of States in International Law*, 1979, p. 113. See also Dugard, *Recognition and the United Nations* 1987, p. 115

<sup>687</sup> Enrico Milano, *Unlawful situations*, P. 201

the nature of the international personality of States is unevenly divided between two tendencies, called by G. Aragio-Ruiz, the «constitutional»<sup>688</sup> and “*inter-State system*”.<sup>689</sup>

Notwithstanding these different views over the nature of State a number of scholars made reference to Article I of the Montevideo Convention on the Rights and Duties of States (1933) as one of the most relevant legal formulations of statehood or at least as distinguishing elements of States, where only effectiveness is constitutive element of statehood.

According to the Montevideo Convention, the State as a person in international law should possess the following qualifications: (a) permanent population; (b) defined territory; (c) government; and (d) capacity to enter into relations with other States.<sup>690</sup> Despite the fact that only sixteen States<sup>691</sup> have ratified the Montevideo Convention (1933), its formulation of the elements of State are widely employed in diplomatic practice and referred to in academic works. The reports of Australia<sup>692</sup>, Austria<sup>693</sup>, Japan, South Africa<sup>694</sup>, Tanzania<sup>695</sup> and the United Kingdom<sup>696</sup> -

<sup>688</sup> Under “constitutional” theories, States and other international persons are seen as legal subdivisions of international law. In particular, international law is to be envisaged as the supreme layer of a public law of a universal legal community of mankind, the constituency of which would be composed of individual human beings. Within such a system, States are conceived of as the legal institutions governing the «autonomous» territorial subdivisions of the legal community of mankind: *provinciae totius orbis*. One of the main corollaries of this view is that the internal legal systems of States are derivative legal systems within the framework of the public law of mankind, that is called the monistic theory of the relationship between international law and national law. Under this view States are *territorial personae morales* of international law. Despite an incomparably higher degree of State «autonomy», general governmental competence is similar to subdivisions of national law as provinces, cities, counties within a unitary State. The “constitutionalist” conception of international law (together with its corollaries) appeals to the basic physical unity of the human kind and the obviously inter-individual composition of the constituency of all (*national*) legal system. The most important supporter of the constitutionalist view is professor Kelsen. He asserted that the State’s international person is a juristic person, as any other juristic person, with its legal system, namely, for the State, municipal law. This vision is consistent with both that author’s concept of *personae morales* in general — a concept of the universal unity of the law. It is natural, within the framework of such a theory, to view the State’s international person as a legal order, namely the State’s municipal law, see H. Kelsen, *General Theory of Law and State*, New York: Russell&Russell, 1961, p. 123; See, Stanley Hoffmann, *the Relevance Of International Law: Essays in Honor of Leo Gross*, Cambridge, Mass: Schenkman, 1968, p. 30.

<sup>689</sup> From the perspective of the ‘inter-State system’ conception, the constituency of international law is composed basically of sovereign, independent States. Within the framework of such theories, States are seen not as the territorial subdivisions of a (non-existent) legal community of mankind, but as the members of a *sui generis* community of sovereign entities and the primary persons of international law. Under the same theories, the internal legal systems of States are not dependent subdivisions of international law — and in that sense “derived” therefrom as the legal systems of a State’s subdivision are “derived” from the law of the nation — but rather «original» legal systems. Hence it has been seen in the light of the pluralist conception of the relationship between international law and municipal law.

Professor Aragio-Ruiz who sees the States as *de facto* entities affirms that *States «precede» international law in the sense that they are presupposed thereby ... States come into being de facto, continue to exist de facto and de facto are eventually modified or dissolved from the viewpoint of international law...States are organized de facto, in the sense that they “will” and “act”, for the purposes of treaty-making or international liability for unlawful acts, not through physical persons legally appointed as agents (as is the case with any juristic person or subdivision of municipal law) but through any human beings factually acting as its agents... States are original, not delegated by international law. A State’s competences remain essentially original.* See Gaetano Aragio-Ruiz, *On The Nature Of The International Personality Of The Holy*, <http://www.gaetanoaragioruiz.it/wp-content/uploads/2017/04/on-the-nature-of-the-international-personality-of-the-holy-see.pdf>

<sup>690</sup> Karl Doehring, “State” in Rudolf Bernhardt (ed), *Encyclopedia of Public International Law*, vol. 4 (North Holland: Elsevier 2000) 600-604, at 601; Dahm/Delbrück/Wolfrum 1988 (above note 3), at 131; Brownlie (above note 2), at 71-72; Cassese, *Public International Law* (above note 3), at 48. Cf. also Opinion No. 1 of the European Conference on Yugoslavia : “the state is commonly defined as a community which consists of a territory and a population subject to an organized political authority” (repr. in ILM 31(1992), at 1494-1497; EJIL 3 (1992), at 182), para. 1 b).

<sup>691</sup> The sixteen States that are a party to the Montevideo Convention are Brazil, Chile, Colombia, Costa Rica, Cuba, Dominican Republic, Ecuador, El Salvador, Guatemala, Haiti, Honduras, Mexico, Nicaragua, Panama, United States and Venezuela. Further information about the Montevideo treaty can be found at < <http://www.oas.org/juridico/english/signs/a-40.html>

<sup>692</sup> “The Australian government requires satisfaction of the following criteria: a permanent population, a defined territory, a capacity for effective government and a capacity to have relations with other nation-states – in this note referred to, for convenience as the Montevideo criteria (...)”

<sup>693</sup> “Certain statehood criteria are unanimously required in the practice of States. They include a permanent population, a defined territory, a government and the capacity to enter into relations with the other states and are expressed in Article 1 of the Montevideo Convention. Austrian diplomatic practice has invoked these criteria in the context of statehood.”

<sup>694</sup> In the book *International Law: A South African Perspective*, by South African professor John Dugard (and others), the Montevideo criteria are also mentioned. They explain that “Although only fifteen States and the United States are parties to this Convention, it is generally accepted as reflecting the requirements of Statehood under customary international law. See DUGARD, John. BETHLEHEM, D. L., PLESSIS, Max Du, and KATZ Anton. *International Law: A South African Perspective*. Lansdowne, South Africa: Juta, 2007, p. 84

<sup>695</sup> “African policy makers are no doubt familiar with the criteria of statehood as set out in the Montevideo Convention, 1933, that is to say, permanent population, defined territory, government, and finally, the capacity to enter into relations with other States.” KAMANGA, Khoti. Tanzanian report. In: *Journal of Refugee Studies*, vol. 18, no. 1, March 2005 : pp. 100-116.

none of which is a party to the Montevideo Convention - all mentioned the Montevideo Convention and its four elements as relevant criteria for the recognition of States. It comes as no surprise that Brazil or the United States<sup>697</sup> - which are parties to the Montevideo convention - also utilize it. As one looks into the responses presented by the national reporters, one may see that even in cases where there was no express mention of the Montevideo Convention; there was substantial overlap between the criteria used by different countries and the Montevideo formula.<sup>698</sup>

Obviously, Montevideo criteria are not immune from criticism or even scepticism. For instance, in his book on recognition, professor Thomas Grant argues that:

*the Convention is of limited law-making force and therefore, regardless of the quality of its content, has little normative reach.*<sup>699</sup>

Professor Arangio-Ruiz does not consider these elements as constitutive elements of States. He sees them as the distinguishing elements of States from other entities. In particular, a State being physical person or *de facto* creature, consists of independent government, determined territory and population, which are external, therefore they are not constitutive.<sup>700</sup> Being States are factual entities, the central constitutive requisite of statehood must be effectiveness.<sup>701</sup>

Among the scholars who partially accepted the Montevideo formula there is the most disagreement regarding the element of *capacity to enter into relations with other States*'. In fact, the most criticized of the four elements of the Montevideo statehood criteria are probably the: -

<sup>696</sup> See a Written Answer dated 16 November 1989 by the then Parliamentary Under-Secretary of State for Foreign and Commonwealth Affairs HAPPOLD, British Report, <https://publications.parliament.uk/pa/ld200809/ldhansrd/text/91104w0004.htm>

<sup>697</sup> As noted by the national reporters Borgen, McGuinness and Roth in the US response "Section 201 of the Restatement (Third) of Foreign Relations Law States: 'Under international law, a state is an entity that has a defined territory and a permanent population, under the control of its own government, and that engages in, or has the capacity to engage in, formal relations with other such entities.' In BORGEN, MCGUINNESS and ROTH. U.S. report, Quoted in Recognition of governments in International Law (Third ILA Report), International Law Association Johannesburg Conference (2016), p. 15.

<sup>698</sup> See, for instance, the Italian reply " State practice shows adherence to certain classic criteria (effective and independent government, territory, population, will be considered a State); the Japanese report transcribes an official document which brings as criteria " effective political authority over the population living in a certain territory"; The Israeli report, by prof. Ronen, points to an official document, which, in its turn, refers to the "The traditional criteria for statehood".

<sup>699</sup> T. Grant, *Defining Statehood: The Montevideo Convention and its Discontents*, Columbia Journal of Transnational Law, v. 37, p. 403-457, 1998, p. 434.

<sup>700</sup> For instance, the Professor affirms that the territory is not an essential element for statehood and statehood does not disappear if the territory is occupied or a part conceded to another entity. He based his argument on the situation of Holy See, which did not possess a territory between 1870-1929. When in 1929 it obtained a certain territory its status did not change. As for population he provides that *ogni persona internazionale statale «reale» resta legata a una base sociale umana-e in tal senso a un popolo-indipendentemente dalla quale essa non è concepibile come mera organizzazione sino a quando non si provi per altra via, a conferma degli indizi considerati sin qui, la sufficienza del solo elemento umano attivo a costituire la persona... [L]a prova decisiva sta nel confronto fra le persone internazionali degli Stati e le persone internazionali cosiddette sui generis... [T]ali soggetti non sono, al pari degli Stati stessi, persone giuridiche più o meno specialmente qualificate dal diritto internazionale in senso funzionale (con pretese conseguenti capacità o incapacità da tal diritto sancite). Qualsiasi loro «specialità» è giuridicamente tale soltanto dal punto di vista del diritto interno di ciascun ente o del diritto nazionale di Stati determinati. Sul piano del diritto internazionale la specialità non va oltre la mera fattualità. Al pari del territorio, il popolo è dunque oggetto esterno rispetto alla persona internazionale dello Stato, e come tale esso figura nelle situazioni giuridiche soggettive internazionali ad esso afferenti. In confirmation to non-constitutivity of independent government as statehood criterion he made a reference to the situation regarding insurgent movements: *il partito insurrezionale si afferma con una relativa stabilità in una parte del territorio, il diritto internazionale riconosce un soggetto distinto in costanza di quello dello Stato dato, e non reagisce preservandola validità dell'ordinamento statale anche nella parte del territorio controllata dagli insorti («governo di fatto locale»).* E se gli insorti conquistano il potere sull'intero territorio («governo di fatto generale»), il diritto internazionale non resiste tenendo fermo l'ordinamento preesistente, ma si piega alla nuova effettività. Privo di ogni forza normativa derivata dal diritto internazionale, l'ordinamento nazionale è solo, sul piano interno, l'aggregante che tiene insieme la società umana controllata dallo Stato-potenza e la struttura di questa come unita'. Anziché elemento giuridicamente vivo, esso è solo un fattore materiale della persona internazionale dello Stato (o del cosiddetto «soggetto sui generis»).*

see G. A. Ruiz, *La persona internazionale dello Stato*, Utet Giuridica, 2008, p. 71.

<sup>701</sup> *Idid.*

'*capacity to enter into relations with other States*'.<sup>702</sup> There are different grounds for objection. It may be said that such capacity '*is, in effect, a consequence, rather than a condition of statehood*'.<sup>703</sup> One may also argue that such capacity is not exclusive to States and, therefore, not particularly useful in distinguishing States from other entities.<sup>704</sup> In fact, International Organizations and, in some cases, even sub-units of a State or '*state members of a federation*' may also conclude treaties.<sup>705</sup>

Despite these critics, it seems that the Montevideo criteria can be a basic consensus of the minimal preconditions for statehood.<sup>706</sup> Therefore, the international legal status of Abkhazia has to be assessed with a view to the presence or absence of the factual elements, such as (1) a defined territory, (2) a permanent population, and (3) an effective government.

## 5. Territory

As government necessarily has to be related to a territory, the first condition of statehood<sup>707</sup> is a certain coherent territory or a "particular territorial base upon which to operate."<sup>708</sup> The notion of *territory* is strictly tied to the concept of *sovereignty*. Therefore, the notion of the territory is analysed in the context of State's sovereignty.

Territory is the spatial sphere within which a State's sovereignty is normally manifested.<sup>709</sup>

The theory of *competence*<sup>710</sup> proposed a definition of territory, under which the spatial framework is valid only within the national legal order. In particular, Kelsen<sup>711</sup>, who systematised

<sup>702</sup> Roth offers the following explanation for such element: "The reference in Article 1 to "the capacity to enter into relations with other states" thus appears to have been intended, not as conditioning statehood on the entity's reception by other states, but as excluding entities whose international relations were confessedly subordinate to another state – i.e., units of federal states (e.g., Michigan, Tasmania) and territories that have full internal self-governance but are dependent in external affairs (e.g., "associated statehood" arrangements, such as the relationship of the Cook Islands to New Zealand)". In Roth, B. *Secession, Coups and the International Rule of Law: Assessing the Decline of the Effective Control Doctrine*, Melbourne Journal of International Law, v. 11, p. 1-47, 2010, at p. 7.

<sup>703</sup> Ingrid Detter Delupis, *The international legal order*. Dartmouth: Aldershot, US, 1994, p. 43. James Crawford observes that "Capacity to enter into relations with States at the international level is no longer, if it ever was, an exclusive State prerogative. True, States pre-eminently possess that capacity, but this is a consequence of statehood, not a criterion for it - and it is not constant but depends on the situation of particular States." In James Crawford, *The Creation ...* p. 61.

<sup>704</sup> T. Grant, *Defining Statehood: The Montevideo Convention and its Discontents*. cit., p. 403-457, 1998, p. 435. Grant argues that "Even if capacity were unique to states, the better view seems to be that, though capacity results from statehood, it is not an element in a state's creation."

<sup>705</sup> *Ibid.*, p. 434.

<sup>706</sup> Karl Doehring, "State" in Rudolf Bernhard (ed), *Encyclopaedia of Public International Law*, vol. 4 (North Holland: Elsevier 2000) 600-604, at 601; Dahm/Delbrück/Wolfrum 1988 (above note 3), at 131; Brownlie (above note 2, at 71-72; Cassese, *Public International Law* (above note 3), at 48. Cf. also Opinion No. 1 of the European Conference on Yugoslavia: "the state is commonly defined as a community which consists of a territory and a population subject to an organized political authority" (repr. in ILM 31(1992), at 1494-1497; EJIL 3 (1992), at 182), para. 1 b).

<sup>707</sup> At the same time it is to be noted that through comparative analysis of States and subjects *sui generis* some authors reaffirm that the non-constitutive nature of the criterion of territory. In fact, the States can exist without territory (e.g. subject *sui generis* such as movements of liberation, Santa Sede and Government in exile (G. Arangio-Ruiz, *La persona internazionale dello Stato*, op.cit., p. 70-71, A. Miele, I soggetti, op.cit., 92-105)). Therefore, they conclude that even the importance of the requirement of territory is not a constituent of the State rather a distinct criterion of its own, Crawford, See the historical debate by James Crawford, *The Creation of States in International Law*, 2nd ed. Oxford: Clarendon Oxford UP, 2006, at 19 et seq., p. 52; For an overview of State practice see Ian Brownlie, *Principles of International Law*, 7th ed. Oxford OUP 2008, at 95 et seq. pp. 70-71.

<sup>708</sup> This definition is used by Malcolm N. Shaw, *International Law* (6th ed. Cambridge University Press 2008), at 199. See also German-Polish Arbitration Court (1 August 1929), *Deutsche Continental-Gas-Gesellschaft v État polonais*, repr. in ZaöRV 2 (1931), 14-40; Crawford, *The creation of States*, op.cit., p. 47.

<sup>709</sup> E. Milano, *Unlawful Territorial Situations in International Law: Reconciling Effectiveness, Legality and Legitimacy*, op.cit., p. 66.

<sup>710</sup> H. Kelsen, *General theory of the Law and State*, 1961, p.208.

<sup>711</sup> *Ibidem*.

this doctrine, affirms that the territory in the narrower sense is the spatial sphere where the State is exclusively entitled to exercise coercive powers, and in the wider sense it consists of those areas where the State hold rights together with other States (e.g. on the High Seas).<sup>712</sup> Under the so-called *functional* theory proposed by Quadri<sup>713</sup> and later by Conforti<sup>714</sup> the territorial sovereignty is the competence of the State to exercise its jurisdictions within the framework of a given territory. This doctrine rejects possibility of the territorial sovereignty being divided from the actual exercise of territorial jurisdiction. It also stresses the role of effectiveness in territorial matters, above all when competence is conceived as a State's subjective right rather than as an attribute recognised by international law.<sup>715</sup> These theories seem to best represent the concept of territory under international law<sup>716</sup>, by equating it to legal competence and authority exercised in a defined spatial sphere.

The territory of Abkhazia is the former administrative unit of the Abkhazian SSR, which reflects the boundaries of a territory that historically, belonged to Abkhazia.<sup>717</sup> There are no doubts concerning the criterion of an identifiable core territory, because the Georgian Government controlled in the past (from 1992 to 1994 and 2006 to 2008), only a small part of the territory (the upper Kodori Gorge) which belonged to Abkhazia, and actually Abkhazian government reportedly exercised control over the entire territory of 8700km<sup>2</sup><sup>718</sup> with in defined borders<sup>719</sup>. However, even if the Georgian Government had continued to exercise of control over the upper Kodori Gorge at that time, this would not prevent from considering Abkhazia as an entity able to enjoy statehood

<sup>712</sup> See, E. Milano, *Unlawful Territorial Situations in International Law: Reconciling Effectiveness, Legality and Legitimacy*, op.cit., pp. 67-68

<sup>713</sup> R. Quadri, *Cours général de droit international public*, 113 Recueil des Cours, 1963, p. 245.

<sup>714</sup> B. Conforti, *The theory of competence* in Alfred Verdross'6 EJIL, 1995, p. 70

<sup>715</sup> E. Milano, *Unlawful Territorial Situations in International Law: Reconciling Effectiveness, Legality and Legitimacy*, op.cit., p. 70.

<sup>716</sup> The doctrinal debate has developed a number of theories in order to explain its meaning in international law, and the writers have mixed elements from each, rather than radically espouse one. In this regard the theory of *property* can be recalled, which despite the harsh criticism, still plays an important role in the legal discourse on territorial sovereignty. By analogy with a private law, in this theory, the territory is to be considered only as object of right of property therefore exclusive and alienable. The importance of territory derives from the belief formed due to application of Roman law that the territory was object of the State's property therefore exclusive and alienable. Later this was transposed by *personification* into the concept of State, where territory was considered the public *dominion* of the prince. The former refers to the supreme State's authority over certain piece of territory, and the latter refers to individuals' and State organs' property. Whiles according to the *Eigenschaftstheorie* theory territory is the physical body of the State, a constitutive element of its personality. A different definition of territory was proposed by the theory of *competence*, under which it is only the spatial framework within which the national legal order is valid. In particular, Kelsen, who systematised this doctrine, affirms that the territory in the narrower sense is the spatial sphere where the State is exclusively entitled to exercise coercive powers, that is within State boundaries, and in the wider sense this is those areas where the State holds rights together with other States (e.g on the High Seas). (See, E. Milano, *Unlawful Territorial Situations in International Law: Reconciling Effectiveness, Legality and Legitimacy*, op.cit., pp. 67-68). This theory stresses the importance of the effective display of State power (Kelsen, *Principles of International Law*, op.cit.). In other words, the territory of the State is a metaphysical essence, whose importance can be measured by reference to territorial and personal competencies. A fourth theory so-called *functional* was proposed by Quadri (Quadri, *Cours général de droit international public*, 113 Recueil des Cours, 1963, p. 245.) and later by Conforti (Conforti, *The theory of competence* in Alfred Verdross'6 EJIL, 1995, p. 70), which expresses personal and territorial competencies as determined by State function protected by international legal order. Under this theory the territorial sovereignty is competence of the State to exercise jurisdictions within the framework of the territory..

<sup>717</sup> See, Chapter I *Historical developments in earlier times*, 5. The legal status of Abkhazia under the Russian Empire, pp.79-81

<sup>718</sup> UNPO, <http://unpo.org/members/7854>

<sup>719</sup> *Ibidem*, See collection of legislative and administrative acts and letters of Georgia and Akhazia in 1998-2006: from region to State. However, under international law the boundary disputes generally do not affect statehood. Crawford, *The Creation of States*, op.cit., p. 49: A new State may exist despite claims to its territory, just as an existing State continues despite such claims. The point was assumed by the Permanent Court in two cases: *Monastery at St Naoum (Albanian Frontier)*, PCIJ ser B no 9 (1924) 2 ILR 385; *Polish-Czechoslovakian Frontier (Question of Jaworzina)*, PCIJ ser B no 8 (1923). But of the stricter view proposed in the British Memorial: *Interpretation of the Treaty of Lausanne*, PCIJ ser C no 10, 202-3. There is no reference to the matter in the judgment: PCIJ ser B no 12 (1925). Franck and Hoffman (1976) 8 *NYUJIL* 331, 383-4 ('infinitesimal smallness has never been seen as a reason to deny self-determination to a population'). See also Mendelson (1972) 21 *ICLQ* 609, 610-17; Verhoeven, *Réconnaissance*, 54; Orlow (1995) 9 *Temple ICLJ* 115, 115-40; Schachter in Beyerlin (ed), *Recht zwischen Umbruch und Bewahrung* (1995) 179.



criterion. In fact, in order to identify the core of the Abkhazian territory, it is sufficient that the Abkhazian government displayed a stable legal order at least over some territory<sup>720</sup>. There is no rule prescribing the minimum area of that territory. The smallest State's territory is Vatican City (0.4 sq km).<sup>721</sup> However in the case of Abkhazia, its government exercises control, not over some part of territory, but over the whole territory. Moreover, despite the fact that there is no—a final settlement on the delimitation of the territory between Georgia and Abkhazia, this is not ground to refuse the existence of the Abkhazian republic; boundary disputes generally do not affect statehood.<sup>722</sup> A new State may exist despite claims to its territory, just as an existing State continues despite such claims.<sup>723</sup> To sum up, the Abkhazian entity fulfils the criterion of territory.

## 6. Permanent population

The exact meaning of the second criterion, a “permanent population”, is disputed in international legal doctrine.<sup>724</sup>

More narrowly, population can be understood in the sense of a people with a common nationality.<sup>725</sup> The Law №71 on Citizenship<sup>726</sup> of 1993 (it was amended in 1995, and in 2005 a new version of the law), was adopted by the Abkhaz Parliament.<sup>727</sup> Each resident of Abkhazia can obtain the Abkhazian citizenship on the following basis:

*his/her forefather was born in Abkhazia (art.11),*

*his/her parents both or one of them have/has Abkhazian citizenship (art. 12-14) each person, who has been permanently resident for 10 years in Abkhazia and speaking the Abkhazian language (art. 16), and learning the Abkhazian Constitution.*

According to the law of 2005, the citizens of the Republic of Abkhazia are:

Abkhaz, regardless of the place of their residence or their citizenship; each person, who has been living permanently in Abkhazia for no less than five years following the adoption of the Act on

<sup>720</sup> Franck and Hoffman (1976) 8 *NYUJIL* 331, 383–4 (‘infinitesimal smallness has never been seen as a reason to deny self-determination to a population’). See also Mendelson (1972) 21 *ICLQ* 609, 610–17; Verhoeven, *Réconnaissance*, 54; Orlov (1995) 9 *Temple ICLJ* 115, 115–40; Schachter in Beyerlin (ed), *Recht zwischen Umbruch und Bewahrung* (1995) 179.

<sup>721</sup> *Ibid.*

<sup>722</sup> James Crawford, *The Creation of States in International Law*, 2nd ed. Oxford: Clarendon Oxford UP 2006, at 49.

<sup>723</sup> The point was assumed by the Permanent Court in two cases: *Monastery at St Naoum (Albanian Frontier)*, PCIJ ser B no 9 (1924) 2 ILR 385; *Polish-Czechoslovakian Frontier (Question of Jaworzina)*, PCIJ ser B no 8 (1923). But of the stricter view proposed in the British Memorial: *Interpretation of the Treaty of Lausanne*, PCIJ ser C no 10, 202–3. There is no reference to the matter in the judgment: PCIJ ser B no 12 (1925).

<sup>724</sup> Crawford, See the historical debate by James Crawford, *The Creation of States in International Law*, 2nd ed. Oxford: Clarendon Oxford UP, 2006, at 19 et seq., p. 52; For an overview of State practice see Ian Brownlie, *Principles of International Law*, 7th ed. Oxford OUP 2008, at 95 et seq. pp. 70-71.

<sup>725</sup> See Alfred Verdross/ Bruno Simma, *Völkerrecht* (3d ed. Berlin: Duncker & Humboldt 1984), at 225; Georg Jellinek, *Allgemeine Staatslehre*, 3rd ed. Berlin: Julius von Springer 1920, at 183; Karl Doehring, *State in Rudolf Bernhard* (ed), *Encyclopaedia of Public International Law*, vol. 4, North Holland: Elsevier 2000, 600-604, p. 601, Georg Dahm/Jost Delbrück/Rüdiger Wolfrum, *Völkerrecht*, vol. I/1, Berlin: De Gruyter 1988, at 188-191, p. 127, Theodor Schweisfurth, *Völkerrecht* (Tübingen: UTB Mohr Siebeck 2006), at 10 and 296; Patrick Daillier/Allain Pellet, *Droit international public* (7th ed. Paris: LGDJ 2002), p. 409.

<sup>726</sup> № 71-c. <http://www.abkhazia.com/book17-30.html>

<sup>727</sup> [http://www.emb-abkhazia.ru/konsulskie\\_voprosy/zakon\\_j/](http://www.emb-abkhazia.ru/konsulskie_voprosy/zakon_j/)

Independence of the Republic of Abkhazia on October 12, 1999(Art. 5); citizens of Abkhazia can simultaneously be citizens of the Russian Federation alone, according to this document.

Art. 5, which entitles a citizen of the Republic of Abkhazia to obtain the citizenship of the Russian Federation, explains the presence of many Russian citizens in Abkhazia and why the majority of the people living in the Abkhazian territory has now a dual-nationality that is Russian-Abkhazian.<sup>728</sup>

Furthermore, there was a flux of the population due to the armed conflict of 1992, which led to the changes within the demographic composition of the population in Abkhazia. Therefore, some commentators bring into question the existence of a stable group with a common nationality in Abkhazia.<sup>729</sup>

However, the criterion of nationality is not significant, at least in the context of secession processes, because here nationality is, as a rule, defined only after having created a new state. As it has been argued by Crawford, the rule under discussion requires States to have a permanent population: it is not a rule relating to the nationality of that population; as a rule nationality seems to depend on statehood and not vice versa.<sup>730</sup>

In confirmation of this he made reference to the case of *Nottebohm*<sup>731</sup>:  
*it appears that the grant of nationality is a matter which only States by their municipal law (or by way of treaty) can perform.*<sup>732</sup> ... *Nationality is thus dependent upon statehood and not vice versa.*<sup>733</sup>

Therefore, he drew a conclusion that the *status* of a new State cannot in legal terms be linked to the existence of a group of persons possessing a common nationality.<sup>734</sup>

At the same time, Brownlie argues that a “stable community” is sufficient to be considered a “permanent population”.<sup>735</sup>

To sum up “population” can be understood as an “aggregate of individuals” independent of these persons’ nationality. The Abkhazians, who are living in the Republic of Abkhazia can be considered as an “aggregate of individuals”, therefore fulfils the second criterion of permanent population of the Abkhazian entity.<sup>736</sup>

<sup>728</sup> Report of Fact-Finding Mission, *The validity of Russian nationality on the international plane*, Chapter 2.3.

<sup>729</sup> *Ibid.*, *The Legal Status of South Ossetia and Abkhazia*, Chapter 3.1. p.131

<sup>730</sup> Crawford, *The Criteria for Statehood in International Law*, at DePaul University on December 5, 2012, p.52.

<sup>731</sup> *Nottebohm case (Second Phase)*, I.C.J. Reports, 1955, p. 4, p. 23.

<sup>732</sup> Crawford, *The Criteria for Statehood in International Law*, op.cit., p.116.

<sup>733</sup> *Ibid.*, p. 52.

<sup>734</sup> *Ibidem*.

<sup>735</sup> Ian Brownlie, *Principles of International Law*, pp. 70-71.

<sup>736</sup> Report of Fact Finding Mission, p. 131.

## 7. Effective government

The requirement of an effective government is mostly viewed as the central and most complex criterion of statehood.<sup>737</sup> Some writers divide it into 'effective government' and 'independence.' In fact, Crawford argues that:

[these terms] *are closely related as criteria-indeed, they may be regarded as different aspects of the requirement of separate and effective control [...] government is treated as the exercise of authority with respect to persons and property within the territory claimed; whereas independence is treated as the exercise, or the right to exercise, such authority with respect to other international persons, whether within or outside the territory claimed.*<sup>738</sup>

Other writers propose a similar distinction but in different terms<sup>739</sup>: for example Wheaton draws a division between 'internal' and 'external' sovereignty<sup>740</sup>; while Kamanda divides in their 'sovereignty' (internal)<sup>741</sup> and 'independence' (external)<sup>742</sup>; E. Milano - in internal independence and external independence<sup>743</sup>; Arangio-Ruiz – in independence/sovereignty (internal) and independence/sovereignty (external).<sup>744</sup>

Despite terminological difference, it is agreed that the criterion of “effective government” has an “inward” and an “outward” or ‘internal’ and ‘external’ aspects. These two aspects refer to the exercise of internal authority with respect to persons and property within the territory of the State, and to the exercise of external authority with respect to other States.<sup>745</sup>

Since effectiveness recalls a situation producing effects, Abkhazian power, in order to be considered effective government, has to display a stable order within its territory and exercise independently its authority towards other States.

Therefore, it is necessary to analyse whether Abkhazia fulfils internally and externally the complex requirement of effective government.

<sup>737</sup> That was the classical approach developed in the 19th century as announced by Georg Jellinek. See in contemporary scholarship Karl Doehring, *Völkerrecht*, 2nd ed. Heidelberg: CF Müller 2004, MN 49; Volker Epping in Knut Ipsen, *Völkerrecht*, 5th ed. Munich: Beck 2004, pp. 59-67; Pierre-Marie Dupuy, *Droit international public*, 9th ed. Paris: Dalloz 2008, p. 95.

<sup>738</sup> Crawford, *The Creation of States in International Law* op.cit., at 55 et seq..

<sup>739</sup> «Sovereignty is supreme authority which is independent of any other earthly authority. Sovereignty in the strict and narrowest sense of the term includes, therefore, independence all round, within and without the borders of the country», see Oppenheim, *International Law, A Treatise*, I, Peace, London, 1905. Theories of sovereignty well explained in Wildhaber, *Sovereignty and International Law*, in MacDonald-Johnson (eds.), Ronald MacDonald, Douglas M. Johnston, *The Structure and Process of International Law: Essays in Legal Philosophy, Doctrine and Theory*, Martinus Nijhoff Publishers, 1983, 425 ss., 428-429. Vedasi, *Sull'origine del concetto*, J. Bartelson, *A genealogy of sovereignty*, Cambridge, 1995.

<sup>740</sup> Wheaton, *Elements of International Law*, jrd edn., 1846, p. 97.

<sup>741</sup> Kamanda, *Legal Status of Protectorates*, pp, 175-182.

<sup>742</sup> Kamanda, *Legal Status of Protectorates*, pp, 175-82

<sup>743</sup> E. Milano, *Unlawful Territorial Situations in International Law: Reconciling Effectiveness, Legality and Legitimacy*. op.cit., p. 48

<sup>744</sup> See, G. Arangio-Ruiz, *La persona internazionale dello Stato*, op.cit., p. 42-46.

<sup>745</sup> Crawford, *The Creation of States in International Law*, op.cit., at 55, fn 85.

### *a. Sovereignty*

The definition of sovereignty that can be assumed in the one given in the Island of Palmas case by Judge Huber:

*...the exclusive competence of the State in regard to its own territory ... Territorial sovereignty ... involves the exclusive right to display the activities of a State.'*<sup>746</sup>

In other words, by the term of *sovereignty* is meant: *supreme authority which is independent of any other earthly authority. Sovereignty in the strict and narrowest sense of the term includes, therefore, independence all round, within and without the borders of the country.*<sup>747</sup>

To sum up, the terms 'sovereignty' and 'competence' designate the legal and manifestation of the State's power with respect to territory and individuals with no real threat for development in the future.<sup>748</sup> Exercise of sovereign power with respect to permanent population and relevant territory occurs through legislative and administrative functions.

Abkhazia's leaders from the last days of the USSR existence and after its collapse, as well as after the end of the armed confrontation, have built a legal framework upon which the formation of statehood could be based. Analysis of legislative and administrative acts of Abkhazia shows that: the Abkhaz leadership was able to strengthen and institutionalize State institutions within an independent political identity legal framework.

On August 25, 1990 the Abkhaz members of the Supreme Council adopted a "Declaration of State Sovereignty" and a resolution "On the legal guarantees of protection of statehood of Abkhazia." Under the terms of these documents Abkhazia declared itself to be a sovereign subject with flag, national anthem and other state symbols, and expressed its intention to establish relationships on the equal basis within the URSS. This decision was confirmed by the first referendum, which took place on March 17, 1991.<sup>749</sup>

On September 27, 1991 the Abkhazian government adopted a resolution on the guarantees of the economic basis of Abkhazian sovereignty. In line with this resolution Abkhazia's Council of Ministers passed on 22 October of 1991 a resolution '*On measures for transference to the jurisdiction of Abkhazian ASSR of the enterprises and organizations subordinate to the Union and*

<sup>746</sup> *Island of Palmas Case* (1928) 1 RIAA 829, 839 (Arbitrator Huber) 4 ILR 3, 103, 108, 110, 111, 113, 114, 418, 479, 482, 487, 492. The term of sovereignty is used as synonym of territorial sovereignty.

<sup>747</sup> Oppenheim, *International Law. A Treatise*, I, Peace, London, 1905, Wildhaber, *Sovereignty and International Law*, in MacDonald-Johnson (eds.), *The Structure and Process of International Law. Essays in Legal Philosophy, Doctrine and Theory in the Honour of Judge Weng*, Dordrecht, 1986, 425 ss., pp. 428-429. Vedasi, *Sull'origine del concetto*, J. Bartelson, *A genealogy of sovereignty*, Cambridge, 1995

<sup>748</sup> See Malcolm N. Shaw, *International Law* (6th ed. Cambridge University Press 2008), at 199. See also German-Polish Arbitration Court (1 August 1929), *Deutsche Continental-Gas-Gesellschaft v État polonais*, repr. in ZaöRV 2 (1931), 14-40, at 23."

<sup>749</sup> See, Part One *General aspects*, Chapter II *Legal basis for secession and creation of the new States*, 3. *The Drafts of the All-Union Agreement*, pp.36-38.

*Union Republic and located on the territory of the Abkhazian ASSR*'. These resolutions envisaged the transference of enterprises and organisations of the Union situated in the Abkhazian SSR under the jurisdiction of Abkhazia without compensation.<sup>750</sup>

On November 27, 1991 the Presidium of the Abkhazian Supreme Council adopted a resolution *on the creation of the Abkhazian security service*.<sup>751</sup> This resolution was the first step towards submission of Union force departments situated in Abkhazia under Abkhazian administration.<sup>752</sup>

On 29 December, 1991 Abkhazia's Supreme Soviet passed two resolutions to establish its full control over all organs of the public prosecutor's office and organs of the Department of Internal Affairs<sup>753</sup> operating in Abkhazia.<sup>754</sup> This decision was taken due to the termination of the existence of the USSR and its structures in Abkhazia.

Hence, based on the above documents it can be assured that at the time of the USSR's collapse Abkhazia had flag, national anthem and other state symbols, head of the government, Constitution (that did not bring into line with the reality through impetuous collapse of the USSR)<sup>755</sup>, legislative and executive organs, State-supervised social and economic institutions, policy, and an army was in process of formation.

On 13<sup>th</sup> February 1992 the Abkhazian government created a commission for transferring the military and internal forces under full jurisdiction and control of the Abkhazian republic.<sup>756</sup>

On 23 July 1992 Abkhazia, as a temporary measure, re-enacted its 1925 constitution, under which Abkhazia and Georgia had equal status of sovereign entities.<sup>757</sup>

In consequence an important step was adoption by Abkhazian parliament of a new Constitution on November 26 1994.<sup>758</sup> This constitution restated Abkhazia's national sovereignty. The preamble established Abkhazian right to self-determination. Under the terms of Article 1 the Republic of Abkhazia (Apsny) was declared:

*суверенное, демократическое, правовое государство, исторически утвердившееся по праву народа на свободное самоопределение.*<sup>759</sup>

<sup>750</sup> Печатается по изданию: «Республика Абхазия». 1991, № 15. 12 октября 1991 г. [see The Republic of Abkhazia, № 15 published 12 October 1991 in Collection of legislative and administrative acts and other documents relative the Georgian, Abkhazian and South Ossetian conflicts]

<sup>751</sup> Печатается по изданию: «Республика Абхазия». 1991, №58. 13 декабря 1991 года.

<sup>752</sup> It is to be noted these three last resolutions were in the line with the All-Union treaty, see Part One *General aspects III. Legal basis for secession and creation of the new States, 3. The Drafts of the All-Union Agreement*, pp.36-38.

<sup>753</sup> Collection of legislative and administrative acts and other documents relative the Georgian, Abkhazian and South Ossetian(1989 – 2005), p. 93.

<sup>754</sup> *Ibid.*, 95.

<sup>755</sup> At the moment of the collapse of the USSR the 1978 Soviet Constitution of Abkhazia was in force.

<sup>756</sup> *Ibid.*, 96.

<sup>757</sup> See 2. *Non-Recognition Of Abkhazia And Georgia In 1991*, 1. The cold war between Georgia and Abkhazia; see Печатается по изданию: Региональные конфликты в Грузии – Юго-Осетинская автономная область, Абхазская АССР (1989 – 2005). Сборник политико-правовых актов. Тбилиси, 2005. pp. 123 – 124. [Collection of legislative and administrative acts and other documents relative the Georgian, Abkhazian and South Ossetian] (1989 – 2005),

<sup>758</sup> <http://www.apsnypress.info/apsny/constitution/>

<sup>759</sup> *Ibid.*.

[a sovereign, democratic state, established historically under the right of a people to free self-determination, and functioning in accordance with law].<sup>760</sup>

Art. 3 provided:

*Республика Абхазия - субъект международного права - вступает в договорные отношения с другими государствами. Порядок заключения, опубликования, ратификации и денонсации международных договоров устанавливается законом.*<sup>761</sup>

[The Republic of Abkhazia, which is subject of international law, enters into treaty-based relations with other states. The rules of conclusion, promulgation, ratification and denunciation of international treaties shall be established by the law].<sup>762</sup>

Art. 30 prescribed:

*Каждый человек, находящийся в Республике Абхазия, обязан соблюдать Конституцию и законы Республики Абхазия.*

[Everyone who happens to be in the territory of the Republic of Abkhazia must abide by its Constitution and its legislation].<sup>763</sup>

Another significant landmark moment on the way towards statehood was the referendum held in Abkhazia in December 1999, at which the population overwhelmingly voted in favour of independence and the constitution consolidating the outcome of the voting. In particular, according to the Abkhazian report, 87.6 per cent of an electorate of 219,534 took part, and 97.7 per cent approved the constitution and confirmed their will to be independent.<sup>764</sup>

Politically, it is to be noted that in Abkhazia prior to the obtaining of recognition by six existing States there had been held three parliamentary and four presidential elections. Abkhazia has a relatively high level of political pluralism, a multiparty system, a developed civil society and a vibrant NGO community.<sup>765</sup>

There are plenty of reasons to conclude that Abkhazia can be defined as sovereign that exercises effective control over its population and territory, having established a State legal order with exclusive, original and plenary character, which covers all fields of activity: political, economic, social etc. and is not assigned from outside.

<sup>760</sup> [https://constitutii.files.wordpress.com/2013/02/abkhazia\\_const1994.pdf](https://constitutii.files.wordpress.com/2013/02/abkhazia_const1994.pdf)

<sup>761</sup> <http://www.apsnypress.info/apsny/constitution/>

<sup>762</sup> [https://constitutii.files.wordpress.com/2013/02/abkhazia\\_const1994.pdf](https://constitutii.files.wordpress.com/2013/02/abkhazia_const1994.pdf)

<sup>763</sup> Ibid..

<sup>764</sup> <http://cluborlov.com/apsny/>.

<sup>765</sup> V.A Chirikba, *The International Legal Status of the Republic of Abkhazia In the Light of International Law*". Paper read at the conference "Independence of Abkhazia and Prospects for the Caucasus" organized by the Friends of Abkhazia Civil Initiative. Istanbul, Bilgi University, 30 May 2009, p.20.

## b. Independence

External independence follows from internal independence or sovereignty.<sup>766</sup> The independence criterion is a complex intermingling of legal and factual elements that constitutes an auto-sufficient and original attribute of entity.<sup>767</sup>

Independence is the central criterion of statehood<sup>768</sup> because it determines the personality of the subject of international law.<sup>769</sup> Its definition was given in the Island of Palmas case by Judge Huber:

*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. The development of the national organization of States during the last few centuries, and, as a corollary, the development of international law, have established this principle of the exclusive competence of the State in regard to its own territory in such a way as to make it the point of departure in settling most questions that concern international relations.*<sup>770</sup>

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Independence is decisive: according to Ian Brownlie, it must be ascertained that there is no ‘foreign control’ overbearing the decision-making of the entity concerned on a wide range of matters of high policy and doing so systematically and on a permanent basis.”<sup>771</sup>

Hence it is important to investigate whether Abkhazia is subject of foreign control or not. In particular, it is necessary to examine the relations between Abkhazia and Georgia, and between Abkhazia and Russia.

<sup>766</sup> *Legal Consequences for States of the Continued Presence of South Africa in Namibia notwithstanding*, Security Council Resolution 276, 1970, Advisory Opinion, ICJ Reports, 1971, p. 6.

<sup>767</sup> A. Miele, *La Comunità internazionale, II I Soggetti*, G. Giappichelli, Torino, 2000, p.3.

<sup>768</sup> See Higgins, *Development*, pp. 25-42; Kamanda, *Legal Status of Protectorates*, pp. 188-g1; Verzijl, *International Law in Historical Perspective*, vol. 2, pp. 455-).

<sup>769</sup> See, A. Miele, *La Comunità internazionale, II I Soggetti*, op.cit., p.3.

<sup>770</sup> Island of Palmas case, April 4, 1928, RSA, vol. II, p. 838. [http://legal.un.org/riaa/cases/vol\\_II/829-871.pdf](http://legal.un.org/riaa/cases/vol_II/829-871.pdf).

<sup>771</sup> Ian Brownlie, *Principles of International Law*, 7th ed. Oxford OUP 2008, p. 72

## 8. The capacity to enter into relations with other States

The criterion of independence has been traditionally related to another criterion of statehood *the capacity to enter into relations with other States*. It has been submitted that an independent State *per se* has the capacity to enter into relations with other States. An entity *superiorem non reconoscens* is supposed to have no restrictions on its capacity as an international person. In fact the right to enter into international engagements is an attribute of State sovereignty<sup>772</sup> and this was confirmed in a number of decisions of the Permanent Court.<sup>773</sup> Abkhazia is capable of engaging in international relations, as shared by Articles 47 and 53 of Abkhazian Constitution of 1994.<sup>774</sup> In particular, Article 47 provides:

*The Parliament of the Republic of Abkhazia shall: ratify and denounce the interstate treaties and agreements of the Republic of Abkhazia... (8)*

Art. 53 prescribes:

*The President of the Republic of Abkhazia shall: officially represent the state in international affairs (3); ... sign international instruments and interstate treaties (4);*

Moreover, Abkhazia has its own independent foreign policy and a Foreign Ministry, which is engaged in international contacts.

Abkhazia is a signatory to politically binding international documents, agreements and treaties. In particular it is a signatory to the Peace treaties signed from 1993 to 1994, in which it participated on an equal basis with other participants, for instance, the Agreement *On a Ceasefire in Abkhazia and On a Mechanism to Ensure its Observance* the so-called *Sochi Agreement* signed on 27 July 1993 (of which Russia was a guarantor)<sup>775</sup>; the Cease-fire agreement *Memorandum of Understanding between the Georgian and the Abkhaz sides at the negotiations held in Geneva* of 15 December 1993<sup>776</sup>; *The Communiqué on the Second Round of Negotiations between the Georgian and Abkhaz Sides in Geneva*, signed on 13 January 1994<sup>777</sup>; *the Declaration on Measures for a political settlement of the Georgian/Abkhaz conflict* (S/1994/397), annex I and *the Quadripartite Agreement on the Voluntary Return of Refugees and IDPs*, (S/1994/397, annex II)

<sup>772</sup> P.C.I.J., Series A, No. 1 (1920), p. 25. The same argument was raised by Germany, and rejected, prior to signature of the Treaty of Versailles: Temperley, *History of the Peace Conference at Paris (1920-4)*, vol. 2, pp. 397, 408.

<sup>773</sup> Exchange of Greek and Turkish Populations, P.C.I.J., Series B, No. 10 (1925), p. 21; Jurisdiction of the European Commission of the Danube, P.C.I.J., Series B, No. 14 (1927), p. 36; cf. Austrian Memorial in the Customs Union case, P.C.I.J., Series C, No. 53, pp. 91-3.

<sup>774</sup> The Constitution of the Republic of Abkhazia, on the 26-th of November 1994 and approved by the national vote on the 3-rd of October 1999 with amendment adopted by the national vote (referendum) on the 3-rd of October 1999.

<sup>775</sup> S/26250, <http://www.un.org/ru/peacekeeping/missions/past/unomig/s26250.pdf> (original version in Russian).

<sup>776</sup> S/26875, Appendix, at [http://peacemaker.un.org/sites/peacemaker.un.org/files/GE\\_931201\\_MoUGeorgianAndAbkhazSides.pdf](http://peacemaker.un.org/sites/peacemaker.un.org/files/GE_931201_MoUGeorgianAndAbkhazSides.pdf);

<sup>777</sup> [http://peacemaker.un.org/sites/peacemaker.un.org/files/GE\\_940113\\_CommuniqueSecondRoundNegotiations.pdf](http://peacemaker.un.org/sites/peacemaker.un.org/files/GE_940113_CommuniqueSecondRoundNegotiations.pdf)



signed on 4 April 1994<sup>778</sup>; *The Agreement on a Cease-fire and Separation of Forces*, signed on 14 May 1994<sup>779</sup>

After its *de jure* recognition of 2008 Abkhazia is a party to a wide range of agreements with Russia on military, political and economic cooperation: the Russian-Abkhazian Treaty on Friendship, Cooperation and Mutual Assistance (17 September 2008), Agreement on Joint Efforts in the Field of Protection of the State Border of the Republic of Abkhazia (30 April 2009), Agreement on Cooperation in the Military Field (15 September 2009), Agreement on a Joint Russian Base on the Territory of the Republic of Abkhazia (17 February 2010), Agreement on Inter-parliamentary Cooperation (4 September 2008), the agreement between Russia and Abkhazia about a united group of troops was signed on November 21, 2015 in Moscow. As noted in the explanatory note to the document, the grouping was intended to respond to an armed attack and other threats to military security in respect of any of the parties. These treaties legalised Russian military presence in Abkhazia. The cooperation also includes, among other things, mutual assistance in customs affairs, visa-free travel, and investments.

#### *a. The relations between Abkhazia and Georgia*

Analysis a series of documents and Georgian official statements suggest that Georgia has not exercised control over Abkhazia since 1992.

For instance, the Chairman of the social-democratic party of Georgia G. Muchaidze in 1991 at the meeting *Round table* affirmed that:

*Абхазия [и Южная Осетия] для Грузии по существу потеряны*<sup>780</sup>

Abkhazia [and the South Ossetia] *per se* were lost by Georgia.

A Georgian scholar, Zurab Papaskiri admitted the loosing of Abkhazia that was due to “the erratic policy of Gamzakhurdia and his team”.<sup>781</sup>

His letter-appeal to the Abkhazians, in which Gamzakhurdia admitted the non-existence of the relationships between the Georgian and Abkhazian republics inviting later to secede from the USSR and create the common State with Georgia.<sup>782</sup>

All the law and resolutions regarding the Abkhazian republic adopted in 1991-1992 by the *de facto* Georgian government, the Abkhazian authority declared null and void and did not implemented them.<sup>783</sup>

<sup>778</sup> S/1994/397, annexes I, II <https://documents-dds-ny.un.org/doc/UNDOC/GEN/N94/166/44/pdf/N9416644.pdf?OpenElement>

<sup>779</sup> S/1994/583 [http://www.un.org/ga/search/view\\_doc.asp?symbol=S/1994/583](http://www.un.org/ga/search/view_doc.asp?symbol=S/1994/583)

<sup>780</sup> Газ. «Абхазия», № 23, 11 июня 1991 г. С. 3. 5, [[official] Newspaper, Abkhazia, N. 23, 11 June 1991, pp. 3-5.]

<sup>781</sup> З. Папаскири «Советская Абхазия». 1991. № 44-45. 15 марта 1991 г. [Z. Papaskiri, Soviet Abkhazia, 1991, N. 44-45, 15 March 1991].

<sup>782</sup> See Newspaper Sovetskaja Abkhazia, № 44-45, 15 March 1991.

The draft on a Union State on the basis of equal partnership proposed in 1992 by the Abkhaz side confirmed the absence of the relations between Abkhazia and Georgia at that time.<sup>784</sup>

Shevardnadze's "the military operation" of 1992-1993 aimed at establishing control over Abkhazia, that was qualified by the latter as aggression, points out the fact that Georgia did not exercise effective control over Abkhazia.

Moreover, it is to be noted that this *military operation* of Georgia, in part a policy supported by the Western countries, was also supported politically, military and financially by Russia.

Despite this support, Georgia was not able to establish control over Abkhazia by political or military means.

Finally, despite non-existence legal-state relations between them the agreement: "*Declaration on measures for a political settlement of the Georgian-Abkhaz conflict*"<sup>785</sup> was indirectly acknowledged in the Moscow Agreement of 4 April 1994 signed by Georgia, Abkhazia, Russia, the UN and OSCE which called for: "*Declaration on measures for a political settlement of the Georgian/Abkhaz Conflict*". Article 8 of this treaty provides: "*A phased action programme will be worked out and proposals on the re-establishment of state- and legal relations will be elaborated*".

Some experts interpret Art. 8, the need to *re-establish* state and legal relations between Abkhazia and Georgia could mean only one thing: that such relations were non-existent.

Despite this evidence, a number of commentators affirm anyway that this agreement indicates simply temporal interruption of relations, which occurred only in 1993.

Analysing the documents of post-Soviet time reveals that there is no bilateral agreement between Abkhazia and Georgia, which would bind these two entities within a common state framework.

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<sup>783</sup> See the collection of the resolutions and laws adopted by the Soviet Republic of Abkhazia in

<sup>784</sup> See Newspaper Sovetskaja Abkhazia, № 23, June of 1992 r.

<sup>785</sup> Declaration on measures for a political settlement of the Georgian/Abkhaz conflict signed on 4 April 1994, op.cit., <http://www.securitycouncilreport.org/atf/cf/%7B65BFCF9B-6D27-4E9C-8CD3-CF6E4FF96FF9%7D/Georgia%20S1994397.pdf>

### b. *The relations between Abkhazia and Russia*

In post-Soviet time Russian policy towards Abkhazia was controversial. In the period between 1992-1999, Russia clearly supported the Georgian side politically and militarily in the armed conflict (1992-1994) and its “*territorial integrity including the Abkhazian territory*” and exerted enormous pressure on the unrecognized republic of Abkhazia in order to induce the latter to renounce its sovereignty and independence in favour of Georgia<sup>786</sup>. Such approach can, first of all, be explained by the significant involvement of the voluntaries from the separatist republic of Chechnya in the Georgian-Abkhazian conflict (1992-1994). Second, Russia’s policies in this regard reflect its aspiration to make Georgia amenable in securing Russia’s interests in the region.

For this reason Russia provided substantial political, military assistance and economic help to Georgia. First of all, the president of the Russian Federation, B. Yeltsin initiated Georgia’s accession to the UN in 1992.<sup>787</sup> Russia also provided the significant military assistance to Georgia during the presidency of Shevardnadze. The Russian leader B. Yeltsin on 15 May 1992, signed military alliance’s treaty<sup>788</sup> called the *Tashkent Agreement* on collective security with Georgia.<sup>789</sup> Under this Agreement, despite the fact that Georgia was not a member of the CIS, it obtained the right to a military quota, which was available only to members of the CIS. At the Dagomys meeting on 24 June 1992 Yeltsin further agreed military support to Shevardnadze on the issue of Abkhazia. As a confirmation of Yeltsin’s promises a communiqué was signed.<sup>790</sup> This document noted that the sides had discussed:

*Президент Российской Федерации и Председатель Государственного совета Республики Грузия провели рабочую встречу в Сочи для обсуждения комплекса российско-*

<sup>786</sup> Yeltsin’s pro-Georgian policies regarding the Abkhazian issue were also brought in to the detriment of Russia’s own interests. Firstly, the armed conflict in Abkhazia had dramatic repercussions generating tensions throughout the whole region of the North Caucasus within the Russian Federation: especially, among the peoples ethnically related to the Abkhaz, such as the Kabards, Circassians and Adyghe. The interests of the indigenous population of this North Caucasus Republic are closely linked, both culturally and ethnically, to their Abkhazian brethren in the south of the Caucasus, who the Russian government could not ignore without running the risk of alienating them. Thus, not only separatist movements in the Chechen Republic, but also the Adyghe, Kabardin-Balkaria and Karachaevo-Cherkessia Republics, which were discontented with Russian policy towards Abkhazia, put at risk the territorial integrity of the Russian Federation. Secondly, the migration from Abkhazia exacerbated inter-ethnic relations in these regions and contributed to the emergence of numerous illegal armed formations on Russian territory. These formations, ranging from self-styled national liberation armies to overtly criminal bands, found a training ground in the most prolonged conflict in the area causing instability in the North Caucasus. In order to stop the spill-over effect and prevent conflicts from raging in the area as well a migration wave, Russia was interested in the end of the armed conflict. But policies of Yeltsin, with political and military support for Georgian side, at expense of the Abkhazian side did not contribute to resolution of the conflict and stability in the Caucasian region. Thus, fertile ground for separatism was created so putting thus at the risk the security of Russia. Moreover, it had negative impact on economic interests: In particular; Russia is dependent on the Transcaucasian countries for a number of goods from the days of the Soviet planned economy, when certain industries were exclusively developed in separated locations across the USSR. After the break-up of the Union the disruption of long-standing co-operative links has damaged the Russian economy. However, in comparison with national security, the economic interests were secondary to Russia’s geopolitics.

<sup>787</sup> See М. Волхонский, В. Захаров, Н. Силаев, *Конфликты в Абхазии и Южной Осетии: документы 1989 – 2006 гг.*, [Ufficiale Raccolta degli atti legislativi, dichiarazioni e gli altri documenti relativi ai conflitti in Abkhazia e the South Ossetia] op.cit., p. 73.

<sup>788</sup> In 1992, six post-Soviet states belonging to the Commonwealth of Independent States Russia, Armenia, Kazakhstan, Kyrgyzstan, Tajikistan, and Uzbekistan—signed the Collective Security Treaty (also referred to as the “Tashkent Pact” or “Tashkent Treaty”).

<sup>789</sup> *Договор о Коллективной Безопасности* от 15 мая 1992 года, [http://www.odkb-csto.org/documents/detail.php?ELEMENT\\_ID=126](http://www.odkb-csto.org/documents/detail.php?ELEMENT_ID=126)

<sup>790</sup> Коммюнике по итогам встречи Б. Н. Ельцина и Э. А. Шеварднадзе от 24 июня 1992 года, at <http://sojcc.ru/soglashenia/print:page.1.50.html>.

*грузинских отношений. Особое внимание было уделено тем моментам, которые вызывают осложнения в отношениях между Российской Федерацией и Республикой Грузия.*<sup>791</sup>

[the entire set of Georgian-Russian relations, paying due attention to issues that could cause complications between the Republic of Georgia and the Russian Federation].

The document also contained the following provision on further military support:

*Российская Федерация и Республика Грузия будут решительно пресекать деятельность незаконных вооруженных формирований и групп на территориях, находящихся под их юрисдикцией.*<sup>792</sup>

[The law enforcement bodies of Georgia and Russia will resolutely stop the activities of unlawful military, paramilitary and unauthorized units and groups in the territories under their jurisdiction].

Hence, the *Communiqué* made possible transfers of arms to Georgia. The first transfer of Russian armaments and armoured vehicles to Georgia took place in February 1992. The process of transferring the military equipment and ammunition was completed in late July-early August 1992.<sup>793</sup> In this way Georgian troops were given overwhelming military superiority over the Abkhazians. As a result of the Dagomys meeting or, the so-called “Dagomys conspiracy” B. Yeltsin, by way of an exception, provided military aid over and above the Tashkent agreement conceding, and even more than the military quota granted to the CIS members.<sup>794</sup>

Moreover, on 3 February 1993 the Georgian-Russian Agreement on Friendship, Cooperation and Good Neighbourly Relations was concluded, which confirmed Russia’s military and economic support for Georgia.<sup>795</sup> The ratification of this Agreement was made conditional on the settlement of the Abkhazia conflict.<sup>796</sup> In this document the Russian government reiterated its recognition of Georgia's territorial integrity and pledged to aid Georgia. In fact, B. Yeltsin intervened anew to induce Abkhazia to stop a counteroffensive and imposed economic sanctions

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<sup>791</sup> Ibid..

<sup>792</sup> Ibid..

<sup>793</sup> Interfax, 02.07.2002, www. Sakartvelo.ru

<sup>794</sup> S. Lakoba, *Abkhazia de facto ili Gruzija de jure?* (O politike Rossii v Abkhazii v postsovetskiy period, 1991-2000 gg.), p. 17.

<sup>795</sup> *On 3 February, President Yeltsin of Russia paid a visit to Tbilisi and signed a Treaty on Friendship, Neighbourliness and Co-operation with Georgia. In addition, 25 intergovernmental agreements were signed, dealing with economic cooperation, science and technology, transport, communications, pensions, etc., See Natella Akaba and Iraklii Khintba, Transformation of the Georgian-Abkhaz conflict: rethinking the paradigm,* p.21.

<sup>796</sup> In Russia, the government camp was in favour of the treaty, but the Duma against. The 3 February statement by the Duma objected to the treaty on the grounds that 1) Georgia had unilaterally infringed international agreements on the settlement of the Georgian-Abkhazian conflict; 2) Georgian aggression against Abkhazia was continuing, and to conclude a treaty with a warring country was to abet aggression; 3) the treaty would provoke negative reactions in the North Caucasus, in Russia as a whole and in all the countries inhabited by the Circassian diaspora; 4) the treaty provided for assistance in the formation of Georgian armed forces, their equipment and the purchase of military hardware and technology, which contravened the law. The statement was signed by all the factions in the Duma, including Russia's Choice, headed by Yegor Gaidar. The Duma's position was supported by the leaders of South Ossetia, the International Circassian Association and Abkhazia, where mass meetings in defense of the republic's sovereignty were held on 31 January 1994. The Abkhazian Supreme Soviet made a statement saying that the Russo-Georgian treaty had no effect on Abkhazia, as the latter was not a part of Georgia. See M. Razorenova, *Gruzija v fevrale 1994*, Politicheskii monitoring, Moscow, IGPI, 1994, No. 2, p. 2.

against Abkhazia thus preventing total Georgian defeat.<sup>797</sup> In addition, economic agreements between Georgia and Russia were especially urgent as the Georgian economy was tottering on the brink of collapse. In 1993, net domestic product was some 30.3% of that of 1990.<sup>798</sup>

However, despite the Russian active military and economic support of Georgia, Abkhazia won in the struggle for independence of 1992-1994 against Georgia.

As a further Russian instrument of pressure on the Abkhazian Republic sanctions were imposed against it, in response, in particular, to the steps of State building and the Abkhazian reluctance to become part of Georgia on the federative basis, Moscow set up a full blockade of Abkhazia in 1993-1999 trying to 'force' Abkhazia to become an integral part of Georgia and make it more pliable in the negotiations process. Firstly, on 20th September 1993 for a brief time Yeltsin set up economic sanctions and imposed an energy blockade, in order to induce the Abkhazian side to cease fire.<sup>799</sup> On 19 December 1994 Russian government adopted a Resolution "On the measures on the provisional restriction of state boundaries between the Russian Federation and Azerbaijan and Georgia", according to which the border with Abkhazia was closed *de facto* (as was done also with other stretches of the Russian borders with Georgia and Azerbaijan). It was motivated by the necessity of preventing a possible flow of volunteers from Chechnya, which provided military assistance to Abkhazia.<sup>800</sup>

Furthermore, in 1996 under the Russian proposal, the CIS Council of Heads of 12 States adopted sanctions against the unrecognized Abkhazian Republic in January 1996.

In particular, the economic sanctions against Abkhazia were introduced by the unanimous "Decision by the Council of CIS Heads of State on Measures to Settle the Conflict in Abkhazia and Georgia".<sup>801</sup> Under this Decision all 12 member countries declared the termination of relations with the self-proclaimed republic in trade, financial, transportation, communications and other areas at the state level. As a result of this a full blockade of Abkhazia was set up. This had severe impacts on the economic growth and development of Abkhazia and aggravated the humanitarian catastrophe in the unrecognized Republic.<sup>802</sup>

<sup>797</sup> It is to be noted that Shervarnadze had to resort to Russia not only to settle the Abkhazian issue, but also to suppress the internal civil rift caused by ousted President Gamsakhurdia in West Georgia (Samegrelo). Indeed, a rebellion by supporters of ousted President Gamsakhurdia in West Georgia (Samegrelo) coincided with the Abkhaz counteroffensive. Not having a reliable rear flank in Samegrelo, the Georgian armed forces were unable to effectively counter both Gamsakhurdian and Abkhazian attack without Russian military help. Through the establishment of five Russian military bases in Georgia the preservation Shevardnadze's own hold on power was assured and Gamsakhurdia defeated.

<sup>798</sup> The Georgian Chronicle, February-March 1994

<sup>799</sup> <http://ia-centr.ru/expert/654/>

<sup>800</sup> *О мерах по временному ограничению пересечения государственной границы РФ с Азербайджаном и Грузией*. от 19 декабря 1994 г., at <http://www.consultant.ru/cons/cgi/online.cgi?req=doc;base=EXP;n=215192#0>.

<sup>801</sup> *CIS Treaty on Abkhaz Sanctions*, 1996, <http://www.civil.ge/eng/article.php?id=17293>

<sup>802</sup> Stanislav Lakoba, *Abkhazia de facto ili Gruzia de jure?* (O politike Rossii v Abkhazii v postsovetskiy period, 1991-2000 gg.), p. 20; S.M. Shamba, "K voprosu o pravovom, istoricheskom i moralnom obosnovanii prava Abkhazii na nezavisimost", *Natsionalnyie interesy*, Moscow, 2000, No. 1, p. 25; T. Šamba, A. Neprošin *Pravovye osnovy gosudarstvennosti i suvereniteta*, Moskva, 2009, p. 232; A. Zverev, *Ethnic Conflict in the Caucasus 1988-94*, in Bruno Coppieters, ed., *Contested Borders in the Caucasus*, VUB University Press: Brussels, 1996, AT <http://poli.vub.ac.be/publi/ContBorders/eng/ch01fn.htm>; В. Исаков, *Абхазии - мир!*, <http://viperson.ru/articles/vladimir-isakov-abhazii-mir>. С. Маркедонов, Уроки «пятидневной войны», *Новая политика*, 30.08. 2010: <http://www.novopol.ru/text89118.html>

However, even under the conditions of a harsh embargo, Abkhazia managed to reach a level of economic activity exploiting its lucrative tourist infrastructure, subtropical agriculture and rich natural resources (forestry, coal mining, fishery, etc.).

As has been seen, notwithstanding B. Yeltsin's strong pressure through economic sanctions and political and military support of Georgian territorial integrity, Abkhazia upheld its independence acting as a subject of international law. In other words, the Abkhaz government *de facto* seceded from Georgia and continued to express its clear will to remain outside of the jurisdiction of the Georgia government.

Hence, at least in that period (1992-1999) the Russian government evidently did not exercise any control over Abkhazia. Abkhazian domestic policies and structures and defence institutions were outside the control of Moscow.

In fact, in that period generally the fact that Abkhazia met the criterion of external independence was not put in doubt.

In the period from 1999 to 2008 Russia changed its politics towards Abkhazia. Indeed, Putin's policy related to Abkhazia marked a clear departure from Yeltsin's clearly pro-Georgian policy, when a generally weak Russia suffered by a prolonged war with Chechnya and separatists movements in North Caucasian Republics. In particular, under the government of Vladimir Putin, Russia started to support Abkhazia politically and economically, taking into account the strong political ties between the Abkhazian republic and the North Caucasus. The pro-Abkhazian trend in Russia's actions was welcomed by the North Caucasus peoples and contributed to stabilization of the situation in the North Caucasus.

Furthermore, many experts mostly link the change in Russia's position vis-à-vis Abkhazia and the deterioration of Russian-Georgian relations as due to the following factors.<sup>803</sup> The first factor was Georgia's withdrawal from the CIS Common Security Treaty in 1999, which resulted in a phased withdrawal of Russian military personnel from Georgian territory, weakening Russian power-projection capabilities in the region. Second was the anti-Russia rhetoric of the Georgian Presidents, especially that of Mikhail Saakashvili, with a rush to establish Georgia as a prospective NATO (and EU) member state. In fact, the intensification of Georgia's contacts with NATO<sup>804</sup> caused serious alarm bells to ring in the Kremlin. In particular, the "Train and Equip" agreement on military cooperation was signed, which was intended to cover the preparation of 2,000 Georgian commandos. NATO's enlargement to include some member states of the former USSR was seen by Russia as serious threat to its security. Georgia's accelerated cooperation and

<sup>803</sup> Natella Akaba and Iraklii Khintba, *Transformation of the Georgian-Abkhaz conflict: rethinking the paradigm* [http://www.cr.org/downloads/Abkhaz%20Perspective\\_Transformaton%20of%20Georgian:Abkhaz%20Conflict\\_201102\\_ENG.pdf](http://www.cr.org/downloads/Abkhaz%20Perspective_Transformaton%20of%20Georgian:Abkhaz%20Conflict_201102_ENG.pdf)

<sup>804</sup> Alan Kasayev, *Shevardnadze postuchitsya v dver' NATO lichno* [Shevardnadze will knock on NATO's door personally], *Nezavisimaya gazeta* [Independent newspaper], 11 April 2000.

integration with the North Atlantic Treaty Organization (NATO) and the deployment of a US military training mission to Georgia created immense tension in Russian-Georgian bilateral relations.

These developments combined with a series of Western initiatives, deemed overtly hostile to Moscow's interests, including the development of the South Caucasian energy transportation corridor<sup>805</sup> and the NATO intervention in the Kosovo conflict.

In response to these, Russia partially ceased to observe the CIS sanctions in 1999 and withdrew from the sanctions regime entirely in March 2008, initially improving Abkhazian economic prospects through some investments. Moreover, in December 2000 the Russian government introduced visas for Georgian citizens, and in March 2001 the so-called "period of adjustment" for the new rules ended and the visa regime came into force. Some commercial sanctions against Georgia were initiated in 2006.<sup>806</sup> In addition, the recognition of Kosovo by many Western states and the war of 2008 in South Ossetia were crucial turning points, which, in the view of Russia, made valid its recognition of Abkhazia and led to the establishment of official relations with Abkhazia. In particular, Abkhazia and Russia have concluded a wide range of agreements on military and political cooperation, as well mutual assistance in customs affairs, visa-free travel, and investments.

In that period it seems, Abkhazia continued to maintain its own independence from Russia. It organised the "presidential elections" of 2004/05: in these elections Sergei Bagapsh won, contrary to the will of Russia, against Raul Khadzhimba, who was their preferred candidate. Moscow had to acknowledge the defeat of the candidate whom it had openly supported); they nevertheless had to accept the victory of Sergei Bagapsh . Alexander Ankvab also came to power in spite of the support of the Kremlin.<sup>807</sup> Thus the Abkhaz government is characterized by a pro-Abkhazian approach, whilst Abkhazian politicians with a pro-Russian approach are present only in the form of opposition. Only at the extraordinary elections of 2014 was the pro-Russian Raul Khadzhimba was voted as president in August 2014.<sup>808</sup> Despite this the president is decisively more loyal to Kremlin than the former presidents; however, it seems that he continues to conduct independent policy from Moscow in the national interest<sup>809</sup>. In fact, R. Khadzhimba signed a new agreement with Russia in 2014 which qualitatively strengthened cooperation between Abkhazia

<sup>805</sup> Rabinowitz, Philip, Mehdi Yusifor, Jessica Arnoldi and Eyal Hakim, *Geology, Oil and Gas Potential, Pipelines, and the Geopolitics of the Caspian Sea Region*, Ocean Development & International Law, 2004, pp. 35, 19-40

<sup>806</sup> Liana Kvarchelia, Georgia-Abkhazia Conflict: View from Abkhazia [https://www.gwu.edu/~ieresgwu/assets/docs/demokratizatsiya%20archive/06-01\\_kvarchelia.pdf](https://www.gwu.edu/~ieresgwu/assets/docs/demokratizatsiya%20archive/06-01_kvarchelia.pdf)

<sup>807</sup> S.Bagdasaryan, S.Petrova, *The Republic Of Abkhazia As An Unrecognized State*, Russian Law Journal Volume V (2017), Issue 1, p.111.

<sup>808</sup> <http://www.kavkaz-uzel.eu/articles/163085/>

<sup>809</sup> [https://www.rbth.com/articles/2011/09/02/abkhazias\\_extraordinary\\_elections\\_noteworthy\\_for\\_being\\_ordinary\\_13340.html](https://www.rbth.com/articles/2011/09/02/abkhazias_extraordinary_elections_noteworthy_for_being_ordinary_13340.html)

and Russia but without affecting the independence of Abkhazia.<sup>810</sup> No doubt this agreement creates an obligation or a restriction upon the exercise of the sovereign rights of the State parties, in the sense that it requires them to be exercised in a certain way. But these convention obligations do not derogate from the formal independence of the State parties.

Nowadays Abkhazian policies and structures, seem to remain to out control of Moscow.

### c. *Economic self-sufficiency*

One of the guarantees of the formal independence of States is economic self-sufficiency. Economic self-sufficiency enables to consolidate the independence of a country and provides a sure guarantee of independence in politics, and self-reliance in defence and ensures rich material and cultural lives for the people. Therefore, it is necessary to investigate whether Abkhazia is economically self-sufficient.

Thanks to Abkhazia's geographical position in the subtropical area and to climate its lands are suitable for agricultures and cattle breeding. Moreover, Abkhazia enjoys a considerable amount of potable water. In particular, it is rich of mineral springs, lakes and other water sources. Such a quantity of drinking water reserves, without pollution permits it to produce hydroelectric energy in abundance. This amount of potable water not only satisfies the needs of the Abkhazian republic, but also it permits it to be one of the biggest exporters. In fact, Abkhazia provides drinking water for Russia, which satisfies a big part of the South of the Russian territory. Nowadays, when there is deficit of potable water in the world, Abkhazia tends to use these natural resources as strategic in its economic policy.<sup>811</sup>

The water reserves are not a unique factor that guarantees economic basis for Abkhazian independence. There are other natural resources at great depths in the sea; in the territorial waters, in particular, there is a huge quantity of gas and oil. However, the Abkhazian government does not want to use gas and oil reserves due to their negative impact on the ecology of the country. In fact, the Abkhazian authorities exploit the water natural resources, mountains and natural parks aiming to development of tourism, rather than industrial sector.<sup>812</sup>

<sup>810</sup> <https://sputniknews.com/interviews/20141020194321779-Abkhazia-Expert-Russia-Abkhazia-Treaty-To-Strengthen-Countrys/>; <http://unpo.org/article/20114>; <http://www.apsnypress.info/en/opinion>; <http://www.apsnypress.info/en/news/agreement-between-the-republic-of-abkhazia-and-the-russian-federation-on-alliance-and-strategic-part/>; <http://www.apsnypress.info/documents/dogovor-mezhdu-rossiyskoy-federatsiy-i-respublikoy-abkhaziya-o-soyuznichestve-i-strategicheskoy-par/>

<sup>811</sup> F. Pederzini, *Intervista al Presidente dell'Abcasia, Aleksandr Ankvab*, 8 novembre, 2012, [eurasia-rivista.org](http://eurasia-rivista.org); <https://www.pravda.ru/world/formerussr/17-06-2016/1303989-ataev-0/>

<sup>812</sup> *Ibid.*.



#### d. *Objection regarding external independence of Abkhazia*

Due to using rouble as currency and Russian military presence on the territory Abkhazia the Abkhazian external independence was put into question by some commentators.<sup>813</sup>

In respect of Rouble it can be noted firstly common currency cannot derogate the formal independence as State practice demonstrates (i.e. euro). Secondly common long history of coexistence Abkhazia and Russia and their neighbouring position reveal only a pragmatic independent choice in establishing economic relationships.

With regard to the military presence of Russians in Abkhazia, it is to be noted that by the force of the agreements on military collaboration concluded between Russia and Abkhazia<sup>814</sup>, a Russian military base was established in Abkhazia. The treaty obligations, including military concessions, do not affect the sovereignty of State parties. Military concessions do not, of themselves, constitute derogation from formal independence.<sup>815</sup> A number of the European countries host missile defense system launchers placed by Nato, American MK-41 missile at new bases in Romania and Poland, but this does not put in doubt their international subjectivity.<sup>816</sup>

Therefore, the treaty obligations on military collaboration between Russia and Abkhazia and the existence of military bases<sup>817</sup> do not derogate from the actual and formal independence of Abkhazia party.

Abkhazia has also had its own army since 1992-1993, which fought against the Georgian army throughout 1992-1994. During the war of 2008, Abkhazian forces exploited that situation to their benefit and expelled the Georgian military presence in Kodori Valley from its territory. Thus, for the first time since 1994, the *de facto* Abkhazian government established complete control over its entire territory. In particular, according to different sources the war of August 2008, Abkhazia affected, but to a much lesser degree than South Ossetia.<sup>818</sup> The launch by the Georgian side of

<sup>813</sup> See Report of Fact Finding Mission on the Conflict in Georgia, vol 2, p. 127

<sup>814</sup> The Russian-Abkhazian Treaty on Friendship, Cooperation and Mutual Assistance (17 September 2008), Agreement on Joint Efforts in the Field of Protection of the State Border of the Republic of Abkhazia (30 April 2009), Agreement on Cooperation in the Military Field (15 September 2009), Agreement on a Joint Russian Base on the Territory of the Republic of Abkhazia (17 February 2010), and Agreement on Inter-parliamentary Cooperation (4 September 2008)); An agreement between Russia and Abkhazia about a united group of troops was signed on November 21, 2015 in Moscow. As noted in the explanatory note to the document, the grouping was intended to respond to an armed attack and other threats to military security in respect of any of the parties.

<sup>815</sup> Higgins, Development, p. 32. *On military 'servitudes' generally* see *ibid.*, pp. 31-4; Esgain, in O'Brien (ed.), *The New Nations in International Law and Diplomacy* (1965), pp. 42-97; Delupis, *International Law and the Independent State* (1974), pp. 200-23.

<sup>816</sup> Bruna dos Santos Lersch, Josiane Simão Sarti, *The Establishment Of Foreign Military Bases And The International Distribution Of Power*, Ufrgsmun, Ufrgs Model United Nations, 2318-3195 v.2, 2014, p. 83-135

<sup>817</sup> The Russian-Abkhazian Treaty on Friendship, Cooperation and Mutual Assistance (17 September 2008), Agreement on Joint Efforts in the Field of Protection of the State Border of the Republic of Abkhazia (30 April 2009), Agreement on Cooperation in the Military Field (15 September 2009), Agreement on a Joint Russian Base on the Territory of the Republic of Abkhazia (17 February 2010), and Agreement on Inter-parliamentary Cooperation (4 September 2008))

<sup>818</sup> I. Tekushev, S. Markedonov and K. Shevchenko, *Abkhazia: Between the Past and the Future*, Prague Medium Orient 2013, p. 56; Stanislav Lakoba, *Abkhazia de facto ili Gruzia de jure? (O politike Rossii v Abkhazii v postsovetskiy period, 1991-2000 gg.)*, p. 20; S.M. Shamba, "K voprosu o pravovom, istoricheskom i moralnom obosnovanii prava Abkhazii na nezavisimost", *Natsionalnyie interesy*, Moscow, 2000, No. 1, p. 25; T. Šamba, A. Neprošin *Pravovye osnovy gosudarstvennosti i suvereniteta*, Moskva, 2009, p. 232; A. Zverev, *Ethnic Conflict in the Caucasus 1988-94*, in Bruno Coppieters, ed., *Contested Borders in the Caucasus*, VUB University Press: Brussels, 1996, at <http://poli.vub.ac.be/publi/ContBorders/eng/ch01fn.htm>; B. Исаков, *Абхазии - мур!*, <http://viperson.ru/articles/vladimir-isakov-abhazii-mir>.

large-scale operations in South Ossetia in August of 2008 only strengthened the Abkhaz side's perception of being a likely target. That perception was reinforced after the reported seizure in the upper Kodori Valley of a number of heavy artillery pieces that had been banned under the 1994 Moscow Agreement.<sup>819</sup> The Abkhaz side criticized UNOMIG for failing to uncover those heavy weapons and questioned the ability of the international community to contribute to the preservation of peace in the region.<sup>820</sup> Therefore, in the context of the attack of Georgian military forces on South Ossetia and the exposure of plans for a similar operation against Abkhazia, on 8 August, the Abkhaz side began introducing heavy weapons to the restricted weapons. On August 9, 2008, Abkhaz armed forces opened a "second front".<sup>821</sup> On 12 August, the latter took control of the Kodori Gorge, without encountering serious opposition from the Georgian military and police units deployed there.<sup>822</sup> On 13 August, the Valley came under the responsibility of the civil administration of the Gulripsh district of Abkhazia.<sup>823</sup> Hence, the operation in the valley was carried out by the Armed Forces of the Abkhaz Republic independently, and was confined strictly to the territory of the Republic of Abkhazia.

## 9. Concluding remarks

Therefore, as has been seen from the point of view of the Montevideo preconditions of statehood, Abkhazia meets all the criteria laid down for being qualified as a State. In particular, it has a permanent population, a defined territory, an elected parliament and a stable government, which solely exercises effective control and administration over the whole territory of the Republic of Abkhazia. Abkhazia is sovereign and is not controlled by any foreign power. It has its own Constitution, flag, national anthem and other state symbols, as well as its own army and judicial system. Abkhazia is capable of engaging in international relations (it is a signatory to politically binding international documents, agreements and treaties) and it has its own independent foreign policy and a Foreign Ministry, which is engaged in international contacts.

In fact, some observers consider Abkhazia as entity that satisfies the statehood's preconditions, for instance the Fact-Finding Commission:

<sup>819</sup> Report of the Secretary-General on the situation in Abkhazia, Georgia, S/2008/631 para 10, [https://reliefweb.int/sites/reliefweb.int/files/resources/07E8C6478CDF01C0852574DA006FBBD1-Full\\_Report.pdf](https://reliefweb.int/sites/reliefweb.int/files/resources/07E8C6478CDF01C0852574DA006FBBD1-Full_Report.pdf)

<sup>820</sup> 3 October 2008 S/2008/631 [http://www.un.org/en/ga/search/view\\_doc.asp?symbol=S/2008/631](http://www.un.org/en/ga/search/view_doc.asp?symbol=S/2008/631)

<sup>821</sup> Report of the Secretary-General on the situation in Abkhazia, Georgia (S/2008/631 para 9)

<sup>822</sup> I. Tekushev, S. Markedonov and K. Shevchenko, *Abkhazia: Between the Past and the Future*, Prague Medium Orient 2013, p. 56.

<sup>823</sup> *Ibid.* p.57; See Russian FM: On the origins of the situation around Abkhazia and South, <http://www.pravdareport.com/russia/politics/09-10-2008/106544-originsouthossetia-3/>

*[...], the Abkhaz government has expressed its clear will to remain independent from Russia... Abkhazia ... might be seen to have reached the threshold of effectiveness. It may therefore be qualified as a state-like entity... [Abkhazia] shows the characteristics of statehood...*<sup>824</sup>

Yet another example is the affirmation of Angelika Nußberger, in her work called *Abkhazia*:

*Weighing the factors differently it could, however, also be argued that the criteria of statehood were already satisfied before the outbreak of the 2008 war and Abkhazia could be qualified as a 'stabilized de facto regime' (De facto Regime), which was denied recognition and membership in international organizations for political reasons only.*<sup>825</sup>

However, despite the fact that Abkhazia satisfies the minimal preconditions of statehood the question still arose concerning its statehood.

The main objection against the statehood of Abkhazia and its recognition has legalistic character. In other words, a number of experts do not question the effectiveness of Abkhazia, but rather Abkhazian observation of certain legal principles of international law during its secession from Georgia. In particular, the legitimacy of the statehood of Abkhazia is being rejected by a number of governments, international organisations and legal observers. For instance, the Fact Finding Mission argued:

*Although [Abkhazia] shows the characteristics of statehood, the process of state-building as such is not legitimate, as Abkhazia never had a right to secession.*<sup>826</sup>

Therefore, it is necessary analyse whether Abkhazia had the right to secede from Georgia in international law. Hence, in the following paragraphs, the issue of the legality of Abkhazia's secession from Georgia in international law, is to be examined.

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<sup>824</sup> Fact/Finding, p. 135.

<sup>825</sup> A. Nußberger, *Abkhazia*, Max Planck Encyclopaedia of Public, <http://opil.ouplaw.com/view/10.1093/law:epil/9780199231690/law-9780199231690-e2069?rskey=gqgqgs&result=7&prd=EPIL>

## CHAPTER II

### THE RIGHT TO SECESSION

#### 1. The notion of secession and the “right to secession”

There is confusion in various legal writings about secession and right to secession. For this reason it is important to clarify the concept of secession and right to secession. With regard to the first, it is to be noted secession occurs when part of an existing State and population separates from that State to become a new State or to join with another.”<sup>827</sup>

Therefore, secession is a matter of fact rather than law.<sup>828</sup> In fact, international law could not take sides in internal power struggles, which call into question the existence of a State because such struggles are simply facts.<sup>829</sup> In this sense it can be asserted that international law is neutral on secessions.

This position is shared by a number of legal experts. In particular, Franck affirms that nobody can seriously argue today that international law permits or prohibits secession.<sup>830</sup> Dugard and Raic agree that one will search “in vain” for international rules on secession - international instruments contain neither explicit prohibition of unilateral secession nor explicit recognition of such a right.<sup>831</sup> Peters asserts that silence of international law in regard to secession may simply mean that secession lies in an “international law- free zone”.<sup>832</sup> Hersch Lauterpacht (1948: 8) emphasised that “international law does not condemn rebellion or secession aiming at the acquisition of independence”. Michael Akehurst (1987: 53) asserts that “there is no rule of international law which forbids secession from an existing state; nor is there any rule which forbids the mother-state to crush the secessionist movement, if it can. Whatever the outcome of the struggle, it will be accepted as legal in the eyes of the international law.” Moreover, Corten argues that the “legal-neutrality” thesis is a classical view; traditionally, international law remains neutral in regard to secession, it neither prohibits, nor authorizes it<sup>833</sup>.

<sup>827</sup> Glen Anderson, *Secession in International Law and Relations: What Are We Talking About?*, 35 LOY. L.A. INT’L & COMP. L. REV., 2013, at 344, 386–88.

<sup>828</sup> K.W. Watson, *When in the course of human events: Kosovo’s independence and the law of secession*, p.274

<sup>829</sup> Tomuschat, *Self-determination in a post-colonial world*, p.7.

<sup>830</sup> Thomas Franck as quoted in Christopher J. Borgen, *Kosovo declaration of independence self-determination, secession and recognition*, 2008, <http://www.asil.org/insight080229.cfm>

<sup>831</sup> John Dugard and David Raic, *The role of recognition in the law and practice of secession*, in *Secession: International Law Perspective*, ed. Marcelo G. Kohen, Cambridge University Press, 2006, p.102.

<sup>832</sup> Ann Peters, *Does Kosovo Lie in the Lotus-Land of Freedom?*, *Leiden Journal of International Law* 24, n.1, 2011: p 98.

<sup>833</sup> O. Corten, *Territorial integrity Narrowly Interpreted: Reasserting the classical Inter-State Paradigm of International Law*, *Leiden Journal of International Law* 24, n.1, 2011, p.88

Different from secession that falls in the "international law-free zone"<sup>834</sup>, a right to secession is not neutral to causes and legal consequences of secession. Indeed secession is not simply concerned with the withdrawal of territory from an existing State to create a new State, but also the loss of sovereignty suffered from the former State.<sup>835</sup> This new entity functions as a "normal State" within its borders, exercises control over its population and seeks international recognition. It wishes to be treated as a sovereign independent State and to receive the rights and privileges enjoyed by sovereign nations.<sup>836</sup> International legal issues might arise in relation to legal personality of the seceding entity and its rights and obligations under international law, as well as in relation to the rights and obligations of third States as a consequence.<sup>837</sup> Hence international law takes into account an effective situation which is consequently considered as a "fait accompli"<sup>838</sup> as such its consequences to be in order to regulate.<sup>839</sup>

## 2. Consensual secession

The existence a right to Secession can be assessed according to whether it is consensual, unilateral, colonial, or non-colonial.<sup>840</sup>

Consensual secession occurs with the existing State's consent. Consensual secession is considered as permitted and lawful within the realm of public international law. Consensual right can be granted through domestic law or through negotiation.<sup>841</sup>

### a. *The right to secession under Soviet law*

The main argument adduced by various governments and some international organizations (e.g. by the European Union, NATO, OSCE, PACE) against the Abkhazian secession and its recognition is that such secession violates the Soviet legislation. Making reference to the 1977 Soviet Constitution, they argue that Abkhazia had no right to external self-determination, why only first-level Soviet sub-units had such right. Therefore, only internal frontiers between the Union Republics (first-level subunits) could become external frontiers of States (in the sense of international law), while the same possibility did not exist for borders between Union Republics

<sup>834</sup> A. Peters, *Does Kosovo Lie in the Lotus-Land of Freedom*, p. 98.

<sup>835</sup> Glen Anderson, *Secession in International Law and Relations: What Are We Talking About?*, 35 Loy. L.A. Int'l & Comp. L. Rev. 346–349 (2013), p.106.

<sup>836</sup> 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

<sup>837</sup> Watson, *When in the course of human events: Kosovo's independence and the law of secession*, p.274

<sup>838</sup> Oppenheim (1st edn), vol 1, p. 264; Arangio-Ruiz (1975–6) p. 26; Willoughby, *Nature of the State*, p.195

<sup>839</sup> Crawford, *The Creation of States in International Law*, op.cit., p. 390

<sup>840</sup> Anderson, *op.cit.*, pp. 345–349.

<sup>841</sup> Lee C. Buchanan, *Secession: The Legitimacy of Self-Determination*, Yale University Press, 1978, p.82

and autonomous republics (second level units) or autonomous regions (third level units). Nevertheless, arguments supporting their opinion seem inconsistent.

Right to secession was formally granted to the first-level sub-units by the 1977 Constitution of the USSR. However, there was no actual possibility for any Soviet Unit to realize its textual right to secede for two reasons. First, this provision was ambiguous<sup>842</sup> and conditional: the right to secede of Soviet republics from the Soviet Union was subjected to the authorization of the Union of Soviet Socialist Republics' government.

Second, there was no legal instrument for practical application. For this reason, no Soviet sub-unit ever invoke the Constitution of 1977 as a legal basis for secession. The first level sub-units, including Georgia, rejected the Soviet Constitution of 1977 and legal order, and unilaterally seceded from the USSR.

A right of secession from the USSR became effective only in 1990, by means of the law on “the Procedure for Resolving Questions Connected with a Union Republic's Secession from the USSR”.<sup>843</sup> According to this law a right to secede was granted to second-level sub-units (like Abkhazia) and Soviet sub-units of third-level.<sup>844</sup> On this basis, not only Abkhazia but some other sub-units (of second and third level) demanded secession from the correspondent first-level sub-units and implemented this right by the means of the All-Union referendum.<sup>845</sup>

Hence, on the one hand, according to USSR law Abkhazian claim to independence was lawful. On the other hand, the principle of estoppel would prevent only State (like Georgia) that had rejected the USSR Constitution - and declared its independence unilaterally – from claiming that Abkhazia’s secession was unlawful because of its contrast with the same USSR Constitution of 1977.

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<sup>842</sup> On one hand, art. 72 states ‘*Each Union Republic shall retain the right freely to secede from the USSR*’. On the other hand, Soviet republics couldn’t freely grant this right. In fact, art. 73 (2) provides: ‘*The jurisdiction of the Union of Soviet Socialist Republics, shall cover: ... determination of the state boundaries of the USSR and approval of changes in the boundaries between Soviet republics.*’ See, Chapter One, V Boundary Delimitation Between The CIS Members, 3. The *Uti possidetis*’s application argument, p. 47.

<sup>843</sup> See Part One *General aspects*, Chapter II *Legal basis for secession and creation of the new States*, 1 *The Law on Secession*, pp. 23-24.

<sup>844</sup> In particular, the Soviet law of 3rd April 1990 states “On the procedure of the settlement of questions connected with the withdrawal of a union republic from the USSR” did allow the Autonomous republics and Autonomous Regions to secede from a Union republic in which they were situated in case of the latter’s secession from the USSR. Hence under this law Abkhazia has the right to decide independently whether or not secede with Georgia from the USSR, or remain within the latter, or create its own independent State. The intention of the lawmaker was change unfair administrative boundary revision under unilateral decision of some Soviet leaders that against the will of the people were incorporated into some Soviet entities. In fact a number of Soviet entities, e.g. Georgia, Azerbaijan, had their territory due to its accession the URSS, and not through free expression of the people will at referendum. Thus, the law opened the door to a so-called ‘fair secession’: The peoples living in territories of Union republics that wished to become independent would have in their turn the right to secede from those republics and to remain in the Soviet Union. See Part One *General aspects*, Chapter II *Legal basis for secession and creation of the new States*, 1. *The Law on Secession*, pp. 23-24.

<sup>845</sup> The right of the Abkhazian republic to secession from Georgia was democratically fulfilled by the means of All-Union referendum of 17 March 1991 on the preservation of the USSR. At this referendum the Abkhazians expressed the will to remain within the USSR and refused to secede with Georgia from the USSR, that held their own local referendum on independence (31 March 1991). The results of these referendums, which were mutually exclusive, provided evidence of the divide between the Georgian and the Abkhaz population; whereas the Georgians boycotted the former and supported the latter, the vast majority of the Abkhazians voted for the preservation of the Soviet Union and refused to take part in the referendum on Georgia’s independence. As a consequence Abkhazia continued to be part of the USSR and Georgia on 9 April 1991, on the basis of its own referendum, declared the ‘restoration’ of the independent Republic of Georgia and seceded *de facto* from the USSR. The acquiescence of the Soviet government with secession of Georgia witnessed the fact that there is no document or official declaration, which condemned the Georgian *de facto* secession from the URSS. See Part One *General aspects*, Chapter II *Legal basis for secession and creation of the new States*, 4 *The All-Union Referendum*, p. 38.

### 3. Colonial Unilateral secession

Unilateral secession occurs without the existing State's consent. According to definitions of Buchanan the right to secede is:

*a claim right that a group has independently of any constitutional provision for secession or any right conferred by consent of the State*<sup>846</sup>.

Unilateral secession can take place in colonial and non-colonial context. Secession in the colonial context occurs as any new assertion of sovereignty over a colonial territory involving a modification to the sovereignty of the metropolitan power.<sup>847</sup> In this context a right to secede, is justified by the independence of colonial territories, to whom is conferred a right of *self-determination*.<sup>848</sup>

The principle of self-determination of peoples is one of fundamental principles of international law. The principle was used as the primary basis for decolonization. It is explicitly acknowledged in the UN Charter using the term self-determination twice. First, in Article 1(2) (Purposes and Principles) where one of the purposes of the United Nations is stated to be the development of '*friendly relations among nations based on respect for the principle of equal rights and self-determination of peoples and to take other appropriate measures to strengthen universal peace*'.<sup>849</sup> In Article 55 the same formula is used to express the general aims of the United Nations in the field of social and economic development and respect for human rights: *With a view to the creation of conditions of stability and well-being which are necessary for peaceful and friendly relations among nations based on respect for the principle of equal rights and self-determination of peoples...*<sup>850</sup>

The General Assembly has sought in a large number of resolutions to define more precisely the content of the principle. Despite the fact that GA instruments' have non-binding character, it must be emphasised that they, be evidence, of either existing customary norms or of an *opinio juris* that generates new international custom.<sup>851</sup> Consequently, it is easy to confer such

<sup>846</sup> Buchanan, *Uncoupling Secession from Nationalism and Intrastate Autonomy from Secession*, op.cit., p. 82.

<sup>847</sup> For examples of scholarship suggesting that secession can occur in the colonial (and non-colonial) context, see Hanna Bokor-Szegö, *The Role Of The United Nations In International, Legislation* 53 (1978); Crawford, op.cit., at 330, 375; Ingrid Detter De Lupis, *International Law And The Independent State* 15 N.4 (2d Ed.1987); Musgrave, op.cit., p. 181; Christine Haverland, *Secession*, In 4 *Encyclopedia Of Public International Law* 354-55 (Rudolf Bernhardt ed., 2000); F. Ouguergouz, *the african Charter on Human and Peoples' rights: a comprehensive agenda for human dignity and sustainable democracy in africa* 235 (2003); Frank Przetacznik, *The Basic Collective Human Right to Self-Determination of Peoples and Nations as a Prerequisite for Peace*, 8 N.Y.L. SCH. J. HUM. RTS. 49, 103-04 (1990); Peter Radan, *Secession: A Word in Search of a Meaning*, in *On The Way To Statehood: Secession and Globalisation* 18, Aleksandar Pavković & Peter Radan eds., 2008; Malcolm N. Shaw, *The Role of Recognition and Non-Recognition with Respect to Secession: Notes on Some Relevant Issues*, in *Secession and International Law: Conflict Avoidance – Regional Appraisals* 245, Julie Dahlitz ed., 2003; Patrick Thornberry, *Self-Determination and Indigenous Peoples: Objection and Responses*, in *Operationalizing The Right Of Indigenous Peoples To Self-Determination*, Pekka Aiko & Martin Scheinin eds., 2000, pp. 52, 54.

<sup>848</sup> UNGA Res 1514 (XV) 'Declaration on the Granting of Independence to Colonial Countries and Peoples' (14 December 1960).

<sup>849</sup> Article 1(2) UN Charter, <http://www.un.org/en/sections/un-Charter/charter-i/index.html>

<sup>850</sup> *Ibid.*, Article 55 UN Charter.

<sup>851</sup> Alan Boyle, *Soft Law in International Law-Making* in: Malcolm D. Evans (ed.), *International Law*, 2014, p. 119.

documents with the authority of binding instruments and to consider nothing more than the instrument itself in the examination of the existence of the right.<sup>852</sup>

For instance, resolution 545(VI)<sup>853</sup> decided that an article providing that ‘All peoples shall have the right of self-determination’ would be included in the International Covenants on Human Rights, which were finally adopted in 1966.

The most authoritative interpretations of that principle have been given in the Friendly Relations Declaration,<sup>854</sup> appended to UNGA Resolution 2625 (XXV). This declaration proclaims that: *By virtue of the principle of equal rights and self-determination of peoples enshrined in the Charter ... all peoples have the right freely to determine, without external interference, their political status and to pursue their economic, social and cultural development, and every State has the duty to respect this right in accordance with the provisions of the Charter.*<sup>855</sup> Thus, this document consecrated the transformation of colonial titles by asserting that ‘[t]he territory of a colony or other Non-Self-Governing Territory has, under the Charter, a status separate and distinct from the territory of the State administering it.’

Additionally, Common Article 1 of the two Covenants clearly defined the principles of equal rights as well as the right of nations to self-determination providing as follows:

1. *All peoples have the right of self-determination; by virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development.*
2. *All peoples may, for their own ends, freely dispose of their natural wealth and resources without prejudice to any obligations arising out of international economic co-operation, based upon the principle of mutual benefit, and international law. In no case may a people be deprived of its own means of subsistence.*
3. *The States Parties to the present Convention, including those having responsibility for the administration of Non-Self-Governing and Trust Territories, shall promote the realization of the right of self-determination and shall respect that right, in conformity with the provisions of the Charter of the United Nations.*<sup>856</sup>

Furthermore, the Colonial Declaration, clause 2, stated that: ‘*All peoples have the right to self-determination; by virtue of that right they freely determine their political status and freely*

<sup>852</sup> Thirlway, *op.cit.*, p. 113.

<sup>853</sup> 5 February 1952, 375th plenary meeting, [http://www.un.org/en/ga/search/view\\_doc.asp?symbol=A/RES/545\(VI\)](http://www.un.org/en/ga/search/view_doc.asp?symbol=A/RES/545(VI))

<sup>854</sup> Declaration on Principles of International Law Concerning Friendly Relations and Cooperation among States in Accordance with the Charter of the United Nations, A/RES/25/2625 of 24.10.1970.

<sup>855</sup> *Ibid.*.

<sup>856</sup> *International Covenant on Economic Social and Cultural Rights*, adopted by UN GA resolution 2200A (XXI) of 16 December 1966 entry into force 3 January 1976, art. 1, <http://www.ohchr.org/EN/ProfessionalInterest/Pages/CESCR.aspx>; *International Covenant on Civil and Political Rights*, adopted by UN GA res. 2200A (XXI) of 16 December 1966, entry into force 23 March 1976, Art. 1 <http://www.ohchr.org/en/professionalinterest/pages/ccpr.aspx>



*pursue their economic, social and cultural development.*<sup>857</sup> It has also been affirmed by the UN Security Council.<sup>858</sup>

Likewise, soft law instruments are considered to be highly relevant and are believed to serve as a contribution to the identification of a right to *external* self-determination too. Similarly to UNGA resolutions, often soft law instruments may provide evidence of existing law or, perhaps, the formation of new customary law.

For instance, the “Final Act on Security and Cooperation in Europe”, 1975 encompasses: “*By virtue of the principle of equal rights and self-determination of peoples, all peoples always have the right, in full freedom, to determine, when and as they wish, their internal and external political status, without external interference, and to pursue as they wish their political, economic, social and cultural development.*”<sup>859</sup>

The principle of self-determination has evolved; it has been confirmed, developed and given a more substantial form by both - international legal instruments and a consistent body of State practice. Today the principle of self-determination is a basic principle of international law, to which even the status of *jus cogens* is attributed.

Together with self-determination, the UN Charter upholds another fundamental principle of international law, that is territorial integrity of any State (Article 2 (4) UN Charter<sup>860</sup>). This principle is than acknowledged in numerous international documents, notably by the Friendly Relations Declaration of 1970<sup>861</sup> and the Helsinki Final Act of 1975.<sup>862</sup> Both principles self-determination and territorial integrity have equal value and form part of customary international law.<sup>863</sup>

The interrelation among the notion of self-determination of peoples and the principle of territorial integrity is expressed through a distinction made between an internal and external right of self-determination, which became evident in the post-war decades with the emergence of various legal sources.<sup>864</sup> The distinction concerns different modes of implementation of the right: an internal implementation and an external one.<sup>865</sup> The rights embedded in the *internal* form apply

<sup>857</sup> UNGA 1514 (XV), adopted 1960 Declaration on the Granting of Independence to Colonial Countries and Peoples, <http://www.un.org/en/decolonization/declaration.shtml>

<sup>858</sup> E.g. SC Res. 301, 20 October 1971 (Nambia); 377, 22 October 1975 (Western Sahara); 384, 22 December 1975 (Portuguese Timor) and so on.

<sup>859</sup> Conference On Security And Co-Operation In Europe Final Act Helsinki 1975, VIII. Equal rights and self-determination of peoples, <http://www.osce.org/helsinki-final-act?download=true>

<sup>860</sup> Article 2(4) UN Charter: “The Organization and its Members, in pursuit of the Purposes stated in Article 1, shall act in accordance with the following Principles: ... 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.”

<sup>861</sup> UN GA Res. 2625 (XXV) of 24 Oct. 1970.

<sup>862</sup> Conference On Security And Co-Operation In Europe Final Act Helsinki 1975, VIII. Equal rights and self-determination of peoples, <http://www.osce.org/helsinki-final-act?download=true>

<sup>863</sup> Edward Mc Whinney, *Self-Determination of Peoples and Plural-Ethnic States in Contemporary International Law. Failed States, Nation-building and the Alternative, Federal Option*, Leiden, Boston: Martinus Nijhoff, 2007, at 2 et seq

<sup>864</sup> For instance see UN GA Res.1514 (XV) of 14 December 1960, <http://www.un.org/en/decolonization/declaration.shtml>; UN GA Res. 217 A of 10 December 1948, [http://www.ohchr.org/EN/UDHR/Documents/UDHR\\_Translations/eng.pdf](http://www.ohchr.org/EN/UDHR/Documents/UDHR_Translations/eng.pdf); UN GA Res. 2200A (XXI) of 16 December 1966, <http://www.ohchr.org/EN/ProfessionalInterest/Pages/CCPR.aspx>

<sup>865</sup> *Reference re Secession of Quebec*, Judgement of the Supreme Court of Canada, para. 126.

to individuals and groups through, requiring mechanisms of political autonomy within the framework of a State, and does not infringe on the territorial integrity of the State concerned. The *external* form assigns to *peoples* the right to establish an internationally recognized independent state to represent a “people”. In other words, external self-determination admits the separation of a group from a State with the consent of the central government, or its secession without the consent of some State, and the establishment of a new State.<sup>866</sup>

Consequently, bearing in mind the fact that two principles self-determination and territorial integrity promoting by the UN Charter,<sup>867</sup> if the principle of self-determination is interpreted as granting the right to secession (external right to self-determination), can appear incompatible with the last principle.<sup>868</sup> For this reason, historically the application of the right to external self-determination was narrowly defined and confined to colonial territories. In fact, under these circumstances self-determination is to be prioritised over territorial integrity. In fact, UNGA res. 1541 of 1960 affirmed that this was a matter of geographical distance and ethnic and/or cultural distinctiveness of a colony,<sup>869</sup> as well as of elements of political, juridical, economic or historical nature negatively affecting the relationship between the colony and the administrating state.<sup>870</sup> If such circumstances were present, there was a right to external self-determination, the outcome of which might take the form of a sovereign independent State or free association, or integration, with an independent State.<sup>871</sup> The resolution further obligated States possessing colonies to transmit information relating to economic, social, and educational conditions in colonies, in order to determine whether these entities were to obtain independence.<sup>872</sup> Therefore, since in the colonial context, external self-determination is not a violation of territorial integrity and in this case such unilateral secession is lawful within the realm of international law.<sup>873</sup>

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<sup>866</sup> Edward Mc Whinney, *Self-Determination of Peoples and Plural-Ethnic States in Contemporary International Law. Failed States, Nation-building and the Alternative, Federal Option*, op.cit., at 2 et seq

<sup>867</sup> M. Griffiths, *Self-Determination, International Society and World Order*, in: *Macquarie Law Journal*, Vol. 3, 2003, p. 48

<sup>868</sup> Benyamin Neuberger, “National Self - Determination: Dilemmas of a Concept”, *Nations and Nationalism*, vol. 1:3(1995): 297-325

<sup>869</sup> United Nations General Assembly resolution 1541(XV), *Principles which should guide members in determining whether or not an obligation exists to transmit the information called for under Article 73e of the Charter*, A/RES/1541(XV) (15 December 1960), Principle III.

<sup>870</sup> UN General Assembly resolution 1541(XV), op.cit., Principle IV.

<sup>871</sup> UN General Assembly resolution 1541(XV), op.cit., Principle V.

<sup>872</sup> Thürer and Burr, op.cit., p. 137.

<sup>873</sup> However, colonial unilateral secession can be unlawful due to violations of international legal norms during its secession. As an example can be given secession of Southern Rhodesia that has violated the self-determination principle, because the secessionist government did not represent the majority population and did not express their will for external self-determination, see inter alia, Security Council resolutions 216 (1965) and 217 (1965) concerning Southern Rhodesia

#### 4. Non-colonial unilateral secession and peremptory norms

Unilateral non-colonial secession refers to the unilateral withdrawal of non-colonial territory from part of an existing state to create a new state.<sup>874</sup>

On the one hand, unilateral secession in non-colonial context is not explicitly prohibited in international law, therefore it is inferentially permitted. On the other hand, there is no right to secession explicitly embodied and clearly defined in any treaty or general norms. However, international law has evolved some criteria for lawfulness or legitimacy of unilateral secession in the non-colonial context. Unilateral secession is “lawful” if it complies with peremptory norms of international law. In fact, according to Jia, “if international law does not provide for rules of secession, instances of secession are legal, as long as they do not contravene any basic tenets of international law”<sup>875</sup>. The ICJ in Kosovo case has implicitly said that secessions may be illegal, however in such cases the illegality exists not because of the unilateral act *per se*, but due to unilateral act's connection to violations of international legal norms: *the illegality attached to the declarations of independence thus stemmed not from the unilateral character of these declarations as such, but from the fact that they were, or would have been, connected with the unlawful use of force or other egregious violations of norms of general international law, in particular those of a peremptory character (jus cogens)*.<sup>876</sup>

As a consequence, if a State seceded in violation of peremptory norms its statehood achieved by compliance with the criteria based on effectiveness can be rendered without legal effects.<sup>877</sup> Moreover, the illegality attached to secession processes may have consequences on the condition of the new State, such as non-recognition. In fact, there is a duty of non-recognition (*vis-à-vis* third States) of a State entity that fails to comply with peremptory norms. The Turkish Republic of Northern Cyprus” and the “Republika Srpska” secessions, are considered of no effect due to external use of force by third States (Turkey and Serbia respectively). As a legal consequence there is non-recognition of Turkish Republic of Northern Cyprus and Republika Srpska.<sup>878</sup>

Peremptory norms that are violated during the secession process are the right of peoples to self-determination and the prohibition on the illegal use of force. Therefore, it is necessary to

<sup>874</sup> See generally Glen Anderson, *Secession in International Law and Relations: What Are We Talking About?*, 35 LOY. L.A. INT'L & COMP. L. REV. 343–88 (2013); Anderson, *op.cit.*, at 343–88.

<sup>875</sup> Jia, *The independence of Kosovo: A unique case of secession?*, para 27

<sup>876</sup> *Accordance with International Law of Declaration of Independence of Kosovo*, para 81, <http://www.icj-cij.org/files/case-related/141/141-20100722-ADV-01-00-EN.pdf>

<sup>877</sup> Dugard has noted, Resolutions of both the Security Council and the General Assembly condemn the non-recognized “States” as “null and void”, invalid and illegal which strongly suggests that they are *without legal effect as States*, not because they fail to meet the essential requirements of statehood but because their existence violates a peremptory rule of international law. See generally, David Raič, *statehood and the law of self-determination* 74 (2002); James R. Crawford, *The Creation Of States In International Law*, 402–03 (2d ed. 2006) at 52;

<sup>878</sup> See *inter alia*, UN SC res. 541 (1983), concerning Northern Cyprus; and UN SC res. 787(1992) concerning Republika Srpska

examine the legal background of the Abkhazian secession in respect of these principles in the following paragraphs. In fact, as developed through UN, the right of self-determination of peoples is almost universally relied on as the legal basis for secession. For this purpose I will investigate whether, and under which exact circumstances, international law provides a right to external self-determination outside colonial context and whether Abkhazia's claims to external self-determination are in accordance with these norms and whether use of force in the situation adhered to international law.

### 5. The right of peoples under foreign occupation to external self-determination

Taking into account the historical context, it might be argued that the unilateral secession was restricted only to colonies.<sup>879</sup> At the same time a right to external self-determination exists where people are subjected to alien subjugation, domination or exploitation outside a colonial context. Therefore, all scholars and States agree that in the case of occupation (foreign domination) international law allows right to secede. For instance, A.Cassese (at 90) affirms that another category, peoples subjected 'to alien subjugation, domination and exploitation' have the right to external self-determination, as there is a violation of the principle of equal rights and self-determination of peoples, as well as a denial of fundamental human rights.<sup>880</sup> This recognition finds its roots in the Declaration on Friendly Relations, which through emphasizing "all peoples" clearly suggested that self-determination was also a right of peoples outside the colonial context. Moreover, it provides an obligation to promote this right within the international community: *...Every State has the duty to promote, through joint and separate action, the realization of the principle of equal rights and self-determination of peoples, in accordance with the provisions of the Charter, and to render assistance to the United... and bearing in mind that subjection of peoples to alien subjugation, domination and exploitation constitutes a violation of the principle, as well as a denial of fundamental human rights, and is contrary to the Charter.*<sup>881</sup>

It was reaffirmed by the Supreme Court of Canada in its opinion relating to the secession of Quebec from Canada

*[T]he international law right to self-determination only generates, at best, a right to external self-determination in situations ... where a people is oppressed, as for example under foreign military occupation... In [this situation], the people in question are entitled to a right to external self-determination...*<sup>882</sup>

<sup>879</sup> E.Craven, op.cit., p. 228.

<sup>880</sup> A Cassese, *Self-determination of Peoples: A Legal Reappraisal*, CUP Cambridge 1995, at 90.

<sup>881</sup> UNGA A/RES/25/2625 (XXV), *Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States in accordance with the Charter of the United Nations*, 24 October 1970 <http://www.un-documents.net/a25r2625.htm>

<sup>882</sup> *Reference re Secession of Quebec*, 1998, para 132

Additionally, the International Court of Justice in its Advisory Opinion on Kosovo's Declaration of Independence also confirmed it:

*During the second half of the twentieth century, the international law of self-determination developed in such a way as to create a right to independence for ... the peoples subject to alien subjugation, domination and exploitation.*<sup>883</sup>

Hence, the right to secede unilaterally is also uncontested for peoples subjected to foreign occupation. Therefore, I will investigate if this situation is present in the Abkhazia case and the validity of the Abkhazian claim to secede in this regard.

#### ***a. Historic Background of the Georgian-Abkhazian conflict (1992-2008)***

After the collapse of the USSR, both Georgia and Abkhazia sought to obtain *de jure* recognition but without success.<sup>884</sup> Abkhazian demands for recognition were simply ignored; Georgia was not recognized by the international community due to the war, which had been in progress in South Ossetia for about a year. Moreover, after Gamsakhurdia's overthrow, a part of the war in South Ossetia sparked the civil war in Mingrelia. Due to the civil war Georgia was divided between the supporters of the deposed President Gamsakhurdia and of the new government. These two Georgian revolutionary insurgent governments lacked both popular and formal legitimacy.<sup>885</sup> Realizing the necessity of winning acceptance into the world-community, the putchists invited Edward Shevardnadze to abandon his Moscow retirement and lead them. Eduard Shevardnadze, serving as Soviet foreign minister under Mikhail Gorbachev during the *glasnost* and *perestroika* years, enjoyed a good reputation amongst the West's community of diplomats and politicians.<sup>886</sup> For this reason in March 1992 Western countries established diplomatic relations with Georgia as soon as 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). The major Western leaders believed that E. Shevardnadze was a man who would move the Georgian state towards a democracy.<sup>887</sup>

Western leaders recognised Georgia within the Soviet administrative line established by I. Stalin, (that is, included Abkhazia) without any great knowledge of the cultural, historical and

<sup>883</sup> ICJ, Advisory Opinion of 22 July 2010 on *Accordance with International Law of the Unilateral Declaration Of Independence in respect of Kosovo*, para 79, p. 37.

<sup>884</sup> See, *Part III Assessment of the Legal Status of Abkhazia, Chapter II. The Right To Secession, a. Historic Background of the Conflict of Abkhazian struggle for independence*, pp.174-179

<sup>885</sup> А.Г. Арешев, Е.Г. Семерикова, *Абхазия и Южная Осетия после признания. Исторический и современный контекст*, op.cit., p.76.

<sup>886</sup> George Hewitt, *The accelerated recognition of Georgia helped to instigate the ethno-political conflicts*, *Caucasus Times*, 16 November 2010, <http://www.caucasustimes.com/article.asp?id=20511>

<sup>887</sup> *Ibid.*.

legal aspects of this former Soviet sub-unit, and without paying attention to the complexities of the antagonistic coexistence between Georgians, Abkhazians and other ethnic groups.

After Georgia's admission to the UN, on 14 August 1992 Georgian armed forces, commanded by Tengiz Kitovani (Minister of Defence)<sup>888</sup>, who was appointed by Shevardnadze, attacked Abkhaz government buildings in the Abkhaz capital Sukhumi.<sup>889</sup> These attacks were absolutely unexpected by the Abkhazians<sup>890</sup>. In fact, according to some sources, with prior permission from Abkhazia, the Georgian troops were moved to the Abkhaz territory to search for and free Georgian officials kidnapped by supporters of ousted Georgian President Zviad Gamsakhurdia.<sup>891</sup> The Abkhazian authorities had offered their support, if necessary, to find and free the hostages. However, that was only a pretext to impose military control over Abkhazia. In fact, on the same day, when the Abkhazian parliament, seeking peaceful solution, was scheduled to discuss a draft treaty to be proposed to the Georgian State Council on a common State-framework, the Georgian troops launched massive attacks against Abkhazia.<sup>892</sup>

According to Shevardnadze's plans, the "Abkhaz question" was supposed to be solved militarily over the weekend by using substantial military support of the Russian Federation. Before August 1992, Russia ensured the military preponderance of Georgian forces over the Abkhaz ones,<sup>893</sup> giving a chance to Georgia bring Abkhazia under its control.

In response, the Abkhazian Parliament protested the incursion of Georgian troops and their hostilities, qualifying it as an invasion and occupation and a violation of oral agreements made in April 1992 with Defence Minister Kitovani and other Georgian officials, by which Georgian troops would be permitted to enter Abkhazia only with the prior permission of the Abkhazian authorities.<sup>894</sup> In return, the Georgian State Council Chairman, Eduard Shevardnadze, asserted that it was Georgia's sovereign right to "relocate" troops within the Abkhazian territory due to its recognition as an integral part of Georgia, and Art. 2 (4) of the NU was not applicable to the Georgian military attacks. As a consequence of the unexpected Georgian hostilities of 1992

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<sup>888</sup> Leader Tengiz Kitovani was a member of the Georgian State Council, presided over by Shevardnadze

<sup>889</sup> Abkhazia Today, Report 176, 15 September 2006, at <https://www.crisisgroup.org/abkhazia-today>

<sup>890</sup> The official reason for sending the troops was to put an end to ongoing sabotage and looting, particularly on the railway line, and to search for and free Georgian officials kidnapped by supporters of ousted Georgian President Zviad Gamsakhurdia, however, the Georgian troops launched massive attacks against Abkhazia. Abkhazian officials maintain also that both reasons given were pretexts to impose military control over Abkhazia, for neither could be substantiated. With few exceptions, they state, sabotage and looting occurred elsewhere in Georgia, outside Abkhazia, and that to their knowledge the hostages were not being kept in Abkhazia. Additionally, the Abkhazian authorities had offered their support, if necessary, to find and free the hostages.

<sup>891</sup> *Belaya kniga Abkhazii: Dokumenty, materialy, svidetelstva* [The Abkhazia's White book: Documents. Materials and testimonies]. Moscow. 1993; Abkhazia Today, Report 176, 15 September 2006, at <https://www.crisisgroup.org/abkhazia-today>

<sup>892</sup> Abkhazia Today, Report 176, 15 September 2006, at <https://www.crisisgroup.org/abkhazia-today>; S. Frederick Starr, K. Dawisha, *The International Politics of Eurasia: v. 2: The Influence of National Identity*; Routledge, 2016, p. 288; *Belaya kniga Abkhazii: Dokumenty, materialy, svidetelstva* [The Abkhazia's White book: Documents. Materials and testimonies]. Moscow. 1993; UNPO, UAC/1992/FFM, *Report of a UNPO Mission to Abkhazia, Georgia and the Northern Caucasus*, p. 344

<sup>893</sup> By the force of Tashkent Agreement and Communiqué of Dagomys meeting, Russia provided arms to Georgia, see: VI. Georgian-Abkhazian Armed Conflict, 3. Russian role

<sup>894</sup> Abkhazia Today, Report 176, 15 September 2006, at <https://www.crisisgroup.org/abkhazia-today>; S. Frederick Starr, Karen Dawisha, *The International Politics of Eurasia: v. 2: The Influence of National Identity*; Routledge, 2016, p. 288.

military conflict between Georgia and Abkhazia arose, which took place from 1992 to 1994, in 2006 and 2008.<sup>895</sup>

The Abkhazian Civil Guard (also called the Abkhazian National Guard) briefly attempted to oppose the advancing Georgian troops, but with little success. In a few days Georgian troops, with support of tanks and helicopters provided by Russia, occupied all of the major cities of Abkhazia, including the capital Sukhumi.<sup>896</sup>

In the occupied Abkhaz towns and villages, Abkhazian sources and the UNPO delegates reported massive atrocities against civilian Abkhaz population, perpetrated by the Georgians troops. The Georgian paramilitary troops included thousands of the former prisoners let out of jail especially for this purpose.<sup>897</sup> Especially, in the period from August to October of 1992 the Abkhazians reported allegations regarding massive human right violations against the Georgian side, which were confirmed by the UNPO mission.<sup>898</sup>

The turning point in the war came during October of 1992 when a massive wave of voluntaries from the North Caucasus intervened in the conflict<sup>899</sup> without the authorisation of the central government. The Russian government was not able to stop the uncontrollable massive movements of the North Caucasians.<sup>900</sup> Therefore, the incapacity of B. Yeltsin to stop voluntaries who fled from the North Caucasus, was frequently a reason why Georgia and the West, despite the clear Russian political and military support of E. Shevardnadze (1992-1999), accused the Russian Federation of supporting the self-proclaimed Abkhaz republic.

On 1 October 1992 the Abkhaz forces, supported by fighters from the North Caucasus region, seized the military initiative and began to extend their control over the north-west of the

<sup>895</sup> *Belaya kniga Abkhazii: Dokumenty, materialy, svidetelstva* [The Abkhazia's White book: Documents. Materials and testimonies]. Moscow, 1993; UNPO, UAC/1992/FFM, *Report of a UNPO Mission to Abkhazia, Georgia and the Northern Caucasus*, p. 344

<sup>896</sup> On 18 August 1992 Sukhumi was totally occupied by the Georgian troops, A. Brojdo, *Chronicle of the Georgian-Abkhazian armed conflict*, at [http://www.apsuara.ru/lib\\_b/abhz\\_grz.php](http://www.apsuara.ru/lib_b/abhz_grz.php)

<sup>897</sup> Т.М. Шамба и А.Ю. Непрошин, *Абхазия. Правовые Основы Государственности И Суверенитета*. Издание 2-Е Переработанное. М.: Изд-Во Ргтэу, 2004, AT [http://www.hrono.ru/libris/lib\\_sh/shamba00.php](http://www.hrono.ru/libris/lib_sh/shamba00.php); *Те суровые дни. Хроника Отечественной войны народа Абхазии 1992 – 1993 годов в документах*. Сухум, 2004. P. 50.; ITAR-TASS, August 16, 1992, cited in FBIS-SOV-92-159, August 17, 1992; Report of a UNPO Mission to Abkhazia, Georgia and the Northern Caucasus", [UNPO]UAC/1992/FFM.I Liana Kvarchelia, Georgia-Abkhazia Conflict: View from Abkhazia [https://www.gwu.edu/~ieresgwu/assets/docs/demokratizatsiya%20archive/06-01\\_kvarchelia.pdf](https://www.gwu.edu/~ieresgwu/assets/docs/demokratizatsiya%20archive/06-01_kvarchelia.pdf); Zverev, *Ethnic Conflict in the Caucasus 1988-94*, in Bruno Coppieters, ed., *Contested Borders in the Caucasus*, VUB University Press: Brussels, 1996, AT <http://poli.vub.ac.be/publi/ContBorders/eng/ch01fn.htm>;

<sup>898</sup> UNPO UAC/1992/FFM, *Report of a UNPO Mission to Abkhazia, Georgia and the Northern Caucasus*, p. 344; *Report of the Independent International Fact-Finding Mission on the Conflict in Georgia*, Vol II, p. 78;

<sup>899</sup> The support for the Abkhaz cause came from the unofficial anti-Georgian movements of the North Caucasus republics forming in the RF. In particular, the Georgian military's shelling of Abkhazia at once rebounded upon the whole region of the North Caucasus: all North Caucasian republics were swept by meetings called under the slogan "Hands off Abkhazia!" Such meetings were held in North Ossetia, Karachai-Circassia, Kabardino-Balkaria and elsewhere. On 17 August 1992, Chechnya drew up a platform of solidarity with Abkhazia. It was joined by such organizations as the International Circassian Association and the Congress of the Kabardian People. In addition, Cossack voluntaries intervened too in the conflict, motivated by Russia patriotic feelings. Thus, the bulk of the Abkhazian forces consisted of Abkhazians, local non-Georgians, and even some Georgians—the rest being Cossack volunteers and volunteers from the North Caucasian republics. However, the huge number of Abkhazian casualties clearly indicates, who was actually resisting the Georgian assault. At the same time, in reinforcement of the Georgian side, sportsmen snipers from the Baltic states who came to fight for mercenary reasons intervened, in addition to volunteers from the extreme nationalist Ukrainian UNA-UNSO organization, motivated by anti-Abkhazian feeling.

<sup>900</sup> As a result of the policy, which can be characterized by exhortation of Yeltsin to the leaders of those autonomies to "take as much sovereignty as you can swallow", numerous Russian autonomies abolished the distasteful adjective "autonomous" and became just "republics" within the Russian Federation with substantially increased rights. For this reason numerous North Caucasus republics enjoyed a special format of relations with the federal centre. In practice, they received *carte blanche* in their internal and socio-economic policy in exchange for political loyalty of local elites to Moscow. Such Yeltsin policy explains how come the North Caucasus republics come to aid of Abkhazia. As for Chechnya in this period this separatist republic was out of control of the central government.

republic; they quickly started capturing the major towns, and sought to regain control over the capital city of Sukhumi.<sup>901</sup>

In March and July 1993 Abkhaz counter offensives expelled the Georgian forces, with the exception of a small area in the upper reaches of the Kodori Gorge.<sup>902</sup>

Only after the deployment, in zone of conflict, of a peacekeeping force of the CIS (CISPKF) did the hostilities cease completely and conflict passed into a frozen stage. In particular, on 4 April of 1994 Russia mediated a cease-fire agreement “*The declaration on measures for a political settlement of the Georgian-Abkhaz conflict*”<sup>903</sup>.

In parallel to the initiatives of the Russian Federation the United Nations reacted through the dispatch of a mission to Georgia and by establishing a UN “presence” in the area in 1993-1994.<sup>904</sup>

Moreover, since the Unrepresented Nations and Peoples Organization (UNPO)<sup>905</sup> considered a series of enquiry teams conducted by the UN insufficient; initiated its own fact-finding human rights mission in Abkhazia and Georgia in order to investigate the serious charges made by both sides.<sup>906</sup>

However, despite the cessation of hostilities, occasional, sporadic clashes periodically took place in the Gali region.<sup>907</sup> In 1998 the security situation deteriorated due to the surprise Georgian

<sup>901</sup> Nezavisimaya gazeta, 4 September 1992.

<sup>902</sup> Since 1993, September 30 has traditionally been celebrated in Abkhazia as Victory Day.

<sup>903</sup> S/1994/397, annex I, <https://documents-dds-ny.un.org/doc/UNDOC/GEN/N94/166/44/pdf/N9416644.pdf?OpenElement>

<sup>904</sup> In particular, the Secretary-General sent a fact-finding mission in October 1992 to observe to area. The UN role in peace efforts in the region was further upgraded in May 1993 when the UN Secretary-General appointed his Special Envoy to Georgia. On 24 August 1993, the Security Council passed Resolution 858, establishing the UN Observer Mission in Georgia (UNOMIG) to monitor implementation of July 1993 Agreement, comprising up to 88 military observers, with support staff, in order to verify compliance with the Agreement. The first small group of UN observers arrived in the conflict zone at the end of August 1993. <http://www.un.org/Depts/dpko/missions/unomig/background.html>

<sup>905</sup> Expressions of frustration at the inability of the international community to respond even to emergency situations of these kinds are heard at most international and intergovernmental conferences today. UNPO was created by nations and peoples without a state and captive states to provide a channel for the affected peoples (rather than only the governments which purport to represent them) to contribute to seeking solutions, and to participate in discussions on an international level about the issues that most concern them. On 15 May, 1992 Mr. V. Ardzinba, Chairman of the Supreme Soviet of Abkhazia, sent an appeal to UNPO's General Secretary for assistance in preventing the outbreak of violent conflict between Abkhazia and Georgia. He cited fears of the use of force by Georgia to resolve a political problem with respect to Abkhazia as the reason for urgent UNPO action, such as mediation. UNPO's Second General Assembly decided, in August 1992, following a daylong special session on Prevention of the Use of Force by States Against Peoples Under Their Control, to establish a special council (referred to as the Urgent Action Council) to intervene at any UNPO Member's request in situations where a people feels threatened with use of force against it or with other forms of violence. In the course of the following year, a structure, rules of procedure, and guidelines were drawn up for the Council, and it is expected to be operative following approval by the Third General Assembly of UNPO in January 1992. On 11 September 1992, President V. Ardzinba faxed a letter to UNPO General Secretary and to the United Nations Secretary-General asking that fact-finding missions be sent to investigate the situation in Abkhazia. Since Abkhazia became a full member of UNPO in August 1992, so that President Ardzinba's request was entirely in keeping with the General Assembly's decision. In response to the Abkhazian requests, UNPO invited a number of parliamentarians or parliamentary staff members to be part of a UNPO Mission to Abkhazia, Georgia and the Chechen Republic in order to investigate the situation in Abkhazia, paying special attention to the principal elements of the Georgian-Abkhaz conflict, the human rights situation, its relationship with developments throughout the Northern Caucasus region, and the potential for peaceful resolution of the conflict. See at <http://www.unpo.org/downloads/AbkGeo1992Report.pdf>. The mission was composed of members of parliament or their staff, from the United Kingdom, the USA, and The Netherlands and of senior representatives of UNPO. The delegation was headed by Lord Ennals, Member of the British House of Lords. The mission travelled to various parts of Abkhazia, to Tbilisi, Grozny, and Moscow. The delegation met with Chairman Vladislav Ardzinba, President Eduard Shevardnadze, exiled President Zviad Gamsakhurdia, and Chechen President Jokhar Dudaev. It also met with numerous officials in Gudauta, Gagra, Sukhum and Tbilisi, and spent time investigating the situation in Abkhazia. See *Report of a UNPO Coordinated Human rights Mission to Abkhazia and Georgia* from Human Rights Advocates Pax Christi International International Federation for the Protection of the Rights of Ethnic, Religious, Linguistic and other Minorities Covcas Centre for Law and Conflict Resolution and The Unrepresented Nations and Peoples Organization, at <http://unpo.org/article/7482>

<sup>906</sup> UNPO UAC/1992/FFM, *Report of a UNPO Mission to Abkhazia, Georgia and the Northern Caucasus*, p. 344; *Report of the Independent International Fact-Finding Mission on the Conflict in Georgia*, Vol II, p. 78.

<sup>907</sup> *Те суровые дни. Хроника Отечественной войны народа Абхазии 1992 – 1993 годов в документах*. Сухум, 2004. p. 391.



attacks of irregulars on the Russian peacekeeping contingents and Abkhazian militia,<sup>908</sup> and in 2001 a group of Chechen mercenaries with the Georgian troops in attempt to occupy the Gali Region entered in the Kodori Gorge triggering the hostilities between the Georgian and Abkhazian sides. These confrontations were stopped with signing new ceasefires.<sup>909</sup>

Finally, unfreezing the Georgian-Abkhazian conflict is associated with *Sakashvili's period of rule from 2003 to 2008*.<sup>910</sup> The Georgian militarization aroused Abkhazian security concerns and fear that the Government of Georgia planned the use of force as a means for resolution.<sup>911</sup>

Soon, the Abkhazian fears were came true with occupation of the Upper Kodori Valley by Georgian troops. In particular, on 26 July 2006 Saakashvili launched a large-scale military operation in the Kodori Gorge and moved the headquarters of the pro-Georgian so-called *Autonomous Republic of Abkhazia* from Tbilisi to the upper Kodori valley. The introduction of Georgian forces in the Kodori valley violated the Moscow agreement of April 1994.<sup>912</sup> In this sense, Tbilisi confirmed that its priority was the settlement of the Abkhazian issue through military force instead of a realistic process of dialogue. Thus, it destroyed the old *status quo* and unfroze the conflict.

<sup>908</sup> А.Б. Крылов, *Абхазия выстраданная независимость*, <http://www.fondsk.ru/article.php?id=1576>

<sup>909</sup> The 1998 events are described below. The September 2001 violence, involving Chechen fighters with the alleged support of the Georgian ministry of interior, resulted in dozens of casualties. See Damien Helly and Giorgi Gogia, "Georgian Security and the Role of the West", in Bruno Coppieters & Robert Legvold (eds.), *Statehood and Security: Georgia after the Rose Revolution* (Cambridge, MA, 2005), p.286; and "Report of the Secretary-General Concerning the Situation in Abkhazia, Georgia", 24 October 2001, paras. 9-25; С. Маркедонов, *Грузино-абхазский конфликт и безопасность на кавказе*, No-2004/3, at <http://www.russkiivopros.com/print.php?id=66>; Abkhazia Today, Report 176, 15 September 2006, at <https://www.crisisgroup.org/abkhazia-today>; А.Г. Арешев, Е.Г. Семерикова, *Абхазия и Южная Осетия после признания. Исторический и современный контекст*, op.cit., p. 120; Ю.В. Воронов, П.В. Флоренский, Т.А. Шутова, *Белая Книга Абхазии. Документы, Материалы, Свидетельства. 1992-1993, Belaya kniga Abkhazii: Dokumenty, materialy, svidetelstva* [The Abkhazia's White book: Documents. Materials and testimonies], Москва 1993, p. 140

<sup>909</sup> M.Volkhonskij, V. Zakharov, N. Silaev, *Konflity v Abkhazii e Južnoj Osetii. Documenti 1989-2006 (pril. K "Kavkazskomu sborniku" №1)*, MGIMO MID . M., 2008. pp. 10-25.

<sup>910</sup> In particular, the initial steps of the new Georgian government, vis-à-vis Abkhazia, engendered cautious hopes for the peaceful resolution of the conflict. In fact, in December 2005, with participation of Russia, Georgia and Abkhazia approved the text of the Protocol on the Non-resumption of Hostilities. However, things did not go much further. Together with peaceful and constructive messages addressed to Sukhumi, there was an increase in the military rhetoric of the Georgian leadership and a general increase in militancy. The new Georgian president stated that: "We will return Abkhazia within my presidential term. Saakashvili's policy set, as of priority, the so-called restoration of the territorial integrity of Georgia for both his domestic and foreign policies. Whilst Mikheil N. Saakashvili was enjoying the patronage of the West, which enthusiastically and generously supported the breakthrough of the reform-oriented new leadership, an intense process of militarization was launched in Georgia. See M.Saakashvili: my vernem Abkhaziyu [M.Saakashvili: We will return Abkhazia] // <http://top.rbc.ru/politics/26/05/2004/52202.shtml>; A. Gegeshidze and I. Haindrava, *Transformation of the Georgian-Abkhaz conflict: rethinking the paradigm*, at [http://www.c-r.org/downloads/Georgian%20Perspective\\_Transformation%20of%20Georgian:Abkhaz%20Conflict\\_201102\\_ENG.pdf](http://www.c-r.org/downloads/Georgian%20Perspective_Transformation%20of%20Georgian:Abkhaz%20Conflict_201102_ENG.pdf);

[http://www.mof.ge/budget/by\\_year/2008](http://www.mof.ge/budget/by_year/2008). Moreover, M. Saakashvili launched militarisation of the country. By 2005 militarization reached a scale that exceeded the defence needs of the country and covered almost every sphere of the military development. In particular, the Georgian military budget rose in 2005 at a rate higher than any other country in the world. While in 2002, its defence budget was 18 million US dollars; in 2005 it actually reached approximately 263 million US dollars. In fact, Georgia was the absolute leader area for military spending in the post-Soviet era. А.Г. Арешев, Е.Г. Семерикова, *Абхазия и Южная Осетия после признания. Исторический и современный контекст*, op.cit., p. 234; С. Багапш *Усилия Грузии по наращиванию боевой силы активизировались*, [http://ruskline.ru/news\\_rl/2007/10/30/sergej\\_bagapsh\\_usiliya\\_gruzii\\_po\\_narawivaniyu\\_boevoj\\_sily\\_aktivizirovalis/](http://ruskline.ru/news_rl/2007/10/30/sergej_bagapsh_usiliya_gruzii_po_narawivaniyu_boevoj_sily_aktivizirovalis/)

<sup>911</sup> С. Багапш, op.cit..

<sup>912</sup> The Georgian representatives commented that these steps were a military operation of the strategic importance. In particular, Givi Targamadze, then chairman of the Defense and Security Parliamentary Committee of Georgia, said during that period: "It is a strategic area from which the helicopter flight time to Sukhumi is only five minutes." See Chapter Three: *Lessons from Post-Soviet Georgia* // Saltzman Working Paper. 2009 - № 12. - November. Pp. 42-67 65 *Saakashvili: V abkhaziyu vozvrashchaetsya legitimnoye pravitel'stvo* [Saakashvili: the legitimate government returns to Abkhazia] // <http://regnum.ru/news/680582.html> ; Cited in: Abkhazia: Ways Forward. International Crisis Group. Europe Report N°179 – 18 January 2007. P.20. See also M.Volkhonskij, V. Zakharov, N. Silaev, *Konflity v Abkhazii e Južnoj Osetii. Documenti 1989-2006 (pril. K "Kavkazskomu sborniku" №1)*, MGIMO MID . M., 2008. pp. 10-25.

In response, Abkhazia declared the Kodori military operation a gross violation of the Moscow cease fire treaties of 1994 and requested the withdrawal of the Georgian troops.<sup>913</sup>

The UN Security Council also condemned these military actions<sup>914</sup> calling on the Georgian side to bring the situation in the upper Kodori valley in line with the 1994 Moscow Agreement, as well as to finalize, without delay, the document between Tbilisi and Sukhumi on the non-use of violence and on the return of refugees. However, Georgia ignored the provisions of the UN SC resolution condemning the Georgian occupations of 2006 and continued to build up its army and police presence in the upper Kodori valley, increasing its strength to 2,500 by August 2008. Thus, Georgia not only refused to bring the situation in the upper Kodori valley into line with the 1994 Moscow Agreement, it also continued to increase military expenditures year on year. To be precise by 2008 the state budget achieved 997 million US dollars (7 percent of the GDP or 20 percent of the state expenditures) for the needs of the Georgian Defence Ministry.<sup>915</sup> Parallel to the Georgian militarization, the situation was deteriorating seriously through numerous provocations of Georgia, including indiscriminate bombings of public places in Gagra, Sukhumi and Gali on the Abkhaz-controlled side of the ceasefire line. Georgian intelligence services stepped up their activities in the area adjacent to the Ingur river – they searched for possible troop deployment routes, fording sites across the Ingur river, and tried to ascertain the level of preparedness amongst the Abkhaz Armed Forces deployed along the right bank of the Ingur river. Georgia's multi-purpose UAVs were regularly sighted flying over Abkhazia's territory. Thus, activities of Georgia, like methodically collecting intelligence data, monitor key strategic facilities and obtain

<sup>913</sup> W. Kaufmann, *A European path for Abkhazia: yesterday's pipe dreams?*, Caucasus Analytical Digest. Abkhazia, Vol 7 (July 2009), p. 3; Zakareishvili, *Georgia's relationship with Abkhazia*, p. 8; *Report of the Independent International Fact-Finding Mission on the Conflict in Georgia*, Vol II, pp. 89-90.

<sup>914</sup> Security Council resolution 1716, 13 October 2006, S/RES/1716 (2006), [http://repository.un.org/bitstream/handle/11176/19464/S\\_RES\\_1716%282006%29-EN.pdf?sequence=3&isAllowed=y](http://repository.un.org/bitstream/handle/11176/19464/S_RES_1716%282006%29-EN.pdf?sequence=3&isAllowed=y); Security Council resolution 1752, 13 April 2007, at [http://www.un.org/en/ga/search/view\\_doc.asp?symbol=S/RES/1752\(2007\)](http://www.un.org/en/ga/search/view_doc.asp?symbol=S/RES/1752(2007))

<sup>915</sup> The acquisition of offensive weapons also continued to increase sharply: from 1 January 2005 to 1 January 2008, the number of tanks in the Georgian army increased from 98 to 183, armoured combat vehicles (ACV) – from 83 to 134, artillery pieces with a calibre over 100 mm – from 96 to 238, combat helicopters – from 3 to 9 and combat aircraft – from 7 to 9. Georgia purchased state-of-the-art offensive weapons systems capable of inflicting casualties and causing destruction on a massive scale. Moreover, the number of Georgian military personnel grew considerably. In 2007, the military personnel of the Georgian army exceeded 32,000 which is twice as much as the “optimal number” recommended to Georgia by US experts in 2005. In July 2008, the Armed Forces of Georgia reached 37,000. In 2008 military personnel exceeded 25% of all state expenditure – which constituted over 8% of the GDP in 2008; В. Мухин *Оборона важнее пенсий* Независимой газета [http://www.ng.ru/cis/2008-01-23/9\\_army.html](http://www.ng.ru/cis/2008-01-23/9_army.html); [http://www.mof.ge/budget/by\\_year/2008](http://www.mof.ge/budget/by_year/2008). This estimate is made only on the basis of official data provided by Georgia in the framework of the CFE Treaty. The real picture is even more serious, taking into account the extensive information on wide-scale illegal shipments of offensive weapons to Georgia. Moreover, the United States provided about \$1.8 billion overall in the 17 years since Georgia gained independence from the collapsing Soviet Union. Excluding Iraq, the infusion made Georgia one of the largest recipients of American foreign aid after Israel and Egypt. The United States provided Georgia weapons and training for its armed forces, as well encouraged its aspirations to join the NATO alliance. Such abundantly military and economic support for Georgia created the clear impression that the American administration inspired Saakashvili to launch an attack against Abkhazia and South Ossetia. П. Глебов *Готовились к блицкригу*, ВПК <http://vpk-news.ru/articles/3680>; А.Г. Арешев, Е.Г. Семерикова, *Абхазия и Южная Осетия после признания. Исторический и современный контекст*, op.cit., p. 234; П. Глебов *Готовились к блицкригу*, ВПК <http://vpk-news.ru/articles/3680>. Embassy of the Russian Federation in the Republic of Croatia, Bulletin, October 2008, at [http://www.zagreb.mid.ru/files/Press%20Bulletin2008\\_10.pdf](http://www.zagreb.mid.ru/files/Press%20Bulletin2008_10.pdf); Gegeshidze and I. Haindrava, *Transformation of the Georgian-Abkhaz conflict: rethinking the paradigm*, at [http://www.c-r.org/downloads/Georgian%20Perspective\\_Transformation%20of%20Georgian-Abkhaz%20Conflict\\_201102\\_ENG.pdf](http://www.c-r.org/downloads/Georgian%20Perspective_Transformation%20of%20Georgian-Abkhaz%20Conflict_201102_ENG.pdf); <http://www.civil.ge/rus/article.php?id=16064&search=>; S. Lee Myerssept, *The New York Times*, 3, 2008 <http://www.nytimes.com/2008/09/04/world/europe/04cheney.html>; А.Г. Арешев, Е.Г. Семерикова, *Абхазия и Южная Осетия после признания. Исторический и современный контекст*, op.cit., p. 234; <http://www.civil.ge/rus/article.php?id=16064&search=>; *Origins of the situation around Abkhazia and South Ossetia*, [http://www.mof.ge/budget/by\\_year/2008](http://www.mof.ge/budget/by_year/2008);

information pertaining to the deployment of the Abkhaz Armed Forces, were seen by the Abkhazian as a threat of its security.<sup>916</sup>

These developments caused further concern in Sukhumi over its security.<sup>917</sup> In this regard, the Abkhaz side on numerous occasions attempted to draw the attention of the UN Mission in Georgia and the CIS peacekeeping force to these facts reiterating that Georgia's use of the Abkhaz airspace was unacceptable and that these flights were carried out in violation of the Agreement reached in Moscow in 1994. Paragraph 1 of this Agreement stipulates that “*the Parties shall strictly observe the terms and conditions of the ceasefire agreement be it on land, at sea and in the airspace...*”<sup>918</sup>

The night of 7-8 August 2008 marked the culmination of the provocation policy on the part of Tbilisi. At about 01:00 a.m. the Georgian side unexpectedly unleashed military actions against South Ossetia using heavy armament and military equipment (aviation, tanks, howitzers, multiple rocket launchers) despite the assurances on the non-use of force made by Mikheil N. Saakashvili a few hours earlier. The headquarters of the Mixed Peacekeeping Forces (MPF) was heavily attacked; the fire was aimed at the Joint Peacekeeping Force (JPKF) observation posts, living quarters, graveyards, and cultural monuments. The shells also hit the OSCE office with the Organization's observers inside. As a result of the Georgian attack on South Ossetia, Russian military personnel were killed, including 12 peacekeepers; and more than 323 were wounded.<sup>919</sup> Moreover, civilians comprised about 1,500 victims; tens of thousands of South Ossetian civilians lost their homes and were deprived of water and food; within four days 35 thousand refugees crossed the Russian border.

The war of August 2008, also affected Abkhazia, but to a much lesser degree than South Ossetia. In particular, the launch by the Georgian side of large-scale operations in South Ossetia in August only strengthened the Abkhaz side's perception of being a likely target and destroyed the credibility of the Georgian leadership as a responsible party to the negotiating process and, in general, as a member of the international community guided by the principles of the Charter of the United Nations.<sup>920</sup> That perception was reinforced after the reported seizure in the upper Kodori Valley of a number of heavy artillery pieces that had been barred under the 1994 Moscow

<sup>916</sup> In fact, between August 2007 and March 2008, UNOMIG military observers registered 26 flights of UAVs over the territory of Abkhazia, conducting reconnaissance in violation of the 1994 Moscow Agreement and the United Nations Security Council resolutions.

<sup>917</sup> *Report of the Independent International Fact-Finding Mission on the Conflict in Georgia*, Chapter four, p. 195, [http://news.bbc.co.uk/2/shared/bsp/hi/pdfs/30\\_09\\_09\\_iiffmgc\\_report.pdf](http://news.bbc.co.uk/2/shared/bsp/hi/pdfs/30_09_09_iiffmgc_report.pdf); S/2006/435, at <http://www.securitycouncilreport.org/atf/cf/%7B65BFCF9B-6D27-4E9C-8CD3-CF6E4FF96FF9%7D/Georgia%20S2006%20435.pdf>

<sup>918</sup> *Report of the Independent International Fact-Finding Mission on the Conflict in Georgia*, Chapter four, p. 195, <http://www.securitycouncilreport.org/atf/cf/%7B65BFCF9B-6D27-4E9C-8CD3-CF6E4FF96FF9%7D/Georgia%20S2006%20435.pdf>

<sup>919</sup> *Report of the Independent International Fact-Finding Mission on the Conflict in Georgia*, Chapter four, p. 195, [http://news.bbc.co.uk/2/shared/bsp/hi/pdfs/30\\_09\\_09\\_iiffmgc\\_report.pdf](http://news.bbc.co.uk/2/shared/bsp/hi/pdfs/30_09_09_iiffmgc_report.pdf)

<sup>920</sup> Joint Control Commission for Georgian–Ossetian Conflict Resolution (JCC) is a peacekeeping organization, operating in South Ossetia and overseeing the joint peacekeeping forces in the region. It was created in 1992 after the South Ossetian War, the Commission consisted of four members with equal representation: Georgia, North Ossetia, Russia, and South Ossetia.

<sup>920</sup> <http://www.securitycouncilreport.org/atf/cf/%7B65BFCF9B-6D27-4E9C-8CD3-CF6E4FF96FF9%7D/Georgia%20SPV%205951.pdf>

Agreement. The Abkhaz side criticized UNOMIG for failing to uncover those heavy weapons and questioned the ability of the international community to contribute to the preservation of peace in the region.<sup>921</sup> Therefore, in the context of the attack of Georgian military forces on South Ossetia and the exposure of plans for a similar operation against Abkhazia, on 8 August, the Abkhaz side began introducing heavy weapons to the restricted weapons. On August 9, 2008, Abkhaz armed forces intervened in the conflict through opening a “second front”. On 12 August, the latter took control of the Kodori Gorge, without encountering serious opposition from the Georgian military. The operation in the valley was carried out by the Armed Forces of the Abkhaz Republic independently and was confined strictly to the territory of the Republic of Abkhazia. For the first time since 1994, the *de facto* Abkhazian government established complete control over its entire territory.<sup>922</sup>

**b. *Legal assessment of Abkhazian situation with respect to the right to external self-determination under foreign domination***

As has been seen the Soviet Law had granted to Abkhazia the right to secede from Georgia<sup>923</sup> and to held a referendum, which took place according to the Soviet rules and in accordance with the wishes and aspirations of the Abkhazia's peoples.<sup>924</sup> In the post-Soviet period Abkhazia sought to obtain *de jure* recognition and at the same time attempted to resolve its future status through dialogue with the Georgian authorities in a way which would grant account of the legitimate rights and interests of the parties concerned.<sup>925</sup> However, the Georgian government refused the peaceful means and unexpectedly launched massive military attacks with excuse to pursue Gamzakhurdia and his follows.<sup>926</sup> As a result of this attack several Abkhazian civilians died, and in Sukhumi, big Abkhazian towns and villages a considerable number of buildings were occupied and destroyed by the Georgian military.<sup>927</sup> Thus, in 1992-1993 the entire territory of Abkhazia was militarily occupied.

<sup>921</sup> See Report of UNPO

<sup>922</sup> *Ibid.*, А.Г. Арешев, Е.Г. Семерикова, *Абхазия и Южная Осетия после признания. Исторический и современный контекст*, op.cit., pp. 235-240.

<sup>923</sup> See Part One *General aspects*, Chapter II *Legal basis for secession and creation of the new States*, pp. 30-34, 38-40; *Part two Analysis of the Abkhazian case*, Chapter IV *The secessionist movements after perestroika*, 4. *The response of the President of the USSR to legislative acts of Georgia and Abkhazia*, pp.128-129, *Pro Soviet Union preservation approach of Abkhazia*, pp. 131-132; *Part III An Assessment of The Present Legal Status of Abkhazia*, Chapter II *The right to secession*, 2. *Consensual secession*, a. *The right to secession under Soviet law*, p.164.

<sup>924</sup> See 6. *Pro Soviet Union preservation approach of Abkhazia*, pp. 131-132.

<sup>925</sup> See, *Part III An Assessment of The Present Legal Status of Abkhazia*, Chapter II *The right to secession*, 2. *Consensual secession*, a. *Historical background of the Conflict of Abkhazian struggle for independence* pp.172-179

<sup>926</sup> See UNPO, UAC/1992/FFM, *Report of a UNPO Mission to Abkhazia, Georgia and the Northern Caucasus*, p. 344; *Belaya kniga Abkhazii: Dokumenty, materialy, svidetelstva* [The Abkhazia's White book: Documents. Materials and testimonies]. Moscow. 1993; *Abkhazia Today*, Report 176, 15 September 2006, at <https://www.crisisgroup.org/abkhazia-today>; *Belaya kniga Abkhazii: Dokumenty, materialy, svidetelstva* [The Abkhazia's White book: Documents. Materials and testimonies]. Moscow. 1993; Zverev, *Ethnic Conflict in the Caucasus 1988-94*, in Bruno Coppeters, ed., *Contested Borders in the Caucasus*, VUB University Press: Brussels, 1996, AT <http://poli.vub.ac.be/publi/ContBorders/eng/ch01fn.htm>; Liana Kvarchelia, *Georgia-Abkhazia Conflict: View from Abkhazia* [https://www.gwu.edu/~ieresgwu/assets/docs/demokratizatsiya%20archive/06-01\\_kvarchelia.pdf](https://www.gwu.edu/~ieresgwu/assets/docs/demokratizatsiya%20archive/06-01_kvarchelia.pdf)

<sup>927</sup> *Ibid.*.

After occupation the Georgian government justified these military actions by the fact that the territories of Abkhazia were internationally recognised as a constituent part of its territory and therefore Article 2(4) was not applicable to the Georgian side. The use of force in international relations is generally prohibited by Art. 2 (4) of the UN Charter and by customary law, and the prohibition is also endorsed in the Helsinki Final Act of 1975.<sup>928</sup> However, the internal use of force excludes the illegitimacy of such actions under international law. A government is generally not prevented from using armed force in internal conflicts, e.g. against insurgents starting a civil war or against territorial entities fighting violently for secession.<sup>929</sup> Abkhazia was an entity, in that statehood was formally considered as belonged to the territory of Georgia. In fact, despite the fact that Georgia had no legal right to exercise control under the 1991 Soviet law and *de facto* did not have effective control over Abkhazia, the former, however, was admitted to the UN with the boundaries, which included the territory of Abkhazia. Moreover, the use of force by Georgia was directed against an unrecognised entity, which met the precondition of statehood. Therefore, *de jure* recognition of Abkhazia as a part of Georgia, had no constitutive value,<sup>930</sup> as has been affirmed by Article 9 of the Charter of the Organization of American States: "The political existence of the State is independent of recognition by other States".<sup>931</sup> Moreover, the EC Arbitration Commission on Yugoslavia has held in its Opinion n. 1 that 'the existence or disappearance of the State is a question of fact' and that 'the effects of recognition are purely declaratory.'<sup>932</sup> Only illegal situations should be subject to recognition of the international community. Consequently, at the moment of a military offensive of the Georgian troops against Abkhazia, the latter secession can be considered accomplished regardless of the refusal of the international community to *de jure* recognize it.

These Georgian military attacks and their occupation of Abkhazia triggered the armed conflict between Abkhazia and Georgia. Abkhazia used of force for its liberation from the Georgian militaries. As a result of the 1992-1994 hostilities Abkhazia won the war for independence. Very often the military successes at the national level were the pre-condition for their political recognition at the international level. Despite the perceived legitimacy of their armed struggle, and the effort of Socialist and Non-Aligned Countries to transform this legitimacy into a legal entitlement, the right to enforce the right of self-determination through military means was opposed by Western states as inconsistent with the UN principles of peaceful settlement of

<sup>928</sup> Part 1 (a) "Declaration on Principles Guiding Relations between Participating States", Principle II, "Refraining from the threat or use of force".

<sup>929</sup> Albrecht Randelzhofer, in Bruno Simma (ed), *The Charter of the United Nations: A Commentary*, vol. 1 (Oxford University Press 2002), Article 2(4) of the UN-Charter, para. 28. Examples of such a situation during the cold war were the military conflicts between North Korea and South Korea, and between North and South Vietnam, where the majority of states rejected the applicability of Article 2(4) of the UN Charter; for a detailed analysis of state practice see Corten, *Le droit contre la guerre* (above note 6), pp. 205-220.

<sup>930</sup> Fitzmaurice, *The General Principles of International Law Considered from the Standpoint of the Rule of Law*, 1957- II RdC5, at 10 (1958)

<sup>931</sup> Charter of the Organization of the American States, reprinted in 46 *AJIL (Documents)* (1952), 44.; P. J. G. KAPTEYN ET AL. (ed.), *International Organization and Integration*, Dordrecht, Nijhoff, 1984, II K 3.3.a. p.188

<sup>932</sup> Arbitration Commission, EC Conference on Yugoslavia, Opinion n. 1 (29 November 1991), 92 *ILR*, 1993, p. 162.

disputes.<sup>933</sup> In fact, despite Abkhazia having won the war of independence, it was not recognised by the international community.

Parallel to the hot phase of the Georgian-Abkhazian conflict, the negotiations between the parties to the conflict were opened. Thus, Abkhazia's struggle for liberation from foreign domination (Georgia) had taken shape in the form of national liberation through a mix of military and political initiatives (e.g. dialogue and negotiations with Georgia, seeking international recognition). In 2006 these negotiations officially were abandoned due to unlawful occupation of Kodori Valley by the Georgian troops. Particularly, since the actions of the Georgian military were in violation of the Peace treaties of 1994, the UN condemned them. In 2008 Abkhazia liberated the Kodori Valley from the presence of the Georgian troops. Subsequently, Russia (the continuator of the USSR) and five other States (Nauru, Nicaragua, Vanuatu, Venezuela) recognized Abkhazia as an independent and sovereign subject in international law.

Abkhazians are a distinct people with a strong sense of national identity, not an ad hoc group trying to gain momentum and making off with an unfair share of the country's wealth. Moreover, their claim to respective territory and to independence confirmed by their persistent rejection of their forcible incorporation into Georgia throughout the period of the Soviet Union. Additionally, Abkhazia was a part of Georgia within the USSR only due to the authoritarian decision of Stalin and not owing to the will of the its peoples. Finally, at the moment of Georgian occupation of Abkhazia, the latter was a *de facto* independent and sovereign entity.

Entitlement of Abkhazia to secession under the Soviet law, its *de facto* secession from Georgia by means of referendum, circumstances under which Abkhazian Republic had been military suppressed and occupied by Georgia and recognition of the Russian Federation as the continuator of the USSR are relevant factors for assessment the status of Abkhazians during liberation and independence in 1992-1994 and in 2008.

Due to the events of 1992-1994 and 2008 Abkhazia's demands for *external* self-determination can be seen as a response to the Georgian occupation. As a people oppressed by foreign domination, the Abkhazians had the right to assert self-determination and to free themselves from alien occupation and such a right was not to be hindered by any State in their efforts to assert this right. This is clearly asserted in GA Resolution 1514 and the 1970 Declaration on Friendly Relations among States, these instruments are non-binding *per se* but now widely accepted as representative of customary international law. The Declaration on Friendly Relations provides that:

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<sup>933</sup> See for example GA Res. 3013 (XXVTII) defining anti-colonial armed struggle 'in full accordance with the principles of international law', which was met with the opposition of 13 votes cast by the Western States.

*Every State has the duty to refrain from any forcible action which deprives peoples referred to above in the elaboration of the present principle of their right to self-determination and freedom and independence'.<sup>934</sup>*

As correctly argued by A. Cassese, in cases of foreign occupation the principle reinforces and restates the general ban on the use of force in international relations established in Article 2(4), therefore it does not represent in itself a new development.<sup>935</sup>

At the same time more problematic is the question of the legality of the use of force by the oppressed people living (like the Abkhazians) on a territory which formally has not yet acquired statehood (at that time they had only *de facto* achieved it):

*In their actions against, and resistance to, [foreign occupation] in pursuit of the exercise of their right to self-determination, such peoples are entitled to seek and to receive support in accordance with the purposes and principles of the Charter.*

Additional Protocol I to the Geneva Conventions provides for application of the right to external self-determination in situations that are deemed like armed conflicts in which peoples are fighting against alien occupation in the exercise of their right of self-determination, as enshrined in the Charter of the United Nations and the Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States in accordance with the Charter of the United Nations (Art. 1 (4))<sup>936</sup>.

One of the principles in accordance with which the oppressed people are entitled to assert their right to self-determination is prohibition of use of force (Article 2(4) UN Charter). From this it derives that the oppressed peoples cannot assert their right to external self-determination using force. In other words, the oppressed people in their struggle for self-determination are limited by general prohibition on the resort to force. National liberation movements could not avail themselves of the pledge of self-defence according to Article 51.<sup>937</sup> At the same time, notwithstanding the lack of a legal entitlement to resort to force, it is correct to observe that, never has a struggle for self-determination per se, even if conducted by military means, been declared illegal,<sup>938</sup> and was generally and widely tolerated. Therefore, the use of force by national liberation movements in their struggle to assert the right to self-determination was not subject to Art. 2 (4) UN Charter prohibition of the use of force under international law.<sup>939</sup> In other words, people

<sup>934</sup> UNGA Res. 2625 (XXV) GAOR 25th Session Supp. 28, 121; Friendly Relations Declaration, 1970.

<sup>935</sup> A.Cassese, *Self-Determination of Peoples: a Legal Reappraisal* (1995), p. 96.

<sup>936</sup> Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol I), 8 June 1977, <https://ihl-databases.icrc.org/applic/ihl/ihl.nsf/Article.xsp?action=openDocument&documentId=6C86520D7EFAD527C12563CD0051D63C>

<sup>937</sup> E. Milano, *op.cit.*, p. 17

<sup>938</sup> A.Cassese, *op.cit.*, p. 153.

<sup>939</sup> UNGA Res. 2625 (XXV) GAOR 25th Session Supp. 28, 121; Friendly Relations Declaration, 1970.

oppressed by foreign dominion could count on the neutrality of international law towards their claim to a military struggle.<sup>940</sup>

This neutrality derives from the fact that the limitation of the principle of territorial integrity would not apply for struggles against foreign domination: a struggle for self-determination *does not constitute “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” under Article 2(4).*<sup>941</sup> In fact those territories are not under the sovereignty of the State, thus the military actions cannot be considered as against the territorial integrity or political independence of the occupying State.

Furthermore, with this in mind, additional Protocol I recognized 'wars of national liberation' as international armed conflicts. This meant that any conflict that arose in pursuance of self-determination and national liberation was to be considered akin to a conflict between two sovereign States.<sup>942</sup>

Further, as noted in 1973 by UNGA Res. 3103 (XXVIII) on the Basic Principles of the Legal Status of the Combatants Struggling against Alien Domination: *the armed conflicts involving the struggle of peoples against colonial and alien domination ... are to be regarded as international conflicts in the sense of the 1949 Geneva Conventions, and the legal status envisaged to apply to the combatants in the 1949 Geneva Conventions and other international instruments is to apply to the persons engaged in armed struggle against colonial and alien domination and racist regimes (at para. 3).*

Therefore, from the prospective of the right of the oppressed peoples to external self-determination a conclusion can be drawn that Abkhazia seceded from Georgia in adherence with the self-determination principle.

## 6. Remedial secession doctrine

Main holders of the right to external self-determination are colonized peoples but this does not mean that unilateral secession in non-colonial context is prohibited. Such right is usually associated with the remedial secession doctrine. According to this doctrine the right to external self-determination arises only in “the most extreme of cases and, even then, under carefully defined circumstances”.<sup>943</sup>

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<sup>940</sup> See A.Cassese, *op.cit.*, p.153.

<sup>941</sup> R.Roth, *Governmental Illegitimacy in International Law*, 1999, p. 215.

<sup>942</sup> Frauke Lachenmann, Rüdiger Wolfrum, *The Law of Armed Conflict and the Use of Force: The Max Planck Encyclopedia of Public International Law*, Oxford University Press, 2017, p. 50.

<sup>943</sup> Judgement of the Supreme Court of Canada, *Reference re Secession of Quebec*, para. 126.



The term “remedial secession” was first mentioned by Buchheit<sup>944</sup> in his search for standards of legitimacy of secession. As a doctrine has become internationally recognized through cases the Aaland Island dispute<sup>945</sup> and the Reference re Secession of Quebec.<sup>946</sup> This Remedial right theory advocates for a specific (remedial) right to secession, which is strictly understood as a “remedy of last resort for persistent and grave injustices, understood as a violation of a basic human rights.”<sup>947</sup>

One of main reasons for the recognition of Abkhazia by Russia was grounded on remedial doctrine,<sup>948</sup> so, it must be asked whether the situation in Abkhazia might be qualified as “exceptional”, thus creating such extraordinary allowance to secede under international law. It is necessary to examine the remedial secession doctrine. It is essential to answer to the question whether international law allows secession outside the colonial context in extreme circumstances.

A right to secession is not clearly defined in some treaty law, there are some instruments, which express the *opinio juris* on the matter.

The Friendly Relations Declaration that in principle 5, paragraph 7 explains the right to self-determination and then adds remedial secession clause:

*“Nothing in the foregoing paragraphs shall be construed as authorising or encouraging any action which would dismember or impair, totally or in part, the territorial integrity or political unity of sovereign and independent States conducting themselves in compliance with the principle of equal rights and self-determination of peoples as described above and thus possessed of a government representing the whole people belonging to the territory without distinction as to race, creed or colour.”*<sup>949</sup>

A *contrario* from this proposition follows that if a State does not conduct itself in compliance with the principle of equal rights and self-determination of peoples and persistently denies totally internal self-determination to a particular group or people within the State and when all peaceful and diplomatic means to establish a regime of internal self-determination have been exhausted, that group or people may be entitled to secession as the *ultima ratio* (“remedial

<sup>944</sup> Lee C. Buchheit, *Secession: The Legitimacy of Self-Determination*, Yale University Press, 1978, p. 222.

<sup>945</sup> The Aaland Islands Question: Report Submitted to the Council of the League of Nations by the Commission of Rapporteurs, League of Nations Doc. B7/21/68/106, Commission of Rapporteurs, 1920. Applying these criteria to the facts, the Commission of Rapporteurs found that the Aalanders had no right to secession because they had not been oppressed by Finland.

<sup>946</sup> Reference re Secession of Quebec, Judgement of the Supreme Court of Canada, para. 126 and 134.

<sup>947</sup> A. Buchanan, *Uncoupling Secession from Nationalism and Intrastate Autonomy from Secession*, pp. 82, 84.

<sup>948</sup> In the statement that explained the reasons for Russia's recognition, President Dmitry Medvedev referred to the “freely expressed will of the Abkhazian peoples” and to several fundamental international instruments that stress inter alia the principle of self-determination of peoples, notably the UN Charter, the 1970 UN General Assembly Declaration on Principles of International Law Concerning Friendly Relations and Cooperation among States (UN General Assembly Resolution 2625) and the 1975 Helsinki Final Act of the Conference on Security and Co-operation in Europe (CSCE). Medvedev also specified that Abkhazians had the right to decide their destiny by themselves in the light of Georgia's allegedly genocidal policies in South Ossetia and the existence of similar plans for Abkhazia. See, New York Times, Text: *Medvedev's statement on South Ossetia and Abkhazia*, August 27, 2008, <http://www.nytimes.com/2008/08/27/world/europe/27iht-27medvedev.15660953.html> ; *Abkhazia, Kosovo and the right to external self-determination of peoples* [https://www.researchgate.net/publication/303738157\\_Abkhazia\\_Kosovo\\_and\\_the\\_right\\_to\\_external\\_self-determination\\_of\\_peoples](https://www.researchgate.net/publication/303738157_Abkhazia_Kosovo_and_the_right_to_external_self-determination_of_peoples)

<sup>949</sup> Friendly Relations Declaration, GA 2625 (XXV), Annex, 24 October 1970, principle 5 para 7. For a summary of writers' views on the meaning of the Declaration and its safeguard clause, see Knop, *Diversity and Self-Determination in International Law*, 75–9. See also GA res 47/135, 18 December 1991, Art 8(4).

secession”).<sup>950</sup> Consequently, territorial integrity is not to be respected anymore, if the government does not represent the whole people and discriminates against one group.<sup>951</sup>

The same formula is reaffirmed in slightly different language by the United Nations World Conference on Human Rights held in Vienna in 1993. The Vienna Declaration provides:

*In accordance with the Declaration on Principles of International Law concerning Friendly Relations and Cooperation Among States in accordance with the Charter of the United Nations, this [sc the right of self-determination] shall not be construed as authorizing or encouraging any action which would dismember or impair, totally or in part, the territorial integrity or political unity of sovereign and independent States conducting themselves in compliance with the principle of equal rights and self-determination of peoples and thus possessed of a Government representing the whole people belonging to the territory without distinction of any kind.*<sup>952</sup>

Further significant document contributed to the remedial secession is the statement of the Supreme Court of Canada, which dealt with the unilateral secession of a part of the population<sup>953</sup>. The Canadian Supreme Court was asked to rule on the issue whether Quebec had the right to secede from Canada and if so under what circumstances. In its decision, the Court concludes that international law “at best” generates the right to external self-determination *inter alia* in situations where a definable group is denied meaningful access to the government to pursue their political, economic, social and cultural development.<sup>954</sup> In such a case, “the people in question are entitled to a right to external self-determination because they have been denied the ability to internally exert their right to self-determination”<sup>955</sup>.

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<sup>950</sup> Diagnosing and supporting remedial secession (as a rule of positive international law derived from the savings clause of the Friendly Relations Declaration) Christian Tomuschat in Marcelo Kohen (ed.) *Secession – International Law Perspectives* (Cambridge: CUP 2006), 23-45, at 42: “[R]emedial secession should be acknowledged as part and parcel of positive law, notwithstanding the fact that its empirical basis is fairly thin, but not totally lacking ...”. See also Schweisfurth (above note 18), at 382; and Markku Suksi, “Keeping the secession under specific circumstances. Although this third circumstance has been described in several ways, the underlying proposition is that, when a people is blocked from the meaningful exercise of its right to self-determination internally, it is entitled, as a last resort, to exercise it by secession. The Vienna Declaration [CSC Vienna meeting of 1989] requirement that governments represent “the whole people belonging to the territory without distinction of any kind” adds credence to the assertion that such a complete blockage may *Lid on the Secession Kettle – a Review of Legal interpretations concerning Claims of Self-Determination by Minority Populations*”, *International Journal on Minority and Group Rights* 12 (2005), 189 *et seq.*, at 225: “Unilateral secession from an existing State is not supported by public international law *except in some very special circumstances* that, against the background of the solutions in situations like Kosovo and Chechnya, are almost unlikely to materialise.” South Ossetia and Abkhazia argue that they do constitute such an “extreme” case. See in state practice the Supreme Court of Canada, *Reference Secession of Quebec*, judgement of 20 August 1998, reprinted in ILM 37 (1998), 1340 *et seq.* paras 134-5, 138, 122, which did not unequivocally endorse this position, but clearly leaned towards it: Para 122. “... [I]nternational law expects that the right to self-determination will be exercised by peoples within the framework of existing sovereign states and consistently with the maintenance of the territorial integrity of those states. Where this is not possible, in the exceptional circumstances discussed below, a right of secession may arise. ...”. Para 134. A number of commentators have further asserted that the right to self-determination may establish a right to unilateral potentially give rise to a right of secession. Para 135. Clearly, such a circumstance parallels the other two recognized situations in that the ability of a people to exercise its right to self-determination internally is somehow being totally frustrated. While it remains unclear whether this third proposition actually reflects an established international law standard, it is unnecessary for present purposes to make that determination.”<sup>138</sup>: “In summary, the international law right to self-determination only generates, at best, a right to external self-determination in situations of former colonies; where a people is oppressed, as for example under foreign military occupation; or where a definable group is denied meaningful access to government to pursue their political, economic, social and cultural development. In all three situations, the people in question are entitled to a right to external self-determination because they have been denied the ability to exert internally their right to self-determination.”

<sup>951</sup> See A. Cassese, *Self-determination of Peoples*, 109–25 for a full discussion of the ‘safeguard clause’

<sup>952</sup> United Nations World Conference on Human Rights, Vienna Declaration and Programme of Action, 25 June 1993, (1993) 32 ILM 1661, 1665

<sup>953</sup> See the Quebec Secession case, (1998) 2 S.C.R. 217, para 111.

<sup>954</sup> See, Reference re Secession of Quebec, para 126,

<sup>955</sup> See, *Ibid.*, para 138.

The Court notes that the population of Quebec was entitled to meaningful internal self-determination, as Canada was a “sovereign and independent state conducting itself in compliance with the principle of equal rights and the self-determination of peoples and thus possessed of a government representing all the people belonging to the territory without distinction.”<sup>956</sup> In other words, the Supreme Court of Canada applied the typical *a contrario* reasoning of the safeguard clause and acknowledged the right to secession, conditioned on non-respect of internal self-determination. At the same time, the Supreme Court of Canada did not examine this question in detail, because the Quebecers could not be regarded as the beneficiaries of the right.<sup>957</sup> Thus, only conditional, qualified or remedial right of unilateral secession can be maintained on the international plane.

With regard to State practice concerning seceding from existing State due to human rights abuses it should be made give some examples, such as Aalands Islands’ secession from Finland<sup>958</sup>, Bangladesh secession from Pakistan<sup>959</sup>, Eritrea secession from Ethiopia<sup>960</sup>, Kosovo secession from Serbia.<sup>961</sup> Since the cases of Bangladesh and Eritrea were influenced by consensual elements in the secession, a Kosovo secession has an even stronger basis to substantiate the remedial theory. In fact, basing on the Kosovo case some international legal scholars have diagnosed a change of international law.<sup>962</sup> Although there are some practice that indicate the existence and applicability of remedial secession doctrine in practical situation, its status in international law remains unclear. In fact, by comparison with the acceptance of self-determination leading to the independence of colonial territories covered by Chapters XI and XII of the Charter and the people under alien domination, the State practice regarding unilateral remedial secession is not so univocal. A number of States embraced remedial secession doctrine as existing law<sup>963</sup>, while other States reject to recognize such right as part of international law.<sup>964</sup>

International law has so far not been able to provide clear guidance of the remedial secession cases. Remedial secession proponents remain divided on the question of whether

<sup>956</sup> See, *ibid.*, para 136, para 154.

<sup>957</sup> See, *ibid.*

<sup>958</sup> League of Nations Doc. B7/21/68/106, Commission of Rapporteurs, *The Aaland Islands Question: Report Submitted to the Council of the League of Nations by the Commission of Rapporteurs*, 1920; Decision Of The Council Of The League of Nations on *The Åland Islands including Sweden’s Protest 1921*, [https://www.webcitation.org/6OvmqsHLk?url=http://www.kultur.aland.fi/kulturstiftelsen/traktater/eng\\_fr/1921a\\_en.htm](https://www.webcitation.org/6OvmqsHLk?url=http://www.kultur.aland.fi/kulturstiftelsen/traktater/eng_fr/1921a_en.htm)

<sup>959</sup> See Richard Sisson & Leo E. Rose, *War And Secession Pakistan, India, and The Creation of Bangladesh*, University of California Press 1990.

<sup>960</sup> L. Serapiao, *International Law and Self-Determination: The Case of Eritrea*, *African Issues*, Volume 15, 1987, pp. 3-8.

<sup>961</sup> ICJ Advisory Opinion of 22 July 2010, *Accordance with International Law of the Unilateral Declaration of Independence in respect of Kosovo* <http://www.icj-cij.org/files/case-related/141/141-20100722-ADV-01-00-EN.pdf>

<sup>962</sup> Marc Weller, *Escaping the Self-determination Trap* (Leiden: Martinus Nijhof 2008), at 65: “While the question of repression or exclusion being constitutive of a new, remedial self-determination status in the sense of secession is therefore not clearly settled, it is at least this legitimising effect that can be clearly observed.” See also *ibid.* at 146: “The hesitancy concerning a move towards what is sometimes called ‘remedial self-determination’ may have been reinforced by Russia’s armed actions relating to Georgia. On the other hand, over time, the situation in Kosovo, Abkhazia, and South Ossetia may well stabilize, leading to a retroactive re-interpretation of these episodes as instances of state practice in favour of remedial secession.” See in favour of a right to secession by Kosovo Katharina Parameswaran, “Der Rechtsstatus des Kosovo im Lichte der aktuellen Entwicklungen”, *Archiv des Völkerrechts* 46 (2008), 172-204 at 178-182.

<sup>963</sup> See Statement of Cyprus, para 153, Written Statement of Germany, p.34; Written Statement of the Netherlands, para 3.6.-3.22; Written Statement of the United Kingdom 5.9-5.33; Written Statement of the Russian Federation para 88.

<sup>964</sup> See Written statement of China, p. 3, UN GA Resolution 2625 as a reflection of customary international law, written statement of Azerbaijan, p. 24;

international law allows secession outside the colonial context in extreme circumstances.<sup>965</sup> There are a lot of writings in the academia suggesting the conditions for secession. For instance, Cassese suggest the following conditions might warrant secession: “when the central authorities of a sovereign State persistently refuse to grant participatory rights to a religious or racial group, grossly and systematically trample upon their fundamental rights, and deny any possibility of reaching a peaceful settlements within the framework of the State structure.”<sup>966</sup> He concludes that there must be gross breaches of fundamental human rights and the exclusion of any likelihood for a possible peaceful solution.<sup>967</sup>

According to Ryngaert and Griffioen “four cumulative conditions [...] must be fulfilled before the right of external self-determination may be invoked. First of all, the group invoking the right of external self-determination has to be people, who have a distinct identity representing a clear majority within a given territory. A minority is not necessarily a “people”. Second, massive violation of basic human rights and systematic discrimination at the hands of a repressive regime have taken place. Third, violations cannot be prevented and remedied because the “people” is excluded from political participation, and is not given internal self-determination (e.g. through devolution or federalism). Finally, negotiations between the “repressive” regime and the “people” lead nowhere.”<sup>968</sup> Borgen states that attempt to claim secession in order to trump territorial integrity must at least show that: (a) the secessionists are a “people” ...; (b) the State from which they are seceding seriously violates their human rights; and (c) there are no other effective remedies under either domestic law or international law.”<sup>969</sup> Fiersten submits that valid claim for secession at least requires “(1) a people (2) subject to historical and persistent State-sponsored human rights abuse (3) with no viable alternative recourse within domestic legal channels.”<sup>970</sup> Raič has summarized requirements of remedial secession (bearing in mind the circumstances of the cases of Bangladesh and Croatia), as follows:

*(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*

<sup>965</sup> See T.Shaw, 2008, p.257: “Self-determination as a concept is capable of developing further so as to include the right to secession from existing states, but that has not as yet convincingly happened.”

<sup>966</sup> A.Cassese, *Self-Determination of Peoples*, p. 119.

<sup>967</sup> *Ibid.*, p.120.

<sup>968</sup> Ryngaert and Griffioen, *The relevance of the right to self-determination in the Kosovo matter. In partial response to Agora papers*, para 6.

<sup>969</sup> Christopher J Borgen, *Kosovo’s Declaration of Independence self-determination, secession and recognition*, 2008, <http://www.asil.org/insights080229.cfm>

<sup>970</sup> Fierstein, *Kosovo’s declaration of independence an incident analysis of legality, policy and future implications*, p. 422.

*the practice of genocide (arguably Bangladesh) and the practice of 'ethnic cleansing' (Croatia).*"<sup>971</sup>

## 7. The Abkhazian as people entitled to external self-determination

As has been examined according "remedial secession", the right to unilateral secession comes into existence only if all strict special conditions are met: 1) secessionists qualify as "people"; 2) denial of the internal self-determination (the exclusion of a group from the political process) and gross human rights violations, which must be reached for the transition of internal self-determination into the external dimension of this right.<sup>972</sup>; 3) secession is a final remedy of last resort.

The definition of 'peoples' is uncertain.<sup>973</sup> However, it is possible to give some characteristics, mentioned as inherent in a description (but not a definition) of a 'people', in other words whether the Abkhazian population can be qualified as a people. Abkhazian habitants are more than a mere association of individuals within a State because they enjoy the common features such as: a common historical tradition; cultural homogeneity; linguistic unity; territorial connection; common economic life. Moreover, it is not disputed that the Abkhazians are a people ethnically, historically, culturally and linguistically<sup>974</sup> distinct from the Georgians, so that they can be considered a people. Likewise, it is not debatable that the Abkhazian government represented the entire population in the post-war period.

In confirmation of this it can be made reference to the 1999 referendum, a majority vote, in particular 97.7 of the Abkhazians percent through approving the constitution supported full independence from Georgia.<sup>975</sup> Only it was questioned whether the Abkhazian authority was representative of the majority of the Abkhazian Republic's population prior of the 1992-1994 War. In confirmation to this, the observers are pointing out the fact that at that time the ethnic

<sup>971</sup> 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

<sup>972</sup> A. Cassese, *Self-Determination* (above note 45), p. 359. Cassese reflects on a multinational intervention in extreme cases.

<sup>973</sup> As eventual universal features of the concept of a 'people' were proposed during the meeting UNESCO: 1. a group of individual human beings who enjoy some or all of the following common features: (a) a common historical tradition; (b) racial or ethnic identity; (c) cultural homogeneity; (d) linguistic unity; (e) religious or ideological affinity; (f) territorial connection; (g) common economic life; 2. the group must be of a certain number which need not be large (e.g. the people of micro States) but which must be more than a mere association of individuals within a State; 3. the group as a whole must have the will to be identified as a people or the consciousness of being a people - allowing that groups or some members of such groups, though sharing the foregoing characteristics, may not have that will or consciousness; and possibly; 4. the group must have institutions or other means of expressing its common characteristics and will for identity. 23. It is possible that, for different purposes of international law, different groups may be a 'people'. A key to understanding the meaning of 'people' in the context of the rights of peoples may be the clarification of the function protected by particular rights. A further key may lie in distinguishing between claims to desirable objectives and rights which are capable of clear expression and acceptance as legal norms. The experts were of the opinion that there is a need for further study and reflection on this topic. Such study and reflection should recognize the diversity of viewpoints which already exist. Further study is appropriately done in the context of Unesco. It should include not only legal experts but anthropological, sociological, psychological and other studies to help identify the meaning of a people for the purposes of particular suggested peoples' rights and the content of those rights as legal norms. <http://unesdoc.unesco.org/images/0008/000851/085152eo.pdf>

<sup>974</sup> They Abkhazians speak the Abkhazian language.

<sup>975</sup> See *Part III An Assessment of The Present Legal Status of Abkhazia, Chapter I The Assessment of Effectiveness, 6. Effective government, a Sovereignty*, pp. 148-151.

Abkhazians constituted less than 20 % of the republic population.<sup>976</sup> However, it is fairly to note that ethnic Abkhazians were supported by non-ethnic Abkhazians (Abkhazian population of different ethnic groups), in their aspiration to secede from Georgia. In fact, the 98.6 % electorate voted for secession from Georgia.<sup>977</sup> It has been stressed that contrary to certain opinions of the writers, the Abkhazian government was the spokesman of the Abkhazian people. Hence, prior the war the Abkhazian authority also represented the majority of the Abkhazian population, which expressed their will to secede from Georgia.

## 8. The denial of the internal self-determination by Georgia

As analysis of the documents evidenced that the Georgian authorities failed to guarantee Abkhazian internal right to self-determination.<sup>978</sup>

On the one hand, the provisional of Art. 107 of the first Georgian Constitution, (which had elaborated in February 21, 1921 and entered in force in 1991), mentioned Abkhazia as its autonomous entity but without specifying in which limits the Abkhazian entity shall exercise its authority State-framework of Georgia:

*Статья 107. Неотделимым частям Грузинской республики – Абхазии (Сухумская область), мусульманской Грузии (Батумский край) и Закатале (Закаталская область) предоставляется автономное правление в местных делах.*<sup>979</sup>

[Art. 107 Chapter Eleven Autonomous government. Abkhazia (Sukhum district), Musulman Georgia (Batum district) and Zakatale (Zakatal district) enjoy autonomy in the administration, in the internal affairs].

However, the provision of Art. 108 provided that the limits of the Abkhazian autonomy would be specified in advance by following legislation<sup>980</sup>:

*Положение об автономном правлении, указанное в предыдущей статье, будет выработано отдельным законом.*

[The statute concerning the autonomy of the districts mentioned in the previous article will be the object of special legislation].

<sup>976</sup> For instance, see Farhad Mirzayev, *Abkhazia, Self-Determination and Secession in International Law in*: Christian Walter, Antje von Ungern-Sternberg, and Kavus Abushov, eds. , 2014, pp. 191-192; Svante E. Cornell, *Small Nations and Great Powers: A study of ethnopolitical conflict in the Caucasus*, 2001, p. 158. See also *Population censuses in Abkhazia: 1886, 1926, 1939, 1959, 1970, 1979, 1989, 2003*, Ethno-Caucasus, 2014, see at [www.ethno-kavkaz.narod.ru](http://www.ethno-kavkaz.narod.ru)

<sup>977</sup> See, Part One *General aspects*, Chapter II *Legal basis for secession and creation of the new States*, 4. *The All-Union Referendum*, pp. 38-40.

<sup>978</sup> See, Part two *Analysis of the Abkhazian case*, Chapter IV *The secessionist movements after perestroika*, 4. *The response of the President of the USSR to legislative acts of Georgia and Abkhazia*, pp.128-129, Chapter IV *The secessionist movements after perestroika*, 3. *The reaction of Abkhazian Autonomous Soviet Socialist Republic to the 1990 legislative acts of the Georgian SSR*, pp. 124-126.

<sup>979</sup> The Constitution of Georgia, elaborated in 21 February 1921, T. Diasamidze, *Статус Автономных Регионов Абхазии и Юго-Осетии в Состае Грузии (1917-1988)*, Сборник Политико-Правовых Актов, [Status of the Autonomous Regions Abkhazia and the South Ossetia within Georgia of 1917/1918 in the Collection of the politic-legislative acts], Центр по Исследованию Регионализма, Tbilisi, 2004, p. 73.

<sup>980</sup> However, this provision would not implement by the Georgian legislative body.

However, the Decree (9) *on Guarantees for Protection of State Sovereignty of Georgia*<sup>981</sup> recalled the fulfillment of *the 1920 Moscow treaty* (1989), under which terms (Article IV (1)) Abkhazia was considered as a province of Georgia without autonomous *status*.<sup>982</sup> Thus, by invoking the implementation of the Moscow Treaty, Georgian legislative body just excluded any autonomous of Abkhazia.

Hence, there was some ambiguity: on the one hand, the Georgian Constitution conceded Abkhazia the right to internal self-determination, on the other hand the Decree (9) *on Guarantees for Protection of State Sovereignty of Georgia* negated this right. Moreover, the statements of the Georgian authorities revealed the unwillingness of the Georgian authority to ensure effective remedies regarding internal self-determination to the Abkhazian population.<sup>983</sup>

Further confirmation to denial of internal self-determination was the fact that the Georgian legislative body subsequently did not only adopt any legislative act, which would have defined the limits of the Abkhazian autonomy and permit to the latter effectively exercise the internal self-determination, but also refused at all any autonomy to Abkhazia. In fact, under terms of the 1995 Constitution Abkhazian entity did not enjoy any autonomous *status*.

The negotiations between Georgia and Abkhazia in 1992-1996 revealed Georgian approach towards to this issue. The Georgian government refused *de facto* signing different drafts<sup>984</sup>, which would grant the internal self-determination to the Abkhazian republic.<sup>985</sup>

Furthermore it is to be emphasised the lack of representativeness of the Abkhazians among the central Georgian government is evidenced by some the Georgian laws of election, that excluded the Abkhazians from the politic process of the country. For instance, it should be given the law “On election of the Georgian SSR’s deputies of peoples, which banned regional parties from the upcoming Georgian parliamentary elections.”<sup>986</sup> As a consequence of enactment by the Georgian authorities of a new electoral law, Abkhazia was prevented from fielding candidates for the posts of deputies. Hence, with outlawing regionally-based parties from Georgian parliamentary

<sup>981</sup> М. Волхонский, В. Захаров, Н. Силаев, *Конфликты в Абхазии и Южной Осетии: документы 1989 – 2006 гг.*, op.cit., pp. 20-22

<sup>982</sup> ... to recognise unconditionally as entering into the state of Georgia, ..., the following provinces and regions of the former Russian Empire: Tiflis, Kutais and Batum with all districts and circuits forming the said provinces and regions, and, in addition, the circuits of Zakatalsk and Sukhum [Abkhazia]. See, Part two *Analysis of the Abkhazian case, Chapter II The dissolution of the Russian Empire and the origin of the Georgian-Abkhazian conflict, The Treaty at the light of the modern law and jus cogens*, pp. 99-100.

<sup>983</sup> See, Part Two *Analysis of the Abkhazian case, Chapter IV The secessionist movements after perestroika, 2 The War of laws and Georgian unilateral abolition of Soviet law, 1. National front and its role, a. The Popular Front of Georgia*, pp. 114-117; See regarding unsuccessful negotiations in the Part three *An assessment of the present legal status of Abkhazia, Chapter II The right to secession: 13 Post-war negotiations: failure of federalisation projects and other initiatives (1995-1997), 14 Deteriorating negotiations, The Boden Plan and stalling of negotiations, 16 The ending of the official negotiations process, 17. Reasons behind the failure.*

See also А.Г. Аршев, Е.Г. Семерикова, *Абхазия и Южная Осетия после признания. Исторический и современный контекст*, op.cit., p. 101-103.

<sup>984</sup> The draft, elaborated in 1995 under the participation of the UN Secretary-General’s Special Envoy E. Brunner; the Moscow Protocol draft of 13 June 1997, see 6. The Remedial Secession, 6.3. (Follows): Unsuccessful negotiations Post-War Negotiations: Failure of Federalisation Projects and Other Initiatives to Reconcile the Positions of The Conflicting Sides (1995-1997) pp. 40-43

<sup>985</sup> Ibid..

<sup>986</sup> Article 8 of the Law of the Georgian SSR on Elections to the Supreme Soviet of Georgia (18 August 1990), op.cit., at: <http://www.parliament.ge/archive/3784g/3784g-01.pdf> [accessed: 12.04.2015]

election, the Abkhazian Party was deprived to the possibility of participating in the running of Georgia.<sup>987</sup>

Moreover, the Georgian government was guided by Gamzakhurdia who carried out radical nationalist policy aimed at the *Georgianization* of the Abkhazians and other non Georgian habitants.”<sup>988</sup> The Georgian authority also advanced one of the slogans “Georgia for the Georgians” and propagandized the expulsion of so-called ‘*guests*’ non-Georgians.<sup>989</sup> Among the measures of *Georgianization* infringing the rights and lawful interests of Abkhazians, was the *State Program for the Georgian language* a law adopted in 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.<sup>990</sup> Georgian authority’s decision to open a branch of the Tbilisi State University on the grounds of the Georgian sector of the Abkhaz State University in the Abkhazian capital Sukhumi, and such a move was deemed to put at risk the viability of Abkhazia's university.<sup>991</sup>

Such a national chauvinist policy adopted by the Georgian bureaucracy and the Georgian-South Ossetian conflict were the main reasons why after the USSR’s collapse in 1991 Georgia did not obtain *de jure* recognition by the existing States conflict, by contrast other the former Soviet first-level units at that time were recognized by the International community.<sup>992</sup>

The second Georgian President, Edward Shevarnadze started hostilities against Abkhazia in order to suppress its *de facto* government, without making any attempt to negotiate a peaceful solution. These attacks of Georgian regular and irregular troops resulted in serious human rights violations and triggered Georgian-Abkhazian war.<sup>993</sup> Abkhazia was open to dialogue with new Georgian government, but the latter opted to resort to force.<sup>994</sup> The military intervention was clearly a violation of Abkhazia’s right to self-determination; the character of the war fought by Abkhazia has been described as defensive, Sukhumi was defended against an aggressor.

<sup>987</sup> See, Part Two *Analysis of the Abkhazian case*, Chapter IV *The secessionist movements after perestroika*, 2 *The War of laws and Georgian unilateral abolition of Soviet law*, 1. *National front and its role*, a. *The Popular Front of Georgia*, pp. 114-117 pp. 98-99.

<sup>988</sup> *Ibid.*, p. 100

<sup>989</sup> Т.М. Шамба, А.Ю. Непрошин, *Абхазия. Правовые основы государственности и суверенитета*, Глава 2. Государственность Абхазии, [or.cit.; arpsnyteka.org/225-abkhazia\\_pravovye\\_osnovy\\_gosudarstvennosti\\_i\\_suvereniteta.html](http://arpsnyteka.org/225-abkhazia_pravovye_osnovy_gosudarstvennosti_i_suvereniteta.html)

<sup>990</sup> Хроника событий грузино-осетинского конфликта с 1988 по 1994 годы, at [https://ria.ru/osetia\\_spravki/20080811/150283008.html](https://ria.ru/osetia_spravki/20080811/150283008.html); Государственная программа развития грузинского языка. *Законы и постановления*, Изд-во ЦК КП Грузии, Тбилиси, 1990, at [http://нэб.пф/catalog/000202\\_000006\\_1769177|B0125952-0088-454F-A5CA-B6AB5E350A92/viewer/](http://нэб.пф/catalog/000202_000006_1769177|B0125952-0088-454F-A5CA-B6AB5E350A92/viewer/)

<sup>991</sup> *Распоряжение Совета министров Грузинской ССР о создании в Сухуми филиала Тбилисского государственного университета*. 14 мая 1989 г.; Постановление Совета министров Грузинской ССР об объединении Абхазского государственного университета им. А.М. Горького и Сухумского филиала Тбилисского государственного университета им. И. Джавахишвили. 2 ноября 1989 г.. Региональные конфликты в Грузии – Юго-Осетинская автономная область, Абхазская АССР (1989 – 2005). Сборник политико-правовых актов. Тбилиси, 2005. С. 5. С. 12 – 13; Т.М. Шамба, А.Ю. Непрошин, *Абхазия. Правовые основы государственности и суверенитета*, Глава 2. Государственность Абхазии, [or.cit.; at arpsnyteka.org/225-abkhazia\\_pravovye\\_osnovy\\_gosudarstvennosti\\_i\\_suvereniteta.html](http://arpsnyteka.org/225-abkhazia_pravovye_osnovy_gosudarstvennosti_i_suvereniteta.html); Хроника событий грузино-осетинского конфликта с 1988 по 1994 годы, available at [https://ria.ru/osetia\\_spravki/20080811/150283008.html](https://ria.ru/osetia_spravki/20080811/150283008.html)

<sup>992</sup> *Ibidem.*

<sup>993</sup> For human rights violations in Abkhazia, see the Report of the Secretary-General’s Fact Finding Mission to Investigate Human Rights Violations in Abkhazia, Republic of Georgia, 17 November 1993, cited in Report of the Independent International Fact-Finding Mission on the Conflict in Georgia, Vol II, 146.

<sup>994</sup> See *Part three, An assessment of the legal status of Abkhazia*, Chapter II *The right to secession* 5. *The right of peoples under foreign occupation to external self-determination*, a. *Historic Background of the Conflict of Abkhazian struggle for independence*, p.173-180



Basing thereon it can be affirmed that Abkhazia sought independence from a non-democratic government, which failed to fulfil its responsibility to guarantee fundamental political, economic and human rights to Abkhazians.

### 9. Gross human rights violations and ethnic cleansing

There are no definite criteria of violations of basic human rights that entitle to external self-determination. Each situation should be treated by the international community as an individual case, and respective decisions should be made in accordance with this attitude<sup>995</sup>

The question of the presence of gross human right violations against the Abkhazians is associated mainly with military attacks of the Georgian troops in 1992-1993. In fact, Abkhazian allegations of ethnic cleansings and genocide, especially, refer to this period. For this reason it is important to examine closely the terms “ethnic cleansing” and “genocide”.

*Ethnic cleansing* and *genocide* are two clearly distinct concepts and it is preferable to review them separately. The notion of ethnic cleansing, in contrast to that of genocide has not been recognized as an independent crime under international law and has never been codified in international law. Despite this the expression “ethnic cleansing” has been used in resolutions of the Security Council and the General Assembly, and has been acknowledged in judgments and indictments of the ICTY, and now constitutes the crime against humanity.

There is no precise definition of this concept or the exact acts to be qualified as ethnic cleansing.<sup>996</sup> Given the absence of any legal definition, a historical approach is useful to outline its key elements. The term surfaced in the context of the 1990’s conflict in the former Yugoslavia and is considered to come from a literal translation of the Serbo-Croatian expression “etničko čišćenje”. However, the precise roots of the term or who started using it and why are still uncertain.

Almost from the start, the use of the term ‘ethnic cleansing’ caused controversy on the grounds that ethnic cleansing could function as a euphemism to cover up violence or to render it more harmless.

But despite its provenance and potential for misinterpretation since the 1990s the term ethnic cleansing soon gained widespread recognition as one of the most widely known forms of violence directed against groups.

In particular, it was employed in the 1990s to describe the brutal treatment of various civilian groups in the conflicts that erupted upon the disintegration of the Federal Republic of

<sup>995</sup> D. Murswiek, *The Issue of a Right of Secession-Reconsidered*, in: C. Tomuschat (ed.), *Modern Law of Self-Determination*, Dordrecht, 1993, p. 27

<sup>996</sup> ICTY, Kunarac case, Judgment (§ 1332).

Yugoslavia. In that context the ethnic cleansing was defined by Special Rapporteur Mazowiecki in his report of 17 November 1992 in the following terms: “The term ethnic cleansing refers to the elimination by the ethnic group exerting control over a given territory of members of other ethnic groups.”<sup>997</sup> Later, in his *Sixth Report*<sup>998</sup> the Special Rapporteur argued that ethnic cleansing may be equated with the systematic purge of the civilian population based on ethnic criteria, with the view to forcing it to abandon the territories where it lives.<sup>999</sup> A further definition was provided by the Commission of Experts, in report to the Security Council, which defined “ethnic cleansing” as “rendering an area ethnically homogenous by using force or intimidation to remove persons of given groups from the area.”<sup>1000</sup> Moreover, in its final report of May 1994, the UN Commission described ethnic cleansing as ‘a purposeful policy designed by one ethnic or religious group to remove by violent and terror-inspiring means the civilian population of another ethnic or religious group from certain geographic areas.’

There are even broader definitions of ethnic cleansing, which determine it as a well-defined policy of a particular group of persons to systematically eliminate another group from a given territory on the basis of religious, ethnic or national origin.<sup>1001</sup> This definition outlines the main characteristics of ethnic cleansing: its systematic character<sup>1002</sup>; the policy of ethnic cleansing supported, participated and instigated by the authorities<sup>1003</sup>; perpetration of such action against particular groups of individuals, according to their ethnic, national, religious, or other characteristics.<sup>1004</sup>

Such policy is to be achieved by all possible means, from discrimination to extermination, and entails violations of human rights and international humanitarian law.<sup>1005</sup> In particular, as examples of the means and methods for carrying out ethnic cleansing in the context of the Yugoslavian disintegration: murder, torture, arbitrary arrest and detention, extra-judicial executions, rape and sexual assault, confinement of the civilian population, deliberate military

<sup>997</sup> Under the Geneva Conventions, States are obliged “to enact any legislation necessary to provide effective penal sanctions for persons committing, or ordering to be committed” such acts and are obligated to “search for persons alleged to have committed, or to have ordered to be committed, such grave breaches, and [to] bring such persons, regardless of their nationality, before its own courts” if these persons are not extradited to another State Party.

<sup>998</sup> Tadeusz Mazowiecki, Special Rapporteur of the Commission on Human Rights, pursuant to paragraph 32 of the Commission resolution 1993/7 of 23 February 1993, UN Doc. E/CN.4/1994/10 (21 February 1994).

<sup>999</sup> *Report of a UNPO Coordinated Human rights Mission to Abkhazia and Georgia* from Human Rights Advocates Pax Christi International International Federation for the Protection of the Rights of Ethnic, Religious, Linguistic and other Minorities Covcas Centre for Law and Conflict Resolution And The Unrepresented Nations and Peoples Organization, at <http://unpo.org/article/7482>

<sup>1000</sup> UN Doc. A/47/666 and S/24809 of 17 November 1992.

<sup>1001</sup> Commission of Experts in its *First Interim Report* of 10 February 1993, UN Doc. S/25274; See also Roux, *A propos de la purification ethnique en Bosnie-Herzegovine*, *Hirodote* (1992) 49. See also by Roux, *Lo scenario bosniaco: Pulizia etnica e spartizione territoriale*, *LIMES Rvvlsta italiana & geopolitica* (1/1993) 29-46.

<sup>1002</sup> Andrew Bell-Fialkoff, *Ethnic Cleansing* (New York: St. Martin's Griffin, 1996), 3; Naimark, *Fires of Hatred*, 3-5; Cathie Carmichael, *Ethnic Cleansing in the Balkans: Nationalism and the Destruction of Tradition* (London: Routledge, 2002), 1-2; Mann, *Dark Side of Democracy*; and Benjamin Lieberman, *Terrible Fate: Ethnic Cleansing in the Making of Modern Europe* (Chicago: Ivan R. Dee, 2006), XIII.

<sup>1003</sup> *Ibid.*

<sup>1004</sup> E Doni, C Valentini, *L'arma d'itolo stupro, Voci dei donne della Bosnia* (1993) 15. *In estrema sintesi, la pulizia etnica e il rifiuto radicate della convivenza fra gruppi diversi per origine e religione, e l'ultima e piu tragica conseguenza del nazionalismo e del razzismo in crescita un po' dovunque in Europa.*

<sup>1005</sup> *Ibid.*; Naimark, *Fires of Hatred*, 3.

attacks or threats of attacks on civilians and civilian areas, and wanton destruction of property were listed by the UN Commission.<sup>1006</sup> Further examples of the ethnic cleansing' forms and means were given by the UN Commission in its final report in May 1994: mass murder, mistreatment of civilian prisoners and prisoners of war, use of civilians as human shields, destruction of cultural property, robbery of personal property, and attacks on hospitals, medical personnel, and locations with the Red Cross/Red Crescent emblem.<sup>1007</sup> Most ethnic cleansing methods listed above as examples are grave breaches of the 1949 Geneva Conventions and 1977 Additional Protocols, as well norms of the customary humanitarian law. In fact, when the UN Security Council used the term ethnic cleansing for the first time in Resolution 771 (1992) of 13 August 1992, it expressly stated that it violated international humanitarian law.<sup>1008</sup> Moreover, the Commission of Experts identified practices employed in ethnic cleansing as 'crimes against humanity' that 'can be assimilated to specific war crimes' and added 'that such acts could also fall within the meaning of the Genocide Convention.'<sup>1009</sup> Hence, ethnic cleansing is a blanket term covering a host of previously defined crimes, which can be defined as a violation of a set of human rights and humanitarian law.

*Ethnic cleansing* shares with genocide the goal of achieving ethnic purity, but the two can differ in their ultimate aims: ethnic cleansing aimed to forced removal of an undesired group or groups, where genocide pursues the group's 'destruction'. In fact, in contrast to genocide the ethnic cleansing has not any clear intention of the target group's physical destruction as a group, but it is focused closely on forced removal of the ethnic or related groups from particular areas. In other words, ethnic cleansing is similar to forced deportation or 'population transfer' whereas genocide is the intentional murder of part or all of a particular ethnic, religious, or national group. Moreover, the term of *ethnic cleansing* can refer to the forced removal not only of ethnic groups but also of similar related groups. Ethnicity typically denotes a group with an identity rooted in common culture or history, but the term may also refer broadly to a group seen as possessing a different and distinct identity from others. Ethnicity also overlaps with other forms of identity, most notably religion; however, the precise combination of factors that defines the identity of groups targeted for removal is less important than the relationship between perpetrators and victims. Typically, perpetrators identify those they force out as an inherently threatening group.<sup>1010</sup>

<sup>1006</sup> F. Mazowiecki Report, at 7, point 23. 'the victims (of rape) are of different nationality from the perpetrator, that is, women have been singled out...

<sup>1007</sup> Security Council Resolution 674, 27 May 1994, Doc. S/1994/674, [http://www.icty.org/x/file/About/OTP/un\\_commission\\_of\\_experts\\_report1994\\_en.pdf](http://www.icty.org/x/file/About/OTP/un_commission_of_experts_report1994_en.pdf); *First Mazowiecki Report I*, at 6, point 31. P. Morillon, *Croire et oser* (1993) 115; *Fourth Mazowiecki Report*, at 55, point 258; *A Wound to the Soul*,

<sup>1008</sup> Security Council Resolution 771, 13 August 1992, UN Doc S/Res/771

<sup>1009</sup> *Rape and Sexual Abuse by Armed Forces*, Amnesty International, op.cit., p.5.

<sup>1010</sup> D. Petrovic, *Ethnic Cleansing: An Attempt at Methodology*, European Journal of International Law 5 (1994), 342–59

After giving definition to the ethnic cleansing it is important to examine whether human rights abuses of the Abkhazians committed by the Georgian government (reported by the UNPO and the Abkhazian side)<sup>1011</sup>, corresponded to the characteristics of the ethnic cleansing.

Abkhazian authorities alleged discriminatory and oppressive policy of Georgian authorities before and during the 14 months of the war, in their opinion, in areas that had been under Georgian control are to be regarded as ethnic cleansing. According to them the intention of rendering an area homogeneous was expressed by policy of Georgian government guided by the principle “Abkhazia - without Abkhazians, which openly instigated the Georgians to remove the Abkhazians from Abkhazia.”<sup>1012</sup> For instance, the Abkhazian Minister of Social Welfare Mistakopoulos told the UNPO mission that Georgian authorities and political groupings had ideologically prepared the Georgians, including the Georgians of Abkhazia for the war before 1992. The Georgian government had distributed arms to the Georgian population in Abkhazia before Abkhazia undertook their counteroffensive against Georgian forces. This was also confirmed in an interview by the head of the Georgian parliament.<sup>1013</sup> It was also confirmed by the local Georgians interviewed by the UNPO mission in Abkhazia.<sup>1014</sup> They said that they were encouraged and pressured to take up arms against their fellow citizens of other nationalities. In this way the local Georgians could kill, loot, rape and ill-treat the Abkhazians with impunity. There were some Georgians, who refused to take part in these criminal acts. Some of them were forced to flee to safety in other towns; some of them were mistreated or killed by the National Georgian guards.<sup>1015</sup> The Georgian militaries conducted their main attack across East Abkhazia. Under instructions from the Georgian government, in this area they surrounded and isolated all exclusively ethnic Abkhazian settlements from the external world, including Tquarchel. As a result of these attacks in the occupied part of Abkhazia, including Ochamchira, Sukhum and Gagra, practically none of the Abkhazian population remained. According to the Office of the Public Prosecutor of Abkhazia, out of seven thousand Abkhazians living in Ochamchira,

<sup>1011</sup> *Report of a UNPO Coordinated Human rights Mission to Abkhazia and Georgia* in Human Rights Advocates Pax Christi International International Federation for the Protection of the Rights of Ethnic, Religious, Linguistic and other Minorities Covcas Centre for Law and Conflict Resolution And The Unrepresented Nations and Peoples Organization, at <http://unpo.org/article/7482>

<sup>1011</sup> Ibid., Ю.В. Воронов, П.В. Флоренский, Т.А. Шутова, *Белая книга Абхазии. Документы, материалы, свидетельства. 1992-1993*, “Белая книга Абхазии: Dokumenty, materialy, svidetelstva” [The Abkhazia’s White book: Documents. Materials and testimonies], op.cit., p. 135.

<sup>1011</sup> *Report of a UNPO Coordinated Human rights Mission to Abkhazia and Georgia*, p. 137.

<sup>1012</sup> А.Г. Арешев, Е.Г. Семерикова, *Абхазия и Южная Осетия после признания. Исторический и современный контекст*, op.cit., p. 120; Ю.В. Воронов, П.В. Флоренский, Т.А. Шутова, *Белая книга Абхазии. Документы, материалы, свидетельства. 1992-1993*, *Belaya kniga Abkhazii: Dokumenty, materialy, svidetelstva* [The Abkhazia’s White book: Documents. Materials and testimonies], op.cit., p. 134; Шамба Т.М., Непрошин А.Ю. *Абхазия: Правовые основы государственности и суверенитета*. М., 2003 [Abkhazia: Legal Basis Of Statehood And Sovereignty], op.cit., p. 140.

<sup>1013</sup> Ibid., p. 141.

<sup>1014</sup> *Report of a UNPO Coordinated Human rights Mission to Abkhazia and Georgia* in Human Rights Advocates Pax Christi International International Federation for the Protection of the Rights of Ethnic, Religious, Linguistic and other Minorities Covcas Centre for Law and Conflict Resolution And The Unrepresented Nations and Peoples Organization, at <http://unpo.org/article/7482>

<sup>1015</sup> Ibid., Ю.В. Воронов, П.В. Флоренский, Т.А. Шутова, *Белая книга Абхазии. Документы, материалы, свидетельства. 1992-1993*, “Белая книга Абхазии. Документы, материалы, свидетельства. 1992-1993”, *Belaya kniga Abkhazii: Dokumenty, materialy, svidetelstva* [The Abkhazia’s White book: Documents. Materials and testimonies], op.cit., p. 135.

hundreds were killed, and the others were forced to seek safety in other country.<sup>1016</sup> The UNPO Mission, based on witnesses obtained sufficient evidence to affirm that gross and systematic violations of human rights had occurred at the hands of Georgian troops in Abkhazia throughout the period since August 14, 1992.<sup>1017</sup> In particular, it argued that Georgian attacks were directed against Abkhazians not taking part in combating, namely against Abkhazian political, cultural, intellectual and community leaders, as well aimed at the removal or destruction of the principal materials and buildings of important historical and cultural importance to Abkhazians.<sup>1018</sup> Therefore, the majority of Georgian actions appear to correspond to ethnic cleansing policies, as they were aimed at removing of Abkhazian population on the basis of ethnicity.

### 10. Elements for assessing crime of genocide

The allegations related to genocide produced by Abkhazia against Georgia should be analysed carefully against the backdrop of the definition found in the 1948 Genocide Convention. At the beginning of the conflict, Georgia was not part of the Convention, to whom acceded on 11 October 1993. The principal Abkhazian allegations related to genocide refer to the time when Georgia had not yet acceded to the Genocide Convention. As for Abkhazia, being an unrecognised entity, it was not party to the Genocide Convention either. However, the prohibition of genocide is a norm of customary international law.<sup>1019</sup> International custom regarding prohibition of genocide is created through evidence of a general practice accepted as law.<sup>1020</sup> Indeed, the adoption of Genocide's prohibition into customary international law was manifested by both a general and consistent practice among a significant number of states and their following the practice out of a sense of legal obligation (*opinio juris*).<sup>1021</sup> Moreover, the prohibition against genocide has developed beyond an ordinary customary international law reaching *jus cogens* status. In fact, the prohibition against genocide as a *jus cogens* norm of international law has been recognised multiple times in ICJ jurisprudence,<sup>1022</sup> in the jurisprudence of national courts<sup>1023</sup> and confirmed

<sup>1016</sup> Report of a UNPO Coordinated Human rights Mission to Abkhazia and Georgia, p. 137.

<sup>1017</sup> Report of a UNPO Coordinated Human rights Mission to Abkhazia and Georgia Report of a UNPO Mission to Abkhazia, Georgia and the Northern Caucasus November, 1992

<sup>1018</sup> Ibidem.

<sup>1019</sup> W. Schabas, *National Courts Finally Begin to Prosecute Genocide, the 'Crime of Crimes'*, Journal of International Criminal Justice, 2003.1, p.61.

<sup>1020</sup> Article 38, ICJ Statute 1945. Customary international law is formed by evidence of state practice coupled with *opinio juris*, indicating that states believe themselves to be legally bound to such practice.

<sup>1021</sup> OHCHR website, at: <http://www.ohchr.org/english/countries/ratification/1.htm>. Last accessed 13 Nov. 2016; GAResolution 96(I) 1946; GA Resolution 180(III) 1992

<sup>1022</sup> *Armed Activities in the Territory of the Congo (New Application 2002) (DRC v. Rwanda)*, 3 Feb. 2006 (ICJ Judgment) at para. 64; confirmed in *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Yugoslavia)*, 26 Feb. 2007 (ICJ Judgment) at para. 161, and Dissenting Opinion of Judge Kreca 11 July 1996 (ICJ Judgment) at para.102: "The norm prohibiting genocide, as a norm of ius cogens, establishes obligations of a State toward the international community as a whole, hence by its very nature it is the concern of all States ...the norm prohibiting genocide as a universal norm binds States in all parts of the world"; and *Requests for Provisional Measures*, 13 Sept. 1993 (ICJ Rep.325) Separate Opinion of Judge Lauterpacht at para. 100: "[T]he prohibition of genocide has long been regarded as one of the few undoubted examples of jus cogens."

by eminent scholars of international law.<sup>1024</sup> In fact, the crime of genocide has been described as being ‘at the apex of the pyramid’ in any hierarchy of crimes.<sup>1025</sup> The expression of the International Criminal Tribunal for Rwanda “crime of crimes,” illustrates the unique nature of genocide.<sup>1026</sup> To sum up, genocide is ‘a norm accepted and recognised by the international community of States as a whole as a norm from which no derogation is permitted and which can be modified only by a subsequent norm of general international law having the same character.’ Protection of people from acts of genocide has been recognised as an *erga omnes*<sup>1027</sup> state obligation, meaning that the duty to enforce this obligation is owed by every state to the international community as a whole.<sup>1028</sup> Hence, there is no doubt that the rules prohibiting Genocide are binding for the parties to the conflict.

As a legal definition of Genocide, the 1948 Genocide Convention in Article 2<sup>1029</sup> defines it as: any of the following acts committed with intent to destroy, in whole or in part, a national ethnical, racial or religious group, as such: (a) *killing members of the group*; (b) *causing serious bodily or mental harm to members of the group*; (c) *deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part*; (d) *imposing measures intended to prevent births within the group*; (e) *forcibly transferring children of the group to another group*. Thus, act to be qualified as genocide it has to have following elements: perpetrated gross violations of human rights consisting of killing, or causing serious bodily or mental harm, or deliberately inflicting conditions of life likely to bring about physical destruction a considerable number of individuals” or “a substantial part” of a group and intent to commit it. It should be noted that the intent to destroy “members of the group” is the key to qualifying a series of acts as genocide and distinguishing them from other crimes. Therefore, acts in the course of armed conflicts committed without the specific intent required by Article II do not constitute genocide as defined by this Convention. In other words, genocide might be deduced from two elements: first, the *actus reus*, that is the gross violations of human rights perpetrated by Government forces and the militias under their control; and, second, the mental element, the

<sup>1023</sup> *Nulyarimma*, fn.21 above, at para.36: ‘...under customary international law there is an international crime of genocide, which has acquired the status of jus cogens or a peremptory norm.’ See also *Nikolai Jorgi (No.263)*, *Bundesverfassungsgericht* (Federal Constitutional Court), Fourth Chamber, Second Senate, 12 Dec. 2000, 2 BvR 1290/99.

<sup>1024</sup> M. Bassiouni, *International Crimes: Jus Cogens and Obligatio Erga Omnes*, 1996 *Law and Contemporary Problems* 58(4), p.68.

<sup>1025</sup> Schabas (2000), fn.20 above at 9.

<sup>1026</sup> The prosecutor v. Kambanda, Trial Judgement and Sentence, 4 September 1998, para. 16, <http://unictr.unmict.org/sites/unictr.org/files/case-documents/ict97-23/trial-judgements/en/980904.pdf>

<sup>1027</sup> *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Yugoslavia)*, 11 July 1996 (ICJ Reports, Judgment) at para. 31: ‘[T]he rights and obligations enshrined by the Convention are rights and obligations erga omnes.’; *Nulyarimma v. Thompson*, [1999] FCA 1192 at para. 81; and see, *Barcelona Traction, Light and Power Company Ltd.*, Judgment, 1970 (ICJ.Rep.3) at paras. 33-34.

<sup>1028</sup> Parliamentary Assembly of the Council of Europe (PACE), Committee on Legal Affairs and Human Rights, “The consequences of the war between Georgia and Russia,” Opinion by rapporteur Christos Pourgourides, Doc. 11732 rev, 1 October 2008, para. 14, at: <http://assembly.coe.int/Main.asp?link=/Documents/WorkingDocs/Doc08/EDOC11732.htm>. See also PACE, Political Affairs Committee, “The consequences of the war between Georgia and Russia,” Opinion by the rapporteur Mr Lindblad, Doc. 11731, 1 October 2008, para. 17, available at: <http://assembly.coe.int/Main.asp?link=/Documents/WorkingDocs/Doc08/EDOC11731.htm>

<sup>1029</sup> *Convention on the Prevention and Punishment of the Crime of Genocide*, United Nations, Treaty Series, vol. 78, p. 277. 1948.

specific intent to destroy a protected group. However, should be noted that the mental state required for the intent to destroy does not necessarily correspond to the objective facts. Genocide does not imply that a protected group is actually destroyed.

In the light of this brief overview of the legal definition of genocide, the inevitable question is whether the violations of international humanitarian law which were committed by the Georgian forces against the Abkhazians can be considered as systematic actions against the corresponding populations with specific intent to destroy them or were isolated incidents without implying a specific intent. In other words, it is necessary to analyse whether the Georgian authorities committed the acts listed in Article 2 with intent to destroy the corresponding ethnic group as such, in whole or in part.

The Abkhazian government *de facto* alleges that several of the acts listed as components of Genocide have been initiated by the Georgian government, including killing members of the group and intentionally causing mental harm through rape and torture. Abkhazian side registered more than half of the losses among the ethnic Abkhazians during the war of 1992–1993. According to the 1989 census the ethnic Abkhazians were counted 93.267<sup>1030</sup> and in 1993 this demographic figure fell to about 45.000 of Abkhazia's population.<sup>1031</sup>

The UN and HRW reported gross human right violations on the part of the both parties to the conflict.<sup>1032</sup> By contrast, the UNPO found evidence of the gross violations and humanitarian law by the part of Georgian troops and authorities on a scale, especially in 1992.<sup>1033</sup> Therefore, it seems that heavy human right violations committed by Georgia against Abkhazia were ascertained by the independent international organisations such as UNPO, UN and HRW.

However, the serious human right violations against Abkhazian groups in itself is not sufficient to prove the intent to destroy it in whole or in part; from this genocide may not be evinced. Indeed, it is not sufficient to establish these violations of human rights it is necessary to ascertain the crucial element of genocidal intent.<sup>1034</sup> According to the Abkhazian authority the specific intent to destroy the Abkhazian people and culture in Abkhazia is apparent through the

<sup>1030</sup> [http://www.demoscope.ru/weekly/ssp/sng\\_nac\\_89.php?reg=6](http://www.demoscope.ru/weekly/ssp/sng_nac_89.php?reg=6); <http://www.ethno-kavkaz.narod.ru/rnabkhazia.html>;

<sup>1031</sup> <https://newsland.com/user/1109560953/content/gruzinskii-genotsid-abkhazskogo-naroda-materialy-rassledovaniia/1350464>; А.Г. Арешев, Е.Г. Семерикова, *Абхазия и Южная Осетия после признания. Исторический и современный контекст*, op.cit., p. 120; Ю.В. Воронов, П.В. Флоренский, Т.А. Шутова, *Белая книга Абхазии. Документы, материалы, свидетельства. 1992-1993*, “Belaya kniga Abkhazii: Dokumenty, materialy, svidetelstva” [The Abkhazia’s White book: Documents, Materials and testimonies], op.cit. p. 134; Шамба Т.М., Непрошин А.Ю. *Абхазия: Правовые основы государственности и суверенитета*. М., 2003 [Abkhazia: legal basis of statehood and sovereignty], op.cit., p. 140;

<sup>1032</sup> ASS, August 16, 1992, cited in FBIS-SOV-92-159, August 17, 1992; Report of the Commission of Experts Established Pursuant to United Nations Security Council Resolution 780 (1992), 27 May 1994 (S/1994/674), §129, p. 33; Human Rights Watch interview, Gudauta, August 1993.

<sup>1033</sup> *Report of a UNPO Coordinated Human rights Mission to Abkhazia and Georgia*; UNPO, UAC/1992/FFM, *Report of a UNPO Mission to Abkhazia, Georgia and the Northern Caucasus*, p. 344; Abkhazia Today, Report 176, 15 September 2006, at <https://www.crisisgroup.org/abkhazia-today>.

<sup>1034</sup> In practice, however, clearly establishing the proof of such an intent, by means of facts, may be a very difficult task. See the International Commission of Inquiry on Darfur, relying on established jurisprudence from international *ad hoc* criminal tribunals, made the following assessment: “Whenever direct evidence of genocidal intent is lacking, as is mostly the case, this intent can be inferred from many acts and manifestations or factual circumstances. In *Jelisi the Appeals Chamber* noted that ‘as to proof of specific intent, it may, in the absence of direct explicit evidence, be inferred from a number of facts and circumstances, such as the general context, the perpetration of other culpable acts systematically directed against the same group...’

Georgian policy of “Abkhazia - without Abkhazians,<sup>1035</sup>” which was directed to building a homogeneous State and eradicating the Abkhazians as nation and people. In the past also Abkhazian authorities frequently claimed that the discriminatory and oppressive Georgian policies towards the Abkhaz population should be regarded as genocide. In particular, it was been seen, as such by the Abkhazian side in E.Shevardnadze’s anti-Abkhazian policies and “ Georgian military operations of 1992” against the Abkhazians;<sup>1036</sup> merely as a continuation of policies of Gamsakhurdia and Menshevik puppet authority, which apparently advocated the physical elimination of the Abkhazian intelligentsia and the Abkhazians peoples. In support of anti-Abkhazian propaganda, personally assured by E. Shevardnadze, they reported the speech of the commander of Georgian troops in Sukhumi, General Georgiy Karkarashvili, who on August 24 1992 openly warned Abkhazians in a televised address that the Abkhazian nation would cease to exist: “no prisoners of war will be taken,” that would be the extermination of the entire Abkhazian nation, all 97,000 Abkhazians (the official figure for the Abkhazian population in Abkhazia), and that “the Abkhaz Nation will be left without descendants.”<sup>1037</sup>

The UNPO delegation saw a video recording of this ominous speech. A similar threat came from the head of Georgia's wartime administration, Giorgi Khaindrava, on the pages of *Le Monde Diplomatique* in April 1993. Goga (Giorgi) Khaindrava, told the correspondent from *Le Monde Diplomatique* that "there are only 80,000 Abkhazians, which means that we can easily and completely destroy the genetic stock of their nation by killing 15,000 of their youth. And we are perfectly capable of doing this."<sup>1038</sup> Abkhazians stated also that as a part of open instigations against the Abkhazians, the Georgian authorities even armed the local Georgian population, which was several times greater than the number of Abkhazians.<sup>1039</sup> All these examples are satisfactory evidence that points to authorization or encouragement by the Georgian authorities for attacks on the Abkhazians.

The Abkhazians were convinced that during the war Georgian forces purposely and methodically destroyed the ethnic Abkhazians and principal materials and buildings of important historical and cultural importance to Abkhazians in order to destroy their culture and national identity. The office of the Public Prosecutor of Abkhazia documented that under the direction

<sup>1035</sup> [Apsnyteka.org/225-abkhazia\\_pravovye\\_osnovy\\_gosudarstvennosti\\_i\\_suvereniteta.html](http://Apsnyteka.org/225-abkhazia_pravovye_osnovy_gosudarstvennosti_i_suvereniteta.html); see VI *The impact of perestroika and secessionist movements*

<sup>1036</sup> А.Г. Аршев, Е.Г. Семерикова, *Абхазия и Южная Осетия после признания. Исторический и современный контекст*, op.cit., p. 120; Ю.В. Воронов, П.В. Флоренский, Т.А. Шутова, *Белая книга Абхазии. Документы, материалы, свидетельства. 1992-1993*, “*Belaya kniga Abkhazii: Dokumenty, materialy, svidetelstva*” [The Abkhazia’s White book: Documents. Materials and testimonies], op.cit.. p. 134; Шамба Т.М., Непрошин А.Ю. *Абхазия: Правовые основы государственности и суверенитета*. М., 2003 [Abkhazia: legal basis of statehood and sovereignty], op.cit., p. 140.

<sup>1037</sup> <https://www.youtube.com/watch?v=XzvtaZIMy98>

<sup>1038</sup> [http://www.circassianworld.com/Geo\\_Abk\\_conflict.html](http://www.circassianworld.com/Geo_Abk_conflict.html)

<sup>1039</sup> Те суровые дни. Хроника Отечественной войны народа Абхазии 1992 – 1993 годов в документах. Сухум, 2004. С. 50.; .В. Воронов, П.В. Флоренский, Т.А. Шутова, *Белая книга Абхазии. Документы, материалы, свидетельства. 1992-1993*, “*Belaya kniga Abkhazii: Dokumenty, materialy, svidetelstva*” [The Abkhazia’s White book: Documents. Materials and testimonies], op.cit. p.146.



given by Georgian military authorities in relation to the conduct of battle and the behaviour of troops during and after battle, targeted ground weapons were mainly used against several headquarters, towns, village or other settlements, (e.g. Ochamchira, Sukhum, Gagra, especially in Abzhui<sup>1040</sup>), where the ethnic composition of ethnic Abkhaz were homogenous or comprised almost half of all Abkhazian people. None of the Abkhazian population remained in that area: hundreds of them were killed and the survivors were forced to seek safety in other countries.<sup>1041</sup> Moreover, the Abkhazian side alleged that the Georgian militaries purposely employed large-scale and indiscriminate use of wide area coverage weapons in areas mostly populated by the Abkhazians. In fact, some witnesses confirmed that these attacks were directed mainly against the civilian population, especially in the first month following the events of 14 August 1992, when the Abkhazians had not even a proper army. Georgia used the most advanced weapons, which it had inherited from the USSR, against the civilian people of Abkhazia: the systems of mass destruction “GRAD” and “URAGAN” and other wide area coverage weapons against the areas populated mostly by the ethnic Abkhazians. Using these weapons in such way inevitably resulted in a large number of losses among the civilian population predominantly the ethnic Abkhazians. As further evidence of intention of the physical destruction of the ethnic Abkhazians, a well-developed plan for a massed nuclear attack on December 26th, 1992 on 34 targets, including settlements in East Abkhazia, mostly populated by the ethnic Abkhazians was produced by the Abkhazian Public Prosecutor.<sup>1042</sup>

Moreover, according to the Abkhazian Prosecutor, in the territories under control of Georgia, the first victims of the Georgian atrocities were the Abkhazians. This was also confirmed by some captured Georgian soldiers. They stated that while serving as soldiers, they were ordered by their superiors to kill Abkhazians. It repeatedly witnessed that the Georgian militaries had a list with names and addresses of Abkhazians in order to terrorize, loot, mistreat and deliberately kill them. Additionally, according to some sources Georgian soldiers and police were reported to continue to ask persons in the streets, in particular in bread lines, to show their identity papers. When an Abkhaz was found he or she was seriously abused and killed.<sup>1043</sup> All these occurrences were committed by the Georgian authorities in attempt to annex Abkhazia; the Abkhazian side sees it, in essence, as evidence of perpetrated serious crimes with specific intent. In fact, there is

<sup>1040</sup> Те суровые дни. Хроника Отечественной войны народа Абхазии 1992 – 1993 годов в документах. Сухум, 2004. С. 51.

<sup>1041</sup> Ю.В. Воронов, П.В. Флоренский, Т.А. Шутова, *Белая книга Абхазии. Документы, материалы, свидетельства. 1992-1993, Белая книга Абхазии. Документы, материалы, свидетельства. 1992-1993*, “Belaya kniga Abkhazii: Dokumenty, materialy, svidetelstva” [The Abkhazia’s White book: Documents. Materials and testimonies], op.cit., p.148.

<sup>1042</sup> Ibid..

<sup>1043</sup> Те суровые дни. Хроника Отечественной войны народа Абхазии 1992 – 1993 годов в документах. Сухум, 2004. С. 50, Report of the Commission of Experts Established Pursuant to United Nations Security Council Resolution 780 (1992), 27 May 1994 (S/1994/674), §129, p. 33; .В. Воронов, П.В. Флоренский, Т.А. Шутова, *Белая книга Абхазии. Документы, материалы, свидетельства. 1992-1993, Белая книга Абхазии. Документы, материалы, свидетельства. 1992-1993*, “Belaya kniga Abkhazii: Dokumenty, materialy, svidetelstva” [The Abkhazia’s White book: Documents. Materials and testimonies], op.cit. p.150.

an enduring perception throughout the population of Abkhazia that the Georgians conducted the war of 1992 – 1993 genocidal intent. For the small Abkhazian nation, all this was their “Holocaust”, the attempt of the Georgian government to annex them, a so-called “final solution” of the Abkhazian problem.

To sum up, the UN Commission of inquiry and HRW were not able to establish whether the Government of Georgia had pursued a policy of genocide against the ethnic Abkhazians.<sup>1044</sup> Indeed, the Missions found evidence of the serious human rights abuses against the ethnic Abkhazians committed by Georgian forces, but they see these violations without implying a specific intent.<sup>1045</sup>

In their turn, Georgian authorities accused the Abkhazian leaders of genocide, they allege that Abkhazian authority had been preparing genocide against the Georgian people since 1988. According to them, the Abkhazian leaders had, in 1988 initiated a hate campaign against the Georgian civilian population of Abkhazia through establishing Chairman Ardzinba's "apartheid regime", which silenced all opposition. By means of psychological warfare the Abkhazian population was indoctrinated. Moreover, the Georgian authority affirmed, allegedly that the Abkhaz members of the Supreme Council, the Council of Ministers and a handful of Abkhaz historians the spiritual fathers of the ‘genocidal policies’ had been carried out to their full extent during the Georgian-Abkhazian war. The Georgian Prosecutor-General in charge of the dossier claimed to have thousands of documents to prove this, which were found to be unavailable to the UN and UNPO missions. Moreover, Egbert Wesselink of Pax Christi Netherlands conducted a one-man Fact Finding Mission to Georgia in July and August, 1992, the findings of which were published in a report "Minorities in the Republic of Georgia", dated September 1992.<sup>1046</sup> Egbert Wesselink travelled extensively in Georgia, including Abkhazia, and authored the said report. He did not find any evidence, not only of a preparatory policy for genocide, neither did he see any sign of discriminatory measures against the Georgian locals. One of the points of focus of this report concerns the Georgian misrepresentation of the political situation in Abkhazia: "A closer look at the ethnic distribution of leading functions though, shows that not only the Georgian population, but the Armenians, Greeks and Russians were under represented in leading positions."<sup>1047</sup>

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<sup>1044</sup> ASS, August 16, 1992, cited in FBIS-SOV-92-159, August 17, 1992; Report of the Commission of Experts Established Pursuant to United Nations Security Council Resolution 780 (1992), 27 May 1994 (S/1994/674), §129, p. 33; Human Rights Watch interview, Gudauta, August 1993; ASS, August 16, 1992; Report of the Commission of Experts Established Pursuant to United Nations Security Council Resolution 780 (1992), 27 May 1994 (S/1994/674), §129, p. 33.

<sup>1045</sup> Ibidem

<sup>1046</sup> Egbert Wesselink, *Minorities in the Republic Of Georgia*, Pax Christi International, Brussels, 1992, p. 12.

<sup>1047</sup> Ibid., p.29.

In the light of the above, the Mission believes that to the best of its knowledge the allegations of genocide in the context of the armed conflict between Abkhazia and Georgia are unfounded in law or non-substantiated by factual evidence.<sup>1048</sup>

Nevertheless, the serious violations of Abkhaz population's human right proved by international Missions (UNPO, HRW and UN) provide grounds for remedial secession of the Abkhazian republic from the Georgia, that is for the lawful exercise of external self-determination.

### 11. Secession as a last resort for Abkhazia?

Secession is a final remedy (of last resort) – can be made as an *ultima ratio* mean, that is based on general principle of law *ubi jus ibi remedium*. It is also highlighted that any extraordinary permission to secede would have to be realised following the appropriate procedures, notably having recourse to a free and fair referendum on independence, ideally under international supervision.<sup>1049</sup> All other options (negotiations and international peaceful solutions) must be exhausted in order to be considered valid under international law.<sup>1050</sup> Non-exhaustion of these solutions represents an abuse of the right of self-determination.<sup>1051</sup>

It is important to analyse whether the secession of Abkhazia can be considered a *ultima ratio*, whether other remedies were exhausted by the latter.

Abkhazia managed to secede, *de facto*, without a use of force within the period of the collapse of the USSR and the emergence of non-stable Georgian government. Moreover, it has been emphasised since the time of their forcible incorporation into Georgia in 1931, the Abkhazians were aspiring to secede from it throughout the Soviet period.<sup>1052</sup> In fact, the Abkhazians have never accepted the authoritative decision of Stalin, by the force of which Abkhazia became a part of the Georgian Soviet Republic. Only, in 1991 it was granted to Abkhazia the right to secede from Georgia. By the means of referendum, in adherence of the Soviet law, the Abkhazians definitely voted for separation from Georgia.<sup>1053</sup>

However, the Abkhazian claim to external self-determination was not a unilateral process devoid of efforts of negotiated accommodation. It witnesses some legislative acts and draft

<sup>1048</sup> August 17, 1992; Report of the Commission of Experts Established Pursuant to United Nations Security Council Resolution 780 (1992), 27 May 1994 (S/1994/674), §129, p. 33.

<sup>1049</sup> See e.g. the Opinion No. 4 of the Badinter Commission on Bosnia-Herzegovina which required a referendum as a pre-condition for recognition by the EC (repr. in ILM 31 (1992), at 1501-3). In scholarship Anne Peters, *Das Gebietsreferendum im Völkerrecht* (Nomos: Baden-Baden 1995); Antonelli Tancredi, "A normative 'due process' in the creation of States through secession" in Marcelo Kohen (ed.) *Secession – International Law Perspectives* (Cambridge: CUP 2006), 171-207, at 190-91.

<sup>1050</sup> *Reference re Secession of Quebec, Judgement of the Supreme Court of Canada*, para. 134

<sup>1051</sup> D. Raič, *Statehood and the Law of Self-Determination, Developments in International Law*, Vol. 43, The Hague et al., 2002, pp. 370-371

<sup>1052</sup> See, *Part Two Analysis of the Abkhazian case*, Chapter III *Legal status of Georgia and Abkhazia under the Soviet Union legislation*, 5. *Downgrading of the Abkhazian Republic's legal status and forced deportation of the Abkhazians under Stalin epoch*, p.107-109.

<sup>1053</sup> See, *Part One General aspects*, Chapter II *Legal basis for secession and creation of the new States*, 4. *The All-Union Referendum*, pp. 38-40..

treaties, which invited to Georgia open dialogue on reciprocal interests and on their future relations.<sup>1054</sup>

For instance, the Decree “On the Legal Guarantees of Abkhazian Statehood” encompasses Abkhazia's readiness to enter negotiations with Georgia on their eventual future relations.<sup>1055</sup> However the *de facto* Georgian leader refused to negotiate with Abkhazia.

In the post-Soviet period, the Georgian authority carried on refusing to open dialogue with Abkhazia and the relations between Georgia and Abkhazia were *de facto* terminated. In particular, after a coup d'état, which took place in Georgia after the dissolution of the USSR, on 6 January 1992, Gamsakhurdia was overthrown, the parliament was ousted from power (Gamsakhurdia was forced into exile in Chechnya) and Georgian military Council came to power.<sup>1056</sup> In February 1992 *de facto* revolutionary government denied to open negotiations with Abkhazia and abrogated the Constitution of the Georgian SSR of 1978, which only formally linked Georgia with Abkhazia after the dissolution of the USSR.<sup>1057</sup> At the same time in 1992 the provisional government declared the instatement of the Constitution,<sup>1058</sup> which did not specify the State relations between Abkhazia and Georgia within the common State framework. In response, on 26 June 1992, a group of Abkhaz lawyers developed and put forward to the Georgian military Council, the draft of Union treaty, according to which Abkhazia had equal status with Georgia within the common state framework.<sup>1059</sup> However, this draft was emphatically rejected by Tbilisi.<sup>1060</sup>

Following the refusal of the Georgian government to consider the Abkhaz proposal, on July 23, 1992 the Supreme Soviet of Abkhazia put forward a decision to abolish the 1978 Soviet Constitution of the Abkhazian Autonomous Republic, which was only nominally in force and *de facto* did not produce any legal effect. Due to impetuous nature process of the dissolution of the USSR, the Abkhazian Republic did not have time to adjust its legislation to the new reality. Thus, the Abkhazian Constitution of 1978 was replaced with the old Abkhazian Constitution of

<sup>1054</sup> See, *Part two Analysis of the Abkhazian case, Chapter IV The secessionist movements after perestroika, 3. The reaction of Abkhazian Autonomous Soviet Socialist Republic to the 1990 legislative acts of the Georgian SSR*, pp. 124-126; see also *Part III An Assessment of The Present Legal Status of Abkhazia, Chapter II The right to secession, 5. The right of peoples under foreign occupation to external self-determination, a. Historic Background of the Conflict or Abkhazian struggle for independence.*

<sup>1055</sup> M. Volkhonskiy, V. Zakharov, N. Silaev, *Konflikty v Abkhazii i Juzhnoj Osetii: dokumenty 1989-2006*, [The Conflicts in Abkhazia and the South Ossetia: documents 1989-2006], M.: NP ID “Russkaja panorama”, 2008, p. 97.

<sup>1056</sup> Georgien 1989-1993: Statistik wichtigster Ereignisse, in: Menschenrechte in der GUSRepublik Georgien 1994, Berichte-Dokumente-Schicksale, IGFM (Hrsg.), Verfasserin: W. Wahnsiedler, p. 4; International Affairs MERIA Journal Volume 15, Number 01 (Mar 2011), *Regional Security the South Caucasus Republics and Russia's growing influence*, at <http://www.rubincenter.org/2011/08/the-south-caucasus-republics-and-russia%E2%80%99s-growing-influence-balancing-on-a-tightrope/>

<sup>1057</sup> The GSSR Constitution of 1978 and the ASSR Constitution of 1978 rested in force only nominally.

<sup>1058</sup> *Постановление Государственного совета Республики Грузия в связи с постановлением Верховного Совета Абхазской АССР от 23 июля 1992 года «О прекращении действия Конституции Абхазской АССР 1978 г.»*, 25 июля 1992 г., «Свободная Грузия». № 95. 28 июля 1992 г. from М. Волхонский, В. Захаров, Н. Силаев, *Конфликты в Абхазии и Южной Осетии: документы 1989 – 2006 гг.*, op.cit., p.61

<sup>1059</sup> Печатается по изданию: «Абхазия». 1992. №23. Июнь 1992 г. from М. Волхонский, В. Захаров, Н. Силаев, *Конфликты в Абхазии и Южной Осетии: документы 1989 – 2006 гг.*, op.cit., p.130

<sup>1060</sup> Шамба С. К вопросу о правовом, историческом и моральном обосновании права Абхазии на независимость, *Международное право*. 1999. № 4. p. 225.

1925.<sup>1061</sup> While under terms of the 1925 Constitution, Abkhazia and Georgia had equal status within so-called ‘Agreed Republic.’

The Georgian side refused this type of state-legal relations with Abkhazia insisting on the unitary State model and any link between these two were definitely interrupted.<sup>1062</sup> At the end of 1991 the relations between Tbilisi and Sukhumi<sup>1063</sup> were characterized by the climate of the cold war.<sup>1064</sup>

Another attempt of the Abkhazian Parliament to re-establish state-relations with Georgia was on that day, when the Georgian troops launched massive attacks against Abkhazia. In particular, the Abkhazian parliament scheduled to discuss the draft treaty proposed to the Georgian State Council on the common state-framework on the soft federative basis.<sup>1065</sup> This draft was newly declined by the Georgian government.

Thereon Abkhazians were prepared to exhaust effective and peaceful remedies before its secession from Georgia. In fact, after the collapse of the USSR the Abkhazians tried to re-establish the relationships with Georgia through proposing projects of a common State and only after widespread violations of fundamental human rights committed by the Georgian government, Abkhazia definitely seceded from Georgia thus re-obtaining control of its historically belonged territory.

## 12. The pursuit of a negotiated solution: the first phase

Only after starting of the Georgian-Abkhazian war in September of 1992 the first negotiations were opened between the parties to the conflict. Initially these negotiations were held with the participation of the Russian Federation in Moscow so-called “Moscow talking”.

These negotiations were characterized by a clear Russian support of Georgia and its open pressure exerted on the Abkhaz side.<sup>1066</sup> Russia refused to recognize Sukhumi as an official negotiating party in its own right. However, after a lot of pressure from Abkhazian leader Ardzinba, the Abkhazian government was physically allowed to take part in the negotiations, but only on the issues of its direct concerning.<sup>1067</sup>

<sup>1061</sup> *Постановление Верховного Совета Абхазии о прекращении действия Конституции Абхазской АССР 1978 года*. 23 июля 1992 г in M. Волхонский, В. Захаров, Н. Силаев, *Конфликты в Абхазии и Южной Осетии: документы 1989 – 2006 гг.*, op.cit., p.133.

<sup>1062</sup> М. Шамба, А.Ю. Непрошин, *Абхазия. Правовые основы государственности и суверенитета*, op.cit. at psnyteka.org/225-abkhazia\_pravovye\_osnovy\_gosudarstvennosti\_i\_suvereniteta.html

<sup>1063</sup> The capital of Abkhazia

<sup>1064</sup> М. Шамба, А.Ю. Непрошин, *Абхазия. Правовые основы государственности и суверенитета*, op.cit. at psnyteka.org/225-abkhazia\_pravovye\_osnovy\_gosudarstvennosti\_i\_suvereniteta.html

<sup>1065</sup> Abkhazia Today, Report 176, 15 September 2006, at <https://www.crisisgroup.org/abkhazia-today>; S. Frederick Starr, Karen Dawisha, *The International Politics of Eurasia: v. 2: The Influence of National Identity*; Routledge, 2016, p. 288; *Belaya kniga Abkhazii: Dokumenty, materialy, svidetelstva* [The Abkhazia’s White book: Documents. Materials and testimonies]. Moscow. 1993; UNPO, UAC/1992/FFM, *Report of a UNPO Mission to Abkhazia, Georgia and the Northern Caucasus*, p. 344

<sup>1066</sup> See, for example, Lakoba, *Abkhazia de facto or Georgia de jure?*, pp. 42-48.

<sup>1067</sup> *Ibid.* p. 177

The Moscow meeting resulted in the creation of a commission for restoring security in the region and the conclusion on 3 September 1992 of an agreement for the ceasefire in Abkhazia.<sup>1068</sup> Under strong pressure of Russia, the Abkhazian side signed the agreement (drafted by the Russian Foreign Ministry Andrey Kozyrev known for his openly anti-Abkhaz views), which turned out to be of great disadvantage to the latter.<sup>1069</sup>

The cease-fire agreement of 3 September was broken on 1 October 1992. Another meeting was held under initiative of Russia in Sochi in July of 1993. This time, the Abkhazian side participated on an equal basis with other participants, due to an improvement in the Abkhaz army's positions as it had advanced towards Sukhumi, and to slight modification of the Russian anti-Abkhazian approach into a more impartial one (threat of North Caucasus republics' secession from Russia<sup>1070</sup> induced the latter to change its openly anti-Abkhazian approach into less partial<sup>1071</sup>). Therefore, the new Agreement on a Ceasefire in Abkhazia suited the interests of the Abkhaz side much better than the previous one but did not contain any provision on the future political and legal status of Abkhazia.<sup>1072</sup> At half of September of 1993 even this second cease-fire agreement was violated, with sparking of the hostilities between the conflicting parties.<sup>1073</sup>

Moscow meetings were not successful and did not contribute to resolution of the Georgian-Abkhazian conflict for following reasons. First, during the Moscow talks the fundamental issue of the Abkhazian *status*, was not treated. Second, the Russian blind support of the Georgian side contributed to the intractable approach of Georgia during the negotiations.<sup>1074</sup>

<sup>1068</sup> S/24523 <http://www.un.org/ru/peacekeeping/missions/past/unomig/24523.pdf>

<sup>1069</sup> Ardzinba has consistently stated that he was pressured to sign the agreement against his will. During his shotgun interview to Russian TV channels Ardzinba explained his signing the document by the need to stop bloodshed and slaughter of the Abkhaz and other nations in the republic. Shevardnadze also confirmed that much pressure was put on Ardzinba to obtain a signature. See, Khintba, *Main stages in the negotiation process (1993-2008): evolution of approaches and analysis of results* in N.Akaba and I. Khintba, *Transformation of the Georgian-Abkhaz conflict: rethinking the paradigm*, p. 20; [http://www.cr.org/downloads/Abkhaz%20Perspective\\_Transformaton%20of%20Georgian:Abkhaz%20Conflict\\_201102\\_ENG.pdf](http://www.cr.org/downloads/Abkhaz%20Perspective_Transformaton%20of%20Georgian:Abkhaz%20Conflict_201102_ENG.pdf); Report of a UNPO Mission to Abkhazia, Georgia and the Northern Caucasus November, 1992

<sup>1070</sup> The armed conflict in Abkhazia had dramatic repercussions generating tensions upon the whole region of the North Caucasus within the Russian Federation: especially, among the peoples ethnically related to the Abkhaz such as the Kabards, Circassians and Adyghe. The interests of the indigenous population of this North Caucasus Republic is closely linked, both culturally and ethnically, to their Abkhazian brethren in the south of the Caucasus, who the Russian government could not ignore without running the risk of alienating them. Thus not only separatist movements in the Chechen Republic, but also Adyghe, Kabardin-Balkaria, Karachaevo-Cherkessia Republics, which were discontented with Russian policy towards Abkhazia, put at risk the territorial integrity of the Russian Federation. See A. Zverev, *Ethnic Conflict in the Caucasus 1988-94*, in Bruno Coppeters, ed., *Contested Borders in the Caucasus*, VUB University Press: Brussels, 1996, at <http://poli.vub.ac.be/publi/ContBorders/eng/ch01fn.htm>; B. Исаков, *Абхазии - мур!*, <http://viperson.ru/articles/vladimir-isakov-abhazii-mir>.

<sup>1071</sup> Natella Akaba and Iraklii Khintba, *Transformation of the Georgian-Abkhaz conflict: rethinking the paradigm* [http://www.cr.org/downloads/Abkhaz%20Perspective\\_Transformaton%20of%20Georgian:Abkhaz%20Conflict\\_201102\\_ENG.pdf](http://www.cr.org/downloads/Abkhaz%20Perspective_Transformaton%20of%20Georgian:Abkhaz%20Conflict_201102_ENG.pdf); Stanislav Lakoba, *Abkhazia de facto ili Gruzia de jure? (O politike Rossii v Abkhazii v postsovetitskiy period, 1991-2000 gg.)*, p. 20; S.M. Shamba, *K voprosu o pravovom, istoricheskom i moralnom obosnovanii prava Abkhazii na nezavisimost*, *Natsionalnye interesy*, Moscow, 2000, No. 1, p. 25; T. Šamba, A. Neprošin *Pravovye osnovy gosudarstvennosti i suvereniteta*, Moskva, 2009, p. 232; A. Zverev, *Ethnic Conflict in the Caucasus 1988-94*, in Bruno Coppeters, ed., *Contested Borders in the Caucasus*, VUB University Press: Brussels, 1996, at <http://poli.vub.ac.be/publi/ContBorders/eng/ch01fn.htm>; B. Исаков, *Абхазии - мур!*, <http://viperson.ru/articles/vladimir-isakov-abhazii-mir>.

<sup>1072</sup> S/26250, Allegato I, Соглашение о прекращении огня в Абхазии и механизме контроля за его соблюдением, Сочи, 27 июля 1993 года, pp.6-8.

<sup>1073</sup> Abkhazia Today, Report 176, 15 September 2006, at <https://www.crisisgroup.org/abkhazia-today>; S. Frederick Starr, Karen Dawisha, *The International Politics of Eurasia: v. 2: The Influence of National Identity*; Routledge, 2016, p. 288; *Belaya kniga Abkhazii: Dokumenty, materialy, svidetelstva* [The Abkhazia's White book: Documents. Materials and testimonies]. Moscow. 1993; UNPO, UAC/1992/FFM, Report of a UNPO Mission to Abkhazia, Georgia and the Northern Caucasus, p. 344

<sup>1074</sup> I. Khintba, *Main stages in the negotiation process (1993-2008): evolution of approaches and analysis of results* in N.Akaba and I. Khintba, *Transformation of the Georgian-Abkhaz conflict: rethinking the paradigm*, p. 20;

Subsequent negotiations were held under the auspices of the UN with the Russian Federation as facilitator and a representative of the Conference on Security and Cooperation in Europe (CSCE) at the end of 1993 in the in the framework of the Geneva Process.<sup>1075</sup>

The Geneva negotiations were signed by the Georgian efforts to mitigate negative political and social consequences of their military defeat, to ensure the return of refugees, as well, to use political, legal and diplomatic means to prevent Abkhazian recognition. In return, Abkhaz sought for formalise its military victory, which in practice resulted in consolidation of Abkhazia's *de facto* independence. Likewise, it did not allow a full-scale return of Georgian refugees due to the absence of adequate security guarantees and fears of the potentially explosive nature of such a step.

It is to be noted that in this stage of negotiations, the Abkhaz side was able to consolidate its *status* as an equal participant in the negotiations as well as scoring some its diplomatic victories, (one of them it was aroused the issue of its *status*).<sup>1076</sup>

The Geneva negotiations were also characterised by supporting for Georgia's territorial integrity from the part of Russia, the representatives of the UN and the Conference on Security and Cooperation in Europe (CSCE). Furthermore, the State-mediators, involved in the Geneva negotiations process, not only had never condemned the Georgian military intervention of August 1992 against Abkhazia, but also transformed the Abkhazians from victims to aggressors.<sup>1077</sup> Therefore, the Abkhaz side was feeling of lack of trust towards the mediators.

This pro-Georgian approach of the mediators explains the extremely intractable position of the Georgian side during the Geneva negotiations and Abkhazian unwillingness to make concessions out of fear that they could be used against Abkhazia.<sup>1078</sup> Despite the attitudes of the conflicting parties and their mediators, however, some positive steps towards the settlements of the hot phase of the conflict were made and the question of the Abkhazian *status* was treated. First, at the meeting the parties to conflict discussed conditions for safe return of the Georgian refugees. In particular, Georgia clamoured for an instant mass return of the exiles, what was unacceptable to the Abkhazians and basically unrealistic for the UN. In fact, a UNHCR spokesman at a conference in June 1998 has been quoted as saying that any large-scale return of refugees was out of the question until something was done about the catastrophic state of the Abkhazian economy. Moreover, given the hatreds sown by the buttressing the mutual animosities that antedated hostilities, if such a mass return were to occur, the scale of bloodshed would simply

<sup>1075</sup> Ibid., S.M. Shamba, *Negotiation process: hopes and disillusionments*, [http://www.mfaabkhazia.org/documents/stati\\_i\\_analiz/peregovornyj\\_process\\_nadezhdy\\_i\\_razocharovaniya](http://www.mfaabkhazia.org/documents/stati_i_analiz/peregovornyj_process_nadezhdy_i_razocharovaniya)

<sup>1076</sup> S.M. Shamba, *Negotiation process: hopes and disillusionments*, op.cit., p.105

<sup>1077</sup> T. Shamba, A. Neproshin, *Abkhazia: Legal basis of statehood and sovereignty*. M: Open Company "In-Oktavo", 2005, 140 p..

<sup>1078</sup> Ibid..

be unimaginable.<sup>1079</sup> These discussions resulted in concluding the *Quadripartite Agreement on the Voluntary Return of Refugees*<sup>1080</sup> on the repatriation of refugees, which conceded return of refugees to Abkhazia.<sup>1081</sup>

It was also signed the most significant document among other the *Declaration on the Measures for the Political Resolution of the Georgian-Abkhaz Conflict* of the 4 April 1994<sup>1082</sup>, because it treated the issue of the Abkhazian status.<sup>1083</sup>

<sup>1079</sup> George Hewitt, *Abkhazia, Georgia and the Circassians (NW Caucasus)*, Central Asian Survey, 1999, 18 (4), p. 476. [http://georgehewitt.net/pdf/Abkhazia\\_Georgia\\_Circassians\\_NW.pdf](http://georgehewitt.net/pdf/Abkhazia_Georgia_Circassians_NW.pdf).

<sup>1080</sup> Through the Quadripartite Agreement on voluntary return of refugees-and displaced persons the Parties agreed:

...to cooperate and to interact in planning and conducting the activities aimed to safeguard and guarantee the safe, secure and dignified return of people who have fled from areas of the conflict zone to the areas of their previous permanent residence... (Art. 1) displaced persons/refugees shall have the right to return peacefully without risk of arrest, detention, imprisonment or legal criminal proceedings (Art. 3 c.).

At the same time the Quadripartite Agreement specified in this respect that:

Such immunity shall not apply to persons where there is serious evidence that they have committed war crimes and crimes against humanity as defined in international instruments and international practice as well as serious non-political crimes committed in the context of the conflict. Such immunity shall also not apply to persons who have previously taken part in the hostilities and are currently serving in the armed formations, preparing to fight in Abkhazia. Persons falling into these categories should be informed through appropriate channels of the possible consequences they may face upon return.

This provision has to be interpreted in light of the following guidelines. Only a person, who committed war crimes and crimes against humanity as defined in international instruments and international practice falls within this exception. Consequently, serious non-political crimes committed in the context of the conflict were not agreed as part of the definition of this term. Moreover, it was not enough for mere suspicions to exist against persons that they had committed one of the crimes above; serious evidence of this was required. In fact, the persons concerned were to be informed of the charges against them through the 'appropriate channels' (i.e., for instance, through UNHCR officials). It follows that the exceptions allowed under this provision did not have to be interpreted too broadly. Hence the Government of Abkhazia was entitled to refuse access to Abkhazia exclusively to persons, who fell under exceptions. The *Quadripartite understanding* gave the Abkhazians the right to vet applications from prospective returnees and to reject those known to have acted militarily or criminally against Abkhazia. Accused of deliberate slowness in the vetting process the Abkhazians pointed out that, even those whose applications were approved regularly failed to turn up at the Ingur bridge at the appointed time, which demonstrated a lack of real eagerness to return. At the same time nothing was done then or has been done since to prevent unofficial returnees to the Gal District. See (S/1994/397, annex II), *the Quadripartite Agreement on the Voluntary Return of Refugees and IDPs*, [http://peacemaker.un.org/sites/peacemaker.un.org/files/GE\\_940404\\_QuadripartiteAgreementVoluntaryReturnRefugees.pdf](http://peacemaker.un.org/sites/peacemaker.un.org/files/GE_940404_QuadripartiteAgreementVoluntaryReturnRefugees.pdf)

<sup>1081</sup> Ibid..

<sup>1082</sup> (S/1994/397, annex I), *Declaration on measures for a political settlement of the Georgian/Abkhaz conflict signed on 4 April 1994*, <http://www.securitycouncilreport.org/atf/cf/%7B65BF9B-6D27-4E9C-8CD3-CF6E4FF96FF9%7D/Georgia%20S1994397.pdf>.

<sup>1083</sup> The most significant document among the peace agreements was *Declaration on measures for a political settlement of the Georgian-Abkhaz conflict* (S/1994/397, annex I). It explains that it was the first document that treated the issue of Abkhazian status. For this reason the 4 April 1994 *Declaration* needs to be examined more closely. On 4 April 1994, under the aegis of the United Nations, with the facilitation of the Russian Federation and with the participation of representatives of the Conference on Security and Cooperation in Europe (CSCE), Georgia and Abkhazia signed this *Declaration* in Moscow. Under terms of the *Declaration* the parties committed themselves to a strict cease-fire and reaffirmed their commitment to the non-use of force or threat of force against each other. In particular, Section № 3 of the 1994 *Declaration* envisaged:

*non-use of force or threat of the use of force' includes, apart from the obligation not to breach the cease-fire by actions from the regular armed forces or irregular forces of either side, also the obligation not to condone such actions.*

In so far as irregular units effectively under control of the Parties were still operating in Abkhazia, either Party was under an obligation to desist from supporting them. The threat of the use of force could take the form of declarations or official government statements, the holding of military manoeuvres clearly intended as a threat of force and actual troop movements in the direction of the opposing party, which show a readiness for combat. The institutional provisions in the 1994 Agreements are laid down in №№ 5-8 of the 1994 *Declaration*. Section № 5 reaffirmed their request for the early deployment of a peacekeeping operation and for the participation of a Russian military contingent in the United Nations peacekeeping force, as stated in the *Memorandum of Understanding of 1 December 1993* (S/26875, annex) and the *Communiqué* of 13 January 1994 (n. 5). The parties to the conflict Georgia and Abkhazia agreed also to the realisation of the peacekeeping operation, which would promote the safe return of refugees (n.5). This Section was based on a compromise of the Georgian and Abkhazian views. On the one hand, the Georgian government saw the peacekeeping forces as forces that were to police the whole territory of Abkhazia, whereas the Abkhazian Government favoured these troops acting as a buffer to separate the Parties. №№ 6, 7, 8 established the basis for a future organization of the political relations between Abkhazia and Georgia. In particular, № 6 provided for Abkhazia right to its own Constitution and legislation and appropriate State symbols, such as an anthem, emblem and flag:

*Abkhazia shall have its own Constitution and legislation and appropriate State symbols, such as anthem, emblem and flag.*

№ 7 the parties discussed the distribution of powers and reached a mutual understanding regarding powers for joint action in the following fields:

(a) foreign policy and foreign economic ties;

(b) border guard arrangements;

(c) customs;

(d) energy, transport and communications;

(e) ecology and elimination of consequences of natural disasters;

(f) ensuring human and civil rights and freedoms and the rights of national minorities.

Hence, the Abkhazian institutions had to be responsible for policy-making and legislation in all other policy domains. Section № 8 provided that proposals on the re-establishment of State and legal relations be elaborated:

*A phased action programme will be worked out and proposals on the re-establishment of State and legal relations will be elaborated.*

As can be seen, the 1994 *Declaration* contains only a few specific obligations and rights. The clauses dealing with the future political relations set out principles rather than detailed obligations. This is due precisely to the continuing disagreement between the Governments of Abkhazia and Georgia on some fundamental aspects of a political solution to the conflict. In fact, the history of the negotiations and the statements made by both sides revealed that there was no agreement on the following points: Georgia insisted on recognition of the territorial integrity of Georgia (including



The international mediators made it conditional on recognition of the territorial integrity of Georgia and the return of refugees, introduction of civil police into the Gal district and deployment of international peacekeeping forces on the whole territory of Abkhazia.<sup>1084</sup> Such conditions could not satisfy the Abkhaz side which preferred to omit them.

Hence, despite the attitudes of the conflicting parties and pro-Georgian approach of mediators, this stage of the negotiation process of 1993-1994 yielded positive results through adoption of the legal foundation of the resolution of this conflict or giving basis for elaborating of available remedies of coexisting within common Georgian-Abkhazian State.<sup>1085</sup> One of the important steps towards resolution and contribution to ending of hostilities between parties was start treating the fundamental issue concerning the Abkhazian *status* and return of Georgian refugees.

### 13. Post-war negotiations: failure of federalisation projects and other initiatives (1995-1997)

The first draft Protocol on a soft-federation was drawn up during an intensive round of Georgian-Russian-Abkhaz consultations, running right through 1995, with the participation of the UN Secretary-General's Special Envoy E. Brunner. The Protocol prescribed that Abkhazia should be given the status of a constituent entity within a Georgian federation. Ardzinba, the Abkhazian

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Abkhazia), while Abkhazia insisted on any agreement between the two Parties must be that between two states of equal status. For this reason the parties reached agreement only on certain defined areas, in which each would delegate powers for joint action (n. 7) , but without specifying whether the final political settlement would be 'federal' or 'confederal', or otherwise. Notwithstanding few specific obligations and rights, some conclusions may be drawn. Despite the fact that the 1994 Declaration does not explicitly pronounce on the question of the Independent or other status for Abkhazia, apart from № 6 (*Abkhazia shall have its own Constitution and legislation and appropriate State symbols, such as anthem, emblem and flag*), it follows that the Parties agreed on the statehood of Abkhazia. Sections № 6 should be read in conjunction with № 7, which referred to the future distribution of powers between Abkhazia and Georgia. Therefore, Section № 7 has to be seen as the distribution of powers between States. Whilst an 'own Constitution and legislation of Abkhazia', imply that no further limitation than that imposed by № 7. In other words, the Section № 7 provided that the Abkhazian legislature and authorities would be competent in all fields not listed in № 7. Section № 8 established *de facto* in the absence of any legal state relations between Abkhazia and Georgia. In particular, n. 8 attested that at the moment of the signing of the Declaration there were no legal state relations between Abkhazia and Georgia, though providing for developing proposals on restoring the legal state relations:

*"A phased action programme will be worked out and proposals on the re-establishment of State and legal relations will be elaborated"*.

It follows also from the Report of the secretary-general of May 3, 1994 (S/1994/529 the Annex II which states "Proposal for political and legal elements for comprehensive settlements of Georgian/ Abkhaz". In particular, para 1 of the annex established:

*"Abkhazia will be a subject with sovereign rights within the framework of a union State to be established as a result of negotiations after issues in dispute have been settled. The name of the union State will be determined by the parties in the course of the further negotiations. The parties acknowledge the territorial integrity of the union State, created as indicated above, within the borders of the former Georgian Soviet Socialist Republic on 21 December 1991"*.

In this way the UN attested the absence the relationships between Georgia and Abkhazia suggesting the creation of a Union State, the name of which would be agreed subsequently. Moreover, Section № 8 envisaging proposal on the re-establishment of State and legal relations, must be interpreted in the context of institutional law in the (former) Soviet Union. It follows from the fact that both Abkhazia and Georgia interpreted the text as such. This means, in essence, a recognition of the sovereignty of Abkhazia but one, which does not *ipso facto* exclude the recognition of the territorial integrity of Georgia. See S/1994/397, *Declaration on measures for a political settlement of the Georgian/Abkhaz conflict signed of 4 April 1994*, Annex I, p. 2, at <http://www.securitycouncilreport.org/atf/cf/%7B65BF9B-6D27-4E9C-8CD3-CF6E4FF96FF9%7D/Georgia%20S1994397.pdf> (English version); <http://www.un.org/ru/peacekeeping/missions/past/unomig/94-397.pdf> (Russian version); <https://documents-dds-ny.un.org/doc/UNDOC/GEN/N94/202/07/IMG/N9420207.pdf?OpenElement>, *Report of the secretary-general concerning the situation in Abkhazia, Georgia, the Annex II, p. 11*; [http://www.un.org/ga/search/view\\_doc.asp?symbol=S/1994/529&referer=http://www.un.org/en/sc/documents/sreports/1994.shtml&Lang=E](http://www.un.org/ga/search/view_doc.asp?symbol=S/1994/529&referer=http://www.un.org/en/sc/documents/sreports/1994.shtml&Lang=E); A. F. Avidzba, "Civil war (1992-1993)". In *Issues in the military political history of Abkhazia* (Sukhum: 2008), pp. 185-187. B. Driessen, *Legal opinion on the validity and interpretation of the 4 April 1994 Georgian-Abkhazian Agreements*, cit [http://peacemaker.un.org/sites/peacemaker.un.org/files/GE\\_931201\\_MoUGeorgianAndAbkhazSides.pdf](http://peacemaker.un.org/sites/peacemaker.un.org/files/GE_931201_MoUGeorgianAndAbkhazSides.pdf); <http://www.un.org/ru/peacekeeping/missions/past/unomig/94-32.pdf>

<sup>1084</sup> Report of The Un Secretary General On The Situation In Abkhazia, Georgia. 3 March 1994, S/1994/253. p. 5.

<sup>1085</sup> S.M. Shamba, Negotiation process: hopes and disillusionments, [http://www.mfaabkhazia.org/documents/stati\\_i\\_analiz/peregovornyj\\_process\\_nadezhdy\\_i\\_razocharovaniya](http://www.mfaabkhazia.org/documents/stati_i_analiz/peregovornyj_process_nadezhdy_i_razocharovaniya)

president was not against the federation model, but insisted that it should be a “union of two equal state entities, similar to the model of Czechoslovakia.”<sup>1086</sup> The Abkhaz side’s consideration of a possible reintegration into Georgia was forced by strong Russian pressure.”<sup>1087</sup> In fact, by establishing a regime of Abkhazia’s political and economic blockade shortly after the end of the war, Russia was seeking to induce Abkhazia to accept the so-called “soft federation” within Georgia’s borders.<sup>1088</sup> However, it was sharply criticised by the Abkhaz Parliament.<sup>1089</sup> The latter demanded that the Abkhaz delegation would act in accordance with the Constitution of Abkhazia of 26 November 1994, in which Abkhazia was declared “a sovereign democratic State”, and that they should remove their initials from the Protocol.<sup>1090</sup>

However, Tbilisi rejected this project, which conceded internal self-determination to Abkhazia.

In 1997, the Abkhaz leaders agreed to the “soft federation” model of relations (that of a common or union state) despite heavy criticism in Abkhaz society, but the Georgian side refused to sign the draft of the Georgian-Abkhazian model.<sup>1091</sup>

Discussion on possible models of state relations between Abkhazia and Georgia continued notwithstanding. The next draft of the Moscow Protocol was drawn up on 13 June 1997 by the mediator, the Russian Federation. This protocol proposed creation of another soft-federal union where both joint and special competences of its subjects would be clearly defined.<sup>1092</sup> Article 2 of this Protocol, pertaining to the mutual relations of Georgia and Abkhazia, was based on agreements achieved earlier, in particular on provisions in the 4 April 1994 Declaration and reflected the compromise to which the Abkhazian side was ready to proceed.<sup>1093</sup> This document was agreed by the sides through the mediation of the First Deputy Foreign Minister of the Russian Federation. After reaching agreement on all clauses of the Protocol late at night, those present noted the successful completion of their work and fixed the 18 June 1997 as the date for signing the Protocol. However, the Georgian side refused once again to sign it on 17 June 1997, seeking to

<sup>1086</sup> V.A. Chirikba, *Georgian-Abkhaz War*, London: Routledge, forthcoming, p. 152

<sup>1087</sup> Ibid..

<sup>1088</sup> I. Khintba, *Main stages in the negotiation process (1993-2008): evolution of approaches and analysis of results* in N.Akaba and I. Khintba, *Transformation of the Georgian-Abkhaz conflict: rethinking the paradigm*, p. 25; [http://www.cr.org/downloads/Abkhaz%20Perspective\\_Transformaton%20of%20Georgian:Abkhaz%20Conflict\\_201102\\_ENG.pdf](http://www.cr.org/downloads/Abkhaz%20Perspective_Transformaton%20of%20Georgian:Abkhaz%20Conflict_201102_ENG.pdf); I. Khintba, *Main stages in the negotiation process (1993-2008): evolution of approaches and analysis of results* in N.Akaba and I. Khintba, *Transformation of the Georgian-Abkhaz conflict: rethinking the paradigm*, p. 25; V. A. Chirikba, *Georgian-Abkhaz War*, London: Routledge, forthcoming, pp. 152-155.

<sup>1089</sup> S.M. Shamba, *Negotiation process: hopes and disillusionments*, [http://www.mfaabkhazia.org/documents/stati\\_i\\_analiz/peregovornyj\\_process\\_nadezhdy\\_i\\_razocharovaniya](http://www.mfaabkhazia.org/documents/stati_i_analiz/peregovornyj_process_nadezhdy_i_razocharovaniya)

<sup>1090</sup> Конституция Республики Абхазия от 26 ноября 1994 г. [http://presidentofabkhazia.org/upload/iblock/9b1/%D0%9A%D0%BE%D0%BD%D1%81%D1%82%D0%B8%D1%82%D1%83%D1%86%D0%B8%D1%8F\\_%D0%A0%D0%B5%D1%81%D0%BF%D1%83%D0%B1%D0%BB%D0%B8%D0%BA%D0%B8\\_%D0%90%D0%B1%D1%85%D0%B0%D0%B7%D0%B8%D1%8F\\_2015\\_03\\_31\\_13\\_14\\_23\\_110.pdf](http://presidentofabkhazia.org/upload/iblock/9b1/%D0%9A%D0%BE%D0%BD%D1%81%D1%82%D0%B8%D1%82%D1%83%D1%86%D0%B8%D1%8F_%D0%A0%D0%B5%D1%81%D0%BF%D1%83%D0%B1%D0%BB%D0%B8%D0%BA%D0%B8_%D0%90%D0%B1%D1%85%D0%B0%D0%B7%D0%B8%D1%8F_2015_03_31_13_14_23_110.pdf)

<sup>1091</sup> S.M. Shamba, *Negotiation process: hopes and disillusionments*, [http://www.mfaabkhazia.org/documents/stati\\_i\\_analiz/peregovornyj\\_process\\_nadezhdy\\_i\\_razocharovaniya](http://www.mfaabkhazia.org/documents/stati_i_analiz/peregovornyj_process_nadezhdy_i_razocharovaniya); V.A. Chirikba, *Georgian-Abkhaz War*, London: Routledge, forthcoming, p. 152; I. Khintba, *Main stages in the negotiation process (1993-2008): evolution of approaches and analysis of results* in N.Akaba and I. Khintba, *Transformation of the Georgian-Abkhaz conflict: rethinking the paradigm*, p. 26.

<sup>1092</sup> Abkhazia: ways forward, International Crisis Group, Europe report No. 179, 18 January 2007, p. 10.

<sup>1093</sup> Ibid..

alter the whole document, due to its “concern that the draft agreement did not refer to Georgia’s territorial integrity and left the question of the right to secede open.”<sup>1094</sup> Hence, the Protocol on the Georgian-Abkhaz settlement was never signed.

It is to be noted that the Protocol was not desirable for Sukhumi, either. Exclusively under the pressure of the Russia<sup>1095</sup> and the Group of Friends<sup>1096</sup> coupled with socio-economic difficulties facing the country, the Abkhaz side accepted to consider the possibility of a federal solution. In its turn, Ardzinba managed to parlay public disaffection with the negotiations around the federal model in order to show both Russia and the West the illegal nature of such a solution.<sup>1097</sup>

Foreign Minister Yevgeny Primakov of Russia personally tried to push the sides toward a solution. On 14 August 1997 at his initiative an Abkhaz delegation headed by Ardzinba made an unprecedented visit to Tbilisi,<sup>1098</sup> where a Joint Declaration was signed. This Declaration was announced in accordance with which the sides committed themselves anew to refrain from the use of force or the threat to use it against each other and declared their readiness to settle all disputed questions exclusively by peaceful means. The document did not contain any reference to a federal solution to the *status* problem. Thus, it lowered the acuteness in the tension in mutual relations between the sides. Following the presidential meeting there took place visits of Georgian and Abkhazian governmental delegations, alternating between Sukhumi and Tbilisi, the outcome of which was the creation of a joint commission for deciding practical questions (for humanitarian and development projects in Abkhazia).<sup>1099</sup>

Activation of the bilateral dialogue gave grounds to hope for achieving progress in the talks’ process. However, the September round, which took place in Sukhumi, again failed to reconcile the positions of the sides. In particular, this round was conducted in the presence of the

<sup>1094</sup> S.M. Shamba, *Negotiation process: hopes and disillusionments*, available at: [http://www.mfaabkhazia.org/documents/stati\\_i\\_analiz/peregovornyj\\_process\\_nadezhdy\\_i\\_razocharovaniya](http://www.mfaabkhazia.org/documents/stati_i_analiz/peregovornyj_process_nadezhdy_i_razocharovaniya); V.A. Chirikba, *Georgian-Abkhaz War*, London: Routledge, forthcoming. p. 152; I. Khintba, *Main stages in the negotiation process (1993-2008): evolution of approaches and analysis of results* in N.Akaba and I. Khintba, *Transformation of the Georgian-Abkhaz conflict: rethinking the paradigm*, p. 26.

<sup>1095</sup> In particular, the readiness to consider such federal project resulted also from the tightening of Abkhazia’s blockade in accordance with the decision by the CIS Heads of States summit in 1996.

<sup>1096</sup> In November 1997 the Group of Friends of the UN Secretary-General on Georgia – a group of countries that has been formally constituted to support the UN’s mediation activities, including France, Germany, the United Kingdom, the United States and Russia. This group, consisting of the Russian Federation, the USA, France, Germany, and Great Britain, carried on a tradition of similar groups on El Salvador, Haiti, Western Sahara, and Guatemala, “which consult and advise the Secretary-General on specific issues, usually related to a crisis”. In particular, it was decided that representatives of the Group could participate in meetings and discussions and make statements and proposals on various aspects of the peace process, including the political settlement. At the same time, it was emphasised that they were not parties to the talks and were not invited to sign any documents which would be agreed by the parties during the talks. Following the Georgian-Abkhaz Geneva Agreements of 17-19 November the role of the Group of Friends of Georgia was formalised. Such formal confirmation of the Group of Friends’s status was necessary in order to ensure their permanent status as participants in the work of the Coordinating Council chaired by the UN Special Envoy, which had been set up pursuant to the Geneva Agreements of 17-19 November. See B. Coppieters, *Western Security Policies and the Georgian-Abkhazian Conflict* in Coppieters/Darchiashvili/Akaba (eds) *Federal Practice. Exploring Alternatives for Georgia and Abkhazia*. Brussels: VUB University Press, p. 48.

<sup>1097</sup> Abkhazia: ways forward, International Crisis Group, Europe report No. 179, 18 January 2007, p. 10; B. Coppieters, *Western Security Policies and the Georgian-Abkhazian Conflict* in Coppieters/Darchiashvili/Akaba (eds) *Federal Practice. Exploring Alternatives for Georgia and Abkhazia*. Brussels: VUB University Press, p. 48.

<sup>1098</sup> M. Shamba, “Negotiation process: hopes and disillusionments”, [http://www.mfaabkhazia.org/documents/stati\\_i\\_analiz/peregovornyj\\_process\\_nadezhdy\\_i\\_razocharovaniya](http://www.mfaabkhazia.org/documents/stati_i_analiz/peregovornyj_process_nadezhdy_i_razocharovaniya)

<sup>1099</sup> S.M. Shamba, *ibid.*; I. Khintba, *Main stages in the negotiation process (1993-2008): evolution of approaches and analysis of results* in N.Akaba and I. Khintba, *Transformation of the Georgian-Abkhaz conflict: rethinking the paradigm*, p. 26.

UN Secretary General's special representative and the First Deputy Foreign Minister of the Russian Federation; the changes introduced into the Protocol and in Attachment on the question of the return of the refugees and composed with regard to the amendments of the Georgian side were discussed. Signing of the discussed document would have enabled the sides to proceed to the final stage of a wide-ranging settlement. The uncompromising nature of the Georgian side's position yet caused again the signing to be postponed.<sup>1100</sup> Hence at this phase of the negotiations despite some progress a lot of issues remained unsolved.

#### **14. Deteriorating negotiations**

Since 1997 the Geneva negotiations were worsen due to terrorist activities by Georgian guerrillas, with strong but not overt support from Tbilisi, widened the gap between Georgia and Abkhazia. In particular, increased hostilities by Georgian paramilitary groups in the Gali region led to clashes with Abkhaz military units. As a consequence in May 1998 it has been seen a sharp deterioration of the security and political situation and a mass exodus back to Georgia of those recently returned residents of the Gal region, as well as the large-scale destruction. The Gal events of May 1998 threatened to wreck the effectiveness of that UN initiative and the overall negotiation climate. Moreover, the high degree of criminality and Georgian terrorist activities continued much more the situation in Gali region highly unstable. In fact, from October 1999 the presence and observation activities of UNOMING and CIS peacekeepers were severely threatened by direct attacks on its personnel, including kidnapping and hostage taking. The relationships between conflicting parties remained to be characterised by lack of confidence..<sup>1101</sup>

#### **15. Boden plan and stalling of negotiations**

The ensuing period of negotiations was marked by attempts to restore confidence between the conflicting parties but without great success, the UN sought to relaunch the political negotiations between Georgian and Abkhazian sides and to find a minimum consensus between the interests of the conflicting parties in the management of the conflict. Liviu Bota, the Special Representative of the UN Secretary-General and his successor Dieter Boden focused on two central issues blocking the negotiation process: the status of Abkhazia and its relationships with Tbilisi, as well return the Georgians to Abkhazia under so-called Plan Boden.

<sup>1100</sup> B. Coppieters, *Western Security Policies and the Georgian-Abkhazian Conflict* in Coppieters/Darchiashvili/Akaba (eds) *Federal Practice. Exploring Alternatives for Georgia and Abkhazia*. Brussels: VUB University Press, p. 48; S.M. Shamba, "Negotiation process: hopes and disillusionments", available at: [http://www.mfaabkhazia.org/documents/stati\\_i\\_analiz/peregovornyj\\_process\\_nadezhdy\\_i\\_razocharovaniya](http://www.mfaabkhazia.org/documents/stati_i_analiz/peregovornyj_process_nadezhdy_i_razocharovaniya)

<sup>1101</sup> S.M. Shamba, *Negotiation process: hopes and disillusionments*, [http://www.mfaabkhazia.org/documents/stati\\_i\\_analiz/peregovornyj\\_process\\_nadezhdy\\_i\\_razocharovaniya](http://www.mfaabkhazia.org/documents/stati_i_analiz/peregovornyj_process_nadezhdy_i_razocharovaniya); . Khintba, *Main stages in the negotiation process (1993-2008): evolution of approaches and analysis of results* in N.Akaba and I. Khintba, *Transformation of the Georgian-Abkhaz conflict: rethinking the paradigm*, p. 26.

In particular, with regard to the issue of Abkhazian status, in 2001, a short list of basic principles for a future peace settlement – called ‘Boden plan’ – was drafted. The envisaged distribution of powers between Tbilisi and Sukhumi was meant as a basis for negotiations between the Georgian and Abkhaz sides. A number of key formulations to be found in the Boden document may, appear to be even contradictory. On the one hand the text made reference to respect for the principle of territorial integrity of Georgia and, on the other hand, to the right of the two nations in conflict to national self-determination. The paper tries to strike a balance between these two principles by using the formula, which defines Abkhazia as a sovereign entity within the sovereign state of Georgia. However, despite this formula, under this document, Abkhazia will not a fully sovereign state. To be precise both Georgia and Abkhazia should be part of the single federal state. Abkhazia was not defined as being part of Georgia, but Sukhumi and Tbilisi would both derive their powers from the federal constitution and would both be equally subordinate to it. The future federation would be based not only on a ‘horizontal’ division of powers between a legislative, executive and judiciary, but also on a ‘vertical’ division of powers between the federal state institutions. The division of powers in this constitution would be regulated according to a federal agreement to be signed by the Georgian government and the Abkhaz authorities. The Boden document also prescribed that both sides "shall not amend or modify the Federal Agreement, nor terminate or invalidate it in any way, other than by mutual agreement". This document already indicated what kinds of powers may be shared by Tbilisi and Sukhumi when it refers to an earlier agreement endorsed by both parties in 1994 (the Declaration on Measures for a Political Settlement of the Georgian-Abkhaz Conflict, signed on 4 April 1994),<sup>1102</sup> which should serve as a point of reference in future negotiations. This agreement provided for ‘joint action’ in the following areas: foreign policy and forging economic ties, arrangements concerning border guards, customs, energy, transport and communication, ecology and the consequences of natural disasters, safeguarding human and civil rights and freedoms, and the rights of national minorities. How these powers would be shared, divided and sub-divided was left open to the parties.<sup>1103</sup>

However, despite the Western mediators considered the paper as a compromise, it was ill-timed and out of touch with reality. Therefore, it proved unacceptable for not only Georgia, but also Abkhazia. To be precise, Georgia refused to make any concession insisting on its alleged right to the Abkhazian territory and accept anything that hinted at the "sovereignty" of Abkhazia within Georgia. *Per se* the real reason to refusing the Boden Plan was the fact that Georgia was not ready to ensure substantial autonomy and meaningful self-administration for Abkhazia. In fact,

<sup>1102</sup> Main principles of the division of powers between Tbilisi and Sukhumi (the ‘Boden plan’); at: <http://abkhazia.narod.ru/boden.htm>

<sup>1103</sup> Interview with Dieter Boden, Ekho Moskvyy, 17 May 2002; <http://www.echo.msk.ru/programs/beseda/18478.phtml>

despite unsuccessful efforts to mitigate negative political and social consequences of its military defeat, Georgia maintained its hardly tractable position in this regard.<sup>1104</sup>

Even though the Boden plan reflected the compromise to which the Abkhazian side had been ready to proceed in previous stages of the peace negotiations, in this period of the negotiations the Abkhazian position hardened to an absolute refusal to discuss the question of a reunification with Georgia on a federal basis, as this might imply a subordinate position within Georgia. The Abkhazian government insisted that they were prepared to discuss only the question the establishing a treaty relationships with Georgia based on voluntary cooperation between two sovereign states possessing equal status. Abkhazia does not agree to engage in negotiations on the basis of the Boden document (ruling out the option of a confederation or of freely associated state), or on the basis of any federal principle that would reincorporate Abkhazia into a Georgian framework. Thus position of Abkhazia explains by increased periodic hostilities by Georgian paramilitary groups in the Gali district and lack of confidence towards Georgia. In fact, a large extent refusal to discuss federal options is mostly to be explained by the fact that this model does not provide solid guarantees to Abkhazia against any the potential Georgian military intervention.<sup>1105</sup> It was not ensured that massive violations of 1992-1993 would not be achieved. Thus, Abkhazian refuse was mostly dictated by the security concerns.<sup>1106</sup>

Therefore, the failure of the Boden plan was caused by its incompatibility with changed realities after 1999 and its nature anachronistic. Consequently, negotiations on Abkhazian status have been stalled since then.

Since both parties refused to discuss the Boden Plan, the UN focused its work on more practical issues, such as conditions for the return of refugees, security in the Gali region, transport and energy linkages – thus with some links to the Sochi agreement. Although the Abkhazian government decided unilaterally to allow to return Georgian refugees the Gali district, without adequate security guarantees and international support, was no progress in this issue.

<sup>1104</sup> S.M. Shamba, *Negotiation process: hopes and disillusionments*, [http://www.mfaabkhazia.org/documents/stati\\_i\\_analiz/peregovornyj\\_process\\_nadezhdy\\_i\\_razocharovaniya](http://www.mfaabkhazia.org/documents/stati_i_analiz/peregovornyj_process_nadezhdy_i_razocharovaniya)

<sup>1105</sup> B.Coppieters, D. Darchiashvili, N. Akaba, *Western Security Policy and the GeorgianAbkhaz Conflict. In The practice of federalism. Looking for Alternatives for Georgia and Abkhazia*, Moscow: Ves mir, 1999, p. 66.

<sup>1106</sup> The Abkhazian refusal to discuss the federal models was supported also by the national referendum of 1999, which confirmed the widening gap between the Georgian-Abkhazian opposing status positions. To be precise, in October of 1999 Abkhazian authority anew held the national referendum, by which the question of Abkhazian independence had been definitively settled by the Abkhaz population. A part of these reasons it is to be mentioned also a changeover in Russia's political elite with election of Vladimir Putin to the Russian Presidency in 2000, which signed the new Russian policy towards the Abkhazian issue. In particular, V. Putin's policy was characterised in certain sense by pro-Abkhazian approach.

## 16. Ending of the official negotiation process

On 25th July 2006, when Georgian President Saakashvili<sup>1107</sup> raised tensions broking the Cease-fire accord of 1994 through occupying part of Abkhazia, the Upper Kodori Valley the negotiations interrupted.<sup>1108</sup> These actions fundamentally changed the tenor of relations between Georgia and the Republic of Abkhazia putting an end to the official negotiation process. The military occupation followed by comments from the Chairman of the Defence and Security Committee of the Georgian Parliament stated publicly that the operation would also establish control over an “*extremely important strategic base ... a place from which one can reach Sukhumi by air in just five minutes*”.<sup>1109</sup> It explains why the Abkhazians believed that Tbilisi was preparing for further attacks against Abkhazia. In response, the *de facto* Abkhazian government had insisted on the withdrawal of the Georgian forces from the upper Kodori Valley and the signing of a document on non-resumption of hostilities, which were as preconditions for the resumption of dialogue with the Georgian side. Nevertheless, Georgia refused to withdraw its forces from the Kodori Gorge and to sign a non-aggression pact. Thus, it rejected to give any guarantees that the Georgian hostilities against Abkhazia would not repeat. At the same time it continued to make bellicose noises about military retaking control over Abkhazia

The introduction of Georgian armed units into Abkhazia’s Kodori gorge on 25 July 2006 was declared by Sukhumi as a gross violation of all key agreements (the 1994 Moscow Agreement on a Ceasefire and Separation of Forces) and a direct security threat. The US and some countries of the EU, who formally supported Georgia, denied any breaches of the 1994 Moscow Agreement. By contrast, Russia condemned the 2006 military operations of Georgia as a violations the cease Moscow agreements. This explains the ambiguous position of the UN in this regard.<sup>1110</sup>

Nevertheless the UN Security Council condemned the offensive in the Kodori Gorge through adopting Resolution 1716 in which it expressed:

*‘its concern with regard to the actions of the Georgian side in the Kodori valley in July 2006 and to all violations of the Moscow Agreement on a Ceasefire and Separation of Forces of 14 May 1994 and other GeorgianAbkhaz agreements concerning the Kodori valley’ and urged the*

<sup>1107</sup> Similar to the former president Shevardnadze, who also arrived to power thrown revolutionary overthrown, Saakashvili was lack of legitimacy. In particular, due to radical turn of the Rose Revolution events and overthrown of Shevardnadze, which resulted in the change in regime with passing power to Mikhail Saakashvili in Georgia in November 2003. Although Mikheil Saakashvili leadership was the lack of legitimacy at the national and international levels, the West (especially the US) promptly transferred its support to him, without waiting for him to secure electoral legitimacy, which came in early 2004.

<sup>1108</sup> Ibid., para.6

<sup>1109</sup> Ibidem.

<sup>1110</sup> А.Г. Арешев, Е.Г. Семерикова, *Абхазия и Южная Осетия после признания. Исторический и современный контекст*, op.cit.,pp..58-59.

*Georgian side to ensure that the situation in the upper Kodori gorge was brought in line with the Moscow Agreement and that no troops unauthorized by this agreement were present.*<sup>1111</sup>

However, the appeal of the UN SC Resolution 1716 of 13 October 2006 to bring the situation in Kodori in line with the 1994 Moscow Agreement fell on deaf ears in Georgia.

UN Secretary-General Ban Ki-moon also condemned the actions of Georgia in the Kodori Gorge. He noted in his reports the activation of Georgia's land and air troop transfers to the upper part of the Kodori gorge, together with other facts should be interpreted as evidence of multiple breaches of the 1994 Agreements on a Ceasefire and Separation of Forces by the part of Georgia. At the time of the writing of the Ban Ki-moon's report of 2006, UNOMIG had issued 13 violation reports of the 1994 Moscow Agreement to the Georgian side relating to the introduction of troops, military vehicles and aircraft into the security zone and obstruction of the freedom of movement of UNOMIG personnel.<sup>1112</sup>

On 13 April 2007, the UN Security Council adopted another resolution (1752) that also called on the Georgian side to bring the situation in the upper Kodori valley in line with the 1994 Moscow Agreement, as well as to finalize without delay the document between Tbilisi and Sukhumi on the non-use of violence and on the return of refugees.<sup>1113</sup>

Nevertheless having ignored the provisions of the UN SC resolutions, the Georgian side continued to build up its army and police presence in the upper Kodori valley, increasing its strength to 2,500 by August 2008.

Hence, the Kodori occupation by Georgia, its bellicose affirmations and intensive militarization<sup>1114</sup> served as an unequivocal reminder to Abkhaz society that Tbilisi was ready to use force in order to regain Abkhazia. As a consequence, the Georgian side blocked the negotiation process and made it impossible to agree on the terms of ensuring security and normal social and economic development of Abkhazia and addressing the most pressing problems facing its population.

There were some attempts to revive the direct dialogue between conflicting parties but without success.<sup>1115</sup>

<sup>1111</sup> Resolution of the Security Council S/RES/1716 adopted on the 13 October 2006 (para 3,4) [http://www.un.org/en/ga/search/view\\_doc.asp?symbol=S/RES/1716\(2006\)](http://www.un.org/en/ga/search/view_doc.asp?symbol=S/RES/1716(2006))

<sup>1112</sup> S/2006/771 (para 7), [http://www.un.org/en/ga/search/view\\_doc.asp?symbol=S/2006/771](http://www.un.org/en/ga/search/view_doc.asp?symbol=S/2006/771)

<sup>1113</sup> [http://www.un.org/en/ga/search/view\\_doc.asp?symbol=S/RES/1752\(2007\)](http://www.un.org/en/ga/search/view_doc.asp?symbol=S/RES/1752(2007))

<sup>1114</sup> [http://www.mil.ru/files/table\\_15\\_05.doc](http://www.mil.ru/files/table_15_05.doc); A. Krylov Gruzia – Vroraja "revolutsia roz", <http://www.fondsk.ru/article.php?id=1050>

<sup>1115</sup> The initiatives of Western countries were directed to resume a direct dialogue between Tbilisi and Sukhumi in order to settle the Abkhazian conflict within the internationally recognized borders of Georgia. In fact, the period from May to July of 2008 was a sharp rise in the number of visits by Western emissaries to Abkhazia. Ambassadors of 15 EU countries (in May 2008) and EU Special Representative Javier Solana visited Abkhazia (in June of the same year). On 17-18 July 2008 the German foreign minister, Frank-Walter Steinmeier, met the Georgian and Abkhazian leaders too. At the meeting Steinmeier brought a three-stage proposal for a peaceful settlement to them. It is to be more precise, the plan implied three steps: the first - a commitment to non-violence by all the parties involved, the second - on economic development and the gradual return of Georgian refugees to the region, and the third - the eventual determination of the political status of Abkhazia within the Georgian State. The first and second points proved acceptable by both (Georgia and Abkhazia). In fact, Saakashvili, said "Georgia is complying with all earlier signed agreements on ceasefire and doesn't intend to use force in the settlement of conflicts." While, the *de facto* president of Abkhazia, Sergei Bagapsh said after talks with German Foreign Minister Frank-Walter Steinmeier that the sign a non-use of force agreement after Georgian troops have been



## 17. Reasons behind the failure

During the years of negotiations the original positions of Georgia remained unchanged at all times, based as they were on determining the status of Abkhazia within the framework of Georgia's territorial integrity, unreadiness to concede substantial autonomy to Abkhazia (that is concede to Abkhazia effective remedies for realisation of the internal right to self-determination) and the unconditional return of refugees to Abkhazia. While the Abkhazian approach to conflict resolution in the course of the negotiations changed. If at the initial of the negotiations the Abkhazian side under pressure of the mediators allowed the possibility the determining Abkhazia within the common State with Georgia on the equal basis, but later through different reasons it refused such solution and focused on its independence. With regard of the Georgian refugees the Abkhazian approach did not change significantly. It agreed only the return only of those who did not take part in military operations against the Abkhaz forces. Since a formula for political compromise was not found the conflicting parties were nonetheless able to establish a constructive partnership.

The negotiations' ineffectiveness can be explained by several reasons: the parties' positions were different – they were gradually drifting away from each other, in the same way as Georgia and Abkhazia are moving in opposite directions;

Negative role of mediators, especially at the initial of the negotiations, who displayed an interest in a particular outcome and did not encourage the Georgian side to explore more flexible approaches and to soften its position;

Periodic escalations of violence on the part of Georgia (1998, 2001, 2006) which undermined positive trends in the parties' attitudes and the implementation of concluded agreements. In fact, the Georgian violation of agreements led to the absence of trust between the parties.

The incorrect interpretation of the nature of the Georgian-Abkhaz conflict by the main stakeholders. Their conceptual distortion is expressed in the tendency to see the Georgian-Abkhaz conflict as a political conflict motivated by narrow elite interests and as a purely ethnic conflict.

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removed from the Kodori Gorge was important. With regard to second-step provision the Georgian president said that the return of refugees to the Abkhazian region is an inalienable part of the peaceful settlement of the conflict and insisted that all refugees return to all regions of Abkhazia. However, Sukhumi conceded return of Georgian refugees to only the Gali district and not to other districts of Abkhazia, because "this can lead to new confrontation between Georgians and Abkhazs." In this way Abkhazia allowed the return of 25,000 ethnic. As for the third step of the Steinmeier plan, which conceded to Abkhazia wide autonomy within Georgia, instead of outright independence, both sides raised some objections. See *Abkhazia rejects Germany's settlement plan for Georgian-Abkhaz conflict*, <http://reliefweb.int/report/georgia/abkhazia-rejects-germanys-settlement-plan-georgian-abkhaz-conflict>; <http://en.people.cn/90001/90777/90853/6452876.html>., see Sergey Shamba: Our state has never known independence such as we have today», Apsnypress, 23 November 2009; <http://www.apsnypress.info/news2009/November/23.htm>

<sup>1116</sup> During the period of *de facto* independence, despite there was no solid support accorded to the claim of Abkhazian self-determination in the post Soviet period, the Abkhazians built a viable State.

## 18. Concluding remarks

In the light of remedial secession doctrine it can be affirmed that Abkhazia meets three conditions set out by the doctrine. Firstly, Abkhazians have to be qualified as a people. Secondly, according to UNPO and ONU there was an evidence of widespread and serious violations of Abkhazian human rights perpetrated by Georgia. The Georgian side, through refusing to sign cease-fire accords, intensive militarisation and bellicose affirmations, failed to ensure that these atrocities and widespread violations of fundamental human rights committed during the military hostilities by Georgian army, documented by the UNPO and the Abkhazian office Prosecutor, would not repeat. And finally, Abkhazians exhausted effective and peaceful remedies. In fact, the Abkhazians tried to re-establish the relationships with Georgia through proposing different projects of common State with Georgia; before and during the Georgian military attacks of 1992-1994 against the Abkhazian republic, Abkhazia was open to dialogue with Georgia. Additionally, even after secession from Georgia Abkhazia continued to negotiate with Georgia seeking peaceful remedies for eventual coexistence within common State until the Georgian occupation of Kodory Gorge. In the light of ongoing gross human rights violations, failing to effectively ensure human rights of Abkhazians and denial to concede the internal right to self-determination, Abkhazia definitely consolidated its independence from Georgia obtaining total control of its historically belonged territory in 2008. Therefore, Abkhazia can be qualified as a self-determination unit within exceptional category to exercise external self-determination and classified as coming within the preview of remedial secession.

To sum up I examined the legal background of the Abkhazian secession from three perspectives: lawfulness of Abkhazian secession under the Soviet law; the validity of the Abkhazian claim to secede due to their subjection to foreign occupation (Georgian domination), and finally under remedial doctrine. This analysis revealed that Abkhazia's claims to external self-determination are in accordance with these legal norms of international law, therefore, Abkhazia had the right to secede from Georgia in international law.

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<sup>1116</sup> The violation in 2006 of the 1994 Moscow Agreement by Georgian military units that entered the upper part of the Kodori Gorge (a demilitarized zone under the terms of the 1994 agreement) put the end of the Georgian-Abkhazian negotiations.

## CHAPTER III

### THE ISSUE OF RECOGNITION

#### 1. Recognition in international law

It is indispensable to explore how recognition is regulated in international law. According to international practice, recognition may be extended to a State, to a government and to a belligerent party.<sup>1117</sup> I will concentrate only on recognition of States. Recognition is an institution of State practice that can resolve uncertainties as to the legal status of governmental entities and allow for new situations to be regulated.<sup>1118</sup> It confirms the will of the recognising State to establish relations with the new entity, and implies the acknowledgement that the new entity fulfils the conditions for becoming an international subject.<sup>1119</sup> Recognition is an instrument for validation of claims to statehood on the part of new entities by existing States.<sup>1120</sup> At the same time, recognition is an important factor in diplomacy and newly formed States are striving for recognition to secure their place on the international arena.

#### 2. Theories on recognition

There are two main theories of recognition in international law. Constitutive and declaratory theories of recognition are termed as classical theories. The constitutive school argues that a recognition of a new entity as a State creates a State. Historic roots of constitutivist theories are traced back to the Vienna Congress. Accession of any new State to the family of States depended on the great powers. In this way “constitutivist” interpretation of recognition is a sort of entrance ticket for a new State to join the exclusive club of States. States seeking recognition could not *ipso facto* and *ipso jure* have rights similar to existing States and particularly to great nations.<sup>1121</sup>

Recognition, under this model is a deliberate measure taken unilaterally and at the discretion of the individual recognizing State.<sup>1122</sup> As Oppenheim put it shortly “A State is, and becomes, an International Person through recognition only and exclusively”.<sup>1123</sup> Recognition in this sense has a heavy political agenda behind it, which may have little or no relation to the act of recognition or even to the benefactor of recognition. Consequently, it makes recognition part of statehood and implies discretion of the existing State to bring new States into being. Recognition makes a new

<sup>1117</sup> H. Lauterpacht, *Recognition in International Law*, 1947, pp.4-5

<sup>1118</sup> J. Crawford, *The Creation of States in International Law*; 2007, p.26

<sup>1119</sup> A. Cassese, *International Law*, 2005, p.74

<sup>1120</sup> Dugard and Raic in Kohen, Marcelo G, ed. *Secession – in International Law Perspectives*, 2006, p. 94

<sup>1121</sup> Д. Фельдман, “Современные теории международно-правового признания”, 1965, P.7

<sup>1122</sup> Anzilotti, 1 *Cours de droit international* (1929) 160; Kelsen, *Principles of International Law*, 2nd edn, 1967, p. 142

<sup>1123</sup> L. Oppenheim 161, 9th edn, 1992, p.57.

State out of a territorial entity, while non-recognition leaves the entity in an indefinite *status*, that gives no chances of being considered on an equal footing by other States.<sup>1124</sup>

However, recognition is solely a matter between the State recognising and the entity being recognised. If recognition is bilateral and discretionary, then there are no legal restraints to censure a State extending recognition. The reaction of third States is also irrelevant, since it concerns a conduct over which any State has discretionary power. The recognising State does not confront any multilateral mechanism either, since only its relations with the beneficiary matter.<sup>1125</sup>

In other words, the decision to recognise is subject exclusively to the sovereign will of the existing State and is made unilaterally without reference to the actions of other members of international community or even to the objective condition of the entity receiving recognition. For a constitutivist, effective existence real statehood bears no importance in the absence of recognition. Under the constitutive theory recognition resides at the complete discretion of the existing State.<sup>1126</sup>

Constitutive doctrine can take other forms, one of them is implying a legal duty. In particular, under this view the existence of a State *'is a question of fact signifies that, whenever the necessary factual requirements exist, the granting of recognition is a matter of legal duty'*.<sup>1127</sup> In other words, political act of recognition is a precondition of the existence of legal rights.<sup>1128</sup>

The most defense of this perspective is that of H.Lauterpacht, who conceives of States as the gatekeepers of the international realm:

*[T]he full international legal personality of rising communities...cannot be automatic...[A]s its ascertainment requires the prior determination of difficult circumstances of fact and law, there must be someone to perform the task. In the absence of a preferable solution, such as the setting up of an impartial international organ to perform that function, the latter must be fulfilled by States already existing. The valid objection is not against the fact of their discharging it, but against their carrying it out as a matter of arbitrary policy distinguished from legal duty*<sup>1129</sup>.

Soviet scholar Tunkin sharing this position asserts that the "statehood criteria" are attained by a community, existing States should recognise that community as a State.<sup>1130</sup>

<sup>1124</sup> I. Brownlie, *Recognition in theory and practice*, in R.St.J. Macdonald & D. Johnston (eds), *The structure and process of international law: essays in legal philosophy, doctrine, and theory*, Dordrecht, Martinus Nijhoff Publishers 1983, 630.

<sup>1125</sup> Thomas D Grant, *Recognition of States*, 1999, p.3

<sup>1126</sup> D. Feldman, *Sovremennye teorii mezhdunarodno-pravovogo priznaniya*, [The modern theories on international recognition], 1965, P.7; Grant, Thomas D "Recognition of States", 1999, p.3; Ti-chiang Chen, *The international law of Recognition*, 1951, p. 13.

<sup>1127</sup> E.g. 1 *Restatement Third* §202(1).

<sup>1128</sup> I. Brownlie (1982) 53 *BY* 197, 209.

<sup>1129</sup> H.Lauterpacht, *Recognition in International Law*, Cambridge, 1947, passim,spec.38 78, p.146

<sup>1130</sup> G. Tunkin, *Osnovy sovremennogo mezhdunarodnogo prava*, [The basis of modern international law], p.22.

Such an opinion implies that there should be workable statehood criteria, established by international law, the attainment of which qualifies entity as a State<sup>1131</sup> and thereafter its recognition is a mere declaration of fact by the recognising State.<sup>1132</sup>

According to Crawford this position can reconcile positivism with the declaratory theory.<sup>1133</sup> In fact some of the scholars who support the declaratory theory see recognition as a legal duty,<sup>1134</sup> whereas the constitutivists, in its classical form (that is depending on the political decision of existing States), refuses such duty.

The constitutive theory of recognition is challenged by the declaratory theory. Declaratory theory emerged as a reaction to the constitutive theory of recognition which failed to address the questions of recognition as early as in 19th century.<sup>1135</sup> According to this doctrine, recognition of new States is a political act, that does not bring consequences such as the creation of the new State as a full subject of international law.<sup>1136</sup> Some scholars consider the Monroe Doctrine as the source of declaratory theory.<sup>1137</sup> Monroe doctrine of *de-facto* recognition struck on the principles of legitimism which served as a basis of constitutive theory.<sup>1138</sup>

The declaratory school asserts that an entity becomes a State when it effectively governs a territory and the people on it. Recognition simply declares the fact that it has done so. The Badinter Arbitration Commission tasked by the European Community in 1991 to provide legal advice on compliance with the EC guidelines for the recognition of States following the dissolution of Yugoslavia, found that

*the existence or disappearance of the state is a question of fact and the effects of recognition by other States are purely declaratory.*<sup>1139</sup>

Ti-Chiang Chen representing declaratist view wrote that  
*in general, a nation's existence should be determined without reference to whether or not other States have officially recognized it.*<sup>1140</sup>

Arangio Ruiz sharing this position affirms that since setting up of States and governments is, from the standpoint of international law, a factual, not a legal event<sup>1141</sup>, therefore recognition or

<sup>1131</sup> H. Lauterpacht, *Recognition in International Law*, op.cit., p. 6; J. Crawford, *The Creation of States in International Law*, op.cit., pp. 17-20.

<sup>1132</sup> Ibidem.

<sup>1133</sup> J. Crawford, *The Creation of States in International Law*, op.cit., pp. 17-20.

<sup>1134</sup> For instance, G. Tunkin. See *Osnovy sovremennogo mezhdunarodnogo prava*, [The basis of modern international law], p.22.

<sup>1135</sup> N. Samkharadze, *Russia's Recognition of Independence of Abkhazia and South Ossetia – Causes of Deviation from Russian Traditional Recognition Policy*, p.72

<sup>1136</sup> See T-C.Chen, *The International Law of Recognition*, for a full discussion of this position. It is of interest that L. C. Green's annotations to the published edition are consistently constitutivist: in this respect Green follows Schwarzenberger rather than Chen.

<sup>1137</sup> For instance, see H. Lauterpacht, *Recognition in International Law*, 1947, p.41; G. Tunkin, *Osnovy sovremennogo mezhdunarodnogo prava*, [The basis of modern international law], p.33.

<sup>1138</sup> N. Samkharadze, *Russia's Recognition of Independence of Abkhazia and South Ossetia – Causes of Deviation from Russian Traditional Recognition Policy*, p.77

<sup>1139</sup> Opinions of the Arbitration Committee, Opinion 1, Article, 1, available at: <http://ejil.oxfordjournals.org/content/3/1/178.full.pdf+html>

<sup>1140</sup> Ti-chiang Chen, *The international law of Recognition*, 1951, p. 13

<sup>1141</sup> The argument in regard factual nature of State, proposed by G. Arangio-Ruiz, can be summed up in the following terms:

...[T]he State itself under national law — is a juridical event with regard to both the establishment of the entity and its elevation to personality. The establishment of a State in the sense of international law is a juridically relevant fact, the only juridical event attached thereto by international (p.

non-recognition has no effect on existence of a State. According to him recognition as an ascertainment of the formation of a new State, which can be paragoned to certifying or “biographical particulars” of physical person.<sup>1142</sup> He also paragoned the establishment of a State to *the biological coming into existence of a human being as a juridically relevant fact (fatto giuridico, fait juridique) to which (national) law attaches the legal event or effect consisting in the acquisition by the individual of a legal personality (18).*<sup>1143</sup> Hence, recognition is not necessary for acquisition of international personality. The formation of a State occurred through historic existence as a sovereign entity and realization of subjective elements of normative circumstances. Under subjective circumstances are understood sovereignty-independence and minimal organization that concedes an entity to act as an unity.<sup>1144</sup>

Substantial State practice supports the declaratory view.<sup>1145</sup> Unrecognized States are quite commonly the object of international claims by the very States refusing recognition. For instance, an example is Israel, long held accountable under international humanitarian and human rights law by certain Arab States that persistently deny it recognition.<sup>1146</sup>

These views have their weaknesses and they have been criticised. The constitutivist theory is criticized for neglecting the rights of new States. In particular, the principle of the sovereign equality of States is distorted under constitutive model, as new States are subordinated to supremacy of the existing ones.<sup>1147</sup> Most of Soviet and eastern European legal scholars criticized the constitutivist school because they saw it as tools serving the interests of colonial Powers, opposing the emergence of new States out of former colonies or adversaries.<sup>1148</sup> Crawford asserts that the constitutive view is as a matter of principle impossible to accept:

*it is clearly established that States cannot by their independent judgment remove or abrogate any competence of other states established by international law (as distinct from agreement or concession). Moreover, the constitutive theory of recognition leads to substantial difficulties in terms of practical application. How many states must recognize? Can existence be*

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137) law being the attribution of personality, namely, international rights and obligations, or the capacity thereof... [States], together with their legal systems, factual entities from the standpoint of international law. Assuming, though, that it could be argued that the States' international persons cannot be anything but juristic entities, such quality being a sine qua non condition of their international legal personality and of the very existence of international law itself (any legal rules vesting them with rights and obligations)... [E]ven if the States' international persons were really juristic persons, they are not juristic enough (so pervasively penetrated or structurally conditioned, if at all, by international law) for the attribution to them of objectionable officials' conduct for international legal purposes to be fully, and thoroughly conditioned by international legal norms.. Not even international rules (conventional or customary) imposing upon a State obligations affecting its structure ... would directly affect such a state of affairs. Any structural modification brought about within that State's national law as a result of the State's compliance with any such obligations will remain, from the standpoint of international law, as factual as that same State's pre-existing structures and any future modification thereof. Indeed, no one but the State itself could possibly alter the State's organic structure.

<sup>1142</sup> G. Arangio-Ruiz, *La persona internazionale dello Stato*, op.cit., pp. 79-80

<sup>1143</sup> G. Arangio-Ruiz, *Eighth report on State Responsibility*, A Special Rapporteur, /CN.4/476 & Corr.1, 1996, p.138, [http://legal.un.org/ilc/documentation/english/a\\_cn4\\_476.pdf](http://legal.un.org/ilc/documentation/english/a_cn4_476.pdf)

<sup>1144</sup> G. Arangio-Ruiz, *La persona internazionale dello Stato*, op.cit., p.80

<sup>1145</sup> Montevideo Convention, Arts 3, *The political existence of the State is independent of recognition by the other States*, 6. Also: 1 *Restatement Third* §202(1); Badinter Commission, *Opinion No 10* (1992) 92 ILR 206, 208; *Reference re Secession of Quebec* (1998) 115 ILR 536, 589-90. Further: Talmon (2004) 75 BY 101, 106-7.

<sup>1146</sup> Craven, in Evans (3rd edn, 2010) 203, 244.

<sup>1147</sup> H. Lauterpacht, *Recognition in International Law*, 1947, p.41

<sup>1148</sup> D. Feldman, *Sovremennye teorii mezhdunarodnogo pravovogo priznanija*, [Modern theory of international recognition], 1965, p.26

*relative only to those states which recognize? Is existence dependent on recognition only when this rests on an adequate knowledge of the facts? More vitally, does non-recognition by a state entitle it to treat an entity as a non-state for the purposes of international law, for example, by intervening in its internal affairs or annexing its territory?*<sup>1149</sup>

In regard to arguments against legal duty to recognition it can be noted that there are not clear defined statehood criteria, established by international law, the attainment of which qualifies entity as a State. There is no authoritative definition of the relevant criteria of statehood.

Moreover, this approach can be seen in contrast with factual nature of States. Under Arangio Ruiz's thesis on factual nature the formation of a new State is a matter of fact, and not of law and the criterion of statehood must be effectiveness and not legitimacy.<sup>1150</sup>

The declarative theory, in turn, is criticized for being not clear as to the legal importance of recognition and, sometimes, even for neglecting the political ingredient of the act.<sup>1151</sup>

### 3. Background to Georgia's recognition

As known the recognition is a two-step process: 1) declaration of recognising States of the fact that a new entity is created with sustainable government and 2) establishment of official relations with the new state.<sup>1152</sup>

During the existence of the USSR in 1990-1991 and soon after the collapse of the Soviet Union the Georgian authorities newly declared the independence of the Georgian State. However, none of existing States recognised the new State-aspiring Georgian entity.<sup>1153</sup> The reason why in 1990-1991 the Georgian like-state entity did not obtain recognition was non-correspondence of the Georgian entity to statehood's criteria. In particular, such unilateral secession from the USSR was considered a violation the principle of the self-determination and the territorial integrity of the USSR. After the *de-facto* collapse of the USSR the new formed Georgian entity did not obtain recognition from the existing States due to the hostilities in the South Ossetia and the civil war in Mingrelia. As a consequence of the civil war, Georgia was divided between the supporters of the deposed President Gamsakhurdia and the adherents of the new government.<sup>1154</sup> The revolutionary

<sup>1149</sup> J.Crawford, *The Creation of States in International Law* (2nd Edition), 2007, Oxford Public International Law.

<sup>1150</sup> Arangio-Ruiz (1975–6) 26 *Ozfor* 265, 284–5, 332. See also the formulation in Willoughby, *Nature of the State*, 195: 'Sovereignty, upon which all legality depends, is itself a question of fact, and not of law.' See also L.Oppenheim (8th edn), vol 1, 544, §209; and the somewhat different formulation in Oppenheim (9th edn), vol 1, 120–3, §34.

<sup>1151</sup> For instance, see Thomas D Grant, *Recognition of States*, op.cit., p.1; E. Lauterpacht, *International Law, Vol. I The General Works* 1970, The University Press, 308, 337–48; David Turns, *The Stimson Doctrine of Non-Recognition: Its Historical Genesis and Influence on Contemporary International Law*, *Chin.J.I.L.*, 2, 2003, 105–43 2003, 2 *Chin JIL* 105; M. Fabry, *Recognizing States*, London: Routledge, 2011, pp. 135–7.

<sup>1152</sup> L. Oppenheim, *International Law*, Vol. 1 para. 71, [http://www.gutenberg.org/files/41046/41046-h/41046-h.htm#Page\\_16](http://www.gutenberg.org/files/41046/41046-h/41046-h.htm#Page_16)

<sup>1153</sup> V.A. Zakharov, A.G. Areshv, *Priznanie nezavisimosti Juznoj Osetii I Abkhazii: Istorija, politika, pravo* [Recognition of Independence of South Ossetia and Abkhazia: history, policy and law], M. MGIMO MID Rossija, 2008; Alexei Zverev,

*Ethnic Conflicts in the Caucasus 1988-1994*, Contested Borders in the Caucasus, by Bruno Coppieters (ed.), 1996, VUB University Press, <http://poli.vub.ac.be/publi/ContBorders/eng/ch0103.htm>; V. Chirikba, *The International Legal Status of the Republic of Abkhazia In the Light of International Law*, <http://abkhazworld.com/aw/analysis/911-int-legal-status-abkhazia-vchirikba>

<sup>1154</sup> *Ibid.*

insurgent government *Georgian Military Council*, who came to power in 1991, lacked both popular and formal legitimacy.<sup>1155</sup> Realizing the necessity of winning acceptance into the world-community, the putchists invited Edward Shevardnadze to abandon his Moscow retirement and lead them.

For the *Georgian Military Council*, this was a brilliant move.<sup>1156</sup> Eduard Shevardnadze, serving as Soviet foreign minister under Mikhail Gorbachev during the *glasnost* and *perestroika* years, enjoyed a good reputation amongst the West's community of diplomats and politicians.<sup>1157</sup> In fact, being in post when the Berlin Wall came down and in the lead-up to the collapse of the Soviet Union earned him a good reputation to the eyes of the West, which 'felt gratitude,' especially Germany.<sup>1158</sup> For this reason in March 1992 Western countries established diplomatic relations with Georgia as soon as Eduard Shevardnadze, former first secretary of the Georgian Communist Party (1972-1985) and then 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).<sup>1159</sup> Major Western leaders believed that E. Shevardnadze was a the right person to move Georgian State towards democracy.<sup>1160</sup> They recognised Georgia within the Soviet administrative line established by I. Stalin: that is, *including* Abkhazia. However, they lacked full knowledge of the cultural, historical and legal aspects of this former Soviet sub-unit, and did not realize how ancient issues posed by the antagonistic coexistence between Georgians, Abkhazians and other ethnic groups would have soon reemerged. Indeed the majority of Western States ignored the tangled issues posed by Stalin's administrative frontiers, whose traumatic consequences were shown by the war in Abkhazia and then in S. Ossetia. .

Membership of the International Monetary Fund (IMF) and World Bank soon followed.<sup>1161</sup> Finally, on 31 July 1992 Georgia was admitted to the United Nations (UN).<sup>1162</sup> Moreover, the candidacy of E. Shevardnadze was supported by the Russian Federation,<sup>1163</sup> which was recognized as a continuator of the Soviet Union. Boris Yeltsin, the president of Russia

<sup>1155</sup> Ibid..

<sup>1156</sup> George Hewitt, *The accelerated recognition of Georgia helped to instigate the ethno-political conflicts*, Caucasus Times, 16 November 2010, <http://www.caucasustimes.com/article.asp?id=20511>

<sup>1157</sup> Ibid..

<sup>1158</sup> Ibid..

<sup>1159</sup> Viacheslav Chirikba, *The International Legal Status of the Republic of Abkhazia In the Light of International Law*, <http://abkhazworld.com/aw/analysis/911-int-legal-status-abkhazia-vchirikba>; <sup>1159</sup> George Hewitt, *The accelerated recognition of Georgia helped to instigate the ethno-political conflicts*, Caucasus Times, 16 November 2010, <http://www.caucasustimes.com/article.asp?id=20511>

<sup>1160</sup> Ibid..

<sup>1161</sup> Ibid..

<sup>1162</sup> GA, A/RES/46/241, *Admission of the Republic of Georgia to membership in the United Nations*, 31 July 1992, at <http://www.un.org/documents/ga/res/46/a46r241.htm>

<sup>1163</sup> Edward Scevarnadze in search for sustain of the Russian Government, the first of all, in the Georgian-Abkhazian conflict, asseced to the CIS and signed a series of treaties (1994), on the basis of which it was established the Russian military base on the Georgian territory.



contributed to the admission of Georgia to the United Nations and, he openly supported Georgia in the Abkhazian conflict, providing political, economical and military aid.<sup>1164</sup>

Undoubtedly, without Edward Shevardnadze, Georgia's fate in (and from) March 1992 would surely have been entirely different.

#### 4. The recognition of Georgia: was it premature?

There are several modalities of recognition of a new State as well as non-recognition. It could occur either unilaterally or collectively. Unilateral recognition occurs when an existing state, international legal personality recognises that another entity claiming to be a State meets the requirement of statehood and is therefore regarded as a State, in the sense of international law.<sup>1165</sup>

Collective recognition occurs, when a group of States recognises the statehood of a new entity directly, by an act of recognition, or indirectly, by the admission of the State to the international organisation.<sup>1166</sup> First unilateral recognitions of Georgia came from States such as, England, USA, Russian Federation and others. Then Georgia was admitted to the United Nations within its Soviet boundaries (i.e. including Abkhazia).<sup>1167</sup>

Recognition, as the practice of States shows<sup>1168</sup>, implies the will to deal with the new State as a full member of the international community.<sup>1169</sup> Since this is a political act, it is discretionary and no rule can actually compel States to provide recognition. This explains the fact that, the act of the recognizing State is conditioned principally by the necessity of protecting its own national interests, which lie in maintaining proper relations with the new State or the new government.<sup>1170</sup> For this reason, States tend to view the decision to recognize or not recognize an entity as a State as a political decision, albeit it exists within an international legal framework, which is not clearly defined<sup>1171</sup>. In fact, there is no authoritative definition of the relevant criteria of statehood.<sup>1172</sup> However, there is one of the most relevant legal formulations of statehood appears

<sup>1164</sup> С.З. Лакоба, *Абхазия - де-факто или Грузия - де-юре? (О политике России в Абхазии в постсоветский период. 1991-2000 гг.)*, Sapporo: Slavic Research Centre, Hokkaido University, 2001, p.27

<sup>1165</sup> Dugard and Raic in Kohen, Marcelo G, ed. *Secession – in International Law Perspectives*, p. 94; <sup>1165</sup> H. Lauterpacht, *Recognition in International Law*, Cambridge Cambridge University Press, 2012, p.26;

<sup>1166</sup> H. Haftendorn, , *Coming of Age*, 2006, p.375; *James R. Crawford, The Creation Of States In International Law, Second Edition*, Oxford University Press Canada, 2010, at <http://www.oxfordscholarship.com/view/10.1093/acprof:oso/9780199228423.001.0001/acprof-9780199228423-chapter-2/102>

<sup>1167</sup> С.З. Лакоба, *Абхазия - де-факто или Грузия - де-юре? (О политике России в Абхазии в постсоветский период. 1991-2000 гг.)*, Sapporo: Slavic Research Centre, Hokkaido University, 2001, p.27

<sup>1168</sup> H. Lauterpacht, *Recognition in International Law*, Cambridge Cambridge University Press, 2012, p.26; *James R. Crawford, The Creation of States in International Law, Second Edition*, Oxford University Press Canada, 2010, <http://www.oxfordscholarship.com/view/10.1093/acprof:oso/9780199228423.001.0001/acprof-9780199228423-chapter-2/102>

<sup>1169</sup> Ibid.

<sup>1170</sup> C. Borgen, *From Intervention to Recognition: Russia, Crimea, and Arguments over Recognizing Secessionist Entities*, <http://opiniojuris.org/2014/03/18/intervention-recognition-russia-crimea-arguments-recognizing-secessionist-entities/>

<sup>1171</sup> See See the Part three *An assessment of the present legal status of Abkhazia*., Chapter I *The assessment of effectiveness*, 3 *The elements of statehood in relation to Abkhazia*, pp. 140-143.

<sup>1172</sup> Karl Doehring, *State* in Rudolf Bernhard (ed), *Encyclopaedia of Public International Law*, vol. 4 (North Holland: Elsevier 2000) 600-604, at 601; Dahm/Delbrück/Wolfrum 1988 (above note 3), at 131; Brownlie at 71-72; Cassese, *Public International Law* (above note 3), at 48. Cf. also Opinion No. 1 of the European Conference on Yugoslavia: "the state is commonly defined as a community which consists of a territory and a population subject to an organized political authority" (repr. in ILM 31(1992), at 1494-1497; EJIL 3 (1992), at 182), para. 1 b).

in Article I of the Montevideo Convention on the Rights and Duties of States (1933)<sup>1173</sup>, which can be considered at least a basic consensus of the minimal preconditions for statehood: effective and independent governmental control, the possession of defined territory, the capacity to freely engage in foreign relations and effective control over a permanent population.<sup>1174</sup> According to Raič when an entity that does not (yet) meet the foundational requirements of statehood is to be qualified as the premature recognition<sup>1175</sup> Therefore, it is to be assessed whether Georgia at the moment of its recognition satisfied the statehood criteria for recognition and the requisites for admission to the United Nations.

At the moment of the recognition, Georgian revolutionary government, headed by Shevardnadze, fulfilled the requisite of a permanent population. As for territory it exercised control only over one third of territory, within which Georgia was recognized in 1992. In particular, it did not exercise effective control over Abkhazia, Adjara, Mingrelia and South Ossetia. Georgia reestablished effective control over Mingrelia<sup>1176</sup> and Adjara in 1993<sup>1177</sup>. As for Abkhazia and South Ossetia, they presently are still out of Georgian jurisdiction. For this reason some experts consider Georgian recognition as premature.<sup>1178</sup> In fact, recognition of the Military Council headed by E. Shevardnadze came despite lack of effective power to rule throughout its territory and regardless of the wars in Mingrelia and South Ossetia.<sup>1179</sup>

Moreover, in modern international law, there is obligation to refrain from recognition of States, whose government was established through violation of the an obligation arising under a norm of *jus cogens*. Such government should be regarded as having no legal existence.<sup>1180</sup> As known, at the time of the recognition of Georgia, the armed conflict between the Georgians and the Ossetians had been in progress for about one year.<sup>1181</sup> Under terms of international law, before the recognition of Georgia within the Soviet frontiers, the military action of Georgia against South Ossetia should be qualified as an aggression, in contrast with Article 2 (4) of the UN Charter regarding prohibiting the use of force. In fact, soon after the USSR's collapse, the main reasons of non-recognition of Georgia, on the part of the international community, was the war in South Ossetia.<sup>1182</sup>

<sup>1173</sup> *Montevideo Convention on the Rights and Duties of States* (1933), signed 26 September 1993, at <https://www.ilsa.org/jessup/jessup15/Montevideo%20Convention.pdf>

<sup>1174</sup> See the Part three *An assessment of the present legal status of Abkhazia*, Chapter I *The assessment of effectiveness*, 3 *The elements of statehood in relation to Abkhazia*, pp. 140-143.

<sup>1175</sup> D. Raič, *Statehood and the law of self-determination*, Leiden, Kluwer Law International 2002, p. 29

<sup>1176</sup> See *Natella Akaba and Irakli Khintba*, Transformation of the Georgian-Abkhaz conflict: rethinking the paradigm, p.21.

<sup>1177</sup> Di Robert A. Saunders, Vlad Strukov, *Historical Dictionary of the Russian Federation*, in *Historical Dictionary of Europa*, No 78, The Scarecrow Press. INC, Lanham Toronto, Plymouth, UK, 2010, pp. 221-222.

<sup>1178</sup> George Hewitt, *The accelerated recognition of Georgia helped to instigate the ethno-political conflicts*, op.cit., <http://www.caucasustimes.com/article.asp?id=20511>

<sup>1179</sup> *Ibid.*

<sup>1180</sup> J. Crawford, *Brownlie's Principles of Public International Law*, Eighth Edition, Oxford, 2012, pp.143-166.

<sup>1181</sup> А.Г. Арешев, Е.Г. Семерикова, *Абхазия и Южная Осетия после признания. Исторический и современный контекст*, op.cit., p. 74; *Хроника событий грузино-осетинского конфликта с 1988 по 1994 годы*, at [https://ria.ru/osetia\\_spravki/20080811/150283008.html](https://ria.ru/osetia_spravki/20080811/150283008.html)

<sup>1182</sup> *Ibid.*

Moreover, external independence of Georgia could be put into question, due to Russian military presence on its territory at the time of recognition. The Georgian armed forces were unable to effectively counter Gamsakhurdian forces without Russian military support. Through the establishment of five Russian military bases, Shevardnadze's own hold on power was assured and then was Gamsakhurdia defeated. Russia provided not only military, but also economic support for Georgia.

The military presence of Russians was provided by means of the so-called *Tashkent Agreement* on collective security with Georgia.<sup>1183</sup> Under this Agreement, despite the fact that Georgia was not a member of the CIS, it obtained the right to a military quota, to whom only members of the CIS were entitled. Indeed, treaty obligations, including military base concessions, do not affect the sovereignty of State parties.<sup>1184</sup> Therefore, the support by Russian contingents<sup>1185</sup> cannot be seen as any evidence of a lack of formal independence of Georgia.<sup>1186</sup>

According to a wide opinion, statehood requisites in present international law should include democracy as an additional standard for the qualification of an entity as a State.<sup>1187</sup> In the case of Georgia, at that time of recognition, Shevardnadze's regime (which in January 1992 had ousted the constitutionally elected president, Zviad Gamsakhurdia) had no mandate from the Georgian people as elections were scheduled for October 1992. In particular, in 1992 the Military Council headed by Shevardnadze triggered the civil war, and thus came into power through use of force, that is, by means of revolutionary overthrow, and not through democratic elections. Therefore, this kind of government did not fulfill the democratic standards at the moment of recognition.

Moreover, according to a group of scholars, the new practice of recognition of States of Eastern Europe and the former Soviet Union since 1991, which was established by the EU (then EC) Member States, has overridden the traditional principles of regarding recognition based only on effectiveness.<sup>1188</sup> These new criteria are designed to evaluate the candidates in terms of the reliability as partners in international relations, considering the extent to which they are able and willing to be politically integrated in the international community. Only after fulfilment these criteria, set up by the EC, should a new entity be recognized and integrated into the community of

<sup>1183</sup> *Договор о Коллективной Безопасности* от 15 мая 1992 года, [http://www.odkb-csto.org/documents/detail.php?ELEMENT\\_ID=126](http://www.odkb-csto.org/documents/detail.php?ELEMENT_ID=126)

<sup>1184</sup> Higgins, Development, p. 32. On military 'servitudes' generally see *ibid.*, pp. 31-4; Esgain, in O'Brien (ed.), *The New Nations in International Law and Diplomacy* (1965), pp. 42-97; Delupis, *International Law and the Independent State* (1974), pp. 200-23.

<sup>1185</sup> *Договор о Коллективной Безопасности* от 15 мая 1992 года, [http://www.odkb-csto.org/documents/detail.php?ELEMENT\\_ID=126](http://www.odkb-csto.org/documents/detail.php?ELEMENT_ID=126)  
Коммюнике по итогам встречи Б. Н. Ельцина и Э. А. Шеварднадзе от 24 июня 1992 года, at <http://sojcc.ru/soglashenia/print:page.1.50.html>.

<sup>1186</sup> S. Lakoba, *Abkhazia de facto ili Gruzia de jure?* [O politike Rossii v Abkhazii v postsovetskiy period, 1991-2000 gg.], p. 17.

<sup>1187</sup> Henry L. Stimson, *States in International law*, pp. 8-9, <https://www.britannica.com/topic/international-law/States-in-international-law>;

T.M. Franck, *Legitimacy and the democratic entitlement*, FOX G.H. and B.R. ROTH (eds), *Democratic Governance and International Law*, Cambridge, Cambridge University Press 2000, p.85.

<sup>1188</sup> C. Hillgruber, *The Admission of New States to the International Community*, at <http://www.ejil.org/pdfs/9/3/664.pdf>; A.E. Eckert, *Constructing States: the Role of the International Community in the creation of New States*, at <https://www.princeton.edu/jpia/past-issues-1/2002/2.pdf>; H. Kelsen, *Recognition in International Law: Theoretical Observations*, *The American Journal of International Law*, Vol. 35, No. 4, (1941), p. 605.

States and the international community.<sup>1189</sup> Therefore, the premature recognition on the part of the states of EU and the USA can be explained by the fact that in the eyes of the Western states the government guided by E. Shevardnadze, was considered as a reliable partner, willing and able to be integrated into the international community. However, these new terms of recognition, established by the EU Member States, do not yet form part of customary international law in order to develop international law in a particular direction and there were not applicable to Georgia.<sup>1190</sup>

Hence, basing above mentioned that in 1992 the recognition of Georgia can be considered premature. According to the Professor of Caucasian studies George Hewitt, the Georgian recognition on the part of the international community was not only premature, but also a geopolitical error, which led to bloodshed.<sup>1191</sup> Professor Hewitt also affirms that in order to be recognized Georgia had to respect the prohibition of the use of force, that is, to stop the war in South Ossetia and Mingrelia.<sup>1192</sup>

## 5. Admission to the United Nations

On 31 July 1992 Georgia was admitted to the UN.<sup>1193</sup> B. Eltsin, the President of the Russian Federation, which was recognized as continuator of the USSR, also contributed to the admission of Georgia to the United Nations (UN)<sup>1194</sup>. After its admission to the United Nations, the statehood of Georgia cannot be called into question.<sup>1195</sup> The admission to the UN is a legal procedure, which occurs through emanating of legal acts by the force of Art. 4 of the UN Charter. As is known, new members to the UN should satisfy certain requisites. In particular, Art. 4 (Item 1) of the UN Charter explicitly establishes that all States: “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”.<sup>1196</sup> Thus, in order to be admitted to the UN a member should meet the criteria of statehood and be “peace-loving,” accept obligations that derive from the Charter of the UN and to be subject of valuation of willingness to carry out these obligations.<sup>1197</sup> Any State which submits an application to the United Nations is subject of discretionary valuation of the UN competent organs, which decide upon its application for membership. However, the General Admission and the Council Security on admission of a new applicant to the UN does not judge on

<sup>1189</sup> C. Hillgruber, *The Admission of New States to the International Community*, at <http://www.ejil.org/pdfs/9/3/664.pdf>.

<sup>1190</sup> Ibid..

<sup>1191</sup> George Hewitt, *The accelerated recognition of Georgia helped to instigate the ethno-political conflicts*, <http://abkhazworld.com/news/interview/596-george-hewitt-interview-for-caucasus-times.html>

<sup>1192</sup> H. Lauterpacht, *Recognition in International Law*, op.cit., pp.7-11

<sup>1193</sup> GA, A/RES/46/241, *Admission of the Republic of Georgia to membership in the United Nations*, 31 July 1992, at <http://www.un.org/documents/ga/res/46/a46r241.htm>

<sup>1194</sup> С.З. Лакоба, *Абхазия - де-факто или Грузия - де-юре? О политике России в Абхазии в постсоветский период. 1991-2000 гг.*, op.cit., p.30.

<sup>1195</sup> Christian Hillgruber, *The Admission of New States to the International Community*, European Journal of International Law, Vol. 9, Firenze, 1998, pp. 491-509, 1998

<sup>1196</sup> Carta delle nazioni Unite, l'art. 4, R. Luzzatto - F. Pocar, *Codice di diritto internazionale pubblico*. Torino: Giappichelli, 2010, p.4.

<sup>1197</sup> C. Focarelli, *Diritto internazionale: il sistema di Stati e i valori comuni dell'umanità*, vol. 1, Padova, Cedam, 2008, p. 67.

the merits of the question and on its adequacy of an applicant.<sup>1198</sup> As seen before, Georgia did not even meet the minimum standard required for admission as a member of the United Nations. In particular, Georgian admission to the UN was in contrast with Art. 4 (1) of the UN Charter, because Georgia did not have effective government and did not correspond to the definition 'peace loving' because of the wars in Mingrelia and the South Ossetia.

For the above-mentioned reasons a group of scholars maintain that the recognition and admission to the UN of Georgia was premature.<sup>1199</sup>

## 6. Non-recognition of Abkhazia and its legal consequences in 1991-2008

In contrast to Georgia, Abkhazia did not obtain recognition. Its requests for recognition and admission to the UN were ignored. It is important to specify that the Abkhazian government appealed to the international community before the formal recognition of Georgia.<sup>1200</sup>

It is necessary to examine the effects of non-recognition on Abkhazia in 1991-2008. The question of the legal effects of recognition and non-recognition is associated with the prevailing declaratory theory, according to which recognition is merely an acknowledgment of the facts.<sup>1201</sup>

There is no general rule of international law which regulates the forming of a new entity, therefore, the establishment of a new State or government is not a breach of international law is simply a question of fact, and recognition and non-recognition usually have no legal effects. Its existence is a question of pure fact<sup>1202</sup>.

If an entity satisfies the requirements of statehood in terms of effectivity, it has to be considered as a State with all international rights and duties and other States should consider it as such, i.e. in terms of equality.<sup>1203</sup> After its formation, a non-recognized State became a part of situations deriving from customary law.<sup>1204</sup> Customary norms, that frequently contemplated the establishment, modification and dissolution of States, are binding them under international law.<sup>1205</sup>

However, recognition can sometimes have a constitutive effect, that is, if the establishment of a State or government is in violation with international law, the State or government has no legal existence. Only its recognition by the international community is a necessary condition for coming into existence on the international plane.<sup>1206</sup>

<sup>1198</sup> Ibid..

<sup>1199</sup> Т.М. Шамба, А.Ю. Непрошин, *Абхазия. Правовые основы государственности и суверенитета*, 2-е изд., М., Ин-Октаво, 2004, с. 135; George Hewitt, *The accelerated recognition of Georgia helped to instigate the ethno-political conflicts*, <http://abkhazworld.com/news/interview/596-george-hewitt-interview-for-caucasus-times.html>

<sup>1200</sup> Т.М. Шамба, А.Ю. Непрошин, *Абхазия. Правовые основы государственности и суверенитета*. Издание 2-е переработанное. М., РГТЭУ, 2004, р. 203.

<sup>1201</sup> Peter Malanczuk, *Akehurst's Modern Introduction to International Law*, Routledge, Seventh revised edition, 1997. p. 82.

<sup>1202</sup> I. Brownlie, *Principles of Public International Law*, 1990, Clarendon Press, 1998, pp 143-147.

<sup>1203</sup> Tunkin, op.cit., p.37.

<sup>1204</sup> G. Arangio-Ruiz, *La persona internazionale dello Stato*, op.cit., p.81.

<sup>1205</sup> Ibid..

<sup>1206</sup> See, Ian Brownlie, *Principles of Public International Law*, p. 147; E. Milano, *Unlawful Territorial Situations in International Law, reconciling effectiveness, legality, and legitimacy*, op.cit., p. 35.

Under the prevailing declaratory theory of recognition<sup>1207</sup>, since Abkhazia came into existence in line with international law,<sup>1208</sup> its recognition or non-recognition by the world powers, is not affecting the existence of Abkhazia at least as a State-like entity.<sup>1209</sup>

In other words, non-recognition of the statehood of Abkhazia by the international community could not either deprive it of its legitimacy, or nullify the existence of the Abkhaz State, inasmuch as *de jure* recognition by Georgia or by any other government will not create the Abkhaz State or give it any additional legitimacy.<sup>1210</sup> It exists independently of these factors, albeit its international legal personality could be limited.

Nevertheless, it is clear that official recognition is of huge political significance for an entity seeking to become a new actor on the international stage. In fact, Tunkin affirms that even though the recognition does not create a legal personality of the State, its legal implications are obvious, since it creates “solid legal basis for relations between the two States.”<sup>1211</sup> Even individual acts of recognition may contribute towards the consolidation of a *status*. At the same time, the more States recognise the new entity, the stronger its position in international law becomes.<sup>1212</sup>

Recognition allows a State to fully promote its rights and to behave like an equal partner in relations with existing States. Moreover, in the countries of *common law* the recognized States enjoy privileges and immunities of a foreign State, before the national courts, which would not be allowed to other entities. While, in the countries of *continental law* there is the principle of *locus standi*, according to which not only recognised States but unrecognised one are entitled to appear before national courts of non-recognising States and have immunity from the jurisprudence of the latter.<sup>1213</sup> In certain cases, recognition can even consolidate the independence of a new State, especially in doubtful, controversial, or unstable situations.<sup>1214</sup>

Non-recognition may be an expression of disapproval of some aspect pertaining to the new State”.<sup>1215</sup> In other words, non-recognition presumes unwillingness to deal with new State as a member of the international community. The consequent absence of diplomatic relations would

<sup>1207</sup> L. Oppenheim, *International Law* §§ 71, at 125 (Hersch Lauterpacht ed., 8th ed., 1955) (“A State is, and becomes an International Person through recognition only and exclusively.”); H. Lauterpacht, *Recognition of States in International Law*, 53 *Yale L.J.* 385, 419 (1944) (describing “The orthodox constitutive view which deduces the legal existence of new States from the will of those already established.” James L. Brierly, *The Law of Nations: An Introduction to the International Law of Peace* (Humphrey Waldoock ed., 6th ed. 1963); Ti-Chiang Chen, *The International Law of Recognition: With Special Reference to Practice in the United States* (L. C. Green ed., 1951); Ian Brownlie, *Principles of Public International Law* (1990); D. J. Harris, *Cases and Materials on International Law* (1983).

<sup>1208</sup> See Charter Three III ASSESSMENT OF THE LEGAL STATUS OF ABKHAZIA, I EFFECTIVENESS and II. THE RIGHT TO SECESSION.

<sup>1209</sup> I. Brownlie, *Principles of public international law*, 7th edn, Oxford, Oxford University Press 2008, 184 p., T. Chen, *The International Law of Recognition*, London, Stevens and Sons, 1951, 61 p.; J. Crawford, *The creation of states in international law*, 2nd edn, Oxford, Clarendon Press, 2006, LXXII, p.114; H. Lauterpacht, *Recognition in International Law*, Cheltenham, Elgar 2012, 42 p.

<sup>1210</sup> Viacheslav Chirikba, *The International Legal Status of the Republic of Abkhazia In the Light of International Law*, op.cit..

<sup>1211</sup> G. Tunkin, *Osnovy sovremennogo prava* [The basis of modern law], p.22.

<sup>1212</sup> *Ibid.*, I. Brownlie, *Principles of public international law*, 7th edn, Oxford, Oxford University Press 2008, 184 p

<sup>1213</sup> N. Ronzitti, *Introduzione al diritto internazionale*, seconda edizione, Torino, G. Giappichelli, 2007, p.57.

<sup>1214</sup> E. Milano, op.cit., pp. 67-68.

<sup>1215</sup> Ian Brownlie, *Principles of Public International Law*, 1998, p. 105; Hersch Lauterpacht, *Recognition of States in International Law*, 53

affect the position of the unrecognized State, in asserting its rights against unrecognized States, or before courts in *common law* States.<sup>1216</sup>

Indeed, non-recognition not only hinders unrecognized State to be a full-fledged actor in the realm of international relations but sometimes can even lead to the failure of entity seeking recognition to establish itself as a State.<sup>1217</sup> In the case of Abkhazia, non-recognition did not prevent it from achieving a stable political system and a viable economy, with state-like structures and democratic presidential and parliamentary elections'.<sup>1218</sup> In spite of non-recognition, Abkhazia has been able to hold its position as a State-like entity, even without assuming formal role as an international law subject.

As stated by the American Law Institute:

*An entity not recognized as a State but meeting the requirements for recognition has the rights of a State under international law in relation to a non-recognizing State.*<sup>1219</sup>

In fact, an unrecognized State is entitled to enjoy certain rights and be subject to obligations deriving from customary law, for instance, the rights to defend its integrity and independence, to provide for its conservation and prosperity and consequently to organize itself as it sees fit.<sup>1220</sup> The exercise of these rights by an unrecognized State has no other limitation than the exercise of the rights of other States according to International Law.<sup>1221</sup>

## 7. The recognition of Abkhazia in 2008

By the time of its recognition by six UN member-states (in 2008 by Russia, Nicaragua and Venezuela, Nauru, Tuvalu e Vanuatu<sup>1222</sup>; then in 2018 by Syria<sup>1223</sup>)<sup>1224</sup> Abkhazia had effectively seceded from Georgia, meeting all internationally accepted criteria to be qualified as a State.<sup>1225</sup> Even under the conditions of non-recognition and blockade, over a period of 17 years it was effectively a self-governed independent polity and subject of international law.<sup>1226</sup> The separation of Abkhazia, which started in 1990, became a *fait accompli* long before their formal recognition. In fact, territorial integrity within the former borders of the Georgian SSR was not attainable.

<sup>1216</sup> N. Ronzitti, *Introduzione al diritto internazionale*, seconda edizione, Torino, G. Giappichelli, 2007, pp.49-50.

<sup>1217</sup> James Crawford, *Creation of States in International Law*, 1979, Oxford: Clarendon Press, p. 74

<sup>1218</sup> See Charter See the Part three *An assessment of the present legal status of Abkhazia.*, Chapter I *The assessment of effectiveness*, 3 *The elements of statehood in relation to Abkhazia*, pp. 140-143.

<sup>1219</sup> Cited from: James Crawford, *Creation of States in International Law*, 1979, Oxford: Clarendon Press, p. 74.

<sup>1220</sup> See generally, H. Lauterpacht, *Recognition in International Law*, op.cit.; C. Chen, *The International law of Recognition* op.cit..

<sup>1221</sup> Fitzmaurice, *The General Principles of International law Considered from the Standpoint of the Rule of La* [https://web.archive.org/web/20141006191232/http://mfa.gov.ge/index.php?lang\\_id=ENG&sec\\_id=59&info\\_id=17401](https://web.archive.org/web/20141006191232/http://mfa.gov.ge/index.php?lang_id=ENG&sec_id=59&info_id=17401) at 10 (1958)

<sup>1222</sup> Vanuatu (2013) Tuvalu (2014) subsequently withdrew their recognition of Abkhazia, <https://www.bloomberg.com/news/articles/2013-05-20/georgia-says-vanuatu-has-withdrawn-recognition-of-abkhazia>;

[https://web.archive.org/web/20141006191232/http://mfa.gov.ge/index.php?lang\\_id=ENG&sec\\_id=59&info\\_id=17401](https://web.archive.org/web/20141006191232/http://mfa.gov.ge/index.php?lang_id=ENG&sec_id=59&info_id=17401);

<sup>1223</sup> <https://sputniknews.com/world/201805291064903741-syria-ossetia-abkhazia-recognition-reaction/>

<sup>1224</sup> <http://tass.com/world/1007058>.

<sup>1225</sup> See the Part three *An assessment of the present legal status of Abkhazia.*, Chapter I *The assessment of effectiveness*, 3 *The elements of statehood in relation to Abkhazia*, pp. 140-143 and Chapter II. *The right to secession*.

<sup>1226</sup> *Ibid.*.

Georgia, though it claimed the territory of Abkhazia, was not in a position to establish effective control over it by political or military means.<sup>1227</sup>

Moreover, there was no resolution nor decision of an organ of the United Nations, which imposed the existing States the duty to non-recognition of Abkhazia.<sup>1228</sup> Support for the concept of the duty of non-recognition of States created through a serious breach of international law was provided by the International Court in the *Kosovo* advisory opinion.<sup>1229</sup> Article 41(2) of the ILC Articles on the Responsibility of States for Internationally Wrongful Acts takes this further, providing that ‘no State shall recognize as lawful a situation created by a serious breach’ of an obligation arising under a peremptory norm of international law<sup>1230</sup>. In that context, there is obligation not to recognize as lawful situations created by a serious breach of international law such as illegal acquisition of territory<sup>1231</sup>; and not to render aid or assistance in maintaining the situation.<sup>1232</sup> Therefore, the recognition of Abkhazia by five UN member-states only formalized and started to consolidate the the *status* of Abkhazia as a subject of international law. In fact, even individual acts of recognition may contribute towards the consolidation of this *status*.

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<sup>1227</sup> *Ibid.*.

<sup>1228</sup> One form of collective non-recognition seen in practice is the resolution or decision of an organ of the United Nations, based on a determination that an illegal act has occurred, see 1 Lauterpacht (1970) 308, 321; Kelsen (2nd edn, 1967) 415–16; Dugard (1987) 81–111; Crawford (2nd edn, 2006) 157–73; Talmon, in Talmon et al (eds), *Fundamental Rules of the International Legal Order* (2006) 99; Talmon (2007); Ronen, *Transition from Illegal Regimes under International Law* (2011) chs 2 and 3.

<sup>1229</sup> Accordance with International Law of the Unilateral Declaration of Independence in Respect of Kosovo, Opinion of 22 July 2010, §81.

<sup>1230</sup> On the aetiology of Art 41: Talmon, in Talmon et al (2006) 99, 102–3; Dawidowicz, in Crawford, Pellet & Olleson (eds), *The Law of International Responsibility* (2010) 677.

<sup>1231</sup> This obligation confirmed as customary international law in the *Wall* opinion, see *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, ICJ Reports 2004 p 136, 171. Moreover, as an example unlawful situation associated with unlawful creation of a State can be given situation in Rhodesia see ); SC Res 253 (1968); SC Res 277 (1970). Later: SC Res 318 (1972); SC Res 320 (1972); SC Res 388 (1976); SC Res 409 (1977); SC Res 423 (1978). Also: *Loizidou v Turkey (Merits)* (1996) 108 ILR 443, 462. Generally: Ronen (2011) 80–100; SC Res 216 (1965); SC Res 217 (1965); SC Res 232 (1966); SC Res 253 (1968); SC Res 277 (1970). Later: SC Res 318 (1972); SC Res 320 (1972); SC Res 388 (1976); SC Res 409 (1977); SC Res 423 (1978).

<sup>1232</sup> R. Luzzatto, F. Pocar, *Progetti di articoli sulla responsabilità dello Stato della Commissione del Diritto Internazionale* (ILC Articles on State Responsibility), *Parte I, art. 41* in Codice di Diritto Internazionale Pubblico, Torino: Giappichelli, 2010, p.433.



## CONCLUSIONS

At the core of the Abkhazian case is the question of its legal status, that involves relevant international law issues such as the right to self-determination and the criteria for boundary delimitation between new States in the post-Soviet area. In particular, on the one hand, Georgia advances territorial claims on the Abkhazian territories affirming that Abkhazia is its integral part. On the other hand, the Abkhazian Republic states to be an independent and sovereign entity, which exercised sovereign rights on the mentioned territory. Solution to these territorial boundaries' disputes would be essential for the maintenance of international peace and security in the area.

The main conclusions that can be drawn from this research are:

1) Abkhazia had a long history of independent statehood before becoming a part of the Russian Empire (1864), in which had the status of a province, just as Georgia. Then Abkhazia was not part of Georgia nor was part of the administrative units which would be later called Georgia. The Georgian State did not exist at that time. Moreover, there were no rules at that time that disciplined the relations between Georgia and Abkhazia.

Then in 1922, Abkhazia took part in the constitution process of the USSR as a first-level sub-units: once again, this was the same status that Georgia had. But soon, under decision of J. Stalin, against the will of Abkhazians, the status of republic was downgraded to that of a second level sub-unit, within the *Georgian Soviet republic* in the framework of the Soviet Union. Obviously, only the USSR had the *status* of an international law subject. The Abkhazian people during the whole Soviet period opposed to this incorporation. They obtained a chance to secede from Georgia only in 1990-1991 through the law "*Law on the Procedure for Resolving Questions Connected with a Union Republic's Secession from the USSR.*"<sup>1233</sup> on secession of April 3, 1990 and the referendum of 1991. However, after the collapse of the URSS, Abkhazia's attempts to crystallize its independence was hindered by international non-recognition. By contrast, Georgia obtained *de jure* recognition within the Stalin-drawn frontiers' territory, that include Abkhazia. Despite this, Abkhazia was capable of maintaining its independence from Georgia and continued its state-building process. After 27 years, this process seems now consolidated and by 2008 came recognition of 6 UN members (now five UN members<sup>1234</sup>).

<sup>1233</sup> Закон СССР от 3 апреля 1990 г. «О порядке решения вопросов, связанных с выходом союзной республики из СССР», at <http://constitutions.ru/?p=2973>.

<sup>1234</sup> <http://tass.com/world/1007058>

2) Nowadays Abkhazia can be considered as a subject of international law due to its government's effectiveness over the territory and to its independence. The government is democratically elected by the Abkhazian people and exercises its sovereignty over a defined territory the same that historically belonged to Abkhazia. In other words, Abkhazia qualifies as a *superiorem non recognoscentes* entity that could develop international relations with other States on an equal basis.

3) Abkhazian effectiveness is not in doubt. The role of effectiveness in international law is crucial for status of territorial entities. The sole external limits of acceptance of the principle of effectiveness are *ex iniuria ius non oritur*. In fact, the creation of a State cannot contravene international law: non-compliance with fundamental principles of the international community such as *jus cogens* leads to a lack of legitimacy of a State on the international plane. Such an unlawful territorial situation can be legitimate due to the acceptance by international community. In other words in the case of the violation of peremptory norms (e.g., external aggression), international law denies the quality of "State" to a secessionist entity, notwithstanding its "effectiveness." Investigation of the legitimacy of the statehood of Abkhazia, which has given rise to matters of territorial integrity and self-determination, gave grounds to affirm that Abkhazia seceded in line with customary law and *jus cogens* for following reasons. Abkhazia's secession was peaceful (through the law on secession and the All-Union referendum). It could not constitute the violation of the territorial integrity of Georgia. In fact, at that time Georgia was not subject of international law. Both Abkhazia and Georgia were autonomous entities within the sovereign entity – USSR. Only the USSR had international subjectivity. After the secession (dissolution) of the USSR before the Georgian *de jure* recognition, separation of Abkhazia from Georgia was a "fait accompli". Hence it can be argued that Abkhazia has never been part of the State called Georgia at the time of its recognition.

4) In 1992 Georgia obtained recognition over a territory including Abkhazia (or, at least, the issue was not raised by any of the recognizing States). Then, claiming for its territorial integrity, Georgia launched hostilities against Abkhazia and occupied it in a month. However, such an aggression and the following occupation could not provide any territorial title over Abkhazia. The Abkhazian counteroffensive (called "Patriotic War" by the Abkhazian people) and expulsion of the Georgian troops from its territory in 1993-1994 (in 2008 from Kodory Valley) are to be regarded as lawful, being grounded on the self-determination and on the inalienable right to self-defence. In fact, the government of Abkhazia has formulated its claims to secession claiming its right to self-determination.

5) Though not yet established by a clear international law norm, the so-called right of remedial secession has been analysed by several works of scholars and it's worth considering whether such right could be claimed by Abkhazia. Therefore, I tried to establish whether conditions for such kind of lawful remedial secession have been met in the Abkhazian case.

First of the all the holder of this right can be only *peoples*. Indeed, the population of the Abkhazia's Republic can be regarded as a people. Abkhazians were the titular ethnic group, but due to several historical reasons, at the time of the USSR they did no longer constitute a majority. This created many difficulties for Abkhazia's secession from Georgia during the Soviet period. However the Abkhaz national movement appealed to the "will of the majority", as revealed by means of the All-Union referendum and other regional self-convened referendums of 1994 and 1999. All the non-Georgian population of Abkhazia supported the secession from Georgia. Given the extreme oppression suffered during the common coexistence within the USSR , the gross human rights violations occurred in 1918-1919, 1992-1993 and considering the denial by Georgia in 1990-91 of any meaningful political participation, Abkhazia could be qualified as a people entitled to self-determination by means of a remedial secession. Therefore, according to this theory, the Abkhazian community lawfully consolidated its independence from Georgia, in 2008.

6) The principle of estoppel could also be invoked to support the claim by Abkhazia over the territory that historically had belonged to it. On the one hand, Georgia abrogated Soviet law and the all agreements concluded during the Soviet time. On the other hand, however, it demanded respect for a piece of the same Soviet law providing for the delimitation of the internal boundaries set up by J. Stalin. Indeed, the incorporation of Abkhazia in the Soviet Georgia was exclusively motivated with political needs of the former Soviet Union, that had nothing to do with actual needs of local people. As Georgia declared that Soviet legislation was null and void, it should now be precluded claiming any rights over Abkhazia allegedly grounded in that legislation. In other words, it seems that Georgia forfeited the right to demand preservations of the boundaries set under the Soviet rule.

7) The analysis of the treaties concerning territorial boundary delimitation in the area allow for the conclusion that there is no single legal document, which would bind Georgia and Abkhazia within a common State framework. In particular, the Moscow Treaty of 1920 cannot be invoked because it has become void, being in contrast with *jus cogens superveniens* . In fact, by the Moscow Treaty Russia granted to Georgia the freedom of extending its rule over Abkhazia. This was meant to assure that Russia would not react to any use of force by Georgia in the region: a promise that , definitely runs in contrast with the presently well-established preemptory norm of

general international law (*jus cogens*) on the prohibition of the use of force. Consequently, that treaty cannot be a legal basis for inclusion of Abkhazia into Georgia.

The CIS treaties did not concern nor define any boundary delimitation, as their purpose was the foundation of the Commonwealth of Independent States.

Moreover, the lack of any legally binding agreement providing for the inclusion of Abkhazia in the Georgian republic was implicitly affirmed by the 1994 Moscow agreement, which stated that “future plans” would be made for *reintegration* of these two state entities:

*A phased action programme will be worked out and proposals on the re-establishment of State and legal relations will be elaborated*<sup>1235</sup>.

8) The case of Abkhazia cannot be considered as a proper field for the application of the *uti possidetis* rule.. The main arguments in this regard can be summarized in the following way. In general, *uti possidetis* is inapplicable to the dissolution of the USSR because the historical and political context is totally different from cases in which that principle has been applied. And no legal act or instrument adopted within the framework of the USSR secession referred to *uti possidetis*.

9) If applied outside the original colonial context, the principle *uti possidetis*, might infringe the principle of self-determination of peoples, thus causing further conflicts. In the case of the Abkhazian region its application would end up ignoring the right of one or the other people living in the territory, i.e. failing to take into account the different languages spoken, and the different culture. And, more than that, an application of the *uti possidetis* rule would not allow people to decide which side they wished to pledge their allegiance to. By its obsession with territorial status quo, it put ‘the destiny of the territory above the destiny of the people’. Therefore, the application of *uti possidetis* from the outset precluded any debate over the adjustment of boundaries, thus leaving some people on the ‘wrong’ side of the border ripe for ‘ethnic cleansing’ and prolonging unjust borders. As stated by Steven Ratner regarding the dissolution of Yugoslavia: *the extension of uti possidetis to modern breakups leads to genuine injustices and instability by leaving significant populations both unsatisfied with their status in new States and uncertain of political participation. By hiding behind inflation notions of uti possidetis, State leaders avoid engaging the issue of territorial adjustments – even minor ones – which is central to the process of self-determination.*<sup>1236</sup>

<sup>1235</sup> <https://documents-dds-ny.un.org/doc/UNDOC/GEN/N94/202/07/IMG/N9420207.pdf?OpenElement>; Declaration on measures for a political settlement of the Georgian/Abkhaz conflict signed on 4 April 1994, op.cit.,<http://www.securitycouncilreport.org/atf/cf/%7B65BF9B-6D27-4E9C-8CD3-CF6E4FF96FF9%7D/Georgia%20S1994397.pdf>

<sup>1236</sup> S. Ratner, (1996) ‘Drawing a Better Line: Uti Possidetis and the Borders of New States’ AJIL90(4), p591

As history teaches, *uti possidetis* principle can provide a peaceful solution to boundary disputes only in cases in which its application has been based on consent, without such consent, it is dangerous. In fact, when *uti possidetis* was contested by one interested part of peoples, the risk of instability and clashes increases enormously, as seen for instance in South Africa. Anne Peters gives as an example of this, maintaining that:

*No doubt, without the clear consent of the population of the territory to alter the territorial configuration of the area concerned, this would have a serious political impact and would raise questions in the context of the application of the principle of self-determination...*<sup>1237</sup>

Notably, in Peters' view, such consent of the population is supposed to be ascertained by the means of a referendum. In fact, in most cases a referendum would provide the best possible procedure for establishing a State boundary. However, the referendums conducted on the different levels of the Soviet sub-units revealed that there was no consent of the population affected by it. Consequently, the preconditions for the *uti possidetis* principle's application were not present in the framework of the dissolution of the USSR.

Even if we admit its application to the USSR secession, the principle could not operate at the level of the *Soviet Union republic* (on the level of the first-level sub-units). From the perspective of *uti possidetis juris* it should be in line with all the Soviet legal and administrative acts clarifying the issue of the boundary delimitation within the new States (former sub-units of the Soviet Union), and not limited only to the constitutional norms, which were ambiguous and did not give answer to the question of 'whether' their boundaries should be, and not where these should run. Therefore, *uti possidetis* cannot be basis for justifying the Georgian territorial claims to Abkhazia either.

Also, an incorrect interpretation of the USSR domestic law led to avoiding the potential *uti possidetis* application to the secession of new States which emerged from the Soviet Union, and which privileged not only the first level sub-units, but also the sub-units within them.

10) The case of Abkhazia illustrates the contradiction between two principles: self-determination and territorial integrity, each one interpreted in an instrumental way by the States according to their own political interests. The following points can give evidence to such contradiction. At the time of the Georgian secession from the USSR (before the latter's dissolution), the refusal of Abkhazia to be part of the new Georgian State could actually be qualified as respect for the territorial integrity and the inviolability of the USSR frontiers, both corresponding to fundamental principles clearly set by the Helsinki Final Act . Indeed, Abkhazia sought to remain within the USSR State framework until its collapse in conformity with the will

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<sup>1237</sup> Anna Peters, *Self-determination and Secession in International law*, CHRISTIAN WALTER; Antje von Ungern-Sternberg; Kavus Abushov, Oxford University Press, 2014, p.104.

of the Abkhazian people as democratically expressed by means of the All-Union referendum. However, Georgia's secession from the USSR is interpreted as a legitimate expression of self-determination, while the will of the Abkhazian peoples to remain under the USSR jurisdiction (and then - after the *de facto* dissolution of the Soviet Union - to be not included within Georgia's jurisdiction) is interpreted by the majority of States as a separatist act conflicting with the territorial integrity of the Georgian State.

11) The case of Abkhazia calls for a comparison with the case of Kosovo, whose declaration of independence was soon followed by formal widespread recognition, regardless of the fact that the region had been an integral part of Serbia for several centuries, without ever being an independent State. By contrast, Abkhazia - that does not obtain recognition by the same western States that support Kosovo - was an independent and sovereign State for centuries and its incorporation into Georgia occurred by means of an authoritarian decision of Stalin against the will of the Abkhazians. Moreover, since the collapse of the USSR and for 27 years, Abkhazia has been able to consolidate and preserve its status as an effectively independent and sovereign entity. A similar condition seems still far from being achieved by Kosovo, where the provisional government instituted by the UN is still the main ruler, in support of the local authorities. Actually, the recognition policy of most western States choosing to support Kosovo while ignoring the situation of Abkhazia (that obtained formal recognition only by six States now five States) seems to aim at maintaining the status quo resulting from the authoritarian Stalinist regime.

12) The creation of the Abkhazian State, did not infringe any international law norm however, the new State has obtained very limited recognition. This is due to political and/or geopolitical considerations. The situation gives clear evidence to the opinion that assumes the political and discretionary nature of the recognition, excluding any legal constitutive effects. The new States are subjected to extremely discretionary judgment of the existing ones. The world powers can even vary their recognition policy on the basis of their political interests, as happened in the case of Abkhazia. Thus, the lawful Abkhazian demands on independence remain without response. At the same time, Georgia despite violating the fundamental principles of international law (resorting to the use of the force against Abkhazia in 1991-1992 and then again in 2004 and 2008, in violation of both the principles of self-determination and territorial integrity) obtained widespread *de jure* recognition. Indeed, as a consequence of unwise political choices, the peaceful solution of the Georgian-Abkhazian conflict was missed.

13) In any case, the non-recognition of Abkhazia does not affect its existence as a State.

14) Analysis of the legal grounds for secession from the USSR shows that the delimitation in 1991-1992 did not correspond to any international nor domestic law rule: however, international recognition of Georgia took uncritically those frontiers as validly established. Again, an unwise policy gave origin to widespread tensions, which turned into severe ethno-national conflicts, that triggered enormous human rights abuses such as 'ethnic cleansing' and genocide, the worst violation of fundamental human and people's rights (not only in Abkhazia, but also in South Ossetia and Nagorno-Karabakh). Furthermore, such delimitation due to arbitrary administrative line determination within the Soviet Union, many boundaries may rightfully be considered unjust. This explains why the frontiers of the new States which emerged from the USSR have been challenged.

15) The referendum (as a matter of international customary law, and as a matter of legal consistency and fairness) was deemed a perfect solution to the territorial disputes (territorial re-portionment) in the post-Soviet area. Indeed, the All-Union referendum, provided for by one of the last legislative acts of the USSR, was meant to be the legal basis for the new territorial *status quo* that could eventually repair unjust boundaries set up by the arbitrary delimitation of the previous Soviet leaderships. It is on this law that Abkhazia claims its territorial sovereignty and the right of self-determination. Such rights are fundamental in contemporary international law, that requires all territorial realignments to be democratically justified. In particular, it seems to mandate that the collective right to self-determination (notably when it seeks secession) should be exercised through direct democratic decision: i.e. by a territorial referendum. The practice giving consistency to this principle started with the plebiscites after World War I and went on with the decolonisation referendums of the 1950s and 1960s. Moreover, it was much intensified by the numerous referendums held during the dissolution of Yugoslavia and Czechoslovakia. Since then, probably all territorial changes and re-drawing of boundaries were preceded by (and justified by) referendums, or at least by democratic elections in which the territorial issue was the main, or only, agenda item.

The procedures and modalities of a referendum are very important. Referendum may be a suitable mechanism for determining a boundary also in the event of secession and could be usefully adopted but only under particular circumstances. Referendum must satisfy international standards, both procedural and material. Only when these standards are respected, a territorial referendum can provide a valid legal basis for a territorial change. The first condition for being admissible concerns the holders of the right to initiate the territorial referendum. Only peoples (independently of their ethnic composition) can be bearer or subject of the collective right to lawfully ask and obtain a referendum. The collective holder of the right to self-determination

through the All-Union people was the Abkhazian population, regardless of its different ethnicities. To the purpose of self-determination, there is no need of ethnic homogeneity, it is sufficient - and in normative terms preferable - to ascribe the right to self-determination to a people living on a given territory united by their political aspiration to form an independent political entity, This is the concept of “people” as understood by many multi-ethnic and multi-lingual peoples in the world, including in Abkhazian.

The referendum has to be free and fair. The All-Union Referendum entirely satisfied the international legal standards to grant a free and fair voting procedure and its results truly reflected the will of the interested USSR populations A call to voting was made at the various administrative levels of the USSR: Soviet republics (first level sub-units), Autonomous republics (second level sub-units), autonomous regions (third level sub-units): all of them voted separately, under the supervision of international and Soviet observers.

From an international law perspective, the constitutional admissibility or inadmissibility of the referendum should be irrelevant. In any case, the All-Union referendum was in line with the USSR domestic law. However - but only after the USSR dissolution - other Abkhazia's territorial referendums (those of 1994 and 1999) were in contrast with the Georgian Constitution. Indeed, it would be unreasonable to challenge the potential international legal value of Abkhazian referendum on independence pretending that it was held in contrast with the (new) Georgian constitution. Besides, it is actually rather common that territorial referendum inspired by the right to self-determination are held without a formal appointment by the law of the 'mother state'. Referendums are and should remain means of last resort which may come into play only when other strategies to realise internal self-determination within a given state, without disrupting territorial integrity, have failed. This means that negotiations on the issue must have been seriously pursued, but failed. As an *ultima ratio* a referendum can only be triggered by persistent and massive human rights violations, and by a long-lasting denial of the right to internal self-determination which could be realised by establishing mechanisms of political autonomy within one State.

All these conditions were present in Abkhazia when the post-Soviet referendums on independence were held. Then, all procedural conditions (democratic procedure, peacefulness, exhaustion of negotiations on internal political autonomy) were fulfilled.

By the means of such referendums, Abkhazia expressed its will to seceded from Georgia without any use nor any threat of use of force Hence, such referendums are not in contrast with any international law provision.



16) From the prospective of the evolution of international law, the Abkhazian case has contributed in many respects. First of all, the case of Abkhazia serves as an example for an on-going process of integration, disintegration and can prove extremely useful in the analysis of issues related to State-building and secession in international law.

It raises many issues concerning the right to self-determination and the right to secession outside the colonial context. In particular, this case would give a relevant contribution to further development of the remedial secession doctrine. In fact, under my opinion, the Abkhazian secession can be regarded as a case of remedial secession.

At the same time, this case shows how greater attention should be paid to the issues that may arise in case of dismemberment of a federal State whose peculiar domestic system distinguishes between different forms of sub-entities - that were actually 4 in the USSR system - each having its borders and a different legal status.

The consequences of internationally established delimitation in the post-Soviet area are to be debated in international law. Likewise the armed conflict is the consequence of the recognition of Georgia within Soviet boundaries without paying attention to historic, cultural and social peculiarities of Caucasian peoples and their coexistence.

Finally the Abkhazia's case reaffirms the dominant theory about the declarative effect of recognition and, also but not least, Professor Arangio-Ruiz's doctrine on non-constitutional or legal, but factual nature of the international personality of the States.

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